
(1993) 05 DEL CK 0077

In the Delhi High Court

Case No : Interim Application No's. 3958 of 1992 and 4096 and 4352 of 1993 and Suit No. 875 of 1993

Jagson International Ltd. and Another

APPELLANT

Vs

Odebrecht Perfuracoes Ltd. and Others

RESPONDENT

Date of Decision : 06-05-1993

Acts Referred:

Citation : (1993) 26 DRJ 474

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : D.D. Thakur, Suman Bagga, A.K. Sen, Hemant Sahai, N.D.B. Raju, P. Chidamabaram, Sunil Gupta, Rajiv Nanda, M.H. Baig, P.S. Shroff and Ritu Bhalla, for the Appellant;

Judgement

C.M. Nayar, J.

(1) The petitioners approached this Court by filing the present petition u/s 20 of the Arbitration Act, 1940, against the respondents. The petition was admitted and notice was issued to the respondents. I.A.No. 3958/93 was filed as an interim application, inter alia, for restraining respondents 1 to 4 from :-

"(A)entering into collaboration agreement with Respondent no.5 and all respondents together be restrained from entering into contractual relationship with the Ongc for supply to said commission the said two rigs Norbe Ii & Norbe V (or under assumed name of Excelsior I and Excelsior II) for drilling in the offshore Bombay. (b) from in any way interfering with the possession, enjoyment use and utilisation of the aforesaid rigs by the petitioners or from removing the said two rigs from the Indian waters otherwise than in accordance with procedure established by law. (c) attach before the judgment the said drilling unit namely, Norbe Ii and Norbe V or any other name which the respondent or, their agents or servants might have given to the said drilling units. (d) passanex-partead-interim order in terms of prayers (a) to (c) above."

The following order was passed on April 21,1993:

"I.A.3958/93 Notice for 14th July, 1993. dusty. Meanwhile status-quo as of today with regard to possession of rigs Norbe II and Norbe V shall be maintained till the next date. Provisions of order 39 Rule 3 CPC be complied with within one week."

(2) The respondent no. I felt aggrieved by the interim order made by this Court on April 21,1993, filed I.A.No. 4096/93 praying for vacation of the above said order. Notice of the application was issued to the petitioners through counsel for 5th May, 1993. Then, respondent no.5 also felt aggrieved by the order of status quo made on April 21, 1993, and moved an Interlocutory Application No. 4352/93 for vacation of stay, which came up for hearing on April 29, 1993, when notice was issued to the petitioners, as well as, to the respondent no.1 through counsel and respondents 2 to 4 for 5th May, 1993. Meanwhile, the order dated April 21,1993, was impugned before the Hon'ble Supreme Court by means of a petition for Special Leave to Appeal No. 6811/93, which requested this Court to take up the matter immediately on a day to day basis and dispose of the same with the utmost expedition. The matter was taken up on Board on 3rd May, 1993 and the arguments concluded on 5th May, 1993.

(3) The facts briefly stated in the petition are that the petitioner no. I is a company, duly incorporated under the Indian Companies Act, 1956, having its registered office at 5, Krishna Menon Lane, New Delhi-110011 and is engaged in the business operations including the one of providing drilling rigs platforms, ships and vessels, boats and support services in the field of oil exploration. The petitioner no.2 is a company, incorporated in pursuance of a joint venture between the petitioner no. I and respondent no. I. Respondent no. 1 is a company incorporated under the laws of Brazil, having its office at Rio de Janeiro B.J., Brazil.

(4) The respondent no. 1 is engaged in the field of offshore oil exploration and claims to have the necessary expertise in rendering supplies and services connected with offshore drilling. The said respondent at the relevant time, represented itself to be the * owner of drilling rigs, namely, Norbe II & N ORBEV.

(5) The respondent no.2 is a company, incorporated under the laws of Cayman Islands, having its principal office at Brazil. The respondents 3 and 4, it is averred by the petitioners, are companies registered in Cayman Island, British West Indies and are the Shell companies of respondent no. 1.

