Orissa Stevedores Limited Vs The Orissa Minerals Development Company Ltd. and Another

Court: Calcutta High Court

Date of Decision: Feb. 26, 2010

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11(4), 11(6), 7, 7(4)(b), 7(5)

Citation: (2010) 2 CALLT 293

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Jagannath Pattanaik, Mr. Mainak Bose, Mr. Avijit Pattanaik and Mr. Anindya Bhattacharya, for the Appellant;Kamal Kr. Chattopadhyay, for the Respondent

Judgement

Sanjib Banerjee, J.
The petitioner has applied u/s 11(6) of the Arbitration and Conciliation Act, 1996 with a request for necessary

measures to be taken for constituting an arbitral tribunal to adjudicate upon the disputes covered by the arbitration agreement that the petitioner

sets up. The respondent has denied the existence of the arbitration agreement.

2. There is no dispute that following a notice inviting tender and the petitioners offer thereupon, a work order was issued in favour of the petitioner

for handling and despatch of iron ore fines from Thakurani/Barbil siding to the ports of Paradip, Haldia and Gopalpur by rail and by road. The

work included port handling, stacking and stevedoring operations. The work order contemplated a formal agreement being executed. The work

order was to remain valid for the period upto December, 2008 with a provision for extension thereof based on the performance of the petitioner.

The performance was to be reviewed every three months. Clause 17 of the work order dated January 22, 2008 provided as follows:

17. CONTRACT:

A written Agreement will be executed between OSL and OMDC within 7 (seven) days of issuance of the Work Order recording the fact of

conclusion of contract between OSL & OMDC.

3. It is not in dispute that a draft agreement was forwarded by the respondent to the petitioner on January 22, 2008 itself. The same will be evident

from a letter dated February 8, 2008 issued by the respondent, a copy whereof appears as annexure ""R-I"" to the respondent''s affidavit-in-

opposition. Under cover of such letter, a copy of the draft agreement was forwarded again with a request that it ""may please be finalised

immediately for execution in the stamp paper."" The draft agreement contained the following, which the petitioner claims to be an arbitration clause:

ARBITRATION: In case of any conflict between the terms and conditions contained in the contract documents, the provisions contained herein

shall prevail over those contained in the documents referred above. All disputes and differences of any kind whatsoever arising out of the Second

Part shall referred to the sole arbitrator namely of the First Part. On any reference the learned arbitrator will decide the dispute in accordance with

the Arbitration and Conciliation Act, 1996. The decision and/or award of the arbitrators will be final and binding upon both the parties.

4. By February 14, 2008 the petitioner had commenced operations under the work order. The petitioner cited a number of logistic and operational

difficulties in its letter of February 14, 2008 and urged the respondent to take remedial steps. The last paragraph of the letter needs to be

specifically noticed:

We urge upon OMDC to bear all the statutory charges including plot rent and amend the work order/contract suitably keeping in view of all the

above uncertainty (sic, uncertainty) for export of Iron Ore Fines within a period of one year.

5. The petitioner says that the work order has not been cancelled though the petitioner has not been required to undertake any further work

thereunder since the respondent cancelled the railway indents by a letter dated March 19, 2008, a copy whereof appears at page 35 of the

petition. The petitioner says that the tender documents contained a reference to a written contract which was to be entered into within seven days

of the issuance of the work order. The petitioner insists that upon the petitioner undertaking the work under the work order there was an

acceptance of the agreement by performance which would entitle the petitioner to invoke the arbitration clause contained therein. The petitioner

seeks to demonstrate that the respondent has been arbitrary and unreasonable in its conduct. The petitioner complains of the respondent failing to

make payment in respect of the bills raised by the petitioner on the respondent. The petitioner refers to a letter dated September 8, 2008 issued by

the respondent, a few paragraphs whereof are relevant in the context:

As even after the expiry of the said 7 specified working days, as mentioned the clause No. 17 of the work order nothing has been received from

OSL about of the formal execution of the contract, in that situation OMDCL issued a reminder letter to OSL vide letter No.

OMDC/HO/EXPORT/ D2891/09 dt. 08.02.08 to execute the said contract immediately in stamp paper. Along with the said letter dated

08.02.08 OMDC also forwarded another copy of the said draft agreement to OSL for execution immediately,

It appears that even after receiving the reminder letter dated on 08.02.08 the OSL did not execute the said concluding contract and on the other

hand OSL refused to accept the said work order and/or contract and requested OMDC to amend the work order and/or the contract vide OSL

letter No. dt. 14.02.08.

