
(2002) 10 BOM CK 0075

In the Bombay High Court

Case No : Arbitration Petition No. 501 of 2002

Oil and Natural Gas Corporation Ltd.

APPELLANT

Vs

R.S. Avtar Singh and Co.

RESPONDENT

Date of Decision : 31-10-2002

Acts Referred:

Arbitration Act, 1940 — Section 33

Arbitration and Conciliation Act, 1996 — Section 85(2)

Citation : (2003) 2 ARBLR 219 : (2003) 2 MhLj 29

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Snehal Paranjape, instructed by Little and Co, for the Appellant;
Virendra Tulzapurkar and Rishab Shah, instructed by Maneksha Sethna, for the Respondent

Judgement

D.Y. Chandrachud, J.—Admit. By consent of counsel, the Arbitration Petition is taken up for hearing and final disposal and is heard. The learned counsel for the respondent waives service.

2. These proceedings have been initiated u/s 33 of the Arbitration Act, 1940. A declaration has been sought by the petitioner that an arbitration agreement contained in Clause 25 of the contract that was entered into between the parties has ceased to exist or that it has perished due to a final settlement, accord and satisfaction between the parties in pursuance whereof the respondents were paid an amount of Rs. 28.95 lacs in full and final settlement of their claims. Consequential declaratory reliefs have been prayed for in these proceedings.

3. The dispute between the parties arises out of a contract for the construction of an Institute of Engineering and Ocean Technology that was awarded by the petitioner to the respondent in the year 1986. The value of the contract was Rs. 2.29 Crores and the construction of the building was completed on 31st December, 1988. On 15th September, 1990 the respondent raised a claim in an amount of Rs. 1.70 Crores as being the amount due and payable to the

respondent in pursuance of the contract. That claim was rejected on 8th January, 1991. There is no dispute between the parties before this Court that in the abovementioned letter dated 15th September, 1990 the respondent had sought to invoke the provisions for arbitration contained in Clause 25 of the agreement dated 28th January, 1986. (In fact in paragraph 7 of the Arbitration Suit which was instituted by the respondent, there is an express statement to the effect that on 15th September, 1990, the respondent had invoked the arbitration proceedings.) The invocation of the arbitration proceedings took place at a stage when the Arbitration Act of 1940 was in force.

4. Subsequently, on 13th January, 1991 the respondent instituted an arbitration suit before this Court in which inter alia the respondent prayed for the appointment of an independent arbitrator to arbitrate upon the disputes between the petitioner and the respondent. Clause 25 of the contract stipulated inter alia that all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions and as to the quality of workmanship or material used on the work or to any other question, claim, right, matter or thing whatsoever, in any way arising out of relating to the contract, design, drawings, specifications, estimates, instructions, orders or the conditions or otherwise concerning the work or the execution or the failure to execute same whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a person appointed by the Chief Engineer at the time of the dispute. The contract stipulates that no person other than the person appointed by the Chief Engineer should act as arbitrator and if that was not possible, the matter could not be referred to arbitration at all. The Court has been informed that in the written statement that was filed by the petitioner, the petitioner agreed to a reference to arbitration though in terms of Clause 25 of the contract.

5. On 18th May, 1993 a letter was addressed by the respondent to the petitioner stating that the respondent was given to understand that the petitioner was going to release payments in accordance with the claims of the respondent. The respondent sought to assure the petitioner that in the event that its payments were released, it would withdraw its application pending before this Court for the appointment of an arbitrator. In its reply dated 8th June, 1993 the petitioner stated that since the respondent had already moved this Court for the appointment of an independent arbitrator, the appointment of the arbitrator in accordance with the agreement could be taken up only once the case was withdrawn before this Court. In response to the letter dated 8th June, 1993 of the petitioner, the respondent addressed a letter dated 9th June, 1993 which is of a considerable degree of significance in these proceedings. In this letter, the respondent stated that it shall withdraw its case which was pending before this Court on the date on which it receives a communication from the petitioner that the petitioner "is willing to settle our case across the table expeditiously". The respondent stated that even if the petitioner was to appoint an arbitrator, it may take several years to resolve the issue in arbitration proceedings. The

respondent, therefore, stated that it was willing to settle its claim and requested that a confirmation be given by the petitioner so that the withdrawal of the case pending before this Court could be taken up.

