



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION NO.131 OF 2018

Transocean Drilling Services (India) Pvt.Ltd. ... Applicant

Vs.

Oil & Natural Gas Corporation Ltd. ... Respondent

Mr.Kaustav Talukdar with Mr.Vishesh Kalra with Raturaj Bankar
i/by M/s Lex Legal & Partners for the Applicant.

Mr.Pankaj Sawant, Senior Advocate with Ms.D. Dabhash with
Mr.J.P.Kapadia with Mr. O. Mohandas i/by M/s Little & Co. for
the Respondent.

CORAM : R.D.DHANUKA, J.

DATE : SEPTEMBER 25, 2018.

JUDGMENT :

1. By this application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant has invoked clause 28.1 of the agreement entered into between the parties and seeks appointment of an arbitrator on behalf of the respondent. Some of the relevant facts for the purpose of deciding this application are as under.

2. The applicant and the respondent have entered into an agreement on 24th May, 2012 for Charter Hire of the applicant's

Drilling Unit “GSF Rig 140”. Clause 28.1(1) of the said arbitration agreement is extracted as under:-

“Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the Agreement or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

“A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.”

The dispute arose between the parties. The applicant invoked arbitration agreement in respect of certain disputes. On 5th March, 2015 followed by notice dated 22nd January, 2016, those disputes were referred to Arbitration. Those arbitral proceedings

are already concluded. The applicant thereafter invoked arbitration agreement in 19th December, 2015 in respect of certain disputes. For those disputes, arbitral tribunal is constituted and the arbitral proceedings are going on between the parties. The applicant, thereafter, invoked arbitration agreement by notice dated 17th March, 2018 in respect of certain disputes.

3. In response to the said notice dated 16th March, 2017, the respondents replied vide letter dated 27th March, 2017 and informed the applicant that before the matter was referred to arbitrator, respondent would seek the consent of the applicant for referring the matter to the Outside Expert Committee(OEC). The respondent also enclosed a format for giving consent by the applicant for referring the matter to the said OEC. The applicant did not agree to the said suggestion of the respondent and filed this arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996. The applicant has already nominated Shri Justice G.S.Singhvi, a former Judge of the Hon'ble Supreme Court as its nominee arbitrator. Since the respondent has not nominated any arbitrator, applicant seeks appointment of

an arbitrator on behalf of the respondent.

4. The learned counsel for the applicant invited my attention to the arbitration clause and the arbitration notice dated 16th March, 2017 issued by the applicant. He also invited my attention to the response of the applicant dated 27th March, 2017. It is submitted that the respondent in the said response dated 27th March, 2017 did not dispute the existence of the arbitration clause or the maintainability of the arbitration notice dated 16th March, 2017, but had suggested to refer the matter to the OEC.

5. It is submitted by the learned counsel that though the arbitration notice issued by the applicant on 16th March, 2017 refers to some of the amounts deducted by the respondent during the period 3rd September, 2018 and 18th December, 2015, the dispute in respect of those notices arose only after the applicant had invoked the arbitration agreement for the second time on 19th December, 2016. He submits that the respondent has refused to refund the said amount illegally deducted by the respondent. He submits that successive references are permitted under the said arbitration agreement. In support of this submission, the

learned counsel placed reliance on the judgment of Supreme Court in case of **Dolphin Drilling Limited Vs. Oil and Natural Gas Corporation Limited**¹ and in particular Paragraph Nos.7 and 8.

6. Mr.Pankaj Sawant, learned Senior counsel for the respondent on the other hand laid emphasis on the words “not thereafter” provided in clause 28.1 in the arbitration agreement. He submits that the said arbitration clause could be invoked only once. He submits that the clause providing that “The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration agreement and not thereafter.” would indicate that arbitration agreement could be invoked only once.

7. It is submitted that all the claims arising out of the dispute under the said contract awarded had to be made only once with all the details and not thereafter. He submits that the applicant had already invoked the arbitration agreement firstly on 5th March, 2015 r/w notice dated 27th January, 2016 and

1 (2010)3 Supreme Court Cases 267

thereafter, on 19th December, 2016. He submits that in so far as second arbitration notice is concerned, the respondent has already filed application before the arbitral tribunal under Section 16 of the Act. It is submitted by the learned senior counsel that though there may not be an issue of limitation, however, the arbitration clause which permits invocation once, which is already invoked by the applicant earlier, the dispute alleged in the third notice if any could be referred to Civil Court by the applicant and not to arbitral tribunal under clause 28.1 of the said agreement.

8. Learned Senior counsel also invited my attention to some parts of clause of 28.1 in support of the submission that the said agreement would clearly indicate that the appointment of the arbitral tribunal is made on the basis of quantification of claims.

9. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Dolphin Drilling Limited** (supra) on the ground that the arbitration clause in question before the Hon'ble Supreme Court in the said judgment did not state the words "and thereafter" and thus, the said judgment would not assist the case of the applicant.

10. In support of the submission that the interpretation of the arbitration clause in question has to be done strictly, the Learned Senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **United India Insurance Co. Ltd. Vs. Hyundai Engineering and Construction Co. Ltd.**¹ and in particular Paragraph Nos. 2, 10, 12, 14, 17 and 18. He submits that the Hon'ble Supreme Court has interpreted an identical arbitration clause in an insurance policy and held that the clause has to be construed strictly and if there is non-compliance of the conditions mentioned therein, no arbitrator can be appointed under Section 11 of the Arbitration and Conciliation Act, 1996.

