
(2012) 10 GUJ CK 0012
In the Gujarat High Court

Case No : Appeal from Order No. 335 of 2012 with Civil Application No. 9634 of 2012 in Appeal from Order No. 335 of 2012

Niko Resources Ltd.

APPELLANT

Vs

Gujarat State Petroleum Corporation Ltd. and 1

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11(5), 12, 13, 16

Citation : (2012) 10 GUJ CK 0012

Hon'ble Judges : M.D. Shah, J

Bench : Single Bench

Advocate : Mihir Joshi, with Mr. Tanvish Bhatt for M/s. Wadia Ghandy and Co, for the Appellant; Aspi M. Kapadia for Respondent(s) : 1 and Mr. U.D. Shukla with Mr. Manav A. Mehta for Respondent(s) : 2, for the Respondent

Final Decision : Dismissed

Judgement

M.D. Shah, J.—This appeal from order is filed against the order dated 26.7.2012 passed below Notice of Motion in Civil Suit (CCC) No. 13 of 2012, whereby the notice of motion application of the present appellant-original plaintiff was dismissed. (For the sake of convenience, the appellant is referred to as "the plaintiff" and the respondents are referred to as "the defendants" in this appeal). The brief facts of the case are such that the plaintiff is a foreign company incorporated in Alberta, Canada and engaged in the business of exploration and development of oil and gas fields and other petroleum resources. By and under a Production Sharing Contract (PSC) dated 23.9.1994, the Government of India appointed the plaintiff and defendant no. 1 jointly as contractor for carrying out "Development Production Operations", including construction, operation and maintenance of all necessary facilities. By and under a Joint Operating Agreement (JOA) dated 5.12.1994, the plaintiff and defendant no. 1 defined their respective rights and obligations inters with respect to the operations to be conducted by them as the contractor under the PSC. Thereafter, since about July, 1995 the joint venture (JV) of the plaintiff and defendant no. 1 has been able to

deliver and sell natural gas produced from the contract area and the JV accordingly entered into several gas supply contracts with third parties for sale of natural gas.

2. By and under Gas Supply Agreement (GSA) dated 16.2.2000, the plaintiff and defendant no. 1 on the one hand entered into contract with the defendant no. 2 on the other hand and agreed to supply "Natural Gas" produced from gas wells, gas condensate wells and the residue gas remaining after processing such gas for removal of liquefiable hydrocarbons and impurities thereafter from Hazira Gas Reservoir to defendant no. 2 in accordance with the terms and conditions of GSA. However, from June 2006, the Hazira Gas Reservoir has been underperforming on account of reservoir depletion and water ingress into gas reservoirs which further restricted gas extraction and life of the field. Consequently disputes arose between the parties.

3. That it came to the knowledge of the plaintiff that as a result of business proximity between the defendants, they have colluded with each other and jeopardized the rights and interests of JV formed between the plaintiff and defendant no. 1. Consequently, the defendant no. 2 sought to invoke arbitration under the GSA, whereby the defendant no. 1 being the majority partner under the JV, shall be representing the JV, with the plaintiff having no say during the arbitral proceedings. Therefore, the plaintiff was compelled to file the suit seeking the following reliefs:

(a) That the Hon''ble Court be pleased to declare the reference to dispute to the sole arbitrator and the appointment of the Hon''ble Arbitrator for disputes between the JV and defendant no. 2 is invalid, non-est and illegal and not binding to the plaintiff;

(b) That the Hon''ble Court be pleased to declare that the defendant no. 1 is disentitled from representing the JV and/or participating and/or exercising its majority rights and/or proceeding with reference to the dispute between the JV and defendant no. 2.

(c) That defendant no. 1 be restrained by a permanent injunction of this Hon''ble Court from acting on its majority vote based on the proportionate participating interest viz. 67% of defendant no. 1 in the Joint Operating Agreement dated 5th December, 1994, in the matter of the Gas Supply Agreement dated 16th February, 2000, including the conduct of arbitration of the disputes between the plaintiff and defendant no. 1 on the one hand and defendant no. 2 on the other arising out of the Gas Supply Agreement dated 16th February, 2000, on account of conflict of interest;

(d) That the defendant no. 2 be restrained by a permanent injunction from referring the dispute with the JV and/or taking steps in relation thereto and also the arbitration except in consultation with the plaintiff, as the representative of the JV."

