Ongc Ltd vs Garware Shipping Corpn. Ltd on 14 November, 2007

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  5210 of 2007

PETITIONER:
ONGC Ltd.

RESPONDENT:
Garware Shipping Corpn. Ltd.

DATE OF JUDGMENT: 14/11/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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J U D G M E N T (Arising out of SLP (C) No.15036 of 2005) Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Bombay High Court dealing with an appeal questioning the correctness of the order passed by a learned Single Judge who dismissed the appellant s appeal under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) questioning the Arbitrator s award.

3. The controversy lies within a very narrow compass.

4. The factual background is almost undisputed and is essentially as follows:

> The appellant required off shore vessels (in short OSVs) inter-alia, for supplying material from its onshore bases to its offshore installations. After initially meeting its requirements by chartering foreign OSVs, the appellant decided to develop a fleet of Indian Flag vessels. Various Indian companies including the respondent and the Shipping Corporation of India (in short SCI) acquired OSVs, with a view to chartering them to the appellant. The respondent acquired five vessels- (named Garware I to Garware V) which were handed over to the appellant in the months of November and December, 1983 and January and March, 1984.

The dispute pertains to the cost of repairs and maintenance of the respondent s OSVs for the eleventh to the sixteenth year of their operation. Even though there is no dispute regarding the first two terms of five years each, reference to the manner in which the rates for the same were arrived at is necessary. A working group under the Director General of Shipping was constituted by the Ministry of Petroleum to determine the floor day rate in respect of the vessels keeping two objects in mind, i.e. (a) long term availability of the OSV s for the appellant and (b) economic viability to ensure the respondent s survival in the business. The report was submitted by the working group on 8.3.1984 suggesting the day rate which comprised of two components, i.e. (a) capital recovery factor and (b) operating expenses. Contracts were accordingly entered into for the first five year period beginning from 1983-84. The Government of India by an order dated 18.8.1984 approved the report in certain respects only. There is no dispute between the parties regarding the payments of operating costs for the first five years. The charter was extended by another five years. A committee presided over by Dr. A.N.Saxena was formed to review the operating costs payable for the extended term. The Government approved the report of the Committee on

5.8.1993. There is no dispute between the parties in respect of the payments regarding the second five year period also.

5. The present dispute relates to the period beyond ten years so far as relates to the basis for computing the rates for repairs and maintenance. By an order dated 29.4.1993 the charter was extended by a further six years. By an order dated 16.3.1995 and as modified by an order dated 14.9.1995, a committee also presided over by Dr. A.N. Saxena was formed to recommend a suitable formula for the charter rate for the further extended period.

6. The committee submitted its report on 14.9.1997. This committee made recommendations inter-alia in respect of repair and maintenance expenses. The reference to arbitration was confined only to the payment of these repairs and maintenance expenses.

7. The Government of India by a letter dated 15.6.1998 accepted the recommendations of the second Dr. A.N. Saxena Committee only partially. Representations were thereafter made by the Indian Shipping Companies including the respondent for reconsideration of the recommendations. Pursuant thereto, the Government of India appointed a High Level Working Group presided over by Mr. Naresh Narad for considering the outstanding pending issues. The following recommendations of the High Power Committee are relevant:

Pending Issues.

1. Determination of year a) 1 to 5 years as per from which R & M payments already expenses are to be made. Settled cases actualized. Not to be reopened.

b) 6 to 10 years as per norms fixed by Dr. Saxena Committee of 1995-77.

c) 11 and 12 years to actualized on the basis of S.C.Is OSVs as recommended by Dr. Saxena Committee of 1995-77.

8. Disputes and differences arose between the appellant and inter-alia the respondent and others regarding the method to the adopted for calculating rates payable with reference to the eleventh to the sixteenth years. The respondent, therefore, filed Writ Petition No.2788 of 2001 for various reliefs.

9. By an order dated 7.12.2001 a Division Bench of the High Court recorded that the Writ Petition involved certain contractual disputes and that both the parties had agreed to refer the disputes raised in the Writ Petition to the sole arbitration of Mr. Justice M.L.Pendse (a former Judge of the Bombay High Court and the former Chief Justice of the Karnataka High Court). The order which is a short one, reads as follows:

> This writ petition involves certain contractual disputes relating to repairs and maintenance expenses etc. contract between the parties contain an arbitration clause. Both the parties agree to refer the disputes raised in the writ petition to sole arbitration of Justice M.L. Pendse (Retd.). Parties further agree that in case Justice Pendse is not in a position to take up the arbitration, Justice D.R. Rege (Retd.) shall be the arbitrator for the disputes between the parties. Arbitrator is requested to dispose of the arbitration as expeditiously as possible.
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> Petition is disposed of.

