

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.11.2017

Delivered on: 22.12.2017

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THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

O.P.No.511 of 2016

National Institute of Ocean Technology,
Velachery, Tambaram Road,
Pallikaranai, Chennai-600 100.

..Petitioner

Vs.

ABS Marine Services Private Limited,
No.15, Valliammal Road, 1st Floor,
Vepery, Chennai-600 007.

.. Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 01.04.2016 passed by the learned Arbitrator viz., the findings of the learned Arbitrator pertaining to issue Nos.3(partly), 4, 5, 6, 7, 14 and 15 contained therein and for costs.

For Petitioner : Mr.Ravichandran

For Respondent : Mr.Manoj Menon

ORDER

The Government of India has established a separate Ministry of Earth Sciences(MoES) to focus its attention and activities with the Earth System as an integrated whole. This involves forecasting the monsoon, water/climate parameters, ocean state, earthquakes, tsunamis and other phenomena related to earth systems. Accordingly, the Ministry of Earth Sciences created five autonomous societies. One among them is the petitioner before us i.e.,National Institute of Ocean Technology (NIOT). It is an autonomous research organisation in India. It functions as a technical arm for the development of ocean related technologies and to improve the understanding of the sea apart from developing a reliable indigenous technology qua engineering problems in dealing with living and non living resources in the Indian Exclusive Economic Zone (EEZ).

2. The petitioner owns a vessel by name TDV "SAGAR NIDHI". Tenders were called for, for running, manning and maintenance of the vessel. The respondent, being the L1 bidder, was declared accordingly as the successful one and in pursuant to which the contract was entered into. The contract was for a period of three years. The vessel was delivered on 10th December, 2007. It was set sail to India on 16th December, 2007.

3. Another tender was floated by the petitioner on 2nd September, 2010. This time, the respondent was once again declared as the successful bidder. It was followed by a contract, entered into on 16.12.2010 for a period of three years. The contract expired on 15.12.2013. In the meanwhile, the petitioner, by letter dated 18.10.2013, informed the respondent that the management of the vessel was to be handed over in favour of M/s Shipping Corporation of India (SCI). Needless to state that this Corporation is a Central Government owned one. This was not agreeable to the respondent though it did not have any vested right. A writ petition was filed and an interim order was obtained preventing the handing over of the vessel in favour of SCI. Ultimately, the writ petition filed was dismissed.

4. As the entire operation was time bound and for the delay in handing over the vessel on 31.01.2014 instead of 15th December 2013, a claim was made by the petitioner. It was made for the costs after giving due deduction towards the bank guarantees. A counter claim was also made by the respondent challenging invocation of bank guarantee. The arbitration Tribunal rejected the claim after giving all the findings in favour of the petitioner. The findings were to the effect that the respondent did not hand over the vessel as per the terms of the contract. However, the

claim was rejected on the ground that the clauses governing the parties did not provide for granting the claim. Resultantly, invocation of the bank guarantee was found to be wrong and thus, the counter claim was allowed. The cost was directed to be apportioned between the parties. Aggrieved over the same, the present original petition is filed before us.

5. Before proceeding further, let us have a cursory look on the clauses governing the contract dated 16.12.2010. Clause 4 of the agreement speaks about redelivery of the vehicle. As per this clause, the respondent being the operator, has to redeliver the vehicle at any part of India as determined by the petitioner. Hence, this clause in clear terms does not provide for the respondent to keep the vessel after the expiry of the contract period. Clause 17 of the agreement speaks about liquidated damages during running, manning and maintenance. Consequential damage is dealt with under Clause 18 of the agreement. This clause fixes a sum of Rs.10,000/- per day due to non sailing and prohibits the parties from making any claim against other for any consequential damages.