6. On 19th October, 1993, the respondent addressed a further letter in continuation of the earlier letter dated 9th June, 1993. In the said letter, the respondent recorded that it had withdrawn the case from this Court for the appointment of an arbitrator, in the circumstances, the petitioner was requested to set up a suitable date for a discussion regarding the claims of the respondent. The respondent also recorded that a copy of the order passed by this Court would be handed over as soon as it was received. On behalf of the respondent it has been stated before the Court that a committee of experts was appointed by the ONGC to enquire into the claims of the respondent and that the committee recommended that an amount of Rs. 43.78 lacs should be paid to the respondent. The decision of the committee, according to the respondent, was not acceptable to the ONGC. On 14th February, 1997 the petitioner addressed a letter to the respondent stating that the petitioner was willing to settle all the outstanding claims of the respondent against the work under the contract for a total lump sum of Rs. 28.95 lacs which will be in full and final settlement. A draft undertaking was furnished by the petitioner to the respondent and the respondent was requested to execute the undertaking and return it to the petitioner so that further action could be taken. Further letters dated 13th March, 1997, 15th May, 1997 and 3rd June, 1997 were addressed by way of reminder to the respondent. In the last of those letters, the petitioner stated that if the undertaking which had been sought was not received by 20th June, 1997, it would be presumed that the respondent was not interested in settling the dispute in a total lump sum amount of Rs. 28.95 lacs and the offer of the petitioner would stand withdrawn.

7. On 14th August, 1997, the respondent accepted the proposal made by the petitioner to the effect that the petitioner would pay an amount of Rs. 28.95 lacs in full and final settlement and that nothing will thereafter remain due and payable. However, the only additional condition that was imposed by the respondent was that this payment should be made within a period of 60 days of the receipt of the letter. The petitioner responded on 26th August, 1997 and stated that the undertaking which had been furnished by the respondent was not in line with the draft of the undertaking furnished by the petitioner and had not been signed by the person who was required to sign it. The respondent was thereafter, requested to resubmit the undertaking duly signed. On 8th September, 1997, the respondent submitted an undertaking to the petitioner recording that the undertaking was subject to the petitioner making a payment of Rs. 28.95 lacs to the respondent within a period of 30 days. The undertaking was inter alia in the following terms :

"In the above noted matter the claimant is ready and willing to settle the matter by mutual negotiation. It is suggested that ONGC do payment to the Contractor/

Claimant, a sum of Rs. 28.95 Lakhs (Rupees Twenty-Eight Lakhs Ninety Five Thousands Only) with respect to the above noted dispute/contract. This is in full and final satisfaction of all the claims against ONGC, in this matter in respect of above contract agreement and nothing remains due and payable by ONGC to the Contractor in this behalf."

Thereafter, a final bill which recorded a payment of Rs. 28.95 lacs towards settlement of all disputes and differences between the petitioner and the respondent (as agreed by the contractor as per the revised undertaking submitted vide letter No. RSA:97:6779 dated 8-9-1997} was prepared. The final bill has been duly signed by the petitioner and by the respondent. Subsequently on 23rd September, 1997, the respondent addressed a letter to the petitioner intimating the address at which the cheque which was to be remitted by the petitioner should be forwarded at New Delhi- On 17th November, 1997, the petitioner recorded that it had already sent a cheque dated 7th October, 1997 drawn on the State Bank of India, Panvel in full and final settlement of the claims of the respondent in accordance with the respondents letter dated 8th September, 1997 and the undertaking furnished by the respondent.