(6) The respondent no.5 is a company incorporated under the Indian Companies Act, having its registered office at New Delhi. The Oil and Natural Gas Commission (who is not made a party to this petition), is a statutory Corporation, created by the Oil and Natural Gas Commission Act, 1959. One of the main function, which is entrusted to this Body is the offshore drilling of oil and natural gas in the Bombay High, for which the ONGC from time to time acquires drilling rigs on hire from various parties. The Oil and Natural Gas Commission invited offers for the supply of rigs and the petitioner no. 1 also

made an offer, which offer was accepted by the Ongc laid Letter of Intent was issued to the petitioner no.1 in the year 1988, for offshore drilling and support services required by Ongc for oil drilling in the Bombay High. The petitioner no.1, With a view to acquire drilling rigs on charter and/or out right purchase basis, started negotiation with various parties, including respondent no.1, .who has been engaged in such oil exploration and claimed to own a fleet of drillingrigs. The negotiations between the petitioner no.1 and the respondent no. 1,.took place and after prolonged discussions, a Memorandum of Understanding between the parties was signed on February 17, 1988 at New Delhi. The same is filed with the petition in this Court.

(7) The petitioners submit that in pursuance to the aforesaid Memorandum of Understanding, a Joint Venture Agreement dated March 14, 1988, was signed between the petitioner no.1 and respondent no.1. Which envisaged to set up a Joint Venture.Company in India and further regulated their respective rights, duties and obligations in connection "with the business of charter hire of Drilling rigs and support services in India. By virtue of the said agreement, it was, inter-alia, agreed that the petitioner no. 1 shall take steps to have a Joint Venture Company., hereinafter referred to Jvc, incorporated under the name and style of Jagson Odebrecht India Ltd., with authorised share capital of Rs.10 million. The initial subscribed and paid up share capital was up to Rs.5 million and was required to be subscribed in the ratio of 60:40 by the petitioner no.1 and respondent no.1 and through a wholly own6d subsidiary, was to make available to the Jvc, drilling units Norbe I and Nobev on the terms and conditions, appearing in the Bareboat Charter Agreement, which is also annexed with the petition as Annexure P-2. The Jvc was approved by the Government of India vide Communication dated June 6,1988 and a certificate of incorporation was issued by the Registrar of Companies, Delhi on August 23, 1988.

(8) The respondent no. I (OPL) was to make available the drilling rigs to the Jvc and the relevant clauses of the Joint Venture Agreement in this regard may be reproduced as follows:- "BAREBOAT Charters And Technical Know How And Assistance

6.01.OPL shall make available to the JVC: (a) through a wholly owned Subsidiary, Norbe I and Norbe V; and (ii)knowhow and technical assistance, including provision of personnel for the operation of the Drilling Units,all in accordance with the terms and conditions set forth in the Bareboat Charters the Technical Assistance Agreement and the provisions of this Agreement. The terms and conditions for the provision of any Drilling Unit other than Norbe I and Norbe V, shall be mutually agreed upon between the parties from time to time.

6.02.All spare parts furnished with the Drilling Units shall be monthly replenished by the Jvc, at its own expenses. Upon termination of the Bareboat Charters,all such and spare parts shall be fully replenished by the Jvc or, alternatively, Opl may choose to be reimburse by the Jvc for the cost of such and spare parts.

6.03.The cost of any additional equipment required by the Jvc to carry out its operations other than the Ongc Contract shall be borne exclusively by the JVC.

6.04.The Jvc shall pay to Opl a charter rate, subject to Ind. taxes payable thereon, per day, per each of Norbe I and Norbe V as set forth in the Bareboat Charters.

6.05.Pursuant to the Technical Assistance Agreement, Opl shall make available for the Joint Venture the following expatriate specialized crew for each of Norbe land Norbe V:- (a) Drilling Superintendent 1 (b) Maintenance Engineer 1 (c) Tool Pusher 2 (d). Tour Pusher 2 (e) Drillers 4 (f)Jackman 2 (g) Master Mechanic 2 (h) Master Electrician 2

6.06.The Jvc shall pay US\$ 1600 (One thousand six hundred dollars) per day, per rig, to yhe crew referred to in the preceding sub-clause 6.05, net of all Indian taxes on the salaries so paid. The Jvc shall also bear the traveling costs to and from India of such crew,and living expenses in India for each of the Drilling Superintendents and Maintenance Engineers. The ..aforesaid rate shall apply for the duration of the Bareboat Charters for Norbe I and Norbe V.

6.07.OPL agrees that it shall forthwith replace any expatriate crew provided by Opl if such expatriate is found not acceptable to Ongc, at its own cost and expenses.

