

(2003) 04 BOM CK 0050
In the Bombay High Court
Case No : Arbitration Petition No. 178 of 2003

Frontier Drilling AS

APPELLANT

Vs

Jagson International Ltd.

RESPONDENT

Date of Decision : 29-04-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2003) 4 ALLMR 1037 : (2003) 3 ARBLR 548 : (2003) 6 BomCR 299

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : S. Venkiteswaran and V.K. Ramabhadran, M. Madhu, A.D. D" Souza and Rohan Janardhanan, for the Appellant; Jai Chinai and Swapnil Bangar, instructed by y, Shiradkar and Co., for the Respondent

Judgement

F.I. Rebello, J.—The petitioners, owners of the drillship and respondents entered into Charter Hire Agreement in respect of the drillship "Frontier Duchess" on 15th September, 2000. An addendum was added to the Charter Agreement on 6th November, 2000. Pursuant to the terms of the agreement and addendum on 7th November, 2000, the respondents issued a letter to the State Bank of Hyderabad, New Delhi giving irrevocable payment instructions in terms of the agreement. On 7th November, 2000, a similar letter was addressed by the respondents to ONGC with whom the respondents have engaged the vessel confirming that the payment instructions should not be altered without the consent of the owners of the drillship. On 13th June, 2002 there is a further addendum by which the charter hire was increased from US \$ 14,000 per day to US \$ 16,372.77 per day from 1st January, 2002, until 30th April, 2002, and a sum of US \$ 15,171.74 per day from 1st May, 2002 till 29th December, 2002. By letter of 23rd December, 2002 the petitioners called upon the respondents to issue fresh letter to State Bank of Hyderabad pursuant to increase in the day rate. Pursuant to that the respondents by letter of 15th January, 2003, issued irrevocable payment instructions to State Bank of Hyderabad, New Delhi who

have confirmed record of the same and further that they would comply with such instructions. The petitioners sent a fax to respondents on 22nd January, 2003 calling upon them to issue similar letter to ONGC. On 28th January, 2003 the respondents wrote to the petitioners that they had given instructions to ONGC by their letter dated 7th November, 2000 and as such fresh letter was unnecessary.

In December, 2002, against the invoice raised by the petitioners the respondents, it is contended, paid only part amount as set out in the petition. Thereafter discussion took place between the parties and it is the case of the petitioners that the respondents agreed to remit the outstanding sum. As the amount was not paid, correspondence was exchanged between the parties. The respondents by letter of 19th November, 2002, claimed from the petitioners a sum of US \$ 706, 784 and called upon the petitioners to pay the same. The petitioners replied to the respondents that their claim had no basis and the outstanding amounts should be paid. On 19th December, 2002, the respondents wrote to the petitioners alleging that the agreement dated 10th April, 2001 was not valid as it was signed by the representative who joined the petitioner company after signing of the said letter. Thereafter, the petitioners had been making demand on the respondents. Though discussion have taken place there has been no settlement. On 11th March, 2003, the petitioners intimated to the respondents that drillship has been withdrawn from the services of the respondents, in view of the respondents' failure to pay the outstanding. The agreement, however, contains a clause that the terms of the agreement would bind the parties till such time as the last well is completed. It is in those circumstances that the vessel is still being operated by the respondents herein.

2. Reliance is placed on the Charter Party Agreement and the various clauses. The Charter Agreement is subject to the ONGC contract on back-to-back basis for the continuation of the agreement as per Annexure "E". Clause 24 is the provision for Arbitration. It reads as under :

"(24) Law and Arbitration--This Charter shall be governed by English Law and any dispute arising out of this Charter shall be referred to Arbitration in London, one Arbitrator being appointed by each party in accordance with the Arbitration Act, 1950 as extended to 1979 or any statutory modifications or re-enactment thereof for the time being in force. "On the receipt by one party of the nomination in writing of the other party's Arbitrator, that party shall appoint their Arbitrator within fourteen (14) days, failing which the decision of the single Arbitrator appointed shall apply. If two Arbitrators do not agree then shall appoint an umpire whose decision shall be final."

