
(2004) 08 DEL CK 0030

In the Delhi High Court

Case No : IA 3743 of 2003, 5819 of 2003 and 5639 of 2003 and CS (OS) No 730 of 2003

Jagson International Ltd.

APPELLANT

Vs

Frontier Drilling

RESPONDENT

Date of Decision : 05-08-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 45, 5, 8, 9

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Citation : (2005) 1 BC 444 : (2005) 124 CompCas 361 : (2004) 113 DLT 189 : (2004) 76 DRJ 299

Hon'ble Judges : Ramesh Chandra Chopra, J

Bench : Single Bench

Advocate : Parag P. Tripathi and B.C. Pandey and Priya Kumar, for the Appellant; C.A. Sundaram and Ekta Kapil, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chopra, J.—This order shall dispose of the plaintiff's application under Order XXXIX Rules 1 and 2 read with Section 151 CPC numbered as is No.3743/2003, the defendant's application is No.5819/2003, under Order XXXIX Rule 4 read with Section 151 CPC and is No.5639/2003, u/s 45 of the Arbitration and Conciliation Act, filed by defendant for referring the matter to arbitration.

2. The facts relevant for the disposal of the aforesaid three applications, briefly stated are that the plaintiff a limited Company has filed a suit for declaration, injunction and recovery praying that Arbitration Agreement contained in Clause 24 of the Charter Agreement dated 15th September, 2000 between plaintiff and defendant be declared illegal, null and void, nonest, inoperative and incapable of being performed. It is also prayed that an injunction be issued restraining the defendant from taking an steps pursuant to the aforesaid arbitration clause. A declaration declaring the invocation of the Bank Guarantee illegal and void is also sought along with injunction directing the defendant to return the benefit of the

Bank Guarantee wrongfully encased .

3. The plaintiff's case is that the plaintiff and defendant entered into a Charter Agreement dated 15th September, 2000, to which addenda dated 6th November, 2000 and 13th June, 2002 were also added. In terms of this Charter Agreement, the defendant was to provide a rig named Frontier Duchess to the plaintiff, which was required for drillship by the plaintiff in Indian waters. According to the plaintiff, this rig was required for the purposes of oil exploration. It was specifically agreed in Clause (6) of the Charter Agreement that the repairs of the latent and inherent defects in the rig would be the liability of the owner and during period of repairs no charter hire would be paid by the plaintiff. It is pleaded that latent and inherent defects could not be detected without survey of the rig and could be seen only upon the working of the rig. The plaintiff as such took this rig on hire on the assurances of the defendant that it would give uninterrupted and trouble-free service but later it was found that Sub-Sea Camera, Top Drive and Compensator Piston Assembly of the rig were having latent defects. When these defects were pointed out, the defendant procured a rented Sub-Sea Camera from Singapore. However, rent was not paid by the defendant and as such it was taken back by the owners. The O.N.G.C. with whom the plaintiff was having oil exploration contract wrote a letter dated 11th December, 2002, to the plaintiff clearly saying that Sub-Sea Camera was not available on the drillship. On account of effective Top Drive also, there were repeated breakdowns and as such substantial loss was caused to the plaintiff.

4. On 21st May, 2002, the plaintiff wrote a letter to the defendant in regard to defective Top Drive and requested for the replacement of the same. In para 12 of the plaint, the plaintiff quoted a statement of the former Operations Manager of the defendant

5. Company to show that before the supply of the rig the defendant knew about the non-operational condition of the equipments on the rig but in spite of objections of the said Operations Manager the defendant supplied this rig to the plaintiff which resulted in loss of revenue to the plaintiff.

6. It is also pleaded that the plaintiff made deductions also from the dues payable to the defendant on account of the amount spent by it for repairs and replacements. It is pleaded that the plaintiff suffered damages on account of the latent and inherent defects in the drillship supplied by the defendant. It is also stated that the exact amount that the defendant has to pay to the plaintiff cannot be presently quantified as the contract with O.N.G.C. is still continuing and full details of the damage suffered by the plaintiff would be available only after the contract between the plaintiff and O.N.G.C. is completed.

