South East Asia Marine Engineering And ... vs Oil India Limited on 11 May, 2020

Equivalent citations: AIR 2020 SUPREME COURT 2323, AIRONLINE 2020 SC 552

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Bench: Ajay Rastogi, Mohan M. Shantanagoudar, N.V. Ramana

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 673 OF 2012

SOUTH EAST ASIA MARINE ENGINEERING AND CONSTRUCTIONS LTD. (SEAMEC LTD.) ...APPELLANT

VERSUS

OIL INDIA LIMITED …RESPONDENT

With

CIVIL APPEAL NO. 900 OF 2012

OIL INDIA LIMITED ...APPELLANT

VERSUS

SOUTH EAST ASIA MARINE ENGINEERING AND CONSTRUCTIONS LTD. (SEAMEC LTD.) …RESPONDENT

JUDGMENT

N. V. RAMANA, J.

1. The present appeal arises out of impugned judgment and order dated 13.12.2007 in Arbitration Appeal No. 11 of 2006 passed by the Gauhati High Court, wherein the High Court allowed the appeal

preferred by the Respondent under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the "Arbitration Act"), and set aside the arbitral award dated 19.12.2003.

2. Brief facts necessary for the disposal of this case are as follows: appellant was awarded the work order dated 20.07.1995 pursuant to a tender floated by the Respondent in 1994. The contract agreement was for the purpose of well drilling and other auxiliary operations in Assam, and the same was effectuated from 05.06.1996. Although, the contract was initially only for a period of two years, the same was extended for two successive periods of one year each by mutual agreement, and finally the contract expired on 04.10.2000.

3. During the subsistence of the contract, the prices of High□Speed Diesel ("HSD"), one of the essential materials for carrying out the drilling operations, increased. Appellant raised a claim that increase in the price of HSD, an essential component for carrying out the contract triggered the "change in law" clause under the contract (i.e., Clause 23) and the Respondent became liable to reimburse them for the same. When the Respondent kept on rejecting the claim, the Appellant eventually invoked the arbitration clause vide letter dated 01.03.1999. The dispute was referred to an Arbitral Tribunal comprising of three arbitrators.

4. On 19.12.2003, the Arbitral Tribunal issued the award in A.P No. 8 of 1999. The majority opinion allowed the claim of the Appellant and awarded a sum of Rs. 98,89,564.33 with interest @10% per annum from the date of the award till the recovery of award money. The amount was subsequently revised to Rs. 1,32,32,126.36 on 11.03.2005. The Arbitral Tribunal held that while an increase in HSD price through a circular issued under the authority of State or Union is not a "law" in the literal sense, but has the "force of law" and thus falls within the ambit of Clause 23. On the other hand, the minority held that the executive orders do not come within the ambit of Clause 23 of the Contract.

5. Aggrieved by the award, the Respondent challenged the same under Section 34 of the Arbitration Act before the District Judge. On 04.07.2006, the learned District Judge, upheld the award and held that the findings of the tribunal were not without basis or against the public policy of India or patently illegal and did not warrant judicial interference.

6. The Respondent challenged the order of the District Judge by filing an appeal under Section 37 of the Arbitration Act, before the High Court. By the impugned judgment, the High Court, allowed the appeal and set aside the award passed by the Arbitral Tribunal.

7. The High Court held that the interpretation of the terms of the contract by the Arbitral Tribunal is erroneous and is against the public policy of India. On the scope of judicial review under Section 37 of the Arbitration Act, the High Court held that the Court had the power to set aside the award as it was passed overlooking the terms and conditions of the contract. Aggrieved by the same, the appellant has filed this present appeal by the way of special leave petition against the impugned judgment.