6.08.The Jvc, it is understood, would at a later date, as soon as the circumstances permit, acquire by outright purchase Norbe I and Norbe V and equipment for the purposes of its business "upon such terms and conditions as may be mutually agreed to between the parties.

14.EFFECTIVE Date

14.01.Except for the provisions of clauses 2,4,11, 16,18and 19 of this Agreement, which shall be in full force and effect as of the date hereof, the following events are specified as conditions to the effectiveness of this Agreement. (a) that the Ongc Contract shall have been awarded to the Jvc or signed by Jagson on the terms and conditions set forth in the draft agreement attached to the tender documents for Tender NO.BRBC/ DBG/SP/RIGS (OH61/87) of Ongc, initialled by the parties hereto on March 14, 1988, provided, however, that the final Ongc Contract may differ from such draft agreement if Opl shall so agree in writing. (b) all Governmental approvals for OPL's participation in the Jvc, including the granting of the application for foreign collaboration, shall have been obtained by Jagson.

14.02.In the event that Jagson fails, for whatsoever reason,to have the Jvc duly incorporated and authorised to operate in India and the Ongc contract signed within 180 days as of the date of this Agreement, then this Agreement shall not become effective unless otherwise signed by OPL"

Clause 15 deals with the events, by which each party was entitled to terminate

the Agreement forthwith by a written notice. Clause 19 deals with the Arbitration in case of disputes arising out or in connection with the provisions of contractual documents, and the same is reproduced as follows:-

"19.ARBITRATION And Governing Laws 19.01. Any dispute arising out or in connection with the provisions of the Contractual Documents, including the existence and validity thereof, which cannot be amicably settled between the parties hereof shall be settled by arbitration to be held in London, England, in accordance with the rules of the International Chamber of Commerce.

19.02. It is understood between the parties that while a dispute is under arbitration, the operations of the Jvc shall not be paralyzed or reduced in any way.

19.03. The Contractual Documents shall be governed, construed and interpreted in all respects in accordance with the Laws of India."

(9) It is contended "that the petitioner no. I, pursuant to Joint Venture Agreement, had taken all the steps, which were also within the knowledge of respondent no. 1. Since the drilling rigs had already arrived in India, pursuant to Joint Venture Agreement dated March 14, 1988, and "since the parties envisaged that the Joint Venture Agreement may not come into full operation in the near future because of the likely delays in obtaining the sanctions and permissions, required under various laws, the Government Departments and the Reserve Bank of India, the parties to the said Agreement entered into a separate Bareboat agreement, whereby Norbe II and Norbe V were taken on lease by the petitioner no. I from the respondent no. 2. Triangle Drilling Ltd.". The relevant clauses of the agreement dated November 24, 1988 may be reproduced as follows:-

"PERIOD" OF Charter - 3.01. The Charter-party shall remain in full force and effect for a period of 48 (forty eight) months as from the date on which this Charter-party becomes effective pursuant to Clause 2 hereof, or such extended period as the parties may agree, unless terminated under the provisions of Clause 11 hereof. This period is hereinafter referred to as "the Charter Period".

5. USE OF THE DRILLING UNIT BY JAGSON 5.01. Jagson shall have the full use of the Drilling Unit during the Charter period.

5.02 Jagson shall maintain the Drilling Unit in perfect operating conditions in accordance with good oil field practice, and to this end shall carry out all necessary maintenance and repairs. Tdl shall have the right, at any time on reasonable notice to inspect the Drilling Unit to satisfy itself that the Drilling Unit is being properly repaired and maintained.

5.63. TDL shall at its own cost, maintain in full force and effect the Drilling Unit's classification and statutory certificates.

5.04. JAGSON shall, at its own expenses, man, "provide catering, .operate, supply, fuel and repair the Drilling Unit as required during the Charter Period.

5.05.Jagson shall make no structural change in the Drilling Unit without. the previous written consent of Tdl such consent not to be unreasonably withheld.

6.RE-DELIVERY Of The Drilling Unit To Tdl 6.01. Jagson shall at the end of the Charter Period, or earlier in the event of termination pursuant to Clause 11 hereof, re-deliver the -Drilling Unit to TDL. at the location on the relevant time. The Drilling Unit shall be redelivered in the same or as good structural, state, condition and class as that in which it was delivered, except for fair wear and tear."

