

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.3353 OF 2005

M/S ESSAR OIL LTD.

... APPELLANT

VERSUS

HINDUSTAN SHIPYARD LTD. & ORS.

... RESPONDENTS

WITH

CIVIL APPEAL NO.3355 OF 2005

J U D G M E N T

ANIL R. DAVE, J.

1. Being aggrieved by a common judgment dated 29th September, 2004, delivered in Appeals Against Order Nos.255 and 624 of 2003 by the High Court of Andhra Pradesh at Hyderabad, these appeals have been filed by M/s Essar Oil Ltd., who had been given a sub-contract by the first respondent, Hindustan

Shipyard Ltd., in respect of a contract which was given to it by the Oil and Natural Gas Commission.

2. The facts giving rise to the present litigation, in a nutshell, are as under:-

The Oil and Natural Gas Commission (hereinafter referred to as 'the ONGC') had given a contract to Hindustan Shipyard Ltd. to carry out work of fabrication, skidding, sea fastening, transportation etc. at various stations located in the coastal areas of India. It is pertinent to note that the contractor, Hindustan Shipyard Ltd., who is respondent no.1 in both the appeals, had been permitted to avail services of any other person for doing the aforesaid work entrusted to it. In other words, it was open to respondent no.1 to engage a sub-contractor for getting the work done. Other respondents in these appeals are the arbitrators, who are formal parties.

3. In pursuance of the aforestated understanding arrived at and the contract entered into between the ONGC and Hindustan Shipyard Ltd. (who has been referred to as 'the respondent' hereinafter), the respondent had entered into a contract with M/s Essar Oil Ltd., who is the appellant in both these appeals. Thus, the appellant was a sub-contractor in respect of the contract which the respondent had to fulfill for the ONGC.

4. It appears that for the sake of convenience and so as to obviate certain financial difficulties of the respondent, certain payments had been made to the appellant directly by the ONGC. The appellant, upon getting certain work done under the sub-contract and upon getting necessary certificates with regard to the quality and quantity of the work done from the respondent, had received some payment from the ONGC on the strength of those certificates.

5. In the process of carrying out the contract, the appellant was not paid by the respondent for the work done and therefore, a dispute had arisen between the appellant and the respondent. Let us not look at the nature of the dispute or the amount claimed or the liability with regard to making payment to the appellant at this stage, suffice it to state that there was an Arbitration Agreement between the appellant and the respondent and therefore, the dispute had been referred to the Arbitral Tribunal. Respondent nos.2, 3 and 4 are the Arbitrators, who had made the Award with regard to which we will discuss presently.

6. Thus, the dispute with regard to non-payment and some other disputes had been referred to the Arbitral Tribunal consisting of Respondent nos.2, 3 and 4. It is pertinent to note here that the ONGC, who had given a contract to the respondent, was not before the Arbitral Tribunal because the ONGC was

not a party to the Arbitration Agreement entered into between the appellant and the respondent. The question which was involved in the said dispute was not only with regard to determination of the amount to be paid to the appellant, but was also with regard to determination of a person who was liable to make payment to the appellant.

7. After hearing the concerned parties, the Arbitral Tribunal made an Award, but all the three Members of the Tribunal could not come to the same conclusion. The majority i.e. two Members of the Tribunal came to the conclusion that there was no privity of contract between the appellant and the ONGC; and the ONGC was not a party to the contract between the appellant and the respondent. In the aforesaid circumstances, the ONGC, according to the majority view, could not be held liable for making payment to the appellant and the liability to make payment to the appellant was that of the

respondent. It was also held by the majority that the appellant could not even sue the ONGC for the unpaid amount. Accordingly, the Award was made. At this stage, we are not concerned with the other facts and the amount awarded by the majority of the Tribunal.

8. On the other hand, the dissenting Member, who was in minority, was of the opinion that there was a contract between the appellant and the ONGC and therefore, the ONGC was liable to make payment to the appellant, but he expressed an opinion to the effect that the respondent should be directed to make payment to the appellant only if the respondent is paid the unpaid amount by the ONGC. Thus, the minority view was that the liability to make payment to the appellant was that of the ONGC, but as the ONGC was not a party before the Tribunal, the proper course open to the appellant was to take appropriate

legal action against the ONGC for recovery of the amount due and payable to the appellant.

9. The respondent was aggrieved by the Award of the Arbitral Tribunal as according to the majority view of the Tribunal, the respondent was liable to make payment to the appellant. In the circumstances, the respondent filed OP NoS.989 of 2001 and 96 of 2002 before the Principal District Judge, Visakhapatnam, under Section 34 of the Arbitration and Conciliation Act, 1996.

