pdp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 11 OF 2017
IN
COMMERCIAL APPEAL NO. 56 OF 2017
IN
ARBITRATION PETITION NO. 819 OF 2010

M/s. Oil & Natural Gas Corporation Ltd. .. Applicant/ Appellant

<u>In the matter between</u>

M/s. Oil & Natural Gas Corporation Ltd. .. Appellant

Versus

M/s. Sedco Forex International Drilling Inc. Respondent

Mr. Dipam Merchant, Sr. Counsel a/w Vaibhav Bajpai, Aziz Khan, Deepak Singh and Promit Sengupta for applicant/appellant.

Mr. Atul Rajadhyaksha, Sr. Counsel a/w Neil Patel, Ms. Manic Joshi & Ms. Henn A. Daulat i/by M/s. Crawford Bayley for the respondent.

CORAM: NARESH H. PATIL &
SMT. BHARATI H. DANGRE, JJ.

JUNE 21, 2017.

P.C.

1. Learned Senior Counsel appearing for the applicant/appellant

submits that Custom Appeal No. 19 of 2008 filed by the respondent is pending hearing. The counsel referred to Clause 15.5 of the Contract Agreement dated 23/8/1988 entered between appellant and the respondent. Clause 15.5 reads as under :-

> "**15.5 Customs Duties, Fees on equipment and supplies** : The Operator agrees to pay for or reimburse, for any and all customs duties, fees, taxes, licenses or similar charges with respect to any equipment and supplies, which Contractor may require, including the Drilling Unit, in order to carry out the terms of this Agreement provided that the Drilling Unit and the equipment shall be exported back from Indian waters immediately after expiry of the Agreement. The Contractor shall provide all assistance to the Operator in claiming and obtaining refunds of such levies wherever possible".

2. The counsel submits that the appellant – operator agreed to pay for or reimburse, for any and all customs duties, fees, taxes, licenses if the drilling unit and equipment imported by the respondent was exported back from Indian waters immediately after expiry of the agreement. The respondent committed default in complying the said clause. In other words, the equipments were not exported immediately after expiry of the

agreement. On the issue of interim relief, the counsel submits that for the government controlled company, the amount is secured with the appellant. Therefore, it is prayed for staying the execution of award till the final disposal of the appeal. The counsel appearing for the respondent submitted that the award passed on 22/1/2010 was confirmed by the learned Single Judge vide order dated 29/3/2016. Learned counsel further submitted that no sooner the contractual obligation was over, the equipments were exported back from the Indian waters. The counsel referred to the observations made by the learned Single Judge and the arbitrators.

3. We perused the record placed before us and considered the submissions. The award was passed by majority of two arbitrators. The Arbitral Tribunal consisted of three arbitrators. Two arbitrators held in favour of the respondent, whereas the one arbitrator by the Tribunal disagreed with the reasoning and final reliefs granted to the claimant in the majority award. We have perused the reasoning adopted by the learned Single Judge in para 26, which reads as under :-

> “26. .... The next contention of the petitioner is

that the Arbitral Tribunal failed to comply the express terms of the contract and also determine the issue of failure to re-export the Rig and consequent lack of liability of ONGC. Mr. Khambhata submitted that under Clause 15.5 the right to reimbursement would have been arisen only if it had been established that the Rig had been re-exported after the expiration of the contract. He submits that issues in respect thereto had been framed by the Arbitral Tribunal at Issues no.10-12, which have not decided by the Arbitral Tribunal. According to him from the material on record, it is clear that SEDCO failed to re-export the Rig and continued to use it in and around Indian waters for commercial gain, hiring it out not just to ONGC but also to a third party. Therefore, the pre-condition for reimbursement of customs duty under Clause 15.5 of the 1988 Contract has not been complied with and ONGC cannot be held liable to reimburse SEDCO....”

In paras 27 and 28, the learned Single Judge observed as under:-

“27. Mr. Rajadhyaksha points out that the defence of ONGC before the Arbitral Tribunal in fact was not of failure on the part of SEDCO in exporting the Rig after completion of the contract. The contention was taken was of re-importation of the Rigs into the territorial waters of India and this act was alleged to be breaching Clause 15.5 of the Contract. It is his submission that according to the written statement of ONGC before the Arbitral Tribunal, the contract was complete on 15th February, 1994 and the Rig was imported back into designated location on the next day i.e. on 16th February, 1994. The argument of reimport of the Rig on 16th February 1994 would presuppose export of the Rig. Perusal of the pleading before the Arbitral Tribunal confirms this agrument of Mr. Rajadhyaksha although in the written submissions filed subsequently ONGC had taken up the contention of failure of re-export. Mr. Rajadhyaksha also sought to submit that silence of the Arbitral Tribunal upon the subject before it would mean that the Tribunal has negatived such a plea.

28. In my opinion, in the facts and circumstances of the case, ONGC cannot be permitted to contend before this court any argument based on re-export of the Rig. It was necessary for it to raise the same in so many words in it's pleadings. In any case, the other material findings as regards the dispute between the parties will dis-entitle ONGC to raise this technical contention before this Court in it's limited jurisdiction under Section 34 of the Arbitration Act. As regards failure to answer the issue, I am inclined to accept the argument of Mr. Rajadhyaksha on the silence of the Arbitral Tribunal. Hence, the petition is dismissed.”

4. In the facts, we find that the issue raised by the appellant requires consideration. The Custom Appeal filed by the respondent herein in respect of the validity of the Notification No. 519 of 1986 is still pending.

5. We pass following order :

O R D E R

(A) On the applicant/appellant depositing the amount under the award within eight weeks with the Office of Prothonotary and Senior Master of this Court, the execution of award dated 22/1/2010 and the impugned order dated 29/3/2016 stand stayed.

6. At this stage, learned Senior Counsel appearing for the respondent prayed for withdrawal of the amount to be deposited by the applicant/appellant. Reliance is placed on the judgment of the Apex Court in the case of Kanpur Jal Sansthan and anr. vs. Bapu Constructions **[(2015) 5 SCC 267]**. The learned Senior Counsel appearing for the applicant/appellant objected to the request made for withdrawal of the

amount.

7. In the facts and circumstances of the case, we direct that in case the applicant/appellant deposits the amount, as directed above, with the Office of Prothonotary and Senior Master of this court, the respondent herein would be at liberty to withdraw 50% of the amount deposited by furnishing security to the satisfaction of the Prothonotary & Senior Master of this Court. The Prothonotary and Senior Master shall deposit the rest of the amount in a fixed deposit scheme of a nationalised Bank.

8. Notice of Motion is disposed of accordingly.

(SMT. BHARATI H. DANGRE,J.) **(NARESH H. PATIL,J.)**