10. The learned arbitrator noted the respondent s submission that while calculating the payments due for the 11th to 16th years of the operation of the OSVs of the respondent, the appellant has overlooked the important fact that the OSVs of the respondent were taken on charter one year prior to the appellant obtaining the OSVs of the SCI. The respondent, therefore, contended that it was not correct that the corresponding years of SCI should be taken into account while determining amounts payable to the respondent. The learned arbitrator rejected the appellant s contention. He held that the committee nowhere recommended that irrespective of the period of induction, the years should be calculated of that of the SCI. He held that the respondent had not questioned the recommendations made by the High Level Working Group Report and the second Saxena Committee Report but merely contended that the mode of implementation thereof was incorrect. The arbitrator further observed and accepted that it was not open for him to go behind the report and the only area of enquiry is whether or not the report was correctly implemented. He came to the conclusion that on a close scrutiny of the reports, it was clear that neither of the committees examined whether the entitlement of each OSV is to be determined with reference to the years of actual user or only with reference to the calendar years. He also came to the conclusion that for the computation of repairs and maintenance expenses, it was necessary to take into consideration the years of operation and not the calendar years. It was held that the 12th year of operation of SCI s OSVs should be equated with the 13th year of operation of the OSVs of the respondent and so on. He also held that the interpretation suggested by the appellant would lead to great injustice. For instance, the OSV of the respondent would complete 11 years of operation while the OSVs of the SCI

would have operated only for 10 years.

11. Appellant questioned correctness of learned Arbitrator s conclusion by filing an appeal under Section 34 of the Act. Learned Single Judge dismissed the appeal holding that the conclusion was rational. An appeal filed was also dismissed.

12. According to the Division Bench, the learned arbitrator has considered and construed the reports while arriving at his conclusions. The entire dispute in the Writ Petition and before the learned arbitrator centered around this issue. The basis of the calculation adopted by the learned arbitrator was, not only logical but just and fair. The provisions of the said reports are not such that they required no interpretation and were merely to be applied without anything more. They called for a proper interpretation and construction before being applied to the facts of the case. The learned arbitrator did so.

13. The learned Single Judge held that undoubtedly there was no reference so far as the period of 13 to 16 years are concerned to the learned Arbitrator. But the prayers and the writ petitions clearly indicated that even for that period an issue was raised.

14. The Division Bench was of the view that even if the mode of calculation as applied by the arbitrator is not very appropriate in its effect, that could not be a ground for exercise of power under Section 34.

15. It noted that the reference in fact did not include the 13th to the 16th year to inspect that the arbitrator thought it improper to open the same. The High Court was of the view that a narrow technical reading of the Award cannot be made.

16. In support of the appeal, learned counsel for the appellant submitted that both learned Single Judge and the Division Bench failed to notice that the Award made by the Arbitrator was beyond the reference made. The arbitrator s view that the corresponding year could be a more appropriate factor is without foundation. The Bench mark of SCI in a particular year could not be departed from. There was no scope for shifting of figures. There is no rule of universal application that the cost of maintenance would be more when the vehicle becomes older. The normative figure for third period remained constant. The order of operation is the operating order and the financial order is defining. Though in the Writ Petition there was challenge to 13 to 16 years, a bare reading of the writ petition shows that it did not relate to the said period.

17. In response, learned counsel for the respondent submitted that two views are possible and, therefore, High Court s view should not have interfered. Arbitrator had accepted one view which is possible. No one says that it is de hors the Committee s report. It is a case where no interference is called for under Article 136 of the Constitution of India, 1950 (in short the Constitution) as substantive justice had been done, even though the order may be wrong on some parts.

18. Some of relevant parts of the Report of HLWG need to be noted:

> This High Level Working Group therefore, concludes that R&M expenses are to be actualized with effect from the 11th year of operation. It was further noted as follows:
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> This Committee was seized of the anomaly of lower rates being paid to those Owners who exercised greater management effectiveness by ensuring lower capital costs, lower interest rates and lower debt equity ratios.

19. The High Level Working Group, therefore, felt that though it is now not possible to correct any anomalies that may have crept in during the first twelve years, at least for the last term of four years the formula should reflect, as far as practicable, the principle of equal pay for equal work.