From the agreement (1) the charter is to be governed by English Law ; (2) any dispute arising under the charter shall be referred to Arbitration in London; (3) the Arbitrators have to be appointed by each party in accordance with the Arbitration Act, 1950 as extended by 1979 or any other statutory modifications or re-enactments thereof for the time being in force. The English Arbitration Act of 1996 has already been referred to earlier. Clause 9 provides for the payment

and the deductions which the respondents could make. Clause 6 contains a provision under which the liability of repairs of latent and inherent defects will be on account of the owner and during such repairs no charter hire will be paid. Under Clause 5 Maintenance and Operation of the drillship is by the charterer. The case of the petitioners is that the respondents have committed breach of not paying the amounts in terms of the agreement from the designated accounts. The petitioners had approached the Court on the ground that they apprehended that the respondents would withdraw the moneys contrary to the Charter Hire Agreement and accordingly the relief was sought in terms of prayer Clause (a). Relief was also sought in terms of prayer Clause (b) on the ground that the terms of the charter hire is liable to come to an end. The petitioners considering the averments in para 21 of the petition as also para 22 prayed that Receiver should be appointed thereby directing the respondents to take all steps to clear the said drillship or in the alternative to redeliver the drillship frontier duchess or to take away the ship.

3. On behalf of the respondents V.K. Sharma, Base Manager of the respondent has filed an affidavit. Various contentions have been raised therein. It is pointed out that the ship was built in the year 1975 and is about 28 years old. It is further pointed out that the respondent commenced operation of the drillship from December, 2000. It is the case of the respondents that inspection was carried out by the petitioners and the inspection report will indicate that the vessel has been maintained as required. It is further pointed out that the vessel on account of its old age had certain latent and inherent defects which could not be detected by the respondents at the time when the drillship was taken over by them without actually testing it on the drilling site under the said charter party agreement. The purported defence is set out in sub-para (d) of paragraph 2 of the reply. It is pointed out that on account of late delivery the respondents suffered various prejudices. It is further pointed out that ONGC has made deductions from the amounts payable to the respondents on account of the break down of the vessel. It is then pointed out that the liability of the repairs on account of latent and inherent defects will be on account of owner and till such period no charter hire was to be paid. Various other contentions have been made. It would not be necessary to advert to all those averments considering the Charter Hire Agreement and the reliefs which can be granted u/s 9 of the Act of 1996. It is also pointed out that the respondents have moved the Delhi High Court filing a suit for declaration that the Arbitration clause in the Charter Party Agreement is illegal, null and void and for an injunction restraining the petitioners from taking any steps pursuant to the said Arbitration clause and also for a decree directing the petitioners to return the benefits of the bank guarantee wrongfully invoked by the petitioners. By interim order dated 2nd April, 2003, it is pointed out that the Delhi High Court was pleased to restrain, the petitioners herein from taking any steps-pursuant to the Arbitration clause in the Charter Party Agreement. At this stage it may be pointed out that insofar as this Court is concerned this Court, considering the Act of 1996 and more specifically Section

16, has taken a view that considering the Arbitration clause it is not open to the Civil Court to decide the same, but it is for the arbitral tribunal u/s 16 of the Act of 1996 to decide it. There are similar provisions under the English Arbitration Act, 1996, namely Sections 7 and 30 which also provide for determination of that question by the Arbitral Tribunal. At any rate it will be open for the petitioners to raise the same before the Delhi High Court as and when the issue as the order of this Court is dated 13th March, 2003. The order was passed by the Delhi High Court on 2nd April, 2003, after the petitioners herein had already invoked Section 9 of the Act of 1996. The respondents were parties and were heard before the order was passed on 13th March, 2003. The matter is subjudice before this Court and considering that prima facie at least the order of the Delhi High Court directing that the respondents cannot proceed with the proceedings at the highest could be restricted to further proceedings for invocation of the Arbitration agreement. This Court atleast could not have been restrained from proceeding with the proceedings u/s 9 being a Court of co-ordinate jurisdiction and a Court which has exercised and assumed jurisdiction earlier to the invocation of the jurisdiction of the Delhi High Court. It is then pointed out that the respondent company is a reputed company having assets as set out in paragraph 20. It is also pointed out that prior to the passing of the ad interim order dated 13th April, 2003, the respondents had already received amount which is subject-matter of the order dated 13th April, 2003 and the said amount was already withdrawn and/or utilised by the respondents. There is a rejoinder filed by one Blair Heines, Constituted Attorney of the petitioners which has met with the contentions as raised by the respondents. It is pointed out that the respondents have their office within the jurisdiction of this Court and apart from the respondents there are other companies having their offices in the very hotel. This was for the purpose of issue of jurisdiction of this Court. It would not be necessary to deal with the other averments and whatever is set out in the pleadings of the parties will be considered while hearing and deciding the issues involved.