6. Advance and performance bank guarantees are dealt with in Clause 19 of the agreement, which is as under.

19. ADVANCE AND PERFORMANCE BANK GUARANTEES:-

a. At the time of execution of this Agreement, the Operator shall submit an irrevocable bank guarantee issued by a Nationalized Bank acceptable to NIOT for a sum of Rs.47,31,375/- as advance of payment being 5% of the annual contract value for 1st year, Rs.51,68,477/- for 2nd year and Rs.56,46,405/- for the 3rd year for the vessel as per proforma provided by NIOT. This bank guarantee shall be kept valid during the contract period and up to three months beyond the currency of this agreement, including extension thereof. NIOT shall have an unqualified option under this bank guarantee to invoke the said guarantee and claim the amount to the extent of the claim of NIOT under this Agreement directly from the Bank.

b. At the time of execution of this Agreement, the Operator shall submit an irrevocable bank guarantee issued by a Nationalized Bank acceptable to NIOT equivalent to Rs.94,62,750/- being 10% (ten percent) of the annual contract value for 1st year, Rs.1,03,36,953/- for 2nd year & Rs.1,12,92,811/- for 3rd year of the total fee payable during the currency of the agreement, valid for the period of the contract (3 years) and 6 months thereafter from a nationalized Bank for satisfactory performance of the contractual obligations as per this agreement.

c. The Agreement shall become operative only upon

receipt and acceptance of the above bank guarantee by NIOT.

d. Performance of the Operator shall be judged by NIOT for the competence of the Master and Crew in handling the vessel and also preventive maintenance, carrying out routine and emergency repairs in shortest possible time, keeping the vessel in a seaworthy condition during the tenure of this agreement.

e. The operator shall have the use of all outfit, equipment and appliances now on board the vessel without extra cost provided the same or their substantial equivalent shall be returned to NIOT on redelivery in the same good order and conditions as and when received, ordinary wear and tear expected.

f. In the event the operator fails to return the items mentioned in clause-19-(e) above in a satisfactory condition, NIOT reserves the right to recover the cost of such damage/missing items from the monthly bills as well as from the Performance Guarantee. This shall be without prejudice to all the other rights and remedies available to NIOT, under the terms of this Agreement.

g. The performance guarantee shall be extended by the Operator as advised by NIOT for the corresponding period of extension of the contract beyond the primary term.”

As per this clause, the petitioner shall have the unqualified option to invoke

the bank guarantee.

7. Clause 25 speaks about arbitration. This clause is exhaustive in nature. All matters related to disputes and differences would become the subject matter of the arbitration.

8. The petitioner made the claim after duly assessing the costs incurred. Discussions were made and thereafter, cost was categorised into different groups. On the refusal of the respondent to pay the costs, the matter went to the Tribunal. The Tribunal dealt with both the claim and the counter claim.

9. The Tribunal framed several issues. Material findings except few were rendered in favour of the petitioner.

9.1. **Claim No.1** is whether the claimant was entitled to seek redelivery of the Vessel on expiry of the contract period dated 16th December, 2010. For this, the following finding was given by the Tribunal.

Findings: The agreement was made on the 16th day of December, 2010 between the Claimant and Respondent. The latter part of the preamble states.-

Quote:

Now therefore in consideration of the promises and the mutual covenants of the parties hereinafter set forth, it is hereby agreed as follows:

1.0 Definitions.

1.12 Terms: This agreement shall be valid for a period of three years from the date of commencement of contract for 'total management' to the operator i.e., from 16th December 2010 to 15th December 2013. The contract shall be reviewed by a committee after completion of every year (Every 12 months from the date mentioned above). NIOT shall extend the contract to second and third year only if the performance is satisfactory which shall be reviewed by a committee constituted by NIOT or NIOT themselves. Operator cannot claim extension of contract as a matter of right and the decision of NIOT shall be final and binding.

.....
Therefore, arbitrators answer to the issue that inspite of the Madras High Court stay by virtue of being Owner, NIOT is entitled to seek redelivery of the Vessel on expiry of the contract period dated 16th December,

2010 on 15th December, 2013.”

9.2. **Claim No.2** is whether the delay in redelivery of the said Vessel is attributable to the respondent or the claimant?

