IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 4368 OF 2005

Oil and Natural Gas Corporation Ltd. ……..Appellant

Versus

Off-Shore Enterprises Inc. ….. Respondent

O R D E R

R. V. Raveendran J.,

Under a contract dated 14.7.1981 between appellant and the respondent, the respondent agreed to supply the equipment and engineering drawings and provide the project management and construction supervision to M/s Paul Lindenau GmbH to assist with the design, building, equipping and launching of a drillship known as 'Sagar Prabhat' purchased by the appellant. The appellant had simultaneously entered into an agreement with M/s Paul Nindenau GmbH for purchase of the said drillship. The said drillship equipped and mobilised by the respondent reached Bombay on 5.6.1982. American Bureau of Shipping ("ABS" for short) vide certificate dated 25.6.1982 certified that the machinery of the drillship and the stability of the drillship were in accordance with its rules and standards. On the basis of the said certificate

dated 25.6.1982, the appellant took delivery of the Drill-ship on 29.6.1982. The appellant thereafter found some defects in the drill-ship and therefore withheld the payment to the respondent. ABS revised its certificate on 18.6.1985, stating that its earlier certificate dated 25.6.1982 was based on incorrect data supplied by Paul Lindenau GmbH (builder of the drillship) and the respondent (designer, equipment supplier and construction supervisor of the drillship).

2. The respondent initiated arbitration proceedings in respect of the dispute relating to non payment of the balance price. An award was made against ONGC, in regard to the balance price due to the respondent. Certain counter claims by ONGC were also allowed. It is stated that challenge by ONGC to the said award is pending adjudication in court. During the pendency of the said arbitration, ONGC sought to raise the issue of defective stability of the Drill-ship. As that issue was beyond the reference of the ongoing arbitration, it was decided that a separate reference would be made in regard to dispute relating to the stability/defects of the drillship.

3. As the respondent disputed the claim of ONGC that the Drill-ship was defective and the defects affected its stability, it issued a notice dated 1.8.1986 stating that a dispute had arisen in regard to the claim of the

appellant about the defects/deficiencies in the stability of the Drill-ship. The said dispute was referred to arbitration by an Arbitral Tribunal with Shri K.H. Bhabha, Senior Advocate and Vice-Admiral Shri N.P. Datta as members. The said Arbitral Tribunal entered upon the reference on 4.9.1986.

4. ONGC filed its Statement of Claim on 2.12.1987 in regard to its claim relating to defects/deficiencies in regard to the stability of the Drill-ship. Para 27 thereof containing the claim and prayer of the appellant is extracted below:

> "27. The Respondents submit that the consequences arising from the entire situation aforesaid would be either that the drillship be directed to be returned to the claimants on the conditions that the claimants return all the amounts received by them from the Respondents including US $ 55 million/and interest @ 12% per annum under the contract dated 14th July, 1981 in addition they pay adequate damages to the Respondent or that the claimants bring the drillship to the required state and condition as indicated hereinabove. The Respondents state and submit that tentatively and on prima facie considerations the amounts required to bring the drillship to the desired state and condition would be Rs.3.50 crores which does not include non-use of the Drillship for the period during which the said adjustment, alterations or necessary things required to be done to the Drillship to bring it to the proper state and conditions would involve. This costs would be calculated at the the rates current when the modifications are carried out. However, the same is tentatively estimated as per the current prevailing rate of U.S.$ 20,000/- per day, So calculated for 90 days the same would work out to U.S.$ 1,80,000/-.
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> The Respondent, therefore, pray:
>
> (a) That the claimants be directed to pay to the Respondent a sum of US $ 55 Million with further interest thereon at 12% per annum being the amount paid by the Respondents to the claimants for the acquisition of the said drillship by the Respondents from the claimants and that on the said amount being paid or in any manner

> secured to the Respondents the claimants may be directed to take back the said drillship "SAGAR PRABHAT".
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> (b) That as an alternative to prayer (a) hereinabove, the claimants be directed to pay to the Respondents (i) a sum of Rs.3.5 crores converted to U.S. Dollars at the convertible rate prevailing on or about the date of the award to enable the Respondent to bring about necessary changes and/or alterations and additions in drillship in order that it may be put to enable the Respondent to operate the same as held out in the agreement between the parties hereto dated 14th July, 1981: and (ii) a further sum of U.S. Dollars 1,80,000/- being the amount of damages for non-use of the drillship at the rate of U.S. Dollars 20,000/- per day for 90 days required to set the drillship right.
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> xxx xxx xxx

