

(2002) 06 GAU CK 0051

In the Gauhati High Court

Case No : M.A. (F) No. 30 of 1997 and Civil Revision No. 1 of 1997

Oil and Natural Gas Corporation Ltd.

APPELLANT

Vs

Ambuja Cement Eastern Ltd.

RESPONDENT

Date of Decision : 21-06-2002

Acts Referred:

Arbitration Act, 1940 — Section 31, 33
Oil and Natural Gas Commission (Transfer of Undertaking and Repeal) Act, 1993 —
Section 4, 8

Citation : (2003) 1 ARBLR 227 : (2002) 3 GLT 84

Hon'ble Judges : P.P. Naolekar, C.J;P.G. Agarwal, J

Bench : Division Bench

Advocate : C.K. Sarma Baruah and N. Islam, for the Appellant; D.K. Bhattacharyya, B.M. Choudhary and G. Baishya, for the Respondent

Final Decision : Allowed

Judgement

P.P. Naolekar, C.J.—The Appeal and the Civil Revision arise out of the same judgment and order dated 30.9.1996 passed by the Assistant District Judge, Sibsagar in Misc. (Arb) Case No. 49 of 1995, whereby the Assistant District Judge had granted injunction restraining the petitioner and the proforma Respondent from embarking upon and continuing with the Arbitration Proceeding arising out of the contract/supply order dated 23/26.6.1990.

2. The petitioner is a company, which is carrying on the business of exploration and production of hydrocarbon and the Eastern Regional Business Centre of the Company is engaged in such activities in the North Eastern States. The petitioner prepares various drill sites at various places as per geological data for the purpose of drilling rigs for exploration of hydrocarbon. The petitioner required ordinary Portland cement for various constructions at drilling sites. The petitioner for the purpose of procuring ordinary portland cement (OPC) invited open tender No. SBS/SP/TS/ORD.Cement/RC/90-91 under single bid system from cement manufacturers only for the award of annual rate contract. The bidders were

asked to quote tenders for the supply of OPC at the rate of 2000 M.T. per month at F.O.R., Sibsagar, price including all taxes, duties and transportation. The petitioner received ten offers from different agencies including the Modi Cement, Calcutta. The Respondent vide their quotation No. MCL/CAL/(186)/90-91 dated 21.5.1990 offered for supply of 10,000 M. Tons of cement to the petitioner, which ultimately culminated in contract/supply order SBS/SP/TS/ORD. Cement RC/90-91/TR-8/T-4/TR-164 dated 23/26.6.1990. There was an arbitration agreement as clause NO. 15 in addendum to the tender documents forming part of the contract. The relevant clause of the Arbitration Agreement reads as under :-

"15. If any dispute, difference, question or disagreement shall, at any time, hereinafter arise between the parties he or the respective representatives or assign in contradiction with or arising out of the contract, or in respect of meaning of specifications, design, drawings, estimates, schedules, annexures, orders, instruction, the construction, interpretation of this agreement, application of provisions the or anything hereunder contained or arising hereunder or as to rights liabilities or duties of the said parties hereunder or any matter whatsoever incidental to this contract or otherwise concerning the works of execution of failure to execute the same whether during the progress of work or stipulated extended period or before or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by a member of ONGC at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is an employee of ONGC or that he had to deal with the matters to which the contract relates and that in the course of his duties as ONGC's employee, he had expressed views on all or any of the matter in dispute or difference.

If the arbitrator to whom the matter is originally referred dies or refuses to act or resigns for any reasons from the position of arbitrator, it shall be lawful for the member of ONGC to appoint another person to act as Arbitrator in the manner aforesaid. Such person shall be entitled to proceed with reference from the stage it was left by his predecessor if both the parties consent to this effect failing which the arbitrator will be entitled to proceed de-novo.

It is a further form of this contract that no person other than the person appointed by a Member of the Commission as aforesaid shall act as Arbitrator and that, if for any reason that is not possible, the matter is not to be referred to the arbitration at all.

The arbitrator(s) may, from time to time, with the written consent of all the parties to the contract enlarge the time for making and publishing the award.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under the clause.

It is also a term of the contract that the contractor shall not stop the work under this contract and the work shall continue as expected to continue whether the

arbitration proceedings have commenced or not.

The arbitrator shall be deemed to have entered on the reference on the date of the issue of notice by him to both the parties for filing of the claims.

The arbitrator shall give reasoned award in respect of each dispute or difference referred to him. The award as aforesaid shall be final and binding on all the parties to this contract in accordance with the law.

The venue of the arbitration shall be Sibsagar (Assam).

Subject to the aforesaid, the provisions of Indian Arbitration Act, 1940 and may statutory modifications or re-enactments thereof and rules made thereunder and for the time being in force shall apply to the Arbitration proceedings under this Clause."

3. When certain differences and disputes arise between the petitioner and the Respondent No. 1 out of the aforesaid contract, the matter was referred to Respondent No. 2, Arbitrator appointed by the Chairman-cum-Managing Director of the petitioner company by his letter dated 19th/20th May, 1994. The Arbitrator took up the matter for framing of issues. The Respondent No. 1 raised two preliminary issues pertaining to the appointment of Arbitrator and the validity of the continuing arbitration proceedings. The two preliminary issues raised were :-

(A) Appointment of present Arbitrator was made by an officer of the Corporation and this is not permissible under Clause 15 of Annexure-A to the Addendum to the Tender documents.