7. It is stated that the defendant had fraudulently and by deceit induced the plaintiff to enter into the agreement for charter hire of the rig and the damages suffered by the plaintiff are much in excess of the alleged claims of the defendant. Objections are also raised to the invocation of the Bank Guarantee by

the defendant. It is pleaded that instead of paying the outstanding dues of the plaintiff the defendant vide letter dated 11th March, 2003, nominated an Arbitrator under the arbitration clauses stated in clause 24 of the Charter Hire Agreement. Defendant asked the plaintiff also to nominate its Arbitrator. Vide letter dated 17th March, 2003, the plaintiff sent a reply nominating its Arbitrator without prejudice to its rights and contentions regarding the legality of the arbitration clause.

8. The defendant's petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' only) which was filed in the High Court of Bombay is also referred to in which interim orders dated 13th March, 2003, have been passed restraining the present plaintiff not to withdraw, transfer or create lien in the money received from O.N.G.C. for charter hire for the month of January, 2003. The plaintiff has pleaded that the arbitration clause in the Charter Agreement dated 15th September, 2000, is illegal, void, unenforceable, bad in law and against public policy. Besides, it is also stated to be oppressive, inoperative and incapable of being performed. According to plaintiff, the defendant had deceived the plaintiff to enter into the said arbitration clause.

9. It is also pleaded that cost of carrying out arbitration proceedings at a distant and foreign land like London is highly oppressive and as such participating in the arbitral proceedings at London would cause a huge monetary loss to the plaintiff with no method of enforcing the recovery thereof from the defendant. It is stated that the plaintiff has no means to contest the arbitral proceedings in London. In its application under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, the plaintiff has prayed this Court to restrain the defendant from taking any steps pursuant to the arbitration clause in the Charter Agreement.

10. The defendant in its application under Order XXXIX Rule 4 read with Section 151 of the Code of Civil Procedure, has pleaded for vacation/modification of the ex parte orders passed by the learned Single Judge of this Court on 2nd April, 2003. It is pointed out that the drillship/rig was hired by the plaintiff for a period of two years from the date the drillship was delivered to the chartered. This period was extendable to complete the work in progress at the end of the prime period. The plaintiff was in default of the payment of the hire charges in terms of the Agreement and as such the defendant invoked the Bank Guarantee. The defendant had filed an Arbitration Petition No.178/2003 in the High Court of Bombay in which interim restraint order was sued against the present plaintiff restraining it from withdrawing or creating any lien in respect of the charter hire payable in the account of the plaintiff. Prior to the filing of the said petition in the High Court of Bombay, the defendant had informed the plaintiff about the nomination of an Arbitrator. The plaintiff failed to nominate its Arbitrator within 14 days of the receipt of the notice. However, vide letter dated 28th March, 2003, the plaintiff claimed to have appointed its Arbitrator. V de letter dated 8th April, 2003, the defendant accepted the appointment of the plaintiff's Arbitrator.

11. In this application, it is pointed out that in High Court of Bombay, the plea taken by the plaintiff was that the said petition filed by the defendant was not maintainable and deserved to be dismissed as the provisions of the Arbitration Act, 1996 were applicable only to those arbitrations where the place of arbitration is in India. It shows that the arbitration agreement was affirmed by the plaintiff and its main contention was that the Act was not applicable to the arbitral proceedings being held at London. It is pleaded that the controversies being raised by the plaintiff in regard to the latent and inherent defects in the rig and the consequent damages suffered by the plaintiff are subject matter of arbitration in London and the arbitration agreement is wide enough to cover all these disputes. It is, however, denied that the rig had any latent or inherent defects as alleged. It is also denied that the encashment of the Bank Guarantee by the defendant was illegal or fraudulent. The defendant has denied that the arbitration clause contained in the Charter Agreement is illegal, void, non-enforceable, bad in law or against public policy as alleged. It is also denied that the arbitration proceedings in London are oppressive or that the plaintiff would be unable to pursue the same as alleged. It is stated that the continuation of the present suit would be an abuse of the process of law in the face of the arbitration agreement between the parties and the suit is liable to be dismissed. It is state that the plaintiff having taken advantage of the contract and having entered into an agreement with open eyes cannot be allowed to raise the pleas which are ex facie untenable. It is also submitted that in terms of Section 5 of the Act, this Court ought not to interfere with the arbitral proceedings. In these premises, a prayer is made to vacate the orders dated 2nd April, 2003.