5. The respondent participated in the initial stages of the second arbitration and filed a reply dated 29.11.1988 denying the claim and arbitrability on four grounds: (i) the claim was beyond the scope of arbitration agreement contained in Article 13.2 of the agreement dated 14.7.1981; (ii) the claim related to a technical matter falling under clause 13.1 of the contract, and therefore to be concluded only by the decision of ABS. (iii) the claim having been made beyond the warranty period of twelve months prescribed in clause 9.2.1 of the contract, was deemed to have been waived and not maintainable; and (iv) the claim was barred by limitation as it was made beyond three years from the date of taking over the drillship.

6. At the meeting of Arbitrators on 17th & 18th January, 1989 the respondent raised a preliminary objection that the dispute related to a technical matter and therefore was an excepted matter beyond

the scope of the Arbitration Agreement. ONGC submitted that the technical question of stability of the drillship be referred to ABS, New York for its opinion and it was willing to accept its opinion as evidence. Respondent submitted that it will settle the dispute in accordance with such opinion of ABS. The Arbitral Tribunal referred the dispute relating to stability of the drillship to the opinion of the ABS, Bombay which gave its report dated 18.5.1990. According to respondent, the parties to the arbitration had agreed that the claim should be referred to ABS, New York, for its opinion as provided by Article 13.1 of the contract, but instead, the matter was referred to ABS, Bombay. However thereafter the respondent did not participate in the arbitration proceeding. In the arbitration proceedings, Mr. Pramod Seth, Dy. General Manager of ONGC filed an affidavit dated 6.4.1995 as the evidence on behalf of ONGC. As the respondent was not contesting the proceedings, the Arbitrators themselves examined Mr. Pramod Seth in detail. Thereafter on 15.9.1995, the concluding date of the arguments, ONGC submitted a comparative statement explaining its claim, giving various alternative calculations.

7. On 18.9.1995 the Arbitrators made an Award for Rs.36,38,50,000/- (Rupees Thirty six crores thirty eight lakhs fifty thousand) in favour of ONGC, with interest at the rate of 12% per annum on the said sum from the date of award. The award set out the contentions of ONGC and the

respondent in brief and then proceeded to direct respondent to pay the following amounts (being the break up of Rs.36.385 crores) by a non-speaking award:

		Rs. In lakhs
(a)	For Cost of Anchors	225.00
(b)	For Cost of Anchor chains	938.00
(c)	For procuring & fitting new motion Compensator	900.00
(d)	For additional sponsons	700.00
(e)	For Lay up charges	870.00
(f)	Cost of Arbitration	13.50
	Total	Rs.3638.50 Lakhs

8. The said award was challenged by the respondent. A learned Single Judge of the Bombay High Court by judgment dated 2/3-9-1996 set aside the said award. The learned Single Judge inter alia held that the issue being a technical matter, the same was not arbitrable and that the Arbitral Tribunal exceeded its jurisdiction in deciding a issue which related to the report of the American Bureau of Shipping. Feeling aggrieved, ONGC filed an appeal. A Division Bench of the High Court by judgment dated 28.7.2004 dismissed the appeal confirming the final decision of the learned Single Judge. It however, set aside the finding of the learned Single Judge on the issue of jurisdiction. The Division Bench was of the view that the award could not be sustained for the following reasons:

(a) ONGC had made only a claim for Rs.3,50,00,000/- (Three crore fifty lakhs) plus US $ 1,80,000 in the claims statement. It did not reserve

the right to add or alter the claim. Therefore it could not make any higher claim.

(b) The claim was sought to be increased by ONGC without amending the pleadings, that is its claim statement. The claim was also not supported by any evidence.

(c) The claim of ONGC as originally made and as altered in the affidavit were both barred by limitation.

(d) The claim made beyond the warranty period of twelve months, was contrary to Article 9.2.1 of the contract (warranty clause) and was prohibited by the contract.

(e) That the Award was arbitrary, capricious, irrational and beyond the claim of ONGC.

The said judgment is challenged by the appellant ONGC in this appeal. On the contentions urged, the only question that arises for consideration is whether the interference with the award by the High Court is justified. On a careful consideration of the award with reference to the claim, we are of the view that the learned Arbitrators have acted beyond the reference and exceeded their jurisdiction in awarding Rs.36,38,50,000/-.