10. The Principal District Judge, Visakhapatnam, decided both the Original Petitions by orders dated 10th October, 2002 and 1st November, 2002, respectively. The learned Principal District Judge confirmed the award on the issues with which we are concerned, but he remanded the matter to the Arbitral Tribunal on the issues regarding counter claim etc., with which we are not concerned in this case.

11. Being aggrieved by the aforestated two orders passed in two Original Petitions, the respondent filed Appeals Against Order Nos.255 and 624 of 2003 before the High Court of Andhra Pradesh and the High Court allowed the appeals by a common judgment dated 29th September, 2004, validity of which has been challenged before this Court in these appeals.

12. The High Court came to a conclusion that there was a tripartite agreement among the ONGC, the appellant and the respondent. The High Court had relied upon some letters written by the appellant to the ONGC and therefore, the ONGC was also treated as a party to the contract. It also held that as the ONGC was a party to the contract, it ought to have been made a party before the Arbitral Tribunal but as the ONGC was not represented before the Arbitral Tribunal, the Award made by the Tribunal was bad in law. The Award deserved to be set aside by the Principal District Judge but he did not and

therefore, the orders passed in the Original Petitions filed before the learned Principal District Judge were also bad in law and accordingly the Award and the orders passed in the Original Petitions were quashed and set aside.

13. The main issue which is involved in these appeals is about ascertainment of a person, who is liable to make payment to the appellant. There is no dispute with regard to quality or quantity of the work done by the appellant at this stage. It is not in dispute that the appellant has not been paid the amount payable to it. It is also not in dispute that the appellant had been engaged by the respondent in pursuance of a contract entered into between the respondent and the ONGC and it was open to the respondent to avail services of any other person for doing the work entrusted to it by the ONGC. In the light of the aforesaid undisputed facts, the question is only with regard to

determination of liability of the person who has to make payment to the appellant.

14. The learned counsel appearing for the appellant had vehemently submitted that the view taken by the majority of the Arbitral Tribunal being correct, the High Court ought not to have interfered with the said view. So as to substantiate his submission, the learned counsel had mainly submitted that there was no privity of contract between the appellant and the ONGC. The appellant had performed the work of the ONGC in pursuance of a contract given to it by the respondent, which was a sub-contract in nature. In absence of any contract between the ONGC and the appellant, the appellant could not have made any claim before the ONGC and as there was no contract between them, it was also not possible for the appellant to make the ONGC a party before any Court or Authority for recovery of the amount payable to

it in pursuance of the sub-contract given by the respondent.

15. It had been fairly admitted by the learned counsel appearing for the appellant that very often payments were made to the appellant by the ONGC. It had further been submitted that the payments were made by the ONGC so as to facilitate the appellant and to get the work of the contract done smoothly. Every time when payment was made by the ONGC to the appellant, the ONGC used to debit the account of the respondent i.e. the amount so paid by the ONGC to the appellant was treated by the ONGC as if the said payment was made by the ONGC to the respondent. Thus, so as to obviate a long procedure and to expedite payment to the appellant, who was actually doing the job for the ONGC, instead of the ONGC paying to the appellant through the respondent, the ONGC was paying directly to the appellant.

16. The learned counsel for the appellant had with great stress submitted that there was not a single contract between the appellant and the ONGC and there was no tripartite contract among the appellant, the respondent and the ONGC, whereby the ONGC was made liable to pay the appellant in respect of the work done by it.

17. For the aforestated simple reason, it had been submitted by the learned counsel for the appellant that the majority view of the Arbitral Tribunal was correct and the respondent is liable to make payment to the appellant with whom it had entered into the contract. It had been further submitted by the learned counsel that in view of the aforestated factual and legal position, the appeals deserve to be allowed and the respondent should be made liable to make payment to the appellant.

18. On the other hand, the learned counsel for the respondent had submitted that the ONGC was liable to

make payment to the appellant and therefore, there is no liability on the part of the respondent to make payment to the appellant.

19. It had further been submitted by the learned counsel for the respondent that it is not necessary that in each and every case the contract should be in writing. The contract can be very well inferred by the act or conduct of the parties, whereby impliedly a party undertakes to make good a liability to make payment to someone. According to the learned counsel, even in the instant case, there was an implied contract amongst the appellant, the respondent and the ONGC and therefore, it was the liability of the ONGC to make payment to the appellant.

