

A OIL & NATURAL GAS CORPORATION LTD.
v.
ATWOOD OCEANIC INTERNATIONAL, S.A.
(Civil Appeal No.1218 of 2001)

MAY 13, 2008

B [TARUN CHATTERJEE AND DALVEER BHANDARI, JJ.]

C *Arbitration Act, 1940 – Agreement between ONGC and foreign company-contractor, for carrying out drilling operations in offshore waters of India on 2.03.1983 – By Notification, Government of India extending Income Tax Act, 1961 to offshore areas with effect from 1.04.1983 – Claim for reimbursement by contractor of personal tax dues paid by it in respect of salaries earned by employees, for accounting year ending on 31.03.1983 and 31.03.1983 – Denied by ONGC – Dispute referred to arbitration – Disagreement between two arbitrators – Award by Umpire – Claim allowed holding that on account of change in income tax laws, contractor paid tax on behalf of its employees and as such contractor incurred increased costs – Challenge to – Single Judge of High Court holding that the Notification was prospective and not retrospective, made award Rule of the Court – In appeal, Division Bench of High Court holding that the direction in Award pertaining to assessment year 1984-85 justified, however, direction pertaining to assessment year 1983-84 contrary to law, thus, direction regarding payment of Rs.28,26,359/- for assessment year 1983-84 set aside – Decree modified to that extent – On appeal, held: In such cases scope for interference by this Court is limited – On perusal of materials on record, interference not called for – Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.*

G CIVILAPPELLATE JURISDICTION : Civil Appeal No. 1218 of 2001

From the final Judgment and Order dated 8.2.2000 of the

High Court of Judicature at Bombay in Appeal No. 141 of 1995 A
in Arbitration Petition No. 24 of 1990 in Arbitration Award No.
15 of 1989

WITH

C.A. No. 1291 of 2001 B

Vivek K. Tankha, K.R. Sasiprabhu and Bindu K. Nair for
the Appellant.

Shyam Dewan, Khooshnum R. Daviervalva, Rajat Navet
and Pradeep Kumar Bakshi for the Respondent. C

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. These appeals are directed
against the judgment of the High Court of judicature at Bombay de-
livered in Appeal Nos.141 and 142 of 1995 dated 8th February, 2000. D

Brief facts which are necessary to dispose of these ap-
peals are recapitulated as under:

On 2nd March, 1983, the appellant, Oil and Natural Gas Corpo-
ration Limited entered into an Agreement with the respondent, Atwood
Oceanic International, S.A. for carrying out drilling operations in off-
shore waters of India and for rendering other related services with
regard to the drilling unit Sagar Pragati belonging to the appellant on
the terms and conditions set forth in the said Agreement. E

The said Agreement contained an Arbitration Clause 11. F
The said Arbitration Clause 11 reads as under:-

"Arbitration :

If any dispute, difference or question shall at any time
hereafter arise between the parties hereto or their
respective representative concerning anything herein
contained or arising out of these presents or as to the
rights, liabilities, or duties of the said parties hereunder
and cannot be mutually resolved the same shall be referred
to arbitration, proceedings of which shall be held at G
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A (Bombay) India. Within thirty(30) days of the receipt of the notice of any dispute, each party shall appoint an arbitrator and such arbitrators shall appoint an Umpire before they enter upon the reference and not later than one month from the latest date of their respective appointments. If any of the parties fail to appoint arbitrators within the specified period or should the two arbitrations fail to agree upon the selection of an Umpire within the stipulated period, the Hon'ble Chief Justice of the Supreme Court of India shall nominate the required arbitrator or the Umpire as the case may be, who shall be a resident of India, but not a national of the country of neither of the parties. The decision of the arbitrators and failing an agreed decision by them, the decision of the Umpire shall be final and binding on the parties thereto.

D The arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act, 1940 and the rules made thereunder as amended from time to time

E The arbitrator or the Umpire, as the case may be, shall decide by whom and in what proportion the arbitrators and Umpire's fees as well as the costs incurred in arbitration shall borne.

The arbitrators or the Umpire may, with the consent of the parties enlarge the time, from time, to make and publish their or his Award."

F At the material time, when the agreement was entered into, the provisions of the Indian Income Tax Act, 1961 (hereinafter referred to as the '1961 Act') were not applicable beyond the territorial waters of India, i.e., beyond the limit of 12 nautical miles.