8. On 19th November. 1997 the respondent recorded that it was in receipt of the cheque forwarded by the petitioner and purported to state that this payment had been accepted without prejudice and under protest and that it was not in full and final settlement. According to the respondent, the delay on the part of the petitioner in making payments had caused financial hardship to the respondent and that the petitioner had dictated the amount and terms of the payment which would be made by the petitioner to the respondent. The respondent then contended that financial difficulties had compelled it to accept whatever amounts had been offered by the petitioner. The respondent claimed that the arbitration suit had been withdrawn before this Court on the assurance that the petitioner would do justice "to the rightful claim of the respondent" against the petitioner. In the circumstances, the respondent sought the payment of an amount of Rs. 1.70 Crores less the payment of Rs. 28.95 lacs within a period of 15 days failing which, it was stated, the letter should be treated as a notice for a reference of the disputes raised by the respondent for the payment of the aforesaid amount to arbitration. There was a similar letter by the respondent to the petitioner on 5th July, 2000. The respondent stated that it was treating the amount of Rs. 28.95 lacs which had been received as a payment on account of its outstanding dues and claimed a balance of Rs. 1.41 Crores. In its reply dated 11th August, 2000, the petitioner has rejected the demand holding that there was a full and final settlement between the parties in pursuance of which the amount of Rs. 28.95 lacs has been paid to the respondent.

9. On 3rd October, 2001 the respondent instituted an arbitration petition u/s 11 of the Arbitration and Conciliation Act, 1996, claiming a reference to arbitration and the appointment of an arbitrator. The petition was dismissed by a learned Single Judge of this Court on 30th March, 2001. The order of the Court was set

aside by a Division Bench of the Court by consent of the parties on 15th July, 2002 with a direction that the arbitration petition would be heard afresh. Accordingly, together with this petition u/s 33, the arbitration petition u/s 11 has been placed before the Court for orders. A separate order is being passed in the petition u/s 11.

10. The learned counsel appearing on behalf of the petitioner has urged that in the present case the respondent had agreed to the unconditional withdrawal of the arbitration suit which had been instituted before this Court. The respondent had agreed to the withdrawal on the assurance that ONGC would agree to settle the claim of the respondent "across the table expeditiously". On 19th October, 1993 the respondent informed the petitioner that the arbitration suit had been withdrawn. As a matter of fact, the Court is informed that the arbitration suit was withdrawn subsequently on 4th January, 1994. The petitioner thereafter offered an amount of Rs. 28.95 lacs to the respondent in full and final settlement. The respondent accepted the settlement and furnished an undertaking to the petitioner to that effect. In pursuance of the settlement which had been arrived at between the parties, an amount of Rs. 28.95 lacs was paid by the petitioner to the respondent on 7th October, 1997. In the circumstances, it has been urged that there was no valid dispute in existence at all since, the respondent had accepted the payment of Rs. 28.95 lacs in full and final settlement. The learned counsel relied upon a judgment of the Supreme Court in *Nathani Steels Ltd. v. Associated Constructions* .

11. On behalf of the respondent the jurisdiction of the Court to entertain the petition u/s 33 has been sought to be questioned. The learned counsel sought to urge that u/s 85 of the Arbitration and Conciliation Act, 1996, the Arbitration Act of 1940 has been repealed. Clause (a) of Sub- section (2) of Section 85 provides that notwithstanding such repeal, the provisions of the Arbitration Act of 1940 shall apply in relation to arbitral proceedings which commenced before the Act came into force. Section 21 of the Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Counsel for the respondent urged that the words "particular dispute" in Section 21 are critical. The submission was that the dispute which was sought to be raised by the respondent on 19th November, 1997 was not the same dispute which was sought to be raised on 15th July, 1990 and that consequently upon the enforcement of the new Act of 1996, the invocation of the arbitral proceedings on 19th November, 1997 was in order.