9. In *Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises* – (1999) 9 SCC 283, this Court summarized the principles relating to interference with arbitral awards under Arbitration Act, 1940. Paras (e) to (i) which are relevant are extracted below :

"(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction--Is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim, then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd. (supra) by relying upon the following passage from M/s. Alopi Parshad v. Union of India : [1988]3SCR103 which is to the following effect:

> There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.

> (i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action."

10. Clause 9.2.1 and 9.2.2 of the agreement dated 14.7.1981 between ONGC and respondent relating to warranty are extracted below :

> 9.2.1 Warranty of material and workmanship : Subject to the provisions hereinafter set forth in this Article Contractor 'B ' undertakes to remedy free of charge to the purchaser any defect in the Drill ship which is due to defective design, material or workmanship or poor or underrated performance/efficiency of operation. Provided that such defects are discovered within a period of twelve months after the date of arrival of Bombay and a notice thereof is duly given to contractor 'B' as hereinafter provided. Any defect caused by normal wear and tear of operation of equipment beyond the manufacturer's prescribed limit in manuals will not apply for this cause.
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> 9.2.2 The Purchaser shall notify contractor 'B' in writing within seven working days after discovery of any defect for which claim is made under this warranty. The purchaser's written notice shall describe the nature of defect and the extent of damage caused or likely to be caused thereby. Cable/telex advice within seven working days that the claim is forthcoming will be sufficient to comply with the requirements as to time."
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> [Note : 'Contractor B' refers to respondent]

11. As noticed above, the drillship arrived at (off) Bombay on 5.6.1982 ONGC took delivery of the ship on 29.6.1982. Having regard to clause 9.2.1 of the contract, the warranty period of 12 months expired on 29.6.1983. Clause 9.2.1 of the contract barred any claim made beyond 12 months. The High Court after exhaustive consideration rightly held that the claim made on 2.12.1987, beyond the warranty period of one year, was

barred by clause 9.2.1 of the contract and therefore Arbitral tribunal committed a jurisdictional error in awarding the cost repairs/replacement by accepting such a claim. ONGC contends that its claim was not based upon breach of warranty, but on total failure of consideration. This contention has no merit. The claim of the appellant, as noticed above was for payment of US $ 55 millions with interest at 12% per annum being cost of acquisition of the drill ship or alternatively for payment of Rs.3.5 crores towards the cost of alteration in the drill ship and US $ 1,80,000 as damages for non use of the drill ship during a period of 90 days required for repairing the drill ship. The appellant did not pursue its main claim for US $ 55 million being the acquisition cost. This is apparently due to the fact that in the first round of arbitration, the Arbitrators had already made an award for the payment of the cost of the ship by the appellant to the respondent. (It is stated that the appellant is contesting the said claim. Be that as it may.) The claim for the cost of acquisition of the drill ship, ceased to be the subject matter of the arbitration and what was considered and decided by the arbitrators was the claim for making additions and alterations in the drill ship to make it operatable. Therefore clause 9.2.1 was clearly attracted.

12. We have extracted the reliefs sought by ONGC in arbitration, in para (4) above and it is evident therefrom that what was claimed was final and

not intended to be varied. The appellant stated that the claim for bringing the drillship to the desired state and condition, would be Rs.3.5 crores. The appellant used the word 'tentatively' with reference to the said claim, not with any reservation to change the claim as and when the actual cost was ascertained, but to show that it was not based on actuals, and was an estimate with reference to the prevailing rates/costs. Similarly the claim for US$ 1,80,000/- as compensation towards 'non-use' of the drillship during the 'repair period' was also final, though it was an estimate and therefore described as 'tentative'. The appellant did not reserve the liberty to modify the claim of Rs.3.5 crores plus US $ 1,80,000. Further, the appellant did not amend the claim before the Arbitral Tribunal nor did they seek to amend the claim. The claim continued to be Rs.3.5 crores plus US$ 1,80,000. Therefore, any award by the Arbitrators in excess of 3.5 crores plus U $ 1,80,000 was wholly without jurisdiction as not being the subject matter of reference to the Arbitral tribunal and being an award beyond the pleadings.