8. Learned Counsel for the Appellant assailing the impugned order contends that a. The High Court has imparted its own personal view as to the intent for inclusion of Clause 23 and has sat in appeal

over the award of the Arbitral Tribunal. The construction of Clause 23, he submitted, is a matter of interpretation and has been correctly interpreted by the Arbitral Tribunal based on the authorities cited before it. b. If two views are possible on a question of law, the High Court cannot substitute one view and deference should be given to the plausible view of the Arbitral Tribunal. Learned counsel has relied upon a judgment of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [(2006) 11 SCC 181] to support his contention. c. The question of law decided by the Arbitral Tribunal is beyond judicial review and thus the High Court could not have interfered with a reasoned award which was neither against public policy of India nor patently illegal.

9. In response, the learned counsel for the Respondent, supporting the findings of the High Court, submits that a. the award passed by the Arbitral Tribunal is contrary to the terms of the contract and essentially re-writes the contract. The Arbitral Tribunal has to adjudicate the dispute within the four corners of the contract and thus awarding additional reimbursement not contemplated under Clause 23 is perverse and patently illegal. b. Overlooking the terms and conditions of a contract is violative of Section 28 of the Arbitration Act and thus the tribunal has exceeded its jurisdiction.

c. This is not a case where the Arbitral Tribunal accepted one interpretation of the terms of the contract where two interpretations were possible. Findings of the Tribunal are perverse and unreasonable as the Tribunal did not consider the contract as a whole and failed to follow the cardinal principle of interpretation of contract. d. The Arbitral Tribunal has re-written the contract in the guise of interpretation and such interpretation being in conflict with the terms of the contract, is in conflict with the public policy of India.

10. We have heard the learned counsels for the parties and perused the materials on record.

11. In order to answer the questions raised in this appeal we first need to delve into the ambit and scope of the court's jurisdiction under Section 34 of the Arbitration Act. Section 34 of the Arbitration Act provides as under –

34. Application for setting aside arbitral award. — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

12. It is a settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the Courts. Recently, this Court in Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd. [2019 SCC Online SC 1656] laid down the scope of such interference. This Court observed as follows-"26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and

cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.

Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated." (emphasis supplied)

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies (supra) observed as under□"27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act." (emphasis supplied)

14. However, the question in the present case is whether the interpretation provided to the contract in the award of the Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Arbitration Act?

15. In the present case, respondent has argued that the view taken by the Arbitral Tribunal was not even a possible interpretation, therefore the award being unreasonable and unfair suffers from perversity. Hence, the respondent has pleaded that the award ought to be set aside. In this context, we may state that usually the Court is not required to examine the merits of the interpretation provided in the award by the arbitrator, if it comes to a conclusion that such an interpretation was reasonably possible.

16. We begin by looking at the clause, i.e Clause 23 which is extracted below:

> SUBSEQUENTLY ENACTED LAWS: □Subsequent to the date of price of Bid Opening if there is a change in or enactment of any law or interpretation of existing law, which results in additional cost/reduction in cost to Contractor on account of the operation under the Contract, the Company/Contractor shall reimburse/pay Contractor/Company for such additional/reduced cost actually incurred.

17. The Arbitral Tribunal held that this clause must be liberally construed and any circular of the Government of India would amount to a change in law. The Arbitral Tribunal observed:

> "According to Rule of Construction of any document harmonious approach should be made reading or taking the document as a whole and exclusion should not be readily inferred unless it is clearly stated in the particular clause of the document. This is

according to Rule of Interpretation. A consistent interpretation should be given with a view to smooth working of the system, which the document purports to regulate. The word, which makes it inconsistent or unworkable, should be avoided. This is known as beneficial construction and a construction should be made which suppress the mischief and advance the remedies. So, the increase in the operational cost due to enhanced price of the diesel is one of the subject matters of the contract as enshrined in Cl. 23. It may be said that Cl. 23 may be termed as ‘‘Habendum Clause”. In the deed of the contract containing various granting clauses and the habendum signifying the intention of, the grantor.