4. Various objection have been raised as to the reliefs which could be granted by this Court. One of the objections raised and which will have to be decided at the threshold is that considering the arbitral clause this Court would have no jurisdiction to entertain, decide or invoke the jurisdiction u/s 9 of the Act of 1996. On behalf of the petitioners their learned counsel points out that considering the judgment of the Apex Court in *Bhatia International Vs. Bulk Trading S.A. and Another*, this Court would have jurisdiction even in a case where arbitral proceedings are to take place in a foreign country to grant interim reliefs u/s 9. On the other hand on behalf of the respondents their learned counsel has contended that considering the observations in the judgment of *Bhatia International (supra)*, it will be clear that such jurisdiction can be invoked by this Court u/s 9 only in the event there is no express or implied exclusion of this jurisdiction. In the instant case it is pointed out that considering the Arbitration clause the substantive law of the agreement is the law of England. The seat of

Arbitration is London. That being the case the law in the absence of any other clause to the contrary the arbitral agreement will also be governed by the law of England and consequently the arbitral procedure will also be governed by the law as applicable in England. Once that be the case it is contended that there is an express exclusion, or in the alternative an implied exclusion, of the jurisdiction of this Court and consequently this Court will have no jurisdiction to hear and entertain or grant the interim relief as prayed for.

5. Before deciding whether any relief can be granted it would be necessary firstly to decide whether this Court would have jurisdiction, considering the law declared by the Apex Court in *Bhatia International* (supra). In the earlier part of the order I have already held that the view taken by this Court is that the issue about existence of the Arbitration agreement can only be decided by the Arbitral Tribunal u/s 16 of the Act of 1996. This position apart from the earlier judgment also is now accepted in *Bhatia International* (supra). The Apex Court in para 29 of the judgment has set out as under :

"....Thus there cannot be applications u/s 9 for stay of arbitral proceedings or to challenge the existence or validity of the Arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act."

The jurisdiction of this Court to entertain an application in respect of an Arbitration proceedings which is of the description of an International Commercial Arbitration, the law has been set out in paragraph 32, which may be reproduced for the sake of convenience :

"To conclude, we hold that the provisions of Part I would apply to all Arbitrations and to all proceeding thereto. Where such Arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial Arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or Rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or Rules will not apply."

A reading of this paragraph, therefore, would show that in case of International Commercial Arbitration held in India, Part I would necessarily apply. To International Commercial Arbitration held outside India Part I may apply provided the application is not expressly or impliedly excluded. Can it be said that the provision of Section 9 are expressly or impliedly excluded. To consider that it will be relevant to consider the law on the subject which in my opinion has been succinctly set out in the judgment of the Apex Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others*, . It is no doubt true that the law therein was being considered under the Act of 1940. That to my mind, however, will make no difference, as these are principles which the Apex Court has applied

in the matter of the law pertaining to assumption of jurisdiction. Considering the law as set out in Sumitomo Heavy Industries (supra), the position as it now emerges is as under :

That in every agreement containing an arbitral clause and in the matter of Arbitration theoretically the application of any one or more of the following laws :

"(1) The proper law of the contract i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

(2) The proper law of the Arbitration agreement, i.e. the law governing the obligation of the parties to submit the dispute to Arbitration, and to honour an Award.

(3) The curial law, i.e. the law governing the conduct of the individual reference."

In the judgment it has been further explained as under :

"(1) The proper law of the Arbitration agreement governs the validity of the Arbitration agreement, the question whether a dispute lies within the scope of the Arbitration agreement, the validity of the notice of Arbitration, the Constitution of the Tribunal; the question whether an Award lies within the jurisdiction of the Arbitrator, the formal validity of the Award ; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

(2) The curial law governs, the manner in which, the reference is to be conducted ; the procedural powers and duties of the Arbitrator ; questions of evidence, the determination of the proper law of the contract.

(3) The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute."

Applying these tests from what has been set out earlier what emerges is (1) that the substantive law of the agreement would be the English Law considering the clause in the agreement between the parties ; (2) the place of Arbitration being London, the curial law in the absence of any other specific provisions would be curial law as applicable to Arbitration in London. In other words the law would be the (English) Arbitration Act, 1996; (3) the law of Arbitration again in the present case would be in the absence of any other provisions the English Arbitration Act, 1996. Therefore, in the instant case applying the tests set out in the judgments of the Apex Court in Sumitomo Heavy Industries Ltd. (supra), the substantive law of the Arbitration agreement and the curial law would be the English law.

7. If that be the case prima facie an application before this Court would not be maintainable. The question, however, is whether on account of supervening and subsequent events, it is still open to this Court to consider this application u/s 9 of the Act of 1996. Let us consider the supervening events which have arisen.