13. The learned counsel for the appellant however contended that the claim was not on imaginary figures, and that ONGC had obtained quotations for the various items and on that basis calculated the claims. By way of illustration, we may refer to how the claim in regard to one of the items (motion compensator) was made. According to the appellant it

obtained a quotation for the item from a US manufacturer in January 1993. The quotation was for US$ 19,50,000. When freight and insurance were added to it, the landing cost would have been US$ 19,94,508. By applying an exchange rate of Rs.33 per US$, the rupee equivalent was Rs.658.19 lakhs. By adding customs duties and clearing and forwarding charges and other miscellaneous expenses, the cost became Rs.888.39 lakhs. When the cost of the item was to be calculated with reference to the year 1995, 12% per annum was added for two years, to arrive at the value as Rs.1114.40 lakhs. The value of the item in the year 1982 and in the year 1986 was arrived at as Rs.255.89 lakhs and Rs.401.86 lakhs respectively, by discounting the 1993 cost of Rs.888.39 lakhs at the rate of 12% per annum. Similar method was adopted for assessing the cost of other items. The claim based on such a method, to say the least, is casual, strange and untenable. If the defect was noticed in 1985 and if the claim statement was made in the year 1987, it is ununderstandable how any claim for compensation for cost of repairs to set right the drillship, could be claimed at the rates prevailing in 1995 or with reference to the prices in 1993 by discounting it by 12% to arrive at the price in 1982 and 1986. The appropriate course would be to place evidence of the actual cost in the year 1982 or in the year 1985 with reference to then prevailing rates. In fact, that was done by ONGC itself in the year 1987. It calculated the cost of repairing/replacing the Anchors, Anchor Chains, Motion compensator and

sponsons to be Rs.3.5 crores in all, which was claimed in its pleading.

14. In para 27 of the Statement of Claim, the appellant stated that the claim for Rs.3.5 crores was tentative as that was a prima facie calculation of the amount required to bring the drill-ship to the desired state and condition. But significantly, the appellant did not make any alteration/additions to the drill-ship to bring it to the desired state and condition as alleged. Therefore, if the sum of Rs.3.5 crores is to be substituted by any higher figure, that would also be a tentative amount and not an actual amount. When the appellant, on the basis of the rates prevailing, calculated the cost for addition and altering the drillship at the relevant time (1987), obviously the same cannot be changed with reference to some other tentative figures or hypothetical figures with reference to prices prevailing on a future date in 1995 when matter was argued before the Arbitral Tribunal. Therefore the award of Rs.27.63 crores (aggregate of items (a) to (d) extracted in para 7 above) as against the claim of Rs.3.5 crores is unsustainable.

15. The award of Rs.8.7 crores (item (e) extracted in para 7 above) towards “lay up” charges (the loss on account of non-use of the drillship during the period of repair) is equally unsustainable. In its claim statement, the claim of ONGC was for US$ 1,80,000 for a period of 90 days which was estimated to be the period required for repairs. In the claim statement

it was alleged that the lay up charges was US$ 20,000 per day. If that is so, for 90 days, the claim ought to have been US$ 18,00,000. But the specific claim was only for US$ 1,80,000. This itself showed that the figures were not based on any acceptable basis and were imaginery. Further though the claim was for 90 days, at the time of arguments before Arbitrators, the claim was increased to Rs.1306.80 lakhs for 180 days which works out to 7.26 lakhs per day. There is absolutely no basis for such a claim. Further it should be remembered that the drillship was never got repaired and the claim which was an estimates was increased by several times on 'guess-estimates' at the time of arguments before the Arbitrators. We have referred to this aspect just to show that the claims were increased by ONGC without basis and accepted and awarded by the arbitral tribunal in a casual manner, which amounts to legal misconduct.

16. The award proceeds on a legal principle which cannot be supported. It is not disputed that alterations and additions were never carried out to the ship. The affidavit filed on behalf of ONGC before the Arbitral Tribunal and the award of the Tribunal clearly show that what was being claimed and what was being awarded were not the actual cost of additions and alterations, but an estimate of the cost of alterations and additions. If the ship was delivered in the year 1982 and the appellant had found out that the ship was defective either in the year 1982 or in the year 1985,

the claim should have been based on the cost of repairing it in the year 1985 or immediately thereafter. If in 1987 the appellant had assessed such cost with reference to the then prevailing rates as Rs.3.5 crores, it is un-understandable how without actually carrying out alterations and additions, the appellant could substitute the said tentative cost with reference to the alleged prices or cost in the year 1995. The very fact that Arbitrators have accepted the 1995 figures as the basis, shows that the Arbitrators have proceeding on an untenable premises that in regard to 1982 or 1985 repair, the rates prevailing in 1995 could be the basis.