G On 31st March, 1983 the Government of India issued a notification in exercise of powers conferred by section 6(6)(a) and 7(7)(a) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone, and other Maritime Zones Act, 1976 extending the provisions of the 1961 Act to the Continental Shelf

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and Exclusive Economic Zone of India with effect from 1st April, 1983 with some modifications. It is not necessary to deal with those modifications because they are not relevant so far as the controversy involved in the instant case is concerned. A

The respondent on 5th March, 1985 forwarded an invoice to the appellant claiming that pursuant to the notification dated 31st March, 1983 issued by the Government of India there was a change in the law with regard to income tax which had resulted in the employees of the respondent becoming liable for income tax and consequently under the employment contract, the respondent had incurred additional liability for payment of personnel income tax which the respondent claimed under the terms of the contract had to be reimbursed. The appellant refuted this claim by its reply dated 15th March, 1985 and took up the stand that the appellant was not liable to reimburse the personnel tax dues due to change of law by way of extension of the tax jurisdiction to offshore areas. On 22nd March, 1986 the respondent sought arbitration of the dispute between itself and the appellant on the aforesaid issues. B
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On 27th July, 1987, the dispute on the aforesaid issues was referred to arbitration of Mr. Justice D.V. Patel (Retd.) and Mr. Justice D.M. Rege (Retd.). On 2nd March, 1989, Mr. Justice D.V. Patel made a speaking award by which he rejected the claim of the respondent. The other learned arbitrator Mr. Justice D.M. Rege (Retd.) made a note of disagreement on 15th June, 1989. E
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In view of the disagreement between the two arbitrators, the dispute was referred to the arbitration of Mr. Justice Tulzapurkar (Retd.) as Umpire. The learned Umpire made his award on 13th October, 1989 by which the claims of the respondent were allowed. G

The appellant aggrieved by the award of the Umpire challenged the same before the learned Single Judge of the Bombay High Court. It was urged by the appellant that there was error apparent on the face of the record. Reliance was placed on H

A Clauses 5-A and 7 of the Agreement dated 2nd March, 1983.
Clauses 5-A and 7 read as under:

“Clause 5-A: Taxes.

B A. Personnel – Any taxes assessed on employees
of Contractor and based on income earned in
the performance of work for owner or otherwise
shall be the responsibility of the Contractor.”

Clause 7:

C “In the event there occur changes in the laws of
Government of India during the course of the
contract from those prevalent on 25.8.1982,
which result in increase decrease to the
Contractor’s cost of carrying out its duties and
responsibilities under this Agreement, then the
D increase/decrease in the cost shall be settled
and paid/recovered after mutual discussion.”

It was contended that in view of the above clauses, tax
assessed on the employees of the contractor was the respon-
E sibility of the contractor/claimants. It is contended that in view of
clause 5-A, the learned Umpire erred in awarding the amount
by way of increased costs, particularly because the responsi-
bility was that of the contractor. It was further contended that
taxes assessable on the employees of a contractor and based
F on the income earned in the performance of work was one of
the items. It cannot constitute increase in the cost of carrying
out responsibilities/duties on the part of the claimants/contractor
under the Agreement. It was further contended that in view of
clause 5-A of the Agreement, the appellant was not liable to pay
G the amounts on the ground of increased cost of the contract.
The learned Single Judge observed as under:

“I do not see any merit in the said submissions advanced
on behalf of ONGC. The contractor has incurred increased
costs for the accounting year ending 31st March, 1983
H and 31st March, 1984. The Government of India issued

Notification on 31st March, 1983 which made the salaries A
earned by the expatriates taxable for the accounting year
ending 31st March 1983 and 31st March, 1984.

The judgment of this Court took the view that the said B
Notification was prospective and not retrospective. In the
above circumstances, the Arbitrator came to the conclusion
that since the Notification is dated 31st March, 1983, Clause
7 of the said Agreement would apply. The learned Umpire
came to the conclusion that the Notification constituted C
change in law of the Central Government during the course
of the contract. The said change admittedly came into force
after 25th August, 1982. In the above circumstances, on
reading Clause 2 read with Clause 5 read with Clause 7 of
the Agreement, the learned Umpire came to the conclusion
that there was an increase in the contractors' cost under the D
Agreement on account of change in the income-tax Law
and which resulted in the increase in the costs. The learned
Umpire also came to the conclusion on the basis of the
evidence on record that the claimant/contractor had agreed
to pay the taxes assessable on the expatriates and in the E
circumstances, the claimant had incurred the increased
costs, and, therefore, the taxes have been paid by the
claimants and they are entitled to that extent to the increased
cost. The learned Umpire agreed with the decision of one
of the Arbitrators Shri D.M. Rege."

After hearing learned counsel for the parties, the learned F
Single Judge further observed as under:-

"In the present case, the dispute referred to the Umpire was
a very narrow dispute viz. whether the contractor was entitled
to be reimbursed for the increased cost borne by him on G
account of salaries of the expatriates being made eligible
to income-tax pursuant to the Notification dated 31st March,
1983. The learned Umpire, after construing the various
provisions of Clause 2, 5A and Clause 7 of the Agreement
has come to the conclusion that since the tax law has been H

A changed after 25th August, 1982 and since the contractor
has paid the tax on behalf of its employees/expatriates, the
cost of contract had increased and to that extent under
Clause 7 he was entitled to be reimbursed. There is no
merit in the contention of ONGC that there was no increased
B cost of carrying out the contract on account of taxes borne
by the contractor on behalf of its employees/expatriates.