4. Application seeking interim injunction was also filed and listed for hearing before the Auxiliary Chamber Judge, City Civil Court, Ahmadabad on 3.1.2012, whereby the plaintiff had prayed for ex-parte ad-interim injunction to the effect that the original defendants be restrained by an order of interim injunction from commencement of arbitral proceedings and the defendant no. 1 be restrained by way of an injunction from acting on its majority vote based on the proportionate participating interest viz. 67% under the JV, in the Joint Operating Agreement dated 5.12.1994, in the matter of the Gas Supply Agreement dated 16.2.2000 including the conduct of arbitration of the disputes between the plaintiff and defendant no. 1 on the one hand and defendant no. 2 on the other.

5. That the defendant no. 1 filed reply to the notice of motion stating that the suit is not maintainable u/s 5 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"). That Article 14 of the GSA contains an arbitration clause whereby the parties thereto have agreed to resolve their disputes by way of arbitration. That the GSA does not specify the number of arbitrators but simply stipulates that any dispute that arises shall be referred to arbitration under the provisions of the Arbitration Act and Section 10 of the Arbitration Act states that if the number of arbitrators is not determined by the agreement, the arbitral tribunal shall consist of sole arbitrator. That under clause 5.4 of the GOA, the defendant no. 1 has by a majority vote concurred in the appointment of Hon'ble Mr. Justice M.B. Shah as the sole Arbitrator and there is no illegality in any of the action of the defendant no. 1. The defendant no. 1 further submitted that the provisions are contained in Sections 12 and 13 of the Arbitration Act for challenging the appointment of an arbitrator.

6. That the defendant no. 2 also filed reply to the notice of motion denying all the allegations leveled against it in respect of collusion with defendant no. 1 as alleged or otherwise and requested to reject the application.

7. After hearing learned advocates for both the parties, the learned City Civil Court rejected the notice of motion, against which this appeal is filed.

8. Learned senior counsel Mr. Joshi appearing for the plaintiff submits that if the defendant no. 1 represents the case before the arbitrator, the interest of the plaintiff will be highly prejudiced and irreparable loss will be caused to the plaintiff as defendant no. 1 has favoured defendant no. 2 and the trial Court has committed error in not considering the same. He also submits that the dispute which has arisen between the parties does not come within the purview of the jurisdiction of arbitrator and only Civil Court has to decide the issue and the trial Court has committed error in not considering the same and holding that till the evidence is led, it is too early to say that defendant no. 1 has colluded with defendant no. 2. He further took this Court through various correspondence between the plaintiff and defendant no. 1 and submitted that though specific instructions have been given by the present plaintiff to defendant no. 1 for issuing notification of for closure and also asked defendant no. 1 to ask bank guarantee and payment from defendant no. 2, however, these instructions were

not followed by defendant no. 1 which prima facie, shows that defendants no. 1 and 2 have colluded with each other and interest of the plaintiff will be prejudiced which the trial Court has not considered in true perspective and by that committed error. He further submitted that the exercise carried out by defendants no. 1 and 2 is not in good faith and lacks bonafide and considering the relation of defendants no. 1 and 2, if the case of the plaintiff is prejudiced, then the plaintiff is entitled to get the relief of injunction.

9. He relied on the following decisions:

- (1) Economic Transport Carrier Vs. Economic Transport Carrier (North), .
- (2) M/s Modern Metal Industries and another V/s Smt. Shanti Parolia and others, reported in AIR 2004 Allahabad 249.
- (3) O'Neill and another V/s Phillips and others, (1999) UKHL 24.
- (4) India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., .
- (5) Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, .
- (6) N. Radhakrishnan Vs. Maestro Engineers and Others, .
- (7) Sohal Engineering Works, M/s V/s Rustom Jahangir Vakil Mills Co. Ltd., Civil Revision No. 1107 of 1979 decided on 3.4.1980.
- (8) Ivory Properties and Hotels Pvt. Ltd. V/s Nusli Neville wadia, reported in 2011 (2) ARBLR 479 (Bom)
- (9) Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, .