11. Learned counsel for the applicant in rejoinder submits that whether claims made by the applicant are arbitrable or not can be agitated by the respondent by invoking under Section 16 of the Arbitration and Conciliation Act, before the arbitral tribunal. It is submitted by the learned counsel for the applicant that respondent does not dispute the arbitration agreement but has requested the applicant to give consent to refer the dispute to Outside Expert Committee and thus, cannot be allowed to raise

1 2018 SCC Online SC 1045

an issue of alleged non-existence of arbitral agreement in this arbitration application.

12. I shall first decide whether applicant could invoke the arbitration agreement only once or successive reference was permissible. In my view, clause 28.1 of the arbitration agreement provides the method for referring the matter to the arbitration. It provides that the party invoking the arbitration agreement has to give 60 days notice to the other party. It further provides that in the notice invoking the arbitration, the party shall indicate all the points of dispute with details of the amount claimed at the time of invocation of the agreement and not thereafter.

13. In my view, what is contemplated in sub-clause 1 of clause 28.1, is that the notice invoking arbitration must indicate the dispute with the details of the amount. The said clause does not prohibit successive reference. If all the points of dispute with details are not referred in the arbitration notice, such details of the claims with amount cannot be supplied before the arbitral tribunal. In my view, if the submission of the learned Senior counsel for the respondent is accepted, the applicant who seeks to invoke arbitration agreement will have to wait till completion of the

contract or can invoke arbitration only when the contract is terminated. In my view, that is not the intent of the parties reflected on the plain reading of sub-clause 1 of the clause 28.1 of the contract.

14. In this matter, the case of the applicant is that though the deductions of various amounts were made from the bills of the applicant during the period between 2013 and 2015, the dispute arose and crystallized after invocation of the arbitration agreement by the applicant for the second time. The issue as to whether dispute arose subsequently or at the earlier point of time can be agitated by the respondent before the arbitral tribunal.

15. A perusal of the notice invoking arbitration agreement prima facie indicates that the applicant had summarized its case as to when the dispute arose between the parties. The applicant has already nominated a former Judge of the Supreme Court in the said notice invoking arbitration agreement while raising a demand in the sum of Rs.2,16,59,520/-. A perusal of the reply of the respondent dated 23rd March, 2018 to the said notice invoking arbitration clearly indicates that it was the case of the respondent that as the arbitration was the long drawn process to

settle the matter, the other alternative as per contract is to refer the dispute to the “Outside Expert Committee” and based on such understanding of the respondent of the arbitration agreement, the respondent requested the applicant to give consent for referring the dispute to the OEC. The respondent also forwarded a format to the applicant for giving consent for referring the dispute to conciliation to the said OEC.

16. In my view, the respondent has thus not disputed the existence of the arbitration agreement or the maintainability of notice invoking arbitration by the applicant on 16th March, 2017. It is clear from the plain reading of the response dated 27th March, 2017 that the respondent wanted the applicant to give consent for referring the dispute to the OEC in view of the long drawn process of the arbitral proceedings.

17. The Hon'ble Supreme Court in case of **United India Insurance Co. Ltd.** has interpreted one of the arbitration agreement in a contract between the petitioner therein and the ONGC Limited. Though the words “not thereafter” is not referred in clause 28.1 of the agreement dated 27th October, 2003, which was the subject matter before the Hon'ble Supreme Court, in view

of the fact that this court has held that the successive references under said clause 28.1 are permissible, in my view the judgment of the Hon'ble Supreme Court in case of **United India Insurance Co. Ltd.** (supra) would assist the case of the applicant.

18. In so far as the judgment delivered by the Hon'ble Supreme Court in case of **United India Insurance Co. Ltd.**, relied upon by the senior learned counsel for the respondent is concerned, the clause in question before the Hon'ble Supreme Court was "It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy."

19. On interpretation of the said clause and after considering the correspondence exchanged between the parties, the Hon'ble Supreme Court held that the Insurance Company had repudiated the claim of the insurer and thus, arbitration clause providing that if the insurance company had disputed or not accepted the liability, then only the reference of dispute shall be referred to arbitration, the dispute could not be referred to arbitration. The arbitration clause in question and under

consideration in this arbitration application is totally different. The facts before the Hon'ble Supreme Court were totally different. It was not the case of the respondent before the Hon'ble Supreme Court that insurance company had not disputed the liability of the claim proposed to be made by the respondent. In my view, the judgment of the Supreme Court in case of **United India Insurance Co. Ltd.** is clearly distinguishable in the facts of this case and would not assist the case of the respondent. The reliance placed by the learned senior counsel on the said judgment is misplaced. In my view, since the respondent has not nominated any arbitrator inspite of receipt of the notice invoking arbitration agreement by the applicant, the present application filed under Section 11(6) of the application is maintainable for appointment of the nominee arbitrator on behalf of the respondent. I therefore, pass the following order:-

ORDER

- i) I propose to nominate Shri Justice J.P.Deodhar, a former Judge of this court as an arbitrator on behalf of the respondent.
- ii) The learned prospective arbitrator is required to file statement of disclosure under Section 11(8) read with Section

12(1) of the Arbitration and Conciliation Act, 1996. The address of the learned prospective arbitrator is as under:-

“311, Churchgate Chambers, 5 New Marine Lines,
Next to American Centre, Churchgate, Mumbai- 400
020.”

iii) The applicant is directed to obtain the statement of disclosure from the learned prospective arbitrator on or before the next date and tender the same before this court on the next date.

19. Place the matter on board on 8th October, 2018, for directions.

(R.D.DHANUKA, J.)