In view of the above position of non execution of the final contract by OSL with OMDCL in stamp paper no final contract was concluded

between the parties. In view of the above the OMDC is also not at all liable for any conditionalitiesin connection of the said work and work order

in question concerning to the said tender to any party including OSL. Thus there can not exit (sic, exist) any liability of OMDC towards OSL.

...

In view of the above situation OSL is not at all entitled to and cannot raise any bill on alleged ground of idle charges for cargo handling equipments

& work force or for handling of iron ore fines and services charges.

6. The petitioner has relied on a judgment reported at Unissi (India) Pvt. Ltd. Vs. Post Graduate Institute of Medical Education and Research, and

has placed paragraphs 15 and 16 from the report. It was held in such case that although no formal agreement was executed, the tender documents

indicated certain conditions of contract and an arbitration clause; and, since the Appellant before the Supreme Court had made an offer following

the notice inviting tender the Appellant had accepted the tender conditions and acted upon the same. There is a sentence in paragraph 15 of the

report that records that the ""together documents themselves contain an arbitration clause. "" Further, it was the admitted position in such case that

the Appellant, who had sought to invoke the arbitration clause, had sent an agreement in accordance with the prescribed format after duly

executing the same but it was the respondent who did not sign the agreement or send it back after execution.

7. The petitioner has next brought a judgment reported at Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd., The

judgment was rendered on a petition u/s 11(4) of the 1996 Act by the learned designated Judge. Paragraph 2.1 of the report records that

purchase orders were placed on the petitioner before the Supreme Court and the purchase orders incorporated the Fertiliser Association of India

terms and conditions for sale and purchase of phosphoric acid. Clause 15 of such FAI terms provided for settlement of disputes by arbitration.

The opinion rendered was that the purchase orders placed were the contracts between the parties and since they referred to the FAI terms which

contained the arbitration clause, section 7(5) of the Arbitration and Conciliation Act was satisfied and the existence of the arbitration agreement

could not be disputed.

8. In the final judgment brought by the petitioner, reported at Great Offshore Ltd. Vs. Iranian Offshore Engineering and Construction Company,

the view expressed by another learned designated Judge is captured at paragraph 60 of the report:

60. Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want -an

efficient, effective and potentially cheap resolution of their dispute. The autonomie de la volonte doctrine is enshrined in the policy objectives of the

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our

Arbitration Act is based. (See Preamble to the Act.) The Courts must implement legislative intention. It would be improper and undesirable for the

Courts to add a number of extra formalities not envisaged by the legislation. The Courts'' directions should be to achieve the legislative intention.

9. In the respondent''s affidavit it has been categorically asserted that there is no arbitration agreement between the parties and that this Court has

no jurisdiction to entertain the petition.

10. The only relevant issue that arises is as to whether there is an arbitration agreement between the parties. If the issue is answered against the

petitioner, the second ground canvassed by the respondent becomes irrelevant. If the issue is answered in favour of the petitioner, the second

ground urged by the respondent would also fail since the draft agreement also contains a forum selection clause that ""only the principal Civil Courts

of Calcutta as well as High Court shall have the jurisdiction over any dispute, which may arise.

11. If it is found that notwithstanding the parties not having formally executed the agreement the terms thereof bind them, it cannot be said that only

the arbitration clause would be effective and the forum selection clause would not of course, the forum selection clause has limited applicability in

proceedings u/s 11(6) of the 1996 Act. A petition u/s 11(6) of the Act has, per force, to be made to the Chief Justice of a High Court or his

designate. A valid forum selection clause contained in an agreement which is governed by an arbitration clause would imply that the chosen forum

would be the only Court authorised to receive petitions u/s 9 and the like of the 1996 Act. A valid forum selection clause in an agreement which

contains an arbitration Clause would only point to the relevant Chief Justice (or his designate) before whom a petition u/s 11(6) of the Act may be

brought. If the forum selection clause confers exclusive jurisdiction in respect of matters pertaining to an agreement containing an arbitration clause

to a particular Court, the Chief Justice (or his designate) of the High Court exercising superintendence over the nominated Court would be the only

authority to receive a petition u/s 11(6) of the 1996 Act. The forum selection clause would not imply that a petition u/s 11(6) of the Act would also

have to be carried to the nominated Court since the authority u/s 11(6) of the 1996 Act is conferred on Chief Justices of High Courts and may be

delegated by the Chief Justices to any designated person or institution.