12. In its application IANo.5639/2003 u/s 45 of the Arbitration and Conciliation Act, 1996, the defendant has given details of the Charter Agreement between the parties which includes Clause 24. The said Clause 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 they shall appoint an umpire whose decision shall be final.""

13. It is stated that the aforesaid arbitration agreement between the parties is valid and enforceable. No fraud was played by defendant to induce the plaintiff to enter into this agreement. It is also disputed that the plaintiff is not in a position to take part in the arbitral proceedings at London or the costs of arbitral proceedings would be extremely heavy. It is submitted that the disputes being raised by the plaintiff in this suit are subject matter of arbitration in London and

as such the sit filed by the plaintiff is liable to be stayed and the parties referred to arbitration.

14. I have heard learned counsel for the plaintiff and learned counsel for the defendant. I have also gone through the records.

15. A comparative perusal of Sections 45 and 8 of the Act makes it clear that u/s 45 of the Act, the Court has been given a wider discretion on the question of referring the parties to arbitration. The apparent reason is that in the case of domestic arbitrations the Legislature aiming at speedy reference of the disputes to arbitral Tribunal has left most of the matters relating to the existence and validity of the arbitration agreement to be decided by the arbitrators themselves. However, in the case of foreign arbitrations, Section 45 of the Act clearly provides that notwithstanding anything contained in part one or in the Code of Civil Procedure, 1908, a judicial authority may refer the parties to arbitration unless it finds that the agreements null and void, inoperative or incapable of being performed. The conditionality mentioned in Section 45 of the Act are conspicuously absent in Section 8 of the Act. In case of foreign arbitrations enormous expense and effort gets involved and as such the Legislature in its wisdom has thought that the questions relating to the validity of the arbitration agreement, its cooperativeness and capability of being performed should be examined by the Court itself instead of leaving those in the hands of Arbitrators in a foreign land. Therefore, this Court fully agrees with the submissions made by learned counsel for the plaintiff that in the present case before invoking Section 45 of the Act as prayed by the defendant, this Court is under a duty to consider as to whether the arbitration agreement is null and void, inoperative or incapable of being performed.

16. A perusal of the plaint and the Charter Agreement dated 15th September, 2000, between the parties clearly shows that in the year 2000 itself the rig in question was made available by the defendant to the plaintiff and the plaintiff started using it for oil exploration in connection with its back to back agreement with O.N.G.C. It is also worth noticing that an addendum was entered into between the parties on 6th November, 2000 and thereafter a second addendum was entered into on 13th June, 2002. Thereafter even the plaintiff continued to use this rig till April, 2003 without taking any step to repudiate the Charter Agreement or initiate any legal action against the defendant alleging fraud. The statement of Operations Manager of defendant which is relied upon by plaintiff does not inspire confidence as he is an ousted employee of defendant. Moreover latent defects, if any, were to be rectified by the defendant in terms of Clause (6) of the Charter Agreement which clearly provided that the liability of the repairs of latent and inherent defects in the rig would be of the owner only and during such repairs no charter hire would be payable. This Clause shows two things - (a) that the possibility of latent and inherent defects was known to the plaintiff and (b) as and when such defects were discovered, the repairs thereof were to be carried out in account of the owner only. It has come in the plaint that certain defects