After Section 9 was invoked before this Court the respondents have moved the Delhi High Court by filing a suit as set out by them in paragraph 2(p) of the affidavit of V.K. Sharma. In the averments it is pointed out that the relief sought for in the suit is to declare the Arbitration clause as null and void. An order came to be passed on 2nd April, 2003 restraining the petitioners herein from taking any steps pursuant to the Arbitration clause in the Charter Party Agreement. In other words though the petitioners would have to move the English Courts or Tribunal under the English Arbitration Act, 1996, for Constitution of Arbitral Tribunal, they are now precluded from so doing. In these circumstances the question is when this Court has assumed jurisdiction and granted relief, whether the petitioners can now be denied relief by this Court as they are prevented pursuant to the order of the Delhi High Court from taking steps pursuant to the Arbitration agreement. In my opinion justice would demand that the petitioners are not deprived of their rights to move this Court considering the subsequent acts on the part of the respondents herein. Otherwise in the normal course considering the tests as earlier laid down this Court would have had no jurisdiction to consider the present petition. Once the Delhi High Court has passed an order, at the highest it would be an order to the petitioners not to proceed further with the Arbitration agreement. It cannot mean and I assume that the Delhi High Court never meant that this High Court of co-ordinate jurisdiction should not proceed in a petition which is already pending before it. In my opinion, therefore, considering the subsequent events on the facts of this case as it stands and as the venue of the Arbitration agreement and the Arbitration clause itself is in dispute it is still open for this Court to consider the justice of the matter to proceed and dispose of the Arbitration petition now filed on merits of the matter.

8. Considering the merits of the matter the question is whether the relief as prayed for by the petitioners ought to be granted ? In the instant case we have seen the contract between the parties. The defence of the respondents in deducting the amount was that there were latent and patent defects. Even if the contract is considered there was no suo motu power in the respondents to deduct the amounts. If at all there was any dispute it was open to them to move the arbitral forum for resolution. That they have not chosen to do. On the contrary from the documents on record the respondents herein on account of late deployment of drillship had sought amount from the petitioners in a sum of US \$ 7,06,784.00 which ONGC had claimed from them. The record shows that the agreement was entered into on 10th April, 2001 under which the respondent agreed that the late deployment of Frontier Duchess against which ONGC had levied liquidated damages to JIL, the petitioners will not be held responsible for such delay and shall be indemnified for any claims thereof. Respondents further agreed that they will not claim any expenditure incurred by them prior to rigs mobilization. After the petitioners had come to this Court insofar as the moneys due in April 2003 in paragraph 20 it is set out that they have already received the amounts which is a subject-matter of the order dated 13th April, 2003 and

the amount was already withdrawn and/or utilised by the respondents. The respondents by this act are clearly in contravention of the contractual terms between the parties and apart from that the letter addressed by them to the banks. The vessel is with the respondents. The respondents had agreed with the petitioners about the method and mode as to how the amounts received from ONGC would be deposited and withdrawn. The respondents have clearly breached this agreement while at the same time are using the vessel of the petitioners. It is no argument setting out that the respondents have assets in India. In the instant case there was a term in the contract and standing instructions to the bank as to the manner in which the moneys deposited in the account will be used. The petitioners, therefore, would be entitled to relief to protect any further amount which the ONGC would be paying into the designated account.

9. That leaves us with the last issue of grant of Receiver. The contract has come to an end. However, considering the back-to-back contract with ONGC the ship has to be made available till such time as the last well is dug. After the contract is over the petitioners are entitled to get the ship back after the respondents comply with the requirements of re-exporting the ship. In my opinion the only contention of the respondents is that they have a claim against the petitioners which they are entitled to secure by way of detention of the ship. To my mind that argument would be misplaced. If and at all there is any amount due and payable to the respondents by the petitioners that would be the subject-matter of Arbitration or other legal proceedings. The respondents have chosen not to invoke the arbitral clause but have rushed to the Delhi High Court to contend that the arbitral agreement is a nullity at law. In these circumstances the ship will have to be protected. In the light of that the Receiver of this Court will have to be appointed as Receiver of the ship as soon as the contract for scudding the last well is completed. In the light of what is stated above the reliefs as claimed by the petitioners should be granted. In the light of that the following order :

The respondents, their agents and servants are restrained from withdrawing and/or transferring and/or creating any lien in respect of the amounts standing in Account Nos. CC-24013 and EEFCI/2001 in State Bank of Hyderabad, Kasturbha Gandhi Marg, New Delhi in the sum of US \$ 994,000.00 being the charter hire from 1st January, 2003 till 12th March, 2003 and further retaining a sum of US \$ 14,000 per day from 13th March, 2003 until the last well for ONGC is completed and/or all amounts received by the petitioners from ONGC.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.