20. It is to be noted that the anomalies referred to in the subsequent paragraphs relate to the anomaly of lower rates being paid to owners to exercise greater management effectiveness by ensuring lower capital because of lower interest rate and lower rate equality ratio.

21. The recommendations of the HLWG are as follows:

1.

Determination of year from which R&M expenses are to be actualized a. 1st to 5th year as per payments already made.

Settled cases not to be reopened.

b. 6th to 10th year as per norms fixed by the Dr. Saxena Committee of 1995-97.

c. 11th and 12th years to be actualised on the basis of SCI s OSVs as recommended by the Dr. Saxena Committee of 1995-97.

5. Ceiling rates for A type Vessels only pertaining to the period beyond 12 years of operation a. From 1st to 5th year ceiling rates as already paid by ONGC.

b. From 6th to 1Oth year floor rates to be paid by ONGC.

c. For the 11th and 12th years ceiling rates to be paid by ONGC

6. Compensation in lieu of CRF a. The Operating Expenses (including Crew Salary & Wages covering agreements between INSA and MUI/ NUSI) as determined on the last day of the 12th year of operation for each vessel, (as per recommendations of the Dr. Saxena Committee and further modified by this Working Group) to be fixed and made applicable for the next four year i.e. from the 13th to the 16th year.

22. Operating costs are to be calculated on the basis of actual expenditure incurred by SCI in operating SCI s OSVs for full (first) one year period.

23. The committee observed that the actual expenses of SCI have not followed any uniform pattern. The scale to be suggested by the committee needed to be based on some normative amount for a base year over which an escalation of 9.5% per annum may be considered for a block of five years and for subsequent block of five year the base may be changed in the same pattern as that of victualling cost. The committee observed that the total cost of repair and maintenance for the block of five years, that is, 1988-89 to 1992-93 of SCI s OSVs is Rs.106.482 lacs per OSV as against the recommended amount of Rs.97.618 lacs given in the JS & FA committee report. The committee considered that the SCI s audited statement of R&M expenses may be considered as appropriate amount for reimbursement to Shipowners. The difference between SCI s audited R&M expenses and the normative amount was to be reimbursed to the Shipowners on receipt of SCI s audit statement from time to time in proportion to the BHP of the respective OSVs.

24. As the concept of reimbursement is the measure fixed, the year of operation can vary is an irrelevant factor. The repair and maintenance expenses have also been dealt by the Committee.

25. In accordance with the deliberation of the Committee on this at para 3.5.5, the committee recommended the normative R&M expenses of OSV of 5400 BHP for the year 1988-89 to 1993-94 to be same as given in the JS&FA Committee report. The R&M expenses for the subsequent years were recommended at the rate of 9.5% escalation per annum on the expense of the year 1993-94 upto 1998-99 and the amount for of subsequent years @ 9.5% escalation per annum. The difference between the recommended normative amount given and the actual R&M expense of SCI s OSVs of 5400 BHP (Audited statements) were to be reimbursed on year to year basis after receipt of the audited statement from SCI additional reimbursement of corresponding overhead expenses in the ratio of 15:85 of the differential amount will also be made. The differential amounts for other OSVs were recommended to be calculated pro rata basis of the BHP of the respective OSVs w.r.t. above differential amount for OSVs of 5400 BHP.

26. Though there was some controversy as to whether the year referred to is the financial year as reimbursement was on year to year basis after receipt of the auditor s statement from SCI the norms obviously relate to financial year.

27. A few factual aspects need to be noted. So far as Essar is concerned, the year is same as SCI. In case of Bann, there was one time settlement and it is only JESCO which challenged the report. SCI s first year of operation was 1984-85. The figures for that year provide some material for rationalization. It is to be noted that stress is on re-imbursement. Thus the measure is fixed and, therefore, year of operation is immaterial. It needs no reiteration that claim was for 11th and 12th years and the award also covered from 13th to 16th year. It is also to be noted that the HLWG referred to certain anomalies. But they related to the previous years. The Bench Mark is the figure of SCI of particular year. So when entry to business was made is irrelevant.

28. There is no proposition that the courts could be slow to interfere with the arbitrator s Award, even if the conclusions are perverse, and even when the very basis of the Arbitrator s award is wrong. In any case this is a case where interference is warranted and we set aside the norms prescribed by the Arbitrator as upheld by the learned Single Judge and the Division Bench.

29. The appeal is allowed to the aforesaid extent with no order as to costs.