12. But it is not necessary to take the second challenge presented by the respondent any further since the petition is liable to fail on the first and

more fundamental, ground. The authority of an arbitrator is derived from an agreement between the parties thereto. For there to be an arbitration

agreement, parties need to be ad idem on the issue. It is not necessary that an arbitration agreement has to be signed and formally executed for it to

be binding on the parties. Section 7 of the 1996 Act contemplates situations where an arbitration agreement can be culled out from the exchange of

letters or even the written reference to a document which contains an arbitration clause.

13. There is no doubt that the work order was issued in this case and the petitioner acted thereupon. However, it is equally evident that the

petitioner did not expressly or by necessary implication accept the terms of the draft agreement that had been forwarded by the respondent on

January 22, 2008 and sent again on February 8, 2008. In its letter of February 14, 2008 the petitioner required the terms of the draft agreement to

be modified. It cannot be said that since the petitioner''s suggestion was only to modify a part of the agreement which did not include the arbitration

clause, the rest of the terms of the agreement, including the arbitration clause, stood accepted. If it were to be held otherwise, that would lead to an

absurd result.

14. The petitioner suggested the modification of one of the minor terms of the draft agreement. The petitioner did not question the arbitration clause

contained in the agreement. There is an exchange of letters which provide a record of the draft agreement having been sent and received. But there

is no record of the agreement since, upon the petitioner suggesting modifications, there is no acceptance of the terms of the agreement as drafted

and sent by the respondent.

15. The matter may be viewed from another perspective. If it is held that the modification suggested did not affect the arbitration clause and as

such the arbitration clause is deemed to have been accepted, there would be a serious problem. The arbitrator would not know whether the clause

or clauses of which modification had been sought stood modified upon the request or the modification stood rejected and the clause as contained

in the draft would be the appropriate term. It is a matter of principle. The draft agreement that was sent by the respondent to the petition was at the

highest, a proposal. If the petitioner did not seek modification of the terms thereof, notwithstanding the petitioner''s failure to execute the

agreement, a case may have been made out that, upon the petitioner undertaking the work under the work order, the agreement was deemed to

have been acted upon. But the petitioner here suggested a modification to the agreement, however insignificant. And, upon suggesting the

modification there was no absolute or unqualified acceptance by the petitioner of the proposal contained in the draft agreement. The proposal

contained in the draft agreement, on the conduct of the petitioner did not fructify into an agreement since there was no complete acceptance of the

terms thereof. The petitioner made a counter offer and suggested ? new agreement. The parties were not ad idem on the draft agreement. The

petitioner cannot now pick out the arbitration clause and seek to enforce it by suggesting that the modification that it sought was to an altogether

different clause of the agreement. Either the petitioner accepted the agreement, or it did not. On the admitted conduct of the petitioner as is evident

from its letter of February 14, 2008 which came after a reminder from the respondent that the petitioner had not executed the agreement, it can no

longer be said that the parties would be governed by the terms of the draft agreement or the arbitration clause contained therein.

16. The exchange of letters in this case provides a record of the factum that a draft agreement had been despatched to the petitioner and received

by it. The correspondence between the parties do not record an agreement within the meaning of section 7(4)(b) of the 1996 Act. The work order

recorded that an agreement had to be executed between the parties as did the tender documents. But neither the tender documents nor the work

order contained a reference to any arbitration clause.

17. Though the parties have not dwelled on such aspect of the matter and the respondent has not raised the question at all, even if it were accepted

that the agreement and the arbitration clause contained therein had been accepted and would govern the conduct of the parties in respect of

matters covered thereby, the relevant clause may not be an agreement to go to arbitration after all. The manner in which the second sentence of the

relevant clause has been drafted may have been erroneous, but it is not for the Court to substitute words into an agreement or to proceed on the

assumption that notwithstanding how the clause is framed the parties had intended it to be an agreement to go to arbitration. The expression

Second Part"" in the draft agreement refers to the petitioner herein. The second sentence of the clause speaks of disputes and differences but does

not relate the disputes and differences to the agreement. The relevant expression is, ""disputes and differences of any kind arising out of the Second

Part"" and not ""disputes and differences arising out of the agreement.

18. The respondent''s objection is justified and there does not appear to be any arbitration agreement between the parties for the petitioner to seek

a reference thereunder.

19. A.P. No. 2 of 2009 fails. There will, however, be no order as to costs.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.