(B) As because the appointment of the present Arbitrator is not made by a Member of the Commission and therefore the Arbitration proceedings cannot be restored to.

The Arbitrator after hearing the parties came to the conclusion that conversion of Oil and Natural Gas Commission to Oil and Natural Gas Corporation Ltd. was only to accord more flexibility in its operations and to generate more revenue. But the functions of the Board Members and Chairman of the Oil and Natural Gas Commission remained the same as in the Oil and Natural Gas Corporation Ltd. except that their designations were changed to Director and Chairman-cum-Managing Director, in accordance with the Companies Act, 1956 for its functioning and therefore the appointment of the Arbitrator by the Chairman-cum-Managing Director of the petitioner Company is in consonance with the provisions of the Act, tender/contract and within the powers conferred on the Chairman-cum-Managing Director of the petitioner Company for appointment of the Arbitrator.

4. Aggrieved by the aforesaid order of the Arbitrator, the Respondent No. 1 had moved an application before the Assistant District Judge-under sections 31 and 33 of the Arbitration Act, 1940 raising the issues of validity of appointment of the

Arbitrator by the Chairman-cum-Managing Director of the petitioner Company instead of the member and the Arbitrator's jurisdiction and power to proceed with the arbitration proceeding arising out of the contract/supply order dated 23rd/26th June, 1990. The petitioner filed written statement as well as show cause reply. The learned Assistant District Judge, Sibsagar by his order dated 30.9.1996 upheld the objections raised by the Respondent No. 1 and passed the order restraining the petitioner and the proforma Respondent from continuing with the arbitration proceeding. It is this order, which is under challenge before this Court in M.A.(F) 30/97 and Civil Revision No. 1/97.

5. The contract was entered into between the Modi Cement Limited (Ambuja Cement Eastern Ltd.), the Respondent No. 1 and the Oil & Natural Gas Commission and in the contract agreement is a provision under Clause 15 for referring any dispute or difference between the parties to the sole arbitration of the person to be appointed by a Member of ONGC. It is further provided that the Arbitrator to whom the matter is originally referred dies or refuses to act or resigns for any reasons from the position of arbitrator, it shall be lawful for the member of ONGC to appoint another person to act as Arbitrator in the manner aforesaid. Such person shall be entitled to proceed with reference from the stage it was left by his predecessor if both the parties consent to this effect, failing which the Arbitrator will be entitled to proceed de-novo. It is further said in the contract that no person other than the person appointed by a Member of the Commission as aforesaid shall act as Arbitrator and that if for any reason that is not possible the matter is not to be referred to the arbitration at all. On the basis of aforesaid terms of the contract document, it is submitted by the learned counsel for the Respondent that in case of any dispute or difference or question of disagreement arises between the parties to the contract, it was only for the Member to appoint a Sole Arbitrator, who can proceed with the arbitration under the terms of Clause 15 of the contract agreement but when the dispute was referred to the Arbitrator by the Chairman-cum-Managing Director, the Arbitrator was neither legally appointed nor he has jurisdiction to proceed with the arbitration proceeding. On the other hand, it is submitted by the learned counsel for the petitioner that by virtue of the Oil and Natural Gas Commission (Transfer of Undertaking and Repeal) Act, 1993, which came into force on 2nd July, 1993, the undertaking of the Commission stood transferred to, and vested in, the Corporation and, thus, all the properties/claims/liabilities/ obligations etc. are vested in Oil & Natural Gas Corporation Limited. As per the provisions of the Oil & Natural Gas Commission (Transfer of Undertaking and Repeal) Act, 1993, the functions and authority of the Board Members and Chairman remained the same except that the designations were changed to Director and Chairman-cum-Managing Director from Chairman/Member of the Commission. Thus, the powers which could be exercised by the Member of the Commission could be exercised by the Chairman-cum-Managing Director of the Corporation.

6. It may be seen that the Oil & Natural Gas Commission (Transfer of Undertaking and Repeal) Act, 1993, hereinafter called the Act of 1993 was

enacted to provide for transfer of the undertaking of the Commission to Oil & Natural Gas Corporation Limited, a company incorporated under the Companies Act, 1956 and the matters connected therewith or incidental thereto and also to repeal the Oil & Natural Gas Commission Act, 1959. By virtue of Section 4 of the Act of 1993, from the appointed day, the entire capital of the Commission stands vested in the Corporation. Under Clause (2) of Section 4 of the Act of 1993, the undertaking of the Commission which is transferred to, and which vests in, is deemed to include all assets, rights, powers, authorities and privileges and all properties, movable and immovable, real and personal, corporeal or incorporeal, in possession or reservation, present or contingent of whatever nature and wheresoever situate including lands, buildings, works, workshops, vehicles, oil rigs, oil platforms, cash balances, deposits, foreign currencies, reserves, reserve funds or any other investments, securities, tenancies, leases and book debts and all other rights and interests arising out of such properties as were immediately before the appointed day in the ownership, possession or power of the Commission in relation to its undertaking, whether within or outside India, all books of account and registers, records and documents relating thereto and also deemed to include all liabilities and obligations of whatever kind, within or outside India, of the Commission in relation to its undertaking subsisting immediately before the appointed day. In other words, the entire property of the Commission is vested in the Corporation.