8.CHARTER Rate 8.01 During the Charter period, Jagson shall pay to Tdl a sum in Dollars calculated on the basis of a daily Charter Rate of US\$ 11,155subject to Indian Taxes payable thereon. The charter Rate includes all risk insurance premium and classification fees applicable from the date of commencement of the Charter until the date of re-delivery of the Drilling Unit to TDL. The aforesaid Charter Rate is based on the assumption that the current rate of tax to be withheld at source is 6.5% of the Charter Rate. In the event there is any change in the tax situation either by variation in the tax rate or imposition of any new taxes, then the said Charter Rate will be adjusted in an appropriate manner so that after satisfying the tax liability, Tdl continues to receive an amount which it had been receiving when the tax had been 6.5%

8.02The Charter Rate referred to in the proceeding sub-clause 8.01 shall be made monthly, but in any event not later than five (5) calendar days after payment by Ongc to Jagson under the Ongc contract.

8.03Payment shall continue without interruption of any kind through out the Charter .period, .subject, however, to payment having been received from ONGC.

16.ARBITRATION And Governing Laws This is similar to the one reproduced earlier."

(10) The petitioners have further submitted in paragraph 26 of the petition that in anticipation of the expiry of the four years contract by November/December, 1992, the Ongc invited offers for supply of rigs in July, 1992. The petitioner no.2 (JVC) also made its bid believing that the two rigs would be available to it pursuant to the Joint Venture Agreement. The petitioner no.2 had excellent chances of obtaining contract but surprisingly, respondent no.1 wrote a letter dated October 7, 1992, to Ongc falsely stating therein that they are no longer the owners of the rigs in question. Consequently, Jvc lost the contract. The price of the Jvc was one of the lowest tender. The petitioners contend that the aforesaid letter dated October 7, 1992, of respondent is malafide,fraudulent and in utter violation and breach of a Joint Venture Agreement. The respondent has no. right or authority to deal with the rigs, much less to sell/transfer the same to any third party. The rigs in question have been and continued to be in possession of the petitioner. The combined reading of Memorandum of Understanding dated February 17, 1988, Joint Venture Agreement dated March 14,1988,Bareboat Agreement dated November 24,1988 and Memorandum of Understanding dated

February 8, 1989, clearly make out a case of creation of bailment in favor of the petitioner no. 1 in respect of two rigs.

(11) The disputes and differences obviously arose between the parties, which have culminated in the present proceedings before this Court. The petitioners have averred that they have a claim for Specific Performance. In the event of a claim for return of two rigs to respondents I to 4, it is open to the petitioner to resist the delivery and instead pray for decree either for specific performance or in the alternative for payment of Us 65 million dollars and till such time as the relief aforesaid are granted, it is open to the petitioner to hold its lien on the two rigs in question.

(12) The respondents have contended that a consideration has to be paid for a charter of a rig During the entire charter period, an amount of Us \$ 8,500.00 per rig was payable daily including Insurance premium and classification fees under the Bareboat Agreement. This was later enhanced to \$ 11,155 and Us \$ 1,600 per rig per day for personnel charges are also payable. The petitioners failed and neglected to make any payment under the Charter party agreement and respondents I and 2 instituted legal proceedings in the Bombay High Court for the recovery of over Rs. 18 Crores as Bareboat Charter hire and other moneys due and the said suit is pending. The Oil and Natural Gas Commission de-hired the rigs w.e.f. November 22, 1992 and December 12, 1992 respectively and they were not provided the services after those dates by the petitioner. The services contemplated were Helicopter facilities or movement of the personnel of the rigs. The Indian Charterer has to bear all other expenses for catering operations, suppliers, fuel and repair during the charter period. The Charter period having expired consequent upon the de-hiring of the rigs on 21st November, 1992/11th December, 1992, the question of manning the vessel, incurring expenses, operating the rigs or remaining in possession after these dates does not arise. The respondents have accordingly contended that the petitioners have falsely stated that they are in possession of the rigs despite the de-hiring on the above said dates.

