

CASE NO.:
Arbitration Petition 1 of 2006

PETITIONER:
SEDCO FOREX INTERNATIONAL DRILLING INC

RESPONDENT:
THE OIL & NATURAL GAS CORPORATION LTD

DATE OF JUDGMENT: 20/04/2006

BENCH:
S.H. KAPADIA

JUDGMENT:
JUDGMENT
O R D E R

Applicant is a foreign company incorporated in Panama. It is engaged in providing rigs on charter-higher basis for offshore drilling.

In April, 1988, the rig was brought into India. It operated in territorial waters, continental shelf and other maritime zones.

Under the contract dated 23.8.1988, ONGC (non-applicant) is liable to reimburse the applicant for customs duty paid on import of rig. This is under clause 15.5 of the contract. Under this clause, ONGC is liable to reimburse/pay all customs duty payable on the rig.

In July 1999, the customs department issued a show-cause notice to the applicant and to the non-applicant, in which it alleged that customs procedure had not been followed for the initial entry of rig in 1988.

By order dated 27.1.2000, the commissioner of customs held that the import of the rig had taken place in 1988 and on several occasions thereafter and that the duty was payable on the rig in respect of its movement to a designated platform in 1988.

Aggrieved by the adjudication order, the applicant herein preferred an appeal to the Customs, Excise and Service Tax Tribunal (for short "the tribunal"). By order dated 2.2.2001, the tribunal came to the conclusion that the duty was payable on the import in 1988 on a value of US\$ 13 million; that, in the absence of an essentiality certificate, the applicant was not entitled to exemption under notification no.516/86. However, the tribunal permitted the applicant herein to pursue its claim for the essentiality certificate. Applicant had imported the rig without filing of the bill of entry.

Suffice it to state that in February 2001, the applicant made payment of the customs duty amounting to Rs.26,67,94,320/-. This was in accordance with the order of the tribunal.

On the strength of the essentiality certificate, the applicant applied for refund of the customs duty paid by the assessee. However, by order dated 1st/4th February, 2002, the additional commissioner of customs rejected the claim for refund.

On 11.2.2002, the applicant called upon the ONGC to reimburse the applicant with the said amount of Rs.26,67,94,320/-. ONGC responded by letters dated 20.3.2002 and 13.6.2002 denying its liability to reimburse the customs duty paid.

Ultimately, vide letter dated 31.3.2003, the applicant herein invoked the arbitration clause 28.0 and suggested that the dispute be referred to arbitration. By the said letter, the applicant appointed its nominee on the Arbitral Tribunal and called upon the ONGC to appoint its nominee, so that both the arbitrators could jointly appoint a third arbitrator.

It is not necessary, at this stage, to go into the chequered history of the earlier round of litigation and the circumstances under which the non-applicant did not agree to the continuance of the proceedings before the duly constituted Arbitral Tribunal. Suffice it to state, that the applicant had called upon the non-applicant to appoint its nominee to the Arbitral Tribunal, failing which it has been constrained to move this application for appointment of an arbitrator to the Arbitral Tribunal to decide the disputes referred to arbitration under the 1988 contract by applicant vide its letter dated 31.3.2003.

By way of counter affidavit, the ONGC has inter alia contended that the applicant is estopped from moving this arbitration application because ONGC had issued the essentiality certificate to enable the applicant to seek refund of the customs duty already paid; that, the certificate was issued as far back as 21.12.2001 and that the same was handed over to the applicant to enable them to avail of the exemption as provided under notification no.516/86 dated 30.12.1986, as amended from time to time. ONGC contends by its counter affidavit that non-utilization of the essentiality certificate is a matter between the applicant and the customs department in which ONGC has no role to play. At this stage, it may be stated that till today, the respondent has not received the revalidated essentiality certificate from the office of the Director General of Hydrocarbons, New Delhi. In the circumstances, ONGC has denied the demand of the applicant for arbitration.

On the factual aspect, my attention is invited to the judgment of the Division Bench of the Bombay High Court dated 22.3.2006 in writ petition No.481/2001 filed by the applicant herein against the customs department in the matter of computation of duty paid on the value of the rig as it existed in 1988. This writ petition was essentially on the working out of the liability. By the said judgment, the High Court has directed the customs

department to compute the duty liability to the assessee in terms of para 48 of the judgment of the tribunal. By the said judgment, the additional commissioner of customs is directed to assess the duty liable as per the order of the tribunal dated 2.2.2001 treating the import of the rig in 1988 having the value of US\$ 13 million. By the said judgment, the High Court left it open to the applicant to claim its entitlement under the essentiality certificate before the additional commissioner of customs, who is directed to pass appropriate orders in that regard. Till today, the decision of the additional commissioner is awaited.

On the above facts, it is argued on behalf of the non-applicant that the matter is pre-mature, particularly, when the additional commissioner of customs has not pronounced its decision on the entitlement of the applicant under the essentiality certificate and, therefore, invocation of the arbitration clause by the applicant was pre-mature and consequently, the application under section 11(4) of the Arbitration & Conciliation Act, 1996 is not maintainable.

In the present case, the applicant has paid customs duty amounting to Rs.26,67,94,320/- as far back as February 2001. It seeks reimbursement of the duty paid in terms of the contract. The applicant has invoked the arbitration clause as far back as 31.3.2003. The accrual of liability, as a concept, is different from quantification of the liability. In the present case, the liability to pay customs duty has accrued. In the circumstances, it cannot be said that the application under section 11(4) of the Arbitration & Conciliation Act, 1996 is pre-mature.

Accordingly, Hon'ble Mrs. Justice Sujata V. Manohar (retired) and Hon'ble Mr. Justice V. N. Khare (former CJI) are appointed as Arbitrators to decide all disputes and differences between the parties. The two arbitrators shall appoint an umpire in terms of clause 28.0 of the contract.

Learned arbitrators may fix their own terms and conditions as to their remuneration.

As far as fixing of date of hearing is concerned, liberty is given to the parties to approach the arbitrators, who will decide the due date according to their convenience.

The arbitration petition is accordingly disposed of.