That Cl. 23 requires liberal interpretation for interpreting the expression ‘law’ or change in law etc. will also be evident from the facts that the respondents Oil India Ltd. through its witness Mr. Pasrija has clearly stated that the change in diesel price or any other oil price was never done and by way of any statutory enactment either by Parliament or by State Legislature So, it is clear that at the time when the Cl. 23 was incorporated in the agreement the Oil India Ltd. was very much aware that change in oil price was never made by any Statutory Legislation but only by virtue of Government Order, Resolution, Instruction, as the case may be, on accepting that a condition of the appropriate committee namely O.P.C. it is also clear to apply when there is change in oil price, here HSD, by the Government and its statutory authority as enacted in the above without resorting any statutory enactment. Therefore that the interpretation of expression ‘law’ or change in law etc. requires this extended meaning to include the statutory law, or any order, instruction and resolution issued by the Central Government in its Ministry of Petroleum and Natural Gas.” The majority award utilizes ‘liberal interpretation rule’ to construe the contract, so that the price escalation of HSD could be brought under the Clause 23 of the contract. Further the Arbitral Tribunal identifies the aforesaid clause to be a ‘Habendum Clause’, wherein the rights granted to the appellant are required to be construed broadly.

18. On the other hand, the High Court in the impugned order, interpreted the same clause as follows:

“27...I am of the firm view that clause 23 was inserted in the agreement to meet such uncertain and unforeseen eventualities and certainly not for revising a fixed rate of contract. I also find that both parties had agreed to keep “force majeure” clause in the agreement. Under this doctrine of commercial law, a contract agreement can be rescinded for acts of God, etc. Under clause 44.3 of the agreement, ‘force majeure” has been clearly defined, which includes acts and regulations of the Government to rescind a contract. In this way, clause 23 is very close and akin to the “force majeure clause”. Besides this, I may also declare that clause 23 is pari materia to the “doctrine of frustration and supervening impossibility”. In other words, under clause 23 rights and obligations of both the parties have been saved due to any change in the existing law or enactment of a new law or on the ground of new interpretation of the existing

> law. In my opinion, clause 23 must have been made a part of the agreement keeping in mind section 56 of the Indian Contract Act, 1872 sans any other intention."

19. The High Court, in its reasoning, suggests that Clause 23 is akin to a force majeure clause. We need to understand the utility and implications of a force majeure clause. Under Indian contract law, the consequences of a force majeure event are provided for under Section 56 of the Contract Act, which states that on the occurrence of an event which renders the performance impossible, the contract becomes void thereafter. Section 56 of the Contract Act stands as follows:

> 56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

20. When the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void. As held by this Court in Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44:

> "15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties." (emphasis supplied) However, there is no doubt that the parties may instead choose the consequences that would flow on the happening of an uncertain future event, under Section 32 of the Contract Act.

21. On the other hand, the common law at one point interpreted the consequence of such frustration to fall on the party who sustained loss before the frustrating event. The best example of such an interpretation can be seen in the line of cases which came to be known as 'coronation cases'. In Chandler v. Webster, [1904] 1 KB 493, Mr. Chandler rented space from Mr. Webster for viewing the coronation procession of King Edward VII to be held on 26 th June 1902. Mr. Chandler had paid part consideration for the same. However, due to the King falling ill, the coronation was postponed. As Mr. Webster insisted on payment of his consideration, the case was brought to the Court. The Court of Appeals rejected the claims of both Mr. Chandler as well as Mr. Webster. The essence of the ruling was that once frustration of contract happens, there cannot be any enforcement and the loss falls on the person who sustained it before the force majeure took place.

22. This formulation was over□ruled by the House of Lords in the historic decision of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., [1942] UKHL 4, wherein the harsh consequences of frustration as per the old doctrine was moderated by the introduction of the law of restitution. Interestingly, Lord Shaw in Cantiare San Rocco SA (Shipbuilding Company) v. Clyde Shipbuilding and Engineering Co. Ltd., [1924] AC 226, had observed that English law of leaving the loss to where it fell unless the contract provided otherwise was, he said, appropriate only 'among tricksters, gamblers and thieves'. The UK Parliament took notice of the aforesaid judgment and legislated Law Reform (Frustrated Contracts) Act, 1943.