(13) The petitioner No.1 also filed a civil suit No. 213/92 entitled M/s Jagson International Ltd. vs. M/s Odebrecht Perfuracoes Ltd. in the Court of Senior Sub Judge, Delhi, wherein an application u/s 41(b) of the Arbitration Act read with Section 151 of the CPC was also made. The interim relief claimed in the application reads as follows:-

"A) Restrain the respondent their agents, associate, companies, namely Octagon Drilling Ltd., Cayman Islands, British West Indies or the Excelsior, Investment Corporation, Cayman Island, British West Indies and their servants or agents from alienating, transferring, encumbering or in any way parting with possession or removing the said drilling units namely, Norse Ii and Norbe V from the Indian Waters. b) Attach before the judgment the said drilling units namely, Norbe Ii and Norbe V or any other name which the respondent or their agents or servants, might have given to the said drilling units."

This suit, however, was dismissed for want of Jurisdiction, as contended, and the present Petition has been filed in this Court.

(14) The learned counsel for the petitioners has contended that the respondent no. 1 was bound in law to fulfill all its obligations, as created by the agreement and Memorandum of Understanding and the same could not be terminated till all the obligations are fulfilled. He has referred me to clauses 6.01, 6.08, 10.01, 10.02 and 15.04 respectively and it has been mentioned that on a reference to the arbitrator, the petitioner no. 1 is entitled to the following reliefs for breach of the terms of the agreement by respondent no. 1. Reference may be made to paragraph 43, which reads as under:-

"43. That in the facts and circumstances narrated above, the petitioner on a reference to the Arbitrator is irresistibly entitled to the following reliefs. a) that the purported withdrawal from the joint venture agreement by respondent no. 1 not being permissible according to various clauses if the joint venture agreement cannot be recognised as legal and enforceable with the result that respondent no. 1 continues to be liable to be governed by joint venture agreement read with agreement dated 24.11.88, Supplement Memo dated 8.2.1989, and other documents. b) That the petitioner no. 1, Therefore, has a corresponding right to compel respondent no. 1 to abide by the terms of the agreement executed by Respondent no. 1. c) That as a result of the; aforesaid respondent no. 1 had no right or title to object to the assignment of the contract entered into between petitioner no. 1 and the Ongc after the completion of the formalities under the Industrial Regulation Act and Foreign Exchange Regulation Act In July, 1992."

(15) He has also referred me to paragraph 50 relating to the claim for damages and for specific performance of contract, which is reproduced as follows:- "That in case the Arbitrator ultimately declines to pass an award compelling the respondent to specifically perform their part of the contract dated 14.3.88 read with other documents for one reason or the other, the petitioner is entitled to damages to the tune of 65 million dollars, details of which are given hereunder:

"A) 5 Million dollars on account of mobilisation charges. The bareboat charter rate of US \$ 11,155 per day was fixed keeping in view the expenses on mobilisation of the rigs from Brazil to Indian waters. This amount was in fact paid by the petitioner in the form of enhanced charter rates. The petitioner had agreed to do so only because of long term benefits which would have accrued to the petitioner no. 1 or no. 2 and not otherwise. The mobilisation of the rigs on a short term basis was not otherwise also economically viable. The petitioner no. 1 Therefore, is entitled to the reimbursement of this amount from the respondent Nos 1 to 4. b) That the total amount of charter per day which the Ongc was paying for the aforesaid two rigs was approx US \$ 23,000. Out of this amount the amount of US\$11,155 was being paid to the respondent no. 2 whereas another US \$ 1600 per day were being paid for the services rendered by the crew. The petitioners saved about US \$4000 per day. Calculating a loss of US \$ 4000 per day the amount comes to about US\$65 million (after taking into consideration breakdown etc)

over period of two years during which the offshore drilling in Bombay High would have continued. As a result of the unilateral withdrawal by the respondent no. 1 the petitioner has been put to a loss of nearly Us \$65 million which the petitioner are entitled to recover from the respondent no. 1 as a direct consequence of the breach of the contract. The total amount which the petitioners claim is Therefore Us \$70 million."