10. Learned advocate Mr. Shukla appearing for the defendant no. 2 submits that only because some directors are common between defendants no. 1 and 2, it could not be said that defendants no. 1 and 2 have colluded with each other and interest of the plaintiff will be prejudiced. He also submits that the defendants no. 1 and 2 are totally different entities and their functions are totally different and so from no stretch of imagination, it can be said that they have colluded with each other and interest of the plaintiff will be prejudiced. He took this Court through the correspondence from November to December and made submission that during this period, by this correspondence, proceedings of appointment of arbitrator were completed and once the arbitrator is appointed and proceedings are initiated, the civil Court has no jurisdiction to decide the suit and interfere at this stage. Therefore, the trial Court has rightly rejected the notice of motion and requested to dismiss this appeal.

11. Learned advocate, Mr. Kapadia for defendant no. 1, submits that the allegations of colluding with defendant no. 2 are baseless and the trial Court has rightly rejected the notice of motion. He relied on the following citations:

- (1) Braithwaite and Co. Ltd. Vs. Central Organisation for Modernisation of

Workshops, .

(2) Sime Darby Engineering SDN BHD V/s Engineers India Ltd. Reported in 2009 (3) Arb. L.R. 220 (SC).

(3) United India Insurance Co. Ltd. V/s M/s Kumar Texturisers and another, reported in AIR 1999 Bombay 118.

(4) Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc., .

(5) Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others, .

(6) Pappu Rice Mills, Jaitu, V/s Punjab State Cooperative Supply and Marketing Federation Ltd., Chandigarh and others, reported in AIR 2000 Punjab and Haryana 276.

(7) Brahan Dutt Shukla Vs. Ashok Leyland Finance,

12. This Court has gone through the order passed by the trial Court as well as the documents which are placed before the trial Court.

13. From the entire correspondence of the plaintiff, it reflects that the plaintiff is insisting for appointment of more than one arbitrator and never raised the point that the defendants no. 1 and 2 have colluded with each other and by that committed fraud or with ulterior motive, they are acting against the instructions of the plaintiff and so in opinion of this Court, the only dispute which has arisen is appointment of arbitrator. Section 10 of the Arbitration Act stipulates that if it is not mentioned in the arbitration clause for appointment of more than one arbitrator, then it is to be presumed that the parties agree to appointment of sole arbitrator. As far as the correspondence made by the plaintiff with the defendant no. 1 is concerned, no allegation is made as far as fraud is concerned and at the time of filing of the suit, this plea is for first time taken by the plaintiff and so apprehension that because of collusion of defendants no. 1 and 2, the interest of plaintiff will be prejudiced is baseless. Prima facie, in opinion of this Court, the dispute is only with reference to the appointment of arbitrator and prima facie no fraud is established nor anything has come on record which prima facie shows that with ulterior motive or to defeat the interest of the plaintiff, the arbitrator is appointed. There is correspondence between the plaintiff and defendant no. 1 and the intention as to the name of the arbitrator is conveyed to each other. After considering the facts and provisions of the Act, the name of the arbitrator suggested by defendant no. 2 has been accepted by defendant no. 1 as it is the right of the defendant no. 1 as they are having majority votes in the JOA and the decision taken by the defendant no. 1 has been taken as per the provisions of Clause 5.4.2 of GOA. Further, till the defence is led before the arbitrator, it cannot be said at this stage that the defendant no. 1 is acting against the interest of the plaintiff. I am in complete agreement with the argument advanced by Mr. Shukla that even if more than one arbitrator is appointed and if the defendant no. 1 will accept the claim of defendant no. 2, then prejudice will be

caused to the plaintiff and therefore it makes no difference if one or more arbitrator is appointed.

14. Article 14.01 of the Gas Supply Contract reads as under:

Any dispute of different whatsoever arising out of this CONTRACT which is not settled by mutual consultation, shall be referred to Arbitration under the provision of "The Arbitration and Conciliation Act, 1996" and the rules made thereunder and any statutory modification thereof shall be applicable to this CONTRACT. The language of Arbitration shall be English.