Findings: Claimant vide letter 18th October, 2013 to respondents asked for redelivery of the vessel on 15th December, 2013 to SCI. The respondent on two occasions (28th October 2013 and 12th November 2013) requested Claimants to re-examine handing over of management to SCI and consider going for an open competitive tender as had been done in the past. However, Claimant was not agreeable as it was a policy decision. Hence, on 3rd December, 2013 the respondent moved a Writ Petition in the Madras High Court under Article 226 of the Constitution praying to issue a writ of Certiorarified Mandamus. On 10th December 2013, an interim stay order was obtained from Madras High Court until 15th December 2013. By virtue of an order passed by the Hon'ble Madras High Court dated 20th December 2013 for M.P.No.1 in W.P.33403 of 2013 the proceedings of the Claimant in

relation to the implementation of the award of contract for the manning and management of the Vessel TDV 'SAGAR NIDHI' post 15th December 2013 to SCI, was stayed.

Writ Petition of the Respondent in the Madras High Court was dismissed on 21st February 2014 and consequently the connected M.P.Nos.1, 2 and 3 of 2013 were closed.

Therefore, arbitrators answer to the issue is that the delay in redelivery is attributable to the respondent.”

9.3. **Claim No.3:** Whether the Claimant or Respondent breached the terms of the contract dated 16th December 2010?

“ **Findings:** This issue is dealt in two parts.

1.Encashing bank guarantee;

2.Redelivery of Vessel.

1.Encashing bank guarantees.

Bank guarantees can be adjusted only towards deficiencies in performance and not against consequential damages as consequential damages of both parties excluded as per contract. Thus, as far as invoking bank guarantees,

Claimant has breached terms of the contract.

2. Vide letter dated 18th October 2013, Claimant instructed Respondent to hand over Vessel to SCI which was not complied with. By virtue of Clause 1.12 terms of the contract, Respondent was bound to effect redelivery on 15th December, 2013.

Thus, regard to re-delivery, Respondent has breached terms of contract. Therefore, Arbitrators answer is that Claimant breached the contract by invoking the bank guarantee and Respondent breached the terms of the contract with respect to Re-delivery.”

9.4. **Claim No.4** is whether the Claimant was right in invoking the Performance Bank Guarantees given by the Respondent?

“Findings: Clause 19 of the TMC deals with advance and performance bank guarantees. The obligations of each party are clearly spelt out in the contract. Bank Guarantees can be adjusted towards missing/damaged items and non-performance only, not against other items, especially against consequential damages.

Therefore, the arbitrators answer to this issue is that the Claimant is not right in invoking advance and performance bank guarantees given by the Respondent as same does not qualify under Clause 19 of the TMC.”

9.5. Claim No.5 is whether the Respondent is entitled for the refund of the amount recovered by the Claimant by invoking the performance bank guarantee along with interests and costs?

“Findings: As per findings of Issue No.4 invoking the bank guarantee by claimant has been wrongful, as same not as per contract terms.

Bank guarantee is a commercial instrument and qualifies for interest.

Arbitrators answer is that the Respondent is entitled for refund of the amount recovered by the Claimant by invoking the advance and performance bank guarantee along with interest.

Interests and Costs dealt separately in the latter award part.”

9.6. **Claim No.6** is whether the Claimant is entitled to damages amounting to Rs.7,95,86,686/- being the loss suffered by them on account of the breach committed by the Respondent?

“Clause 17 and Clause 18 applicable.

As per Clause 17.0 of the contract, liquidated damages attracts Rs.10,000/- per day for operational delay.

As per Clause 18.0 of the contract on consequential damages.

Quote: Neither NIOT or operator shall have any claim against each other for any consequential damage.

Unquote: No incidence of operational delay and thus liquidated damages would not be applicable.

Arbitrators answer is that the Claimant is not entitled to any consequential damages and the amount of Rs.7,95,86,686/- does not qualify for award.”

10. Thus, the findings were indeed given in favour of the petitioner and so was the case with the major issues. However, the Tribunal found that Clauses 17 and 18 of the agreement are not available to the petitioner and therefore, invocation of bank guarantee under Clause 19 of the agreement was also bad. Resultantly, the claim was dismissed as

against the counter claim while ordering apportionment of costs.