(16) The following questions, which according to the petitioners, require adjudication, are referred to in paragraph 51 and the same read as follows:- (i) That respondent no.4 Excelsior Investment Corporation as stated earlier is registered in Brazil. As stated in the earlier part of the petition, it is reported to have entered into collaboration agreement with Hi-Tech Company for supply of rigs to Ongc for offshore drilling in Bombay Offshore consequent on the tender floated in the month of January, 1993 by ONGC. Since respondent no.4 Excelsior Investment Corporation is claiming rights and interest in the aforesaid two rigs through respondent no. 1 the Collaborator of the petitioner No. 1 respondent no.4 is equally bound by the terms and conditions of the agreement entered into between petitioner and respondent no. 1. Arbitration clause "also accordingly is binding on respondent no.3 for the same reasons respondent no.4 which claims right in the aforesaid two rigs on the basis of title, originally possessed by Respondent no. 1 and transfer through respondent no.3 to respondent no.4. Respondent no.3 and 4 are also bound by the terms and conditions as successor in interest or office as borne by the contract as much as original contractor. Petition u/s 20 Therefore is clearly maintainable not only against respondent alone but also against respondent no.3 and 4 also. ii) That the so called collaboration between Excelsior Investment Corporation and Hi-tech in relation to the two rigs aforesaid does not have any effect on the petitioner's right of possession of aforesaid rigs on the basis of agreements executed by owners, reference to which in detail has already been made in the petition. As a matter of fact petitioner emphatically denies the genuineness, legitimacy and validity of collaboration if any executed between them. Such an agreement cannot have effect of superseding the agreements executed in favor of petitioner or impairing their efficacy in any manner. In fact the futility, unrealness and ineffectiveness of such a contract is borne on the face of it in the sense that they are not in possession of any rigs and when especially before any right accrues before any arbitrator the rigs are projected as being available for being placed at the disposal of ONGC. Ongc also is in fact duty bound not to enter into any such agreement with Respondent no.4 and 5 in derogation of the rights of the petitioner accruing to it on the basis of agreement executed. As a matter in this behalf petitioner through Miss Suman Bagga already served on Ongc a communication requesting Ongc not to act on such representation which may have been made by respondents in relation to aforesaid two rigs. Ongc however for reasons best known to them has not shown any response to the notice sent by the petitioner. iii) Ongc is a statutory Corporation of Government of India which has inescapable responsibility of acting fairly, reasonably and correctly.

Such an organisation cannot be privy to take such method of either procuring or conferring contractual obligations p73 and, Therefore, petitioners are entitled even as a major and interim relief to obtain appropriate orders from this Court in anticipation of reference u/s 20 against respondents, restraining them from obtaining contract by representing to Ongc that the aforesaid rigs are available for being handed over to Ongc and in case court is not inclined to grant such a relief petitioners would have to pray for keeping in view the peculiar circumstances and facts and circumstances of the case particularly the fact that the first two respondents being from Brazil and having no other property owned by them in India except the aforesaid two rigs the claim made by the petitioners being, more than 180 crores, petitioners are entitled to order of attachment before the judgment- in respect of the said two rigs."

(17) The counsel has further contended that the respondent no. 1 had no right to transfer the rigs in favor of respondent no.4 by purported sale, which is clearly fraudulent and is not permissible in law and in any case, the agreement is assignable regarding arbitration clause. Reference is made to the judgment of the Calcutta High Court in Hindustan Steel Works Construction Ltd. Vs. Bharat Spun Pipe Co., . The following statement of law may be reproduced:- "On this aspect it may be appropriate to refer to the statement of law as stated by the learned editor of Russell on Arbitration, 18th Edition at page 143 "3. Person claiming through or under a party. Assignee of contract, . An arbitration clause will bind a valid assignee of a contract containing it; and the presence of an arbitration clause will not normally cause a court to hold that a contract is not assignable."

(18) In *Shayler v. Woolf* (1946) 2 All E.R. 54, it was held that "if a contract were otherwise assignable, an arbitration clause did not prevent it from being assignable; the clause followed the assignment of the subject matter of the contract, It was clear from the Arbitration Act, 1889, section 4, that an arbitration clause was in its nature assignable." The argument of the counsel for the respondent no.4 "that there is no privity of contract between the petitioners and the said respondent and they cannot be made parties to any disputes, which have now arisen between the petitioners and respondent no., will have to be considered on the basis of the settled law, as referred above I do not propose to express any final opinion at the interlocutory stage and it will be open to the petitioners to agitate this point at an appropriate time. It has been further argued that the sale in favor of respondent no.4 is fictitious as the rigs could not be sold, as at the date of sale on April 16, 1991, they continued to be in possession of the petitioners. It will also not be necessary for me to go into the question of validity of sale, as for disposal of the interim applications, I have only to determine the factum of possession of the two rigs and the balance of convenience, which may be in favor of each party.