7. Under Clause (3) of section 4 of the Act of 1993, all contracts, deeds, bonds, guarantees, powers of attorney, other instruments and working arrangements subsisting immediately before the appointed day and affecting the Commission shall cease to have effect or to be enforceable against the Commission and shall be of as full force and effect against or in favour of the Corporation and enforceable as fully and effectually as if, instead of the Commission, the Corporation had been named therein or had been a party thereto. Clause (4) of Section 4 of the Act of 1993 provides that any proceeding or cause of action pending or existing immediately before the appointed day by or against the Commission, in relation to its undertaking may, as from the appointed day, be continued and enforced by or against the Corporation as it might have been enforced by or against the Commission. Thus, Clause (3) of section 4 of the Act of 1993 clearly provides for incorporation of the name of the Corporation in place of the Commission in all contracts, deeds, bonds, guarantees, powers of attorney other instruments, working arrangements etc. On account of the aforesaid clause, the contract entered between the Commission and the Respondent No. 1 shall be deemed to have been entered with the Corporation and as a necessary corollary powers which have been vested in the members shall be exercised hitherto by the officers of the Corporation, namely, Chariman-cum-Managing Director. The contract between the parties shall be read as if it is entered between the Corporation and the Respondent No. 1. There is no Member in the Corporation, which is a company incorporated under the Companies Act, 1956. The powers and duties of the Members of the Commission shall be

discharged by the Chairman-cum-Managing Director in the Corporation.

8. Much emphasis has been placed by the Court below on Section 8 of 1993 Act, which provides that every officer or employee of the Commission serving in its employment immediately before the appointed day, shall be deemed to be appointed as an officer as the case may be as that of the other employee of the Corporation except member or the chairman. The learned Court below has proceeded with the reasoning that because Section 8 of the 1993 Act does not provide for transfer of member or Chairman of the Commission as an employee of the Corporation, it cannot be assumed that the Chairman-cum-Managing Director has stepped into the shoes of the member and therefore has no power to refer the dispute to the arbitration, failing to see that the Members or the Chairman are not the employees of the Commission and are appointed u/s 4 of the Oil & Natural Gas Commission Act, 1959. Section 8 provides for transfer of services of the employees of the Commission to the Corporation. Section 8 of the Act of 1993 does not provide for transfer of the members or the chairman, which does not mean that the powers exercised by the member or the chairman under the Commission are different to that of the powers exercised by the Chairman-cum-Managing Director of the Corporation and cannot be exercised by the Chairman after the repeal of the Act of 1959. After the repeal of Act of 1959 post of Member does not exist and shall be deemed to be a post of Chairman-cum-Managing Director.

9. In the case of The Union of India (UOI) Vs. D.N. Revri and Co. and Others, the arbitration clause in the agreement between the appellant Union of India and respondent supplier of sugar provided that the single arbitrator would be nominated by the "Secretary to the Government of India in the Ministry of Food and Agriculture". After the dispute and before the appointment of an arbitrator the ministry was bifurcated into the Ministry of Food and Ministry of Agriculture. Later both ministries were amalgamated as before with the difference that there was one secretary for Food and one for Agriculture. The Secretary for Food who was concerned with the subject-matter of the contract appointed the sole arbitrator. The respondents filed their claim before the arbitrator and participated in the proceedings. The award went in favour of the appellant who filed the award in court. The respondent resisted the application, one of the grounds being that the arbitrator was not validly appointed since he was not "the" Secretary mentioned in the clause after the bifurcation of the ministry. The lower court rejected the ground but the High Court in appeal accepted it and set aside the award. Hence the appeal.

Held:

A contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a

contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.

10. The ratio laid down in the aforesaid judgment of the Apex Court applies with full force in the facts and circumstances of the present case. In the present case, the entire undertaking of the Commission had been merged by virtue of the Act of 1993 in the Corporation. The power to appoint Arbitrator given to the Member of the Commission shall be read as the power to appoint given to the Chairman-cum-Managing Director of the Corporation under the contract.

11. In the aforesaid view of the matter, the appeal and the Civil Revision are allowed with costs of Rs. 5,000 (Rupees five thousand). The impugned order dated 30.9.1996 passed by the Assistant District Judge, Sibsagar in Misc. (Arb) Case No. 49 of 1995 is set aside. We direct that the Arbitrator, Proforma Respondent shall proceed with the Arbitration referred to him under letter No. SBS/SP/TS/ ORD.Cement/RC/90-91-433 dated 19/20.5.1994 of the Chairman-cum-Managing Director of the petitioner company. The petitioner and the Respondent are directed to appear before the Arbitrator (Proforma Respondent) on 22nd July, 2002.