

ODC-21

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[Commercial Division]

AP-COM/326/2024
[Old case no. AP/358/2023]

BMG GULF FZC
VS
QUIPPO OIL AND GAS INFRASTRUCTURE LIMITED

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 3rd May, 2024.

Appearance:

Mr. Rishav Banerjee, Adv.

Mr. A. K. Awasthi, Adv.

Mr. S. Gole, Adv.

Ms. P. Shaha, Adv.

..for the petitioner

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Rishad Medora, Adv.

Mr. A. Chakraborty, Adv.

..for the respondent

This is an application under section 11 of the Arbitration and Conciliation Act, 1996.

Briefly, the petitioner is a company incorporated under the laws of United Arab Emirates (UAE) having offices both at Sharjah and at Dubai situated in the UAE. The petitioner is also the owner of several oil drilling rigs and is *inter alia* engaged in leasing of the same. The respondent is a company within the meaning of the Companies Act, 2013 having its

registered office at Calcutta. The respondent is *inter-alia* engaged in the business of providing oil drilling rigs.

By a lease agreement dated 19th August, 2016, entered into between the predecessor in interest of the petitioner i.e. National Oil Gas Services Limited (NOGSL) Mauritius and the respondent, the respondent had taken on lease one Oil and Gas Drilling Rig bearing RC Book No. 2009-027G of make Honghua of 2000 HP capacity alongwith allied equipment (Drilling Rig No.32).

It is alleged that, pursuant to a Memorandum of Understanding dated 27th August, 2021, the petitioner had purchased several rigs including Rig No.32 from NOGSL. Thereafter, the aforesaid Rig had been leased out to Oil India Limited. The agreement was terminated premature and the said Rig was re-hired by the respondent.

It is now alleged that despite termination of the lease agreement by the predecessor in interest of the petitioner and the respondent, the respondent has neither returned the Rig nor made any payment. In such circumstances, there has been a breach of the agreement and the respondent illegally and wrongfully continues to retain possession of the same.

In this background, the petitioner was compelled to file an application under section 9 of the Act, before the Learned Commercial Court at Rajarhat being Misc. Arbitration Case No.46 of 2022(CC) seeking urgent interim reliefs. By an order dated 18 July, 2022, the respondent was restrained from alienating or creating any third party

interests in respect of the said Rig and the Advocates appearing on behalf of both the parties, were appointed as Joint Receivers over the same. It also appears from the records that, the *ad interim* order of injunction has been extended on 18th August 2022, 16th September 2022, 19th November 2022, 20th January 2023, 9th March 2023 and 29th April, 2023 respectively by the Commercial Court at Rajarhat.

In the above background, the petitioner had issued a notice under section 21 of the Act and invoked clause 29 of the agreement seeking appointment of an Arbitrator. In response to the letter dated 24th February, 2023, the respondent had issued a reply dated 10th April, 2023.

Clause 29 of the agreement is as follows:

“29. DISPUTE RESOLUTION

29.1 Any dispute or difference arising out of or in connection with this Agreement during its subsistence or thereafter between the Parties including any disputes and differences relating to the interpretation of the Agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act 1996 and rules framed thereunder and any amendment, modification, statutory enactment thereto from time to time.

29.2 The arbitration will be referred to the sole arbitration of an arbitrator appointed by the consent of both Lessor and Lessee.

29.3 The arbitrator’s decision shall be final and binding on both the Parties and the relevant award shall be enforced in any court having jurisdiction to enforce the Award.

29.4 The arbitration proceedings shall be held in Kolkata and shall be in English.

29.5 Each Party shall be responsible for its own costs, charges and expenses associated with the arbitration proceeding.”

In the above circumstances, the petitioner alleges that the disputes are commercial disputes within the meaning of the Commercial Courts Act, 2015 and there is also an exclusive jurisdiction clause conferring jurisdiction to the Courts at Calcutta.

On 2nd April, 2024, the matter had appeared for the first time before this Bench and the parties had sought for an adjournment. Prior thereto, the matter was being heard by a Co-ordinate Bench on the aspect of whether the petitioner had lawfully obtained any right of assignment or not.

During the course of the hearing before this Court, both parties consented to an order being passed and also submitted a suggested order which reads as follows:

The parties submitted that there is a dispute with regard to a Lease Agreement dated 19.08.2016. The arbitration agreement contained under Clause 29 of the said Lease Agreement as under:

“29. DISPUTE RESOLUTION

29.1 Any dispute or difference arising out of or in connection with this Agreement during its subsistence or thereafter between the Parties including any disputes and differences relating to the interpretation of the Agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act 1996 and rules framed thereunder and any amendment, modification, statutory enactment thereto from time to time.