were tried to be removed even by the defendant. However the fact remains that in spite of alleged defects the plaintiff continued to utilize and operate the rig supplied by the defendant. Thus, it can be safely said that the latent defects as alleged by the plaintiff did not frustrate the Charter Agreement between the parties and the plaintiff continued to reap benefits there under. It was only at the fag end of the contract when the rig was due to be returned to the defendant, that the plaintiff started alleging that the arbitration agreement between the parties was null and void or inoperative. Under the circumstances, this Court has no hesitation in holding that the presence of latent defects as alleged, even if accepted, does not make out a case of fraud on the part of the defendant vitiating the Charter Agreement or the arbitration agreement. At the most, these were deficiencies in the equipment provided on the rig which in terms of Clause (6) of the Charter Agreement did not render the contract void and merely entitled the plaintiff to claim that the repairs thereof would be carried out in the account of the defendant and plaintiff would not be liable to pay hire charges during the repair period.

17. A distinction has to be drawn between a fraud going to the root of an agreement where a party would not have entered into the agreement but for the fraud or misrepresentations and a wrong information, over-statement or under-statement. Every wrong or misleading claim or misrepresentation does not go to the root of the contract entitling the opposite party to repudiate or rescind the contract. As an illustration, the case of the sale of immovable property may be taken. If the seller makes a false or misleading statement in regard to his title acting upon which the buyer purchases the property, it would be a case of fraud rendering the sale agreement void ab initio but in case a seller having good title makes a misleading statement in regard to some outstanding dues in respect of the property and it is also one of the terms in the Sale Agreement that the seller would be liable to pay such amounts, the buyer would not be entitled to repudiate or rescind the contract of sale saying that the seller had made a misstatement or false statement in regard to the outstanding dues. Another example can be in regard to the sale of a machine regarding which the seller gives assurances about its performance but in the course of working of the machine the purchaser finds that certain defects are there. Even if the seller knew about the defects the contract would not be void on the plea of fraud especially if it is found that the machine was good for the purpose for which it was purchased and the defective parts are capable of being replaced.. If the contract is not rescinded immediately and the machine is not returned, the remedy of the purchaser would lie in claiming damages only. He cannot be permitted to repudiate the contract after fulfilling the purpose for which he had purchased it. On the aforesaid analogy since the plaintiff had utilized the drillship/rig provided by the defendant not only during the period of Charter Agreement but thereafter also for the completion of its contract with O.N.G.C., it can not be held that the rig supplied by the defendant was useless and the defendant had played a fraud upon plaintiff. If a party continues to act under the contract even after coming to know

about a false or misleading statement it can be inferred that it has acquiesced and has no intention to repudiate or rescind the contract.

18. The facts of this case clearly show that in spite of alleged deficiencies, the rig was working well and the plaintiff fully used it during the period of Charter Agreement. The plaintiff tried to stall the invocation of the Bank Guarantee even by the defendant which was given by the plaintiff towards the end of the Charter Agreement and was invoked on 13th March, 2003. If the Charter Agreement was null and void or vitiated by fraud, the plaintiff would not have furnished a fresh Bank Guarantee to defendant in December, 2002. The Charter Agreement between the parties, thus, cannot be held to be vitiated by fraud. plaintiff never terminated the contract on the ground of fraud. It was not done by the plaintiff for the obvious reason that had the plaintiff terminated the contract, the rig would have gone back to the defendant which the plaintiff never wanted as it was using it all along. This Court, thus, has no hesitation in holding that prima facie the Charter Agreement between the parties was not hit by any fraud and as such it was neither void nor illegal.

19. Therefore, it can be safely held that the Charter Agreement between the parties was valid, legal, operative and capable of being performed. The Charter Agreement has been actually acted upon, performed, lasted its term and the plaintiff has taken full advantage under it. The rig was delivered back by the plaintiff to the defendant only after the filing of the suit and no action was taken earlier by the plaintiff to repudiate or terminate the Charter Agreement on the ground of fraud or illegality. This Court has no hesitation in concluding that the arbitration agreement also which is a part of a Charter Agreement is valid and capable of being performed. Nothing is stated in the plaint as to how the arbitration agreement between the parties is vitiated except attacking the main Charter Agreement on the ground of misrepresentations in regard to certain defects in the rig. It is neither pleaded nor argued that any fraudulent misrepresentation was made by defendant to induce the plaintiff to agree to arbitration clause. It is also not shown as to how the arbitration clause can be termed null and void, inoperative or incapable of being performed. The contention that since the mother agreement i.e. the Charter Agreement is null and void the arbitration clause which is part of it also goes cannot be accepted firstly for the reason that it cannot be held that the Charter Agreement was hit by any fraud or was null and void and secondly the arbitration agreement between the parties was independent and was entered into by the parties upon a clear understanding to settle disputes arising out of the Charter Agreement through arbitration. Their intentions stand fortified by the fact that both the parties have already submitted to arbitration and in Bombay High Court where the present plaintiff was a respondent the arbitration agreement was not at all disputed.

