(2009) 08 DEL CK 0389

Delhi High Court

Case No: OMP No. 282 of 2009

Cairn Energy India Pty. Ltd.	APPELLANT
Vs	
Union of India (UOI)	RESPONDENT

Date of Decision: Aug. 4, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9

Citation: (2011) 3 ARBLR 375

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: A.K. Ganguli, Rajiv Nayar, Ciccu Mukhopadhaya, Sanjay Kumar and Ayush Agarwal, for the Appellant; A.S. Chandoik, ASG, Shasti Prabhu, Ritesh Kumar and Sandeep Bajaj, for the Respondent

Final Decision: Dismissed

Judgement

Shiv Narayan Dhingra, J.

The petitioner (former name: Command Petroleum India Pty. Ltd.) has filed this application u/s 9 of the Arbitration & Conciliation Act, 1996 with a prayer that this Court should restrain respondent i.e. Union of India from recovering any amounts payable by the petitioner through Hindustan Petroleum Corporation Limited (HPCL) and Bongaigaon Refinery Petrochemicals Ltd. (BRPL) pursuant to judgment of the Malaysian Court dated 12th January, 2009.

2. Union of India had entered into a Production Sharing Contract (PSC) dated 28th October, 1994 with Oil & Natural Gas Corporation Ltd., Videocon Petroleum Limited (Videocon), Command Petroleum India Pty Limited and RAAVA Oil Singapore Pte. Limited. The agreement provided a specific procedure of calculation of Post Tax Rate of Return (PTRR). This contract specifically provided as to what can be included in the accounts for the purpose of PTRR calculations. However, the respondents did not follow the contractual provisions and started including, for the purpose of PTRR

calculation, the sums paid by the companies in accordance with the Article 3.3 of Production Sharing Contract (PSC). A dispute was raised by the Union of India on this method of calculation of PTRR by petitioner and other two companies viz. Videocon and RAVVA OIL Singapore Pte. Ltd. and the dispute was referred to an Arbitral Tribunal. The Arbitral Tribunal, by a majority, upheld the method of calculating PTRR as adopted by the petitioner and other two companies. Against the decision of Arbitral Tribunal, an appeal was preferred by Union of India before the Malaysian Court at Kuala Lumpur and the Malaysian Court after considering the terms of the contract came to the conclusion that it was wrong for the Majority Arbitrators to have ignored the plain meanings of the words in the relevant provisions and include "commercial sense" in the contract, since the words were clear. The Malaysian Court therefore set aside the part of the award observing as under:

On balance, and since I have found a manifest error of law on the face of the relevant portion of the Partial Award, an order that that portion of the Partial Award reading:

The Companies are entitled to include in the accounts, for the purposes of PTRR calculation (in accordance with Article 16 and Appendix D of the PSC) sums paid by the Companies in accordance with Article 3.3 of the PSC.

be set aside, will be more appropriate, and so I order.

3. After this award was set aside by the Malaysian Court, the petitioner preferred an appeal against the order of the Malaysian Court. The Appellate Court at Malaysia did not grant stay against the order of the Malaysian Court. The Union of India thereafter calculated the amounts recoverable from petitioner and other companies which were short-paid to Union of India adopting a wrong method of PTRR calculation. Since the petroleum supply was being made by the petitioner to HPCL and BRPL, Union of India issued letters dated 5th February, 2009 and 20th March, 2009 asking HPCL/BRPL to divert the amounts payable to the petitioner to Union of India so that the amounts recoverable by Union of India from the petitioner and other companies were recovered and adjusted. After these letters, the petitioner has filed this petition u/s 9 of the Arbitration & Conciliation Act, 1996 seeking an interim injunction against recovery of these amounts.

4. The arbitration agreement between the parties reads as under:

Article 34

Sole Expert, Conciliation and Arbitration

34.1 Parties to Use Best Efforts to Settle Disputes

The Parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this

contract or concerning the interpretation or performance thereof.

34.2 Reference to Sole Expert

Matter which, by the terms of this contract, the Parties have agreed to refer to a sole expert and any other matters which the Parties may agreed to so refer, shall be referred to an independent and impartial person of international standing with relevant qualifications and experience appointed by agreement between the Parties. Any sole expert appointed shall be acting as an expert and not as an arbitrator and the decision of the sole expert on matters referred to him shall be final and binding on the Parties and not subject to arbitration. If the Parties are unable to agree on a sole expert, the matter may be refereed to arbitration.

34.3 Unresolved Disputes

Subject to the provisions of this contract, the parties hereby agree that any mater, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.4. Composition of Arbitral Tribunal and Appointment of Arbitrators

The arbitral tribunal shall consist of three arbitrators. Each party to the dispute shall appoint one arbitrator. The two arbitrators appointed by the Parties shall appoint the third arbitrator.

34.5 Failure of a Party to Appoint Arbitrator

Any party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party fails to appoint an arbitrator within thirty (30) days of receipt of the written request to do so, the second arbitrator may, at the request of the first party, be appointed by the secretary general of the Permanent Court of Arbitrator at The Hague, within thirty (30) days of the date of receipt of such request, from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings.

34.6 Failure of Arbitrators to Appoint Third Arbitrator

If the two arbitrators appointed by or on behalf of the parties fail to agree on the appoint of the third arbitrator within fourteen (14) days of the appointment of the second arbitrator and if the parities do not otherwise agree, the Secretary general of the Permanent Court of Arbitration at the Hague may, at the request of either Party and in consultation with both, appoint the third arbitrator who shall not be a national of the country of any party.