15. From the correspondence between the plaintiff and defendant no. 1, it seems that the plaintiff wanted the appointment of Mr. Justice A.M. Ahemadi, former Chief Justice of India as the arbitrator but the defendant no. 1 has given concurrence for appointment of Hon"ble Mr. Justice M.B. Shah, Former Judge of Supreme Court of India. However, the correspondence does not show that name was suggested in place of Hon"ble Mr. Justice M.B. Shah, Former Judge of Supreme Court of India, and even today, the plaintiff has not expressed any confidence in the appointment of Hon"ble Mr. Justice M.B. Shah, Former Judge of Supreme Court of India. This shows that the plaintiff also wanted to refer the matter to the arbitrator but to an arbitrator of his choice.

16. When there is no mention with regard to number of arbitrators in the contract, as per Section 10 of the Arbitration Act, the Arbitral Tribunal shall consist of sole arbitrator. When Mr. Justice M.B. Shah, former Judge of Supreme Court of India has been appointed as sole Arbitrator on the suggestion of defendant no. 2 with the concurrence of defendant no. 1 and there is no provision for appointment of three arbitrators, as per the Arbitration Act, suggestion of the plaintiff cannot be accepted and hence, if concurrence is given by defendant no. 1 to the defendant no. 2 as to the proposal of Mr. Justice M.B. Shah, former Judge of Supreme Court of India as a sole arbitrator, it cannot be said that defendant no. 1 is acting against the interest of JV. From 5.11.2011, the arbitral proceedings have been commenced in the present case and Once the arbitral proceedings have started, the civil Court has no jurisdiction to stay the proceedings and therefore the trial Court has rightly rejected the notice of motion.

17. Further, if the plaintiff is aggrieved by the appointment of a particular person as arbitrator and he wants the appointment of another person, then instead of the approaching the civil court, remedy is available to the plaintiff to approach the High Court under the provisions of Section 11(5) of the Arbitration Act.

18. It is rightly considered by the trial Court that Section 16 of the Arbitration Act deals with competence of arbitral tribunal to rule on its jurisdiction. As per sub-section 1 of Section 16, the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and as per sub-section (2) of Section 16, a plea that the arbitral tribunal does not have jurisdiction shall be raised.

19. It transpires from the papers and arguments that the plaintiff has full faith in arbitrator Mr. M.B. Shah, Former Judge of Supreme Court of India but plaintiff has apprehension that defendant no. 1 will not put the correct case of the defendant no. 1 and plaintiff and so the case of the plaintiff will be prejudiced. However, in opinion of this Court, this apprehension is baseless as the plaintiff can put his case independently before the arbitrator and the arbitrator has all power to decide the issues.

20. The facts of the authorities cited by learned advocates for the parties are different from the facts of this case and so they are not applicable to this case.

21. This Court has considered the aspect that present appeal from order is challenging the discretionary order passed by the trial Court. In this connection, reliance is placed on a decision of this Court in the case of Matrix Telecom Pvt. Ltd. V/s Matrix Cellular Services Pvt. Ltd. reported in 2011 (3) GLR 1951 more particularly, towards paragraph 6.1 which reads thus:

6.1. It is required to be noted that it is well settled law that the Appellate Court may not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.

22. In view of the above settled principle of law, power of this Court as an appellate court to interfere with the order passed by the trial court is very limited and only in exceptional circumstances, the appellate court can interfere with the order passed by the trial Court. The appellate Court cannot reevaluate or reassess the entire evidence and arrive at a conclusion contrary to the conclusion arrived at by the trial court. However, in case where the order passed by the trial court is found to be invalid, illegal, arbitrary, perverse or contrary to the settled principles of law, the appellate court has all powers to interfere with the same.

23. Considering the above principles of law, this court is of the opinion that the trial court has not committed any error in passing the impugned order.

24. In view of the above discussion, this appeal from order deserves to be dismissed and is accordingly dismissed. In view of the dismissal of Appeal From Order, Civil Application also stands dismissed. Notice is discharged.