29.2 The arbitration will be referred to the sole arbitration of an arbitrator appointed by the consent of both Lessor and Lessee.

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29.4 The arbitration proceedings shall be held in Kolkata and shall be in English.

29.5 Each Party shall be responsible for its own costs, charges and expenses associated with the arbitration proceeding.”

By consent of parties,_____ is appointed as a Sole Arbitrator to adjudicate the disputes between the Petitioner and the Respondent. All contentions made by the petitioner and respondent including the point of maintainability, existence and jurisdiction are kept open.

The relevant provisions of the Act are as follows:

2.(e) “Court” means -

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;].

(f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

*(iii) *** an association or a body of individuals whose central management and control is exercised in any country other than India; or*

(iv) the Government of a foreign country;

11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

[(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:

Provided that in respect of those High Court jurisdiction, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule:

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.]

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be].

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree [the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4)].

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

*[(6A) [***]*

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

*(7) [***]*

[(8) [The arbitral institution referred to in sub-sections (4), (5) and (6)], before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, [the arbitral institution designated by the Supreme Court or the person or institution designated by that Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

*(10) [***]*

[(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall alone be competent to appoint.]

[(12) Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3A).]

[(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.]

[(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation.- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.]

On a plain reading of the aforesaid provisions, it would be evident that in view of the admitted fact that the petitioner is a company incorporated under the laws of UAE, the disputes between the parties falls within the definition of an international commercial arbitration under section 2(f) of the Act and it is only the Chief Justice of India or his delegate who has the power to appoint an Arbitrator under the Act. Hence, any such application before the High Court is misconceived and not maintainable. For the same reasons, even an application under section 9 of the Act is ex facie barred before any Court other than the High Court. (*M/s. OCI Corporation vs. Kandla Export Corporation & 2,*

2016 SCC OnLine Guj 5981 and Gemini Bay Transcription Pvt. Ltd vs. Integrated Sales Service Ltd. 2018 SCC OnLine Bom 255).

On a query from the Bench, the petitioner unconditionally and unequivocally admitted that this Court had no jurisdiction. Each of the Advocates appearing on behalf of the petitioner signed an unconditional apology for filing this application before this Court. Senior Advocate appearing on behalf of the respondent confessed that there has been an inadvertent and bonafide error on their part and they had overlooked the aspect of jurisdiction of this Court as well as the Commercial Court at Rajarhat having no jurisdiction in a proceeding of this nature.

The more sagacious judicial pronouncements instruct that a judgment should not betray any agitation on the part of the Judge and should not be intemperate in its expression. But public interest demands at times that a cheat be described as such for him and others that he has cheated to be aware that there is appropriate recognition on the basis of the character of a person's conduct. Plain-speaking must sometimes be used if only to bolster the image of the institution and to instill confidence in it. (*Madura Coats Ltd. vs. Dunlop India Ltd., 2012 SCC OnLine Cal 13214*).

I choose not to dilate on whether the proceeding between the parties is collusive or not or whether the appointment of Joint Advocates over the Rig is only a preventive measure to thwart any impending action by a creditor. This is also not the stage for a discourse on the role of Advocates in the administration of justice. It is for members of the Bar to

introspect and take necessary steps and spare the Courts of the unpleasant duty.

Court time is a valuable national resource. Our dockets are ever flowing. In a system, where the civil libertarian, pension seeker, motor vehicle accident claimant, octogenarian and undertrial are languishing before Courts, it is unfortunate how unscrupulous and dishonest litigants and their advisors manage not only to hijack the system but strangely find their matters on the top of any Roster. Both the proceedings before the Rajarhat Commercial Court and this Court are misconceived and a nullity. There is an inherent lack of jurisdiction in either of the Courts to entertain the respective applications. The mistake is so obvious that the same cannot be described as accidental or bonafide but only as deliberate, intentional and orchestrated for some sinister purpose.

Punitive costs were for the asking. However, in view of the unconditional apology expressed by all the lawyers who had appeared in this matter and on the touchstone of the quality of *mercy*, discretion is exercised by simply dismissing AP-COM/326/2024 [Old case no. AP/358/2023] on the ground of maintainability with a caution to each of the Advocates who had appeared in this proceeding not to commit any such act in future.

(Ravi Krishan Kapur, J.)