11. The learned counsel for the petitioner would submit that the award passed is *per se* perverse. It is liable to be set aside being tainted with an error apparent on the face of it. The Tribunal has totally misdirected itself. Having answered the issues on merit in favour of the petitioner, the claim ought to have been allowed. There was no serious dispute raised on the quantum. The issues in favour of the petitioner have become final. Clause 4 read with Clause 25 of the agreement would entitle the petitioner to get the relief. Clauses 17 and 18 of the agreement have no application. Clause 19 has to be seen independent of Clauses 17 and 18 of the agreement. Thus, the petition will have to be allowed.

12. The learned counsel for the respondent would submit that the scope being limited and restrictive, this Court cannot act like an Appellate Court. When two views are possible, one that is plausible in the opinion of the Tribunal requires to be accepted though may not be strictly correct. The Tribunal has considered the scope of clauses 17 and 18 of the agreement. The learned counsel laid much emphasis on the role of this Court in exercising the power under Section 34 of the Act. The submission is sprinkled with the following decisions.

1. **Municipal Corporation of Delhi Vs. M/s Jagan Nath Ashok Kumar and another ((1987) 4 Supreme Court Cases 497);**
2. **Puri Construction Pvt. Ltd., V. Union of India ((1989) 1 Supreme Court Cases 411);**
3. **M/s Sudarsan Trading Company V. Government of Kerala and another(1989) 2 Supreme Court Cases 38);**
4. **State of U.P. V. Allied Constructions((2003) 7 Supreme Court Cases 396);**
5. **Oil and Natural Gas Corporation Limited V. Western Geco International Limited((2014) 9 Supreme Court Cases 263);**
6. **Associate Builders V. Delhi Development Authority ((2015) 3 Supreme Court Cases 49);**
7. **Swan Gold Mining Limited V. Hindustan Copper Limited ((2015) 5 Supreme Court Cases 739);**
8. **Navodaya Mass Entertainment Limited V. J.M.Combines ((2015) 5 Supreme Court Cases 698);**
and
9. **P.R.Shah, Shares and Stock Brokers Private Limited V. B.H.H. Securities Private Limited and others ((2012) 1 Supreme Court Cases 594).**

13. At the outset, this Court finds that the award cannot be stated to be a well discussed one. Be that as it may, the core issue has been considered by the Tribunal. Therefore, it has to be seen that it being only a legal one, is correct or not, while exercising the power under Section 34 of

the Arbitration and Conciliation Act, 1996.

14. As submitted by the learned counsel appearing for the petitioner, we need not go into the facts as even the Tribunal was pleased to hold that the respondent did not deliver the vessel as per Clause 4 of the agreement. The Tribunal has also held that it was a duty of the respondent to do so. Admittedly, the respondent did not have any vested right to keep the vessel beyond the contractual period, which unfortunately, it did with the fond hope of getting a contract afresh.

15. The Tribunal has totally misdirected itself. Clauses 17 and 18, which deal with liquidated damages and consequential damages, are not relevant for the case. They are applicable only during the currency of the contract. We are dealing with the case where the respondent admittedly did not redeliver the vessel. Once the contract was over and in terms of Clause 4 of the agreement, it was the mandatory duty of the respondent to redeliver. In other words, the act of the respondent in not handing over the vessel despite communication sent by the petitioner would warrant the consequences. As discussed above, Clause 25 of the agreement is very exhaustive. All disputes and differences are amenable to arbitration. The claim made was not barred by the agreement. Inasmuch as there is a

violation of the contract in not redelivering the vessel, the terms were accordingly violated. In such view of the matter, Clauses 17 and 18 of the Agreement, which dealt with liquidated damages and consequential damages during the currency, by which, the respondent was entitled to run, operate and maintain the vessel, do not have any application. Hence, the reasoning adopted by the Tribunal is *per se* perverse and that too, after the earlier issues answered in favour of the petitioner.