12. In considering the objection which has been raised to the jurisdiction of the Court, it would at the outset be necessary to refer to Sub-sections (1) and (2) of Section 85 which provide thus :

"85. Repeal and savings.--(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed. (2)

Notwithstanding such repeal,

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

Sub-section (2) of Section 85 provides that notwithstanding the repeal of the Arbitration Act of 1940 that Act shall apply in relation to arbitral proceedings which commenced before the Arbitration and Conciliation Act, 1996 came into force. Significantly, Clause (a) of Sub-section (2) of Section 85 does not postulate that the arbitral proceedings should be pending on the date on which the new Act came into force. The provision is clear, in that what the legislature has enunciated is that the Arbitration Act of 1940 shall apply in relation to arbitral proceedings which commenced before the Act of 1996 came into force. Parliament has used the expression "apply in relation to arbitral proceedings", which expression is wider in its ambit than the expression "apply to arbitral proceedings". In other words, the provisions of the old Act shall continue to apply not merely to arbitral proceedings which commenced under the old Act, but also in relation to arbitral proceedings which commenced before the new Act came into force. In *Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another*, , the Supreme Court laid down that since the new Act came into force on 26th January, 1996, if the request for arbitration had been made prior thereto, the old Act would continue to govern. In the case before the Supreme Court, arbitration suits had been instituted on 24th August, 1995 and the request for arbitration had been made much prior thereto in March and April 1995. Since the suits had been instituted prior to 26th January 1996, the Supreme Court held that all the four suits should be governed by the Arbitration Act, 1940. In the present case, there is no dispute about the fact that the demand for arbitration was made by the respondent on 15th September, 1990. The demand was rejected on 8th January, 1991 upon which the respondent instituted an arbitration suit before this Court on 13th March, 1991. In that view of the matter, there could be no doubt that the Arbitration Act of 1940 would govern. The learned counsel appearing on behalf of the respondent, however, urged that the Arbitration Act of 1940 would not apply since the suit which had been instituted by the respondent came to be withdrawn on 4th January, 1994. Counsel urged that the withdrawal of the suit would operate to divest the application of the Arbitration Act, 1940, In my view, this submission cannot be accepted, having regard to the plain terms of Section 85(2)(a) of the Act. At the cost of repetition, it would be necessary to emphasize that what Section 85(2) postulates is that the Arbitration Act, 1940 and the other acts referred to in Sub-section (1) shall apply in relation to arbitration proceedings which commenced

before the Arbitration and Conciliation Act, 1996 came into force. The petitioner has moved this Court u/s 33 of the Arbitration Act, 1940 contending that under that provision it is open to this Court to determine whether the arbitration agreement was in existence or whether it was valid. u/s 33 any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits. Under the proviso, the Court is empowered to set down the application for hearing on other evidence where it deems just and expedient to do so. In my view, once the arbitral proceedings had commenced before the Arbitration and Conciliation Act, 1996 came into force then, this Court would have jurisdiction u/s 33 of the Arbitration Act, 1940 to determine the challenge to the existence or validity of the arbitration agreement. The contention of the petitioner is that there is no existing or valid arbitration agreement since the dispute between the parties has been entirely settled in terms of the payment which was made by the petitioner and accepted by the respondent in full and final settlement. For the purpose of invoking the jurisdiction of this Court u/s 33 of the Arbitration Act, 1940, all that is necessary is that the arbitral proceedings ought to have commenced prior to 26th January, 1996. The subsequent withdrawal of the arbitration suit on 4th January, 1994 does not divest the Court of the jurisdiction u/s 33 of the Arbitration Act, 1940 because in fact the basis on which the suit came to be withdrawn was the settlement that was entered into between the parties. Under the terms of the settlement, as will be clear from a consideration of the facts hereinafter, the respondent agreed to accept an amount of Rs. 28.95 lacs from the petitioner in full and final settlement. The fact that the actual payment of the amount was made and received after the enforcement of the new Act would make no difference to the jurisdiction of the Court under the Act of 1940. The jurisdiction under the Act of 1940 becomes crystallized so long as the arbitral proceedings have commenced before the new Act came into force. That was so in the present case.