23. In India, the Contract Act had already recognized the harsh consequences of such frustration to some extent and had provided for a limited mechanism to ameliorate the same under Section 65 of the Contract Act. Section 65 provides as under:

> 65. Obligation of person who has received advantage under void agreement, or contract that becomes void When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

The aforesaid clause provides the basis of restitution for 'failure of basis'. We are cognizant that the aforesaid provision addresses limited circumstances wherein an agreement is void ab initio or the contract becomes subsequently void.

24. Coming back to the case, the contract has explicitly recognized force majeure events in Clause 44.3 in the following manner:

> For purpose of this clause "Force Majeure" means an act of God, war, revolt, riots, strikes, bandh, fire, flood, sabotage, failure or destruction of roads, systems and acts and regulations of the Government of India and other clauses (but not due to employment problem of the contractor) beyond the reasonable control of the parties.
>
> Further, under Clause 22.23, the parties had agreed for a payment of force majeure rate to tide over any force majeure event, which is temporary in nature.

25. Having regards to the law discussed herein, we do not subscribe to either the reasons provided by the Arbitral Tribunal or the High Court. Although, the Arbitral Tribunal correctly held that a contract needs to be interpreted taking into consideration all the clauses of the contract, it failed to apply the same standard while interpreting Clause 23 of the Contract.

26. We also do not completely subscribe to the reasoning of the High Court holding that Clause 23 was inserted in furtherance of the doctrine of frustration. Rather, under Indian contract law, the effect of the doctrine of frustration is that it discharges all the parties from future obligations. In order to mitigate the harsh consequences of frustration and to uphold the sanctity of the contract, the parties with their commercial wisdom, chose to mitigate the risk under Clause 23 of the contract.

27. Our attention was drawn to Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited, (2010) 11 SCC 296, where this Court interpreted an indemnity clause and found that an additional tax burden could be recovered under such clause. Based on an appreciation of the evidence, the Court ruled that additional tax burden could be recovered under the clause as such an interpretation was a plausible view that a reasonable person could take and accordingly sustained the award. However, we are of the opinion that the aforesaid case and ratio may not be applicable herein as the evidence on record does not suggest that the parties had agreed to a broad interpretation to the clause in question.

28. In this context, the interpretation of Clause 23 of the Contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

29. The contract was entered into between the parties in furtherance of a tender issued by the Respondent herein. After considering the tender bids, the Appellant issued a Letter of Intent. In furtherance of the Letter of Intent, the contract (Contract No. CCO/FC/0040/95) was for drilling oil wells and auxiliary operations. It is important to note that the contract price was payable to the 'contractor' for full and proper performance of its contractual obligations. Further, Clauses 14.7 and 14.11 of the Contract states that the rates, terms and conditions were to be in force until the completion or abandonment of the last well being drilled.

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.

32. The other contractual terms also suggest that the interpretation of the clause, as suggested by the Arbitral Tribunal, is perverse. For instance, Item 1 of List II (Consumables) of Exhibit C (Consolidated Statement of Equipment and Services Furnished by Contractor or Operator for the Onshore Rig Operation), indicates that fuel would be supplied by the contactor, at his expense. The existence of such a clause shows that the interpretation of the contract by the Arbitral Tribunal is not a possible interpretation of the contract.

33. For the aforesaid reasons, we are not inclined to interfere with the impugned judgment and order of the High Court setting aside the award. The appeal is accordingly dismissed. There shall be no order as to costs.

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34. In view of the judgment pronounced in C.A. No. 673 of 2012, the aforesaid matter is disposed of in the aforesaid terms.

.....J. (N.V. RAMANA) .....J. (MOHAN M. SHANTANAGOUDAR) .....J. (AJAY RASTOGI) NEW DELHI;

MAY 11, 2020.