(19) The learned counsel for respondent no. 1 has argued that the petitioner never complied with the conditions under clause 2.1 of the Memorandum of

Understanding, namely, the bringing in of the share capital and allotment of shares to the petitioners and the respondent no. 1, on the assignment of the contract with Ongc to Jvc i.e. petitioner no.2; Contract with Ongc was taken in the name of the petitioner no. 1 and was never assigned to the Jvc until its conclusion and the Petitioner carried out the same on the basis of Bareboat Charter Party Agreements. The petitioners failed to obtain permission of the Reserve Bank of India and the Government of India for the functioning of the Jvc or for the issue of the shares to respondent no. 1 and no shares were allotted except the shares, which were mentioned in the Memorandum of petitioner no.2 at the time of its incorporation. The rigs were sold to Excelsior Investment Corporation, respondent no.4, after the same were de-hired by Ongc and possession was taken over by the respondent no. 1. Thereafter, the said rigs were taken out of the territorial waters of India and have been in possession of respondent no.4. Both the rigs had been sold to respondent No.4 on April 16, 1991. This was intimated by the respondent no.4's President to the petitioner no.1 in March, 1992. The said rigs were only allowed to be operated until the expiry of the drilling by the petitioner was completed by allowing the Charter Party Agreement to be extended to Complete the working of the wells. The Joint Venture Committee never became operational and there is, Therefore, no question of any arbitration between the parties, as referred to in the arbitration clause in the agreement.

(20) The learned counsel for- respondent no.4 submits that M/s Excelsior Investments Corporation Ltd. are the bonafide purchasers of the two rigs and the rigs were registered in their names on April 16, 1991. As a consequence, Protocol of redelivery was entered into between respondent no.2 and physical redelivery of the said rigs was taken in International waters off the shores of Bombay, India at 21.30 hours on November 21, 1992, and 11th December, 1992 respectively. The relevant portions of these documents to indicate the delivery of the rigs by the said respondent read as follows:- "Taken physical redelivery of the jack-up rig m.v. Excelsior I at 21.30 hours on 21st November, 1992 in international waters off the shores of Bombay, India." "Taken physical redelivery of the Jack up rig m.v. Excelsior II at 15.30 hours on 11th December, 1992 in international waters off the shores of "Bombay, India."

(21) The learned counsel for respondent no.5 has contended that respondent no. 1 had informed Ongc that the two rigs in question had already been sold by it to third parties and the same would not be available to petitioner no.2. This was in view of the reason that petitioner no.2 had not become operational and no agreement to purchase the rigs was entered into between Jvc and respondent No.1 or 2. The right of bailment, claimed by petitioner no.1 ceased with the expiry of Charter period reference was made to clause 3,6,7 of the Bareboat Charter as well as Section 160 of the Indian Contract Act. The rigs were desired by Ongc and Charter period of 48 months having expired, the possession of the rigs has been with the respondent no.4, who has paid the salary, expenses, maintenance charges of the two rigs. The contention of the petitioners that the

respondents no.2 to 5 are also subject to arbitration, as the rigs have been assigned to third parties, subject to contractual rights of petitioners 1 and 2, is misconceived.

(22) There is no doubt that the Bareboat Charter Agreement of November 24, 1988, was for a period of 48 months, which has since expired and no extension of the said period-has been granted in favor of the petitioners. The Jvc had not become operational. It will not be necessary for me to consider the contentions of the parties that the said Agreement did not become operational for the lapses of petitioner no.1 and/or respondents 1 & 2, as this will be determined at the time of final disposal of the petition u/s 20 of the Arbitration Act.

(23) The question which arises for consideration, is that the Bareboat Charter, having entered into between the parties, ended after the expiry of 48 months and the documents have been placed on record to indicate that the possession of the two rigs has since been re-delivered to respondent no.4, the alleged possession of the petitioners in respect of the two rigs is illusory and cannot be established.

(24) The petitioner no. I, as mentioned earlier, had also filed a suit in the court of Senior Sub Judge Delhi, where he had only prayed for the restraint order, to be passed against respondent no. I, their agents, associates etc. from alienating, transferring, encumbering, or in any way, parting with possession or moving the said Drilling Units, namely Norbe Ii and Norbe from the Indian Waters and for attachment before judgment of the above said Drilling Units. They had not claimed the relief in that suit, as has been claimed in the present application "from in any way, interfering with the possession, enjoyment, use and utilisation of the aforesaid two rigs by the petitioners or from removing the said two rigs from the Indian Water, otherwise than in accordance with procedure established by law". Therefore, it cannot be held that the possession of the rigs was with the petitioners, as it had in fact been passed over to respondent no.4 when the rigs were re- delivered to the said respondent.