For the foregoing reasons, there is no merit in the above
Two Arbitration Petitions. Both the Arbitration Petitions
are accordingly dismissed with costs. Consequently, the
C impugned Award dated 13th October, 1989 is made Rule
of this court. Decree in terms of the Award. Further, interest
to be paid @ 12% per annum from the date of the Decree
till payment on the respective principal amounts to be
calculated in terms of the said Awards."

D The appellant aggrieved by the said judgment of the learned
Single Judge preferred an appeal before the Division Bench of the
Bombay High Court. The Division Bench heard the learned counsel
for the parties at length and examined the material documents.

E The Division Bench carefully perused the award of the
Umpire and the judgment of the learned Single Judge and ob-
served that the Umpire has taken one of the possible views on
a fair reading of the contractual terms and this court cannot in-
terfere with it. The court further observed that we perceive no
F jurisdictional error committed by the learned Umpire.

Before the Division Bench it was contended on behalf of
the appellant that at least with regard to Assessment Year 1983-
84, the direction in the award was clearly contrary to law and,
therefore, it ought to be interfered with. The Division Bench found
G substance in this argument. The Division Bench held as under:

"Though in para 1 of the impugned Award, the Umpire
granted the claims pertaining to the two Assessment years
1983-84 and 1984-85. in para 2, he referred to the
judgment of this court in Mcdermott International Inc Vs.
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Union of India and Others, reported in 173 ITR 155 and noticed that the said judgment had taken the view that the Notification dated 31.3.1983 making the Indian Income Tax Act applicable to personnel working within the Continental Shelf had no retrospective effect and that it would not apply to Assessment Year 1983-84 (accounting year 1982-83). The Umpire thereafter proceeded to give a direction that since the said decision was pending in Appeal before the Supreme Court and there was a possibility of the Respondent being able to recover refund of the income tax paid by it from the Income Tax Department, the respondent while obtaining the decree from the appropriate Court, should give a written undertaking to the Court that in case it recovers a refund of the concerned amount of income tax it shall refund the said amount to the Appellant. The award states that this direction was given at the instance of the respondent itself with a view to prevent the respondent from receiving the amount of income tax paid by it twice over, and for protection of the interest of the Appellant.

Mr. Madon, learned Counsel for the respondent, contended that the directions with regard to the claims were only contained in para 1 of the award which gave no reasons in support of the said directions. Consequently, the entire award is a non-speaking award and is immune from scrutiny of the Court. He explained away the reasons contained in para 2 of the award as pertaining to the ancillary direction with regard to the undertaking to be given by the respondent and not with regard to the award itself. It is not possible to percept the contention that the award has to be read in compartments. In our view, both paragraphs 1 and 2 of the award have to be read in conjunction. When read in conjunction, it appears to us, the Umpire was alive to the fact that in *Modermott International* (supra) this Court had taken the view that the Notification dated 31.3.1983 had no retrospective effect and would not apply to Assessment

A Year 1983-84. If this was the law, then the respondent's employees were not liable for making payment of income tax during the year 1983-84 for income earned while carrying out work beyond the territorial waters of India. Consequently, there was no question of increased cost of services within the meaning of Clause 7 of the Contract between the parties, or was there any scope for passing on a non-existing liability to the Appellant. At least to this extent, it appears to us that this contention must succeed."

C The Division Bench in the concluding para of the judgment observed that the learned Single Judge erred in not interfering with the direction contained in the award pertaining to assessment year 1983-84, but the conclusion of the learned Single Judge with regard to the direction pertaining to assessment year 1984-85 is perfectly justified and needs no interference.

D The Division Bench partly allowed the appeal filed by the appellant and set aside the direction contained in the Umpire's award with regard to the payment of Rs.28,26,359/- for the year ending 31st March, 1983 (assessment year 1983-84) and uphold the rest of the judgment of the learned Single Judge. The Division Bench further directed that the decree is modified to the extent that there shall be a decree in accordance with the award only pertaining to assessment year 1984-85, together with interest as directed in the award and as granted by the learned Single Judge.

F The appellant aggrieved by the said judgment preferred these appeals before this Court. The appellant reiterated the same argument before this court. The scope for interference by this court is extremely limited in a case of this nature. We have carefully perused the entire material on record and analysed the impugned judgment. In our considered opinion, no interference is called for. The appeals being devoid of any merit are accordingly dismissed. In the facts and circumstances of the case, we direct the parties to bear their own costs.

N.J.

Appeals dismissed.

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