20. The learned counsel for the respondents had drawn our attention to correspondence exchanged between the ONGC and the respondent. He had specially referred to a letter dated 25th October,

1991 addressed by the respondent to the ONGC, wherein it was stated that the ONGC had desired to make payment directly to the appellant in pursuance of meetings convened among the representatives of the respondents and the ONGC. He had also submitted that some of the letters written by the ONGC to the respondent clearly denoted that the ONGC had accepted the liability to make payment to the appellant and therefore, there was no liability on the part of the respondent to make any payment to the appellant. He had further submitted that the subsequent conduct of the ONGC of making direct payment to the appellant established the fact that the ONGC had undertaken the liability to make payment to the appellant. The aforestated letter dated 25th October, 1991 and other letters which had been exchanged between the respondent and the ONGC were placed on record to show that there was a contract between the ONGC and the appellant.

21. For the aforestated reasons, it had been submitted by the learned counsel for the respondent that the view of the High Court that the ONGC was liable to make payment to the appellant is correct and therefore, the appellant should take appropriate action against the ONGC for recovery of the unpaid amount. The learned counsel had, therefore, submitted that the view taken by the High Court is absolutely correct and the respondent is no more liable to make any payment to the appellant.

22. We have heard the learned counsel for the parties at length and have also considered some judgments cited by them and the documents which had been placed on record and relied upon by them.

23. Upon hearing the learned counsel and looking at the contract entered into between the appellant and the respondent and upon perusal of other letters, we believe that the view expressed by the High Court cannot be accepted.

24. It is true that the ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between the ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of the ONGC was likely to be adversely affected. The ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between the ONGC and the respondent, it is clear that so as to facilitate the respondent, the ONGC had made payments on behalf of the respondent to the appellant directly.

25. Simply because some payments had been made by the ONGC to the appellant, it would not be established that there was a privity of contract between the ONGC and the appellant and only for that reason the ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the respondent.

26. It is also pertinent to note that the Arbitration Agreement was only between the appellant and the respondent. The ONGC was not a party to the Arbitration Agreement. When a dispute had arisen between the appellant and the respondent in relation to payment of money, the appellant had initiated the arbitration proceedings. As the ONGC was not a party to the Arbitration Agreement, it could not have been represented before the Arbitral Tribunal. If the ONGC was not a party before the Arbitral Tribunal, the Tribunal could not have made any Award making the ONGC liable to make payment to the

appellant. In the aforestated factual and legal position, the Arbitral Tribunal could not have made the ONGC liable in any respect and rightly, the majority view of the Arbitral Tribunal was to the effect that the ONGC, not being a party to any contract or Arbitration Agreement with the appellant, could not have been made liable to make any payment to the appellant.

27. We are in agreement with the view expressed by the majority of the Arbitral Tribunal. In our opinion, the High Court had committed an error by not considering the above facts and by observing that the appellant will have to take legal action against the ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the respondent, it is very clear that the respondent had given a sub-contract to the appellant and in the said agreement of sub-contract, the ONGC was not a party and there was no liability

on the part of the ONGC to make any payment to the appellant. Moreover, we could not find any correspondence establishing contractual relationship between the ONGC and the appellant. In the circumstances, the ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, only for the sake of convenience and to get the work of the ONGC done without any hassle, the ONGC had made payment to the appellant on behalf of the respondent without incurring any liability to make complete payment on behalf of the respondent.

28. The learned counsel appearing for the appellant failed to show any document in the nature of a contract entered into between the appellant and the ONGC whereby the ONGC had made itself liable to make payment to the appellant. Even when the payment had been made by the ONGC, it was very clear that the payments were made on behalf of the respondent as

the ONGC was debiting the account of the respondent by the amount paid to the appellant. It is important that the payment was made to the appellant only upon certification of work done by the respondent. The ONGC had given a contract to the respondent. The ONGC had never entered into any contract with the appellant and therefore, it did not rely upon any certification or any statement made by the appellant in relation to quantum of work done by the appellant. This fact also shows that the ONGC was concerned with the work which had been approved by the respondent and instead of making payment to the respondent, the ONGC had made payment to the appellant on behalf of the respondent, though there was no legal obligation on the part of the ONGC to make such a payment to the appellant.

29. For the aforestated reasons, we do not agree with the view expressed by the High Court and the impugned judgment delivered by the High Court is set

aside. The ONGC shall not be liable to make payment, as rightly decided by the Arbitral Tribunal, to the appellant but the payment shall have to be made by the respondent, who had given a sub-contract to the appellant. Majority view of the Arbitral Tribunal on the above issue is confirmed and the view of the High Court is not accepted. The respondent shall accordingly make payment to the appellant.

30. For the reasons enumerated hereinabove, the appeals are allowed with no order to costs.

JUDGMENT

.....J
(ANIL R. DAVE)

.....J
(VIKRAMAJIT SEN)

.....J
(PINAKI CHANDRA GHOSE)

NEW DELHI;
JULY 2, 2015.