(25) It is further argued that the two rigs maybe required by the the Ongc, in case, the contract is entered into between Ongc and respondent no.5 for the purposes of oil exploration plans in the offshore Bombay High Sea and any delay in the same before the onset of the Monsoon, is likely to cause loss to the Nation in the sensitive and important Sector of oil exploration. The petitioners have not made Ongc as a party in the present proceedings, but has not denied that the contract for the use of the two rigs is likely to be considered by Ongc in the very near future. In view of this, the balance of convenience is not in favor of the petitioners to place an embargo by means of an interim order of this Court for oil exploration by an Agency of the Government, without that Agency being a party to the present proceedings. The ex parte interim order, made 21, 1993, is liable to be vacated on this short ground.

(26) The petitioner no. I has prayed in the present proceedings u/s 20 of the

Arbitration Act, for filing of the original agreement dated March 14, 1988 as amended by Memorandum dated February 8, 1989, and for reference of disputes to Arbitration, in terms of the agreement between the parties and for appointment of an independent arbitrator in the alternative to decide the disputes, which have arisen between the parties. They have also stated in paragraph 50 of the petition that in case, the Arbitrator ultimately declines to pass an Award, compelling the respondents to specifically perform their part of the contract dated March 14, 1988, read with other documents, for one reason or the other, the petitioners are entitled to damages to the tune of Us \$65 million and the details have also been specified in the above said paragraph. There is, Therefore, no doubt that in case, the disputes are referred to Arbitration, the petitioners can be compensated by means of damages, in case the award is made in their favor. There is an alternative relief, which can be granted to the petitioners and it will not be in the interest of justice, if a restraint order is passed to withhold the use of the two rigs at this stage.

(27) The counsel for the petitioners has vehemently argued that the purported transfer and sale of the two rigs, in favor of respondent no.4, are bogus and fraudulent and no proof has been furnished to this Court, with regard to the bonafide nature of the transaction. The Certificate of Registration is itself not a sale document and does not, confer any title on the alleged purchaser. He has referred me to the judgments in *Ah Foon v. Hoe Lai Pat and others* Air 1932 Ran 13; *Mir Mohamed Muzuffer Hossein and another* 1884 (11) IA10 : AIR 1938 249 (Nagpur) and *Insurance Company Limited Vs. Vimal Rai and Others*, . He has also reiterated that the respondents 1 and 2 are themselves guilty of not making the agreement operational and working and they cannot put the blame on the petitioners for their own lapses. They have even violated the covenant, as referred to in clause 10.01 of the Joint Venture Agreement, which reads as follows:-

"10.01. Jagson and Opl shall not undertake any business involving the, "provision of drilling services in India, except through the Jvc and except further for the Drillship contract against tender No.CH/48 of ONGC."

(28) There is one aspect of the matter which is very glaring and has to be looked into at. an appropriate time, that the alleged agreement for the sale of rigs, in favor of respondent no.4 , entered into by the respondent no.2, as far back as April 16, 1991, much before the Bareboat charter Agreement was to expire on a later date in November, 1992. This will indicate that the owners of the rigs, respondent no.2, had also decided not to continue their dealings with i the petitioners, as they had obviously got interested in a third party. The counsel for the respondents have .however, reiterated that the petitioners did not fulfill their part of the contract and the prior agreement with them was not in operation. These points shall have to be considered at the final hearing of the present petition or in case, the matter is held to be referable to Arbitration, by the Arbitrator, appointed in this regard.

(29) In the final analysis, I hold that the two rigs are not in possession of the petitioners and the order dated April 21, 1993, is vacated. The respondents shall, however, not alienate by further sale of the two (now known as Excelsior I and Excelsior II) and remove the same from the territorial waters of India, without leave of this Court. This will be subject to respective contentions of the parties and nothing expressed; herein will be construed as an expression of to) opinion in the main petition. It is, howbver, made clear that Ongg, who is not a party to the present proceedings, shall be at liberty to use the aforesaid rigs for drilling development/exploratory wells and work over operations" on execution of contract between the concerned parties- I.As.3958/93,4096/93 and 4352/93 stand disposed of in the above terms.