34.7. Failure of Arbitrator to Act

If any of the arbitrators fails or is unable to act, his successor shall be appointed by the party or person which originally appointed such arbitrator or as may be otherwise agreed by the parties to the dispute.

34.8 Decision of Arbitral Tribunal to be Binding

The decision of the arbitral tribunal, and, in the case of differences among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.

34.9. UNCITRAL, Rules to Apply

Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model law on International Commercial Arbitration of 1985 except that in the event of any conflict between these rules and the provisions of this Article 34, the provisions of the Article 34 shall govern.

34.10 Survival of Right to Arbitrate

The right to arbitrate disputes and claims under this contract shall survive the termination of this contract.

34.11. Conciliation

Prior to submitting a dispute to arbitration, the Parties may by mutual agreement submit the matter for conciliation under the UNCITRAL conciliation rules by a sole conciliator to be appointed by mutual agreement of the parties. No arbitration proceedings hall be instituted while conciliation proceedings are pending provided that a party may initiate arbitration proceedings in the event the dispute has not been resolved by conciliation within twenty one (21) days of the date of agreement by the Parties to submit such dispute to conciliation.

34.12 Venue and Law of Arbitration Agreement

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

5. The notice of this petition was served upon the respondent and the respondent raised objection about the maintainability of this petition on dual grounds; one, that the Courts in India have no jurisdiction to entertain petition u/s 9 in view of the above arbitration Clause showing that the parties had intended that the arbitration had to take place in Malaysia and the arbitration agreement shall be governed by laws of England. The other ground raised by the respondent regarding maintainability of this petition is that the notice of arbitration sent by the petitioner did not disclose a dispute, in fact, the alleged dispute has already been the subject

matter of arbitration and an award has already been given by the Arbitral Tribunal against which an appeal was preferred by Union of India (as seen in para 2 above) and second appeal is pending before the Court in Malaysia therefore, the same dispute cannot be raised again and an application u/s 9 was not maintainable.

6. As far as the issue of territorial jurisdiction of this Court in entertaining an application u/s 9 in view of the specific arbitration Clause is concerned, another Bench of this Court on a petition filed by Union of India against Videocon has held that this Court would have jurisdiction to entertain an application u/s 9. I am told that the decision has been assailed by way of an SLP before the Supreme Court and the matter is now subjudice before the Supreme Court. I, therefore, consider that it would not be appropriate to go into the issue of territorial jurisdiction of this Court in view of particular arbitration clause, since I find that this petition is not entertain-able even otherwise for reasons given below.

7. It is the petitioner''s own case that the dispute regarding PTRR was referred to the Arbitral Tribunal at Malaysia and the award passed by the Arbitral Tribunal in respect of PTRR has been set aside by a competent Court at Malaysia and the Court at Malaysia has given a finding that the accounting procedure adopted by the petitioner for calculating PTRR was contrary to the terms of agreement. The "commercial sense" on which the award was based by Tribunal could not be merged into the agreement when the intention of the parties to the agreement was very clear. Against this order of the Malaysian Court an appeal is pending. An enquiry from the petitioner as to why the petitioner did not ask for stay of order from the Appellate Court revealed that in Malaysia the Appellate Courts normally do not stay the operation of the judgments and the judgments are implemented. Thus, what compelled the petitioner to rush to Indian Courts was a situation that the petitioner could not get relief from Court at Malaysia, despite the fact that an appeal was preferred before the Court at Malaysia, so the petitioner thought it proper to invoke Section 9 of the (Indian) Arbitration & Conciliation Act, 1996. When the petitioner was asked as to what dispute the petitioner intends to raise, the petitioner stated that though order of the Malaysian Court has been passed that accounting procedure adopted by the petitioner was not proper but the exact amount recoverable by Union of India has not been determined and the dispute as to what would be the exact amount, recoverable by Union of India is yet to be resolved and has to be referred to the Arbitral Tribunal.

8. I consider that the dispute stated by the petitioner in fact is no dispute in the eyes of law and such a dispute cannot be raised by the petitioner unless the petitioner disputed the quantum of the amount sought to be recovered by Union of India. The petitioner has not disputed the quantum of amount, but the right to recover the amount, which has already been adjudicated. Even otherwise, Clause 34.1 of the Arbitration agreement provides that where disputes/differences arise, the first effort has to be made for amicable settlement and if the amicable settlement fails,

within 21 days then it has to be submitted to a sole expert (clause 34.2). Whether the amount sought to be recovered by Union of India was in accordance with the PTRR as ruled by Malaysian Court or not, can be referred to a Chartered Accountant or an accounting expert. The petitioner had not written to Union of India as to what would be the amount recoverable under the contract i.e. short-paid by the petitioner in view of the judgment, neither the petitioner sought appointment of an expert nor asked the respondent to resolve the differences regarding quantum of the amount amicably. In view of the steps as provided under Article 34 of the Contract not having been taken by the petitioner, the petitioner cannot invoke arbitration Clause and cannot make an application u/s 9.

9. It is not even the case of the petitioner in this petition that Union of India was trying to recover more amount than what is due. I also consider that, Section 9 of the Arbitration & Conciliation Act, 1996 is not a last refuge Section available to those parties, who choose that the arbitration shall be held on a foreign land in accordance with the foreign laws and shall not be governed by a procedure as prevailing in India, so as and when they fail in the country where arbitration takes place and whose laws are applicable, they rush to India and take help of Section 9 as a residual Section as if Courts in India were to give refuge to the parties who fail in foreign courts.

I, therefore, consider that this petition u/s 9 seeking injunction against Union of India against implementing the decision of Malaysian Court is not maintainable. Section 9 is not meant to frustrate the gains of a foreign Court''s judgments. The petition is hereby dismissed.