13. Now insofar as the facts of the present case are concerned, they are capable of one conclusion and one conclusion alone. On 9th June, 1993, the respondent had agreed to withdraw the arbitration suit which was filed before this Court, subject to the petitioner being willing to settle the dispute expeditiously. Subsequently, on 19th October, 1993, the respondent unconditionally informed the petitioner that the suit was being withdrawn. On 8th September, 1997, the respondent submitted an undertaking to the petitioner recording that it was accepting an amount of Rs. 28.95 lacs in full and final settlement. In the covering letter dated 8th September, 1997, while furnishing the undertaking, the respondent stated that the payment should be made within 30 days. The respondent accepted the final bill and duly signed it. The final bill records that an amount of Rs. 28.95 lacs was being paid to the respondent towards settlement of all disputes and in terms of the undertaking dated 8th September, 1997. The respondent thereupon intimated to the petitioner the address where the cheque

should be forwarded and there is no dispute about the fact that the cheque dated 7th October, 1997 furnished by the petitioner was duly encashed by the respondent. In these circumstances, the contention which was sought to be raised thereafter was clearly an afterthought and there can be no doubt about the fact that the dispute between the parties was clearly and comprehensively settled by the terms of the settlement.

14. A similar question arose before the Supreme Court in *Nathani Steels Ltd. v. Associated Constructions*. A Bench of three learned Judges referred to the earlier decisions of the Supreme Court on the subject and held that "once there is a full and final settlement, in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an arbitrable dispute and the arbitration clause cannot be invoked even though for certain other matters, the contract may be in subsistence." The Supreme Court further held as follows:

"Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot be in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause."

In the judgment of the Supreme Court in *Nathani Steels* case, the Court has followed the view which was taken by that Court in *P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., and in State of Maharashtra v. Nav Bharat Builders*.

15. The attention of the Court has also been drawn to a judgment of Chief Justice M.B. Shah (as the learned Chief Justice then was) in *Lloyds Steel Industries Limited Vs. Oil and Natural Gas Corporation Ltd.*, . The learned Chief Justice has adverted to the earlier decisions on the point including the judgment in *Nathani Steels*.

16. The learned counsel appearing on behalf of the respondent has sought to urge that the dispute which was sought to be raised in the year 1997 was not the same dispute as was raised in 1990 and that in the circumstances, the Arbitration and Conciliation Act, 1996 would apply to the dispute sought to be raised on 19th November, 1997. There is no merit in that submission. The letter

which was addressed on behalf of the respondent on 19th November, 1997 would make it abundantly clear that the claim contained in that letter was in respect of the very claim which was raised on 15th September, 1990. What the respondent sought to claim was that the balance of the amount of Rs. 1.70 Crores should be paid after giving due credit for an amount of Rs. 28.95 lacs which was paid by the petitioner to the respondent. This is further clear from the subsequent letter dated 5th July, 2000 addressed by the respondent to the petitioner. In paragraph 23 of that letter, the respondent has stated that it was treating the amount of Rs. 28.95 lacs as having been received on account of its outstanding dues and it was on that basis that the payment of the balance out of Rs. 1.70 Crores was sought.

17. In the circumstances, I am of the view that the dispute between the parties was clearly settled in terms of the agreement which was arrived at between them in pursuance of which the petitioner made a payment of Rs. 28.95 lacs to the respondent. Upon the making of that payment, all the disputes between the parties were clearly settled and there was no surviving or arbitrable dispute that can be referred to arbitration. The respondent having taken the benefit of the payment made under the mutually agreed settlement has sought to thereafter raise a dispute all over again which is anything but bona fide. In the circumstances, the petitioner is entitled to the relief as prayed for. Accordingly, the petition is made absolute in terms of prayer Clauses (a) to (d).

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