20. The mere fact that certain latent defects were allegedly discovered by the plaintiff in some parts of rig does not render the conduct of the defendant

unconscionable especially in view of Clause (6) of the Charter Agreement which made it obligatory for the defendant to bear the expenses for repairs of such latent defects and also entitled the plaintiff to deduct hire charges for the period during which the repairs were being carried out.

21. The plea of the plaintiff that it is not in a position to defend arbitral proceedings in London on account of financial constraints or that the arbitral proceedings are oppressive in nature is also liable to be rejected. The plaintiff-Company which is involved in off-shore oil explorations, calls itself ""Jagson International"" and is engaged in trans-border contracts cannot raise a plea of financial difficulties. It had entered into arbitration agreement with open eyes and had agreed to participate in the arbitral proceedings at London and as such it cannot now turn around and say that the proceedings are oppressive in nature. It also cannot be said that the plaintiff was in unequal bargaining position. The plaintiff was not forced into the Charter Agreement under any compulsion or pressure. It was a commercial deal and as such there are no good grounds for holding that the parties were in unequal bargaining position.

22. The plaintiff has already submitted to arbitral proceedings by appointing its Arbitrator in terms of Clause 24 as contained in the Charter Agreement. This clause covers all disputes between the parties arising out of the Agreement and would take care of the claim of damages also if raised by the plaintiff on account of defective equipments, if any. There are no pre-contractual disputes between the parties which are beyond the scope of the arbitration clause. The plea of fraud as raised by the plaintiff is a totally sham plea which has been raised to scuttle arbitration at London. An action for fraud may be based on pre-contractual period and the Arbitrator may not have jurisdiction to go into this question but on bald and baseless averments of fraud an Arbitrator cannot be divested of his jurisdiction. The judgment in *Unicel Ltd. Vs. 1978(2) S.T.C. 203* is not attracted in this case. In *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, also a similar view was taken. This Court Therefore is fully satisfied that the arbitration agreement between the parties is valid, operative and capable of being performed. All the disputes between the parties arise out of the Charter Agreement and as such are covered by the arbitration clause. The judgment in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, is of no help to the plaintiff.

23. In view of the foregoing discussions, this Court has no hesitation in holding that the plaintiff has no prima face case for grant of interim injunction under Order XXXIX Rules 1 and 2 read with Section 151 CPC as prayed. The balance of convenience also is not in favor of the plaintiff inasmuch as it has already utilized and enjoyed the rig and now it cannot be permitted to wriggle out of the arbitration clause on frivolous grounds. No irreparable loss/injury would be caused to the plaintiff if in terms of the arbitration clause it participates in the arbitral proceedings at London. The present suit and application for injunction are abuse of process of law by a party which after taking advantage under a

contract is trying to scuttle arbitral proceedings initiated by the other party strictly in terms of contract. The plaintiff's application under Order XXXIX Rules 1 and 2 read with Section 151 CPC is, Therefore, dismissed. The defendant's application under Order XXXIX Rule 4 read with Section 151 CPC is allowed and interim injunction dated 2nd April, 2003, is vacated.

24. The defendant's application u/s 45 of the Arbitration and Conciliation Act, 1996, is allowed and the parties are referred to the arbitral Tribunal which already stands constituted.

25. Further proceedings in this suit are stayed.

26. Suit as well as IAs stand disposed of.