16. Similarly, the invocation of bank guarantee cannot be faulted with. The invocation did not have anything to do with Clauses 17 and 18 of the agreement. Clause 9 of the agreement stands on its own footing. The issues answered in its favour would also clinch the other issue of invocation of bank guarantee. Therefore, even on this count, the Tribunal has seriously erred. To put it differently, the Tribunal has granted a relief to a party committing the breach to the detriment of other. After answering the issues in favour of the petitioner, it does not lie in the mouth of the Tribunal to give a strange finding followed by a relief in favour of the respondent that the invocation of the bank guarantees being wrong, it is entitled for their return.

17. One more submission has been made by the respondent. It is submitted that even if the Courts come to the conclusion that the award was wrong, the claim cannot be granted as the power of this Court is only to the extent of setting aside the award. The said submission also cannot be countenanced. There was no dispute on the claim made. Further the entitlement would flow from the award itself. The respondent did not seriously challenge the quantum. The claim was based upon an objective assessment of costs involved during the interregnum. The costs was incurred for the wrong committed by the respondent. It also included the maintenance of the vessel. Admittedly, during the period, which was the subject matter of the claim, the vessel was not to be put into use due to the breach on the part of the respondent. Similarly, the costs towards the learned Arbitrator has to be paid only by the respondent for forcing the petitioner to make the claim. However, while allowing the claim as prayed for, the interest is pegged down at 12% per annum.

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18. The decisions relied upon by the learned counsel for the respondent do not have any application to the case on hand. This case involved a total wrong application of law by the Tribunal. There is no appreciation of fact involved. The reasoning on the face of it is perverse. Accordingly, the award passed by the Tribunal dated 16.12.2010 is set aside and the claim petition stands allowed as prayed for with interest at 12% per annum. No costs.

raa

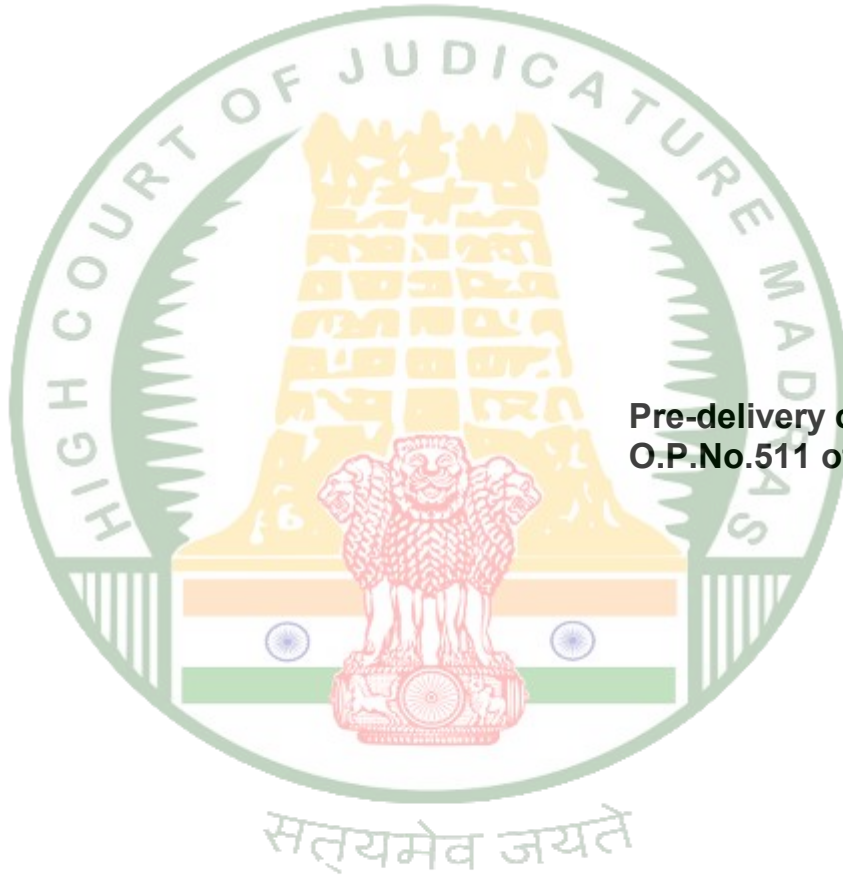
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M.M.SUNDRESH,J.

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