17. We may refer to another anomaly. As noticed above, the tentative cost of alteration and additions stated in the Statement of Claim was Rs.3.5 crores and the loss for lay up of the drillship as US$ 1,80,000. Without amending the said claim, evidence was let in by filing an affidavit before the Arbitrators wherein the ONGC claimed Rs.20,49,54,000/- as detailed below:

(a) New Anchors & Chains	Rs.296.40 lakhs at 1982 prices
(b) New motion compensator	Rs.256.39 lakhs at 1982 prices
(c) Addition of sponsons	Rs.189.95 lakhs at 1982 prices
(d) Loss due to lay up of drillship for 180 days	Rs.1306.80 lakhs at current price
Total	**Rs.2049.54 lakhs**

Thus the claim for setting right the drill ship was increased from Rs. 3.5 crores to Rs.742.74 lakhs towards the cost of items to be purchased and fitted (that is, Anchors & chains, Compensator and sponsons) which according to ONGC was required for setting the drillship right and Rs.1306.80 lakhs as lay up charges for six months. The claim on account of loss due to non-use of the drill-ship during the period when it has to be repaired was increased from US $ 1,80,000 (claimed in the claim statement) to Rs.1306.80 lakhs. Obviously there could be no such change as the ship was not actually repaired. The aforesaid increased claim was not supported by the pleading.

18. What is, however, surprising is that the award is neither based on the claim of Rs.3.5 crore plus US $ 180,000/- made in the claim statement or the claim of Rs.2049.54 lakhs that was made in the affidavit. The arbitrators referred to the claim of the ONGC as 4329.46 lakhs in para 5 of the award, and awarded Rs.3638.50 lakhs without any reasons as detailed below :

SNo.	Particulars	Claim of ONGC (as stated in the award) (Rs. in lakhs)	Amount awarded by Arbitrators (Rs. in lakhs)
(a)	Cost of Anchors	238.00	225.00
(b)	Cost of Anchor chains	938.97	938.00
(c)	Cost of procuring & fitting new motion Compensator	1052.88	900.00
(d)	Cost of additional sponsons	780.11	700.00
(e)	Lay up charges for carrying out the above modifications	1306.00	870.00

(f)	Cost of Arbitration	13.50	13.50
	Total	4329.46	3638.50

19. These amounts were far more than what was claimed in the claim statement or in the affidavit filed on behalf of ONGC by way of evidence. As the award is a non-reasoned award, it is not possible to ascertain how the Arbitrators awarded a sum of Rs.3638.50 lakhs which is more than the claim in the Statement of Claim and the claim in the affidavit evidence. This is one of the main ground on which the High Court has chosen to interfere with the arbitral award. It has held that the entire award was arbitrary, whimsical and beyond the jurisdiction of the Arbitrators.

20. To explain this conduct on the part of the Arbitrators, the learned counsel for the appellant submitted that the increase was based on a comparative statement that was filed before the Arbitrators on 15.9.1995 at the final stages of hearing, where three alternatives were given in regard to the claim of ONGC. The first option was for a claim for Rs.2473.96 lakhs based on 1986 prices (arrived at by discounting the 1995 prices). The second option was for Rs.2049.55 lakhs based on 1982 prices (arrived at by discounting the 1995 prices). The third option was a claim of 4543.42 lakhs with reference to the 1995 prices. The only constant in all three options is the claim of Rs.1306.80 lakhs towards the lay up charges for

180 days. The Arbitrators have choosen the third option of 1995 cost on the basis of the claim. It is un-understandable how such alternative claims could be made during arguments with reference to the alleged cost of repair/additions/alterations in the years 1982, 1985 and 1995 without actually repairing the vessel, particularly when ONGC had arrived it as Rs.3.5 crore plus US $ 1.8 lakhs in the year 1987 based on 1985 prices/rates. This again shows that the claim was casual, imaginary and not based on any facts, figures or actual rates. In regard to a drillship supplied in the year 1982 in which defects were allegedly found in 1985 but claim made in 1987, a hypothetical claim for cost of repairs based of 1995 rates, cannot be accepted. As the award apparently proceeds on a legal principle which is wholly erroneous, the award cannot be sustained. The above also demonstrates that the Arbitrators have exceeded their jurisdiction and gone beyond the reference.

21. In view of the above, there is no need to examine the other grounds of attack against the award. We, therefore, dismiss the appeal as having no merit.

.....J.
(R V Raveendran)

…….J.
(A K Patnaik)

New Delhi
February 23, 2011.