

Bench: J

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 21 OF 2009

Dolphin Drilling Ltd. ....Petitioner Versus

Oil and Natural Gas Corporation Ltd. ..Respondent O R D E R

AFTAB ALAM, J

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for and on behalf of the respondent and to refer the dispute(s) between the parties for arbitration. The applicant and the respondent entered into an agreement dated October 17, 2003 for "Charter Hire of Deepwater Drilling Rig DP-Drill Ship `Belford Dolphin' along with Services on Integrated Basis". In terms of the agreement, the applicant was to carry out drilling operations for the respondent in the offshore waters of India as allocated by the respondent. Clause 28 of the agreement contained the arbitration clause. According to the applicant, though the period of the agreement came to an end on February 13, 2007, on being called upon by the respondent, it continued to provide further services till April 10, 2007 for which it was entitled to be paid additionally on comparable rates under the agreement.

2. The applicant makes the grievance that a number of its invoices were not paid or only paid in part by the respondent and on demands made by it the respondent did not even give any satisfactory reply for non-payment/part-payment of those invoices. Failing to get any positive response from the respondent despite demands and reminders, the applicant was left with no option but to invoke the arbitration clause under the agreement. It accordingly, addressed a notice to the respondent on January 29, 2008 invoking arbitration on the disputes broadly set-out in the notice and nominating Mr. Justice S. P. Bharucha, a former Chief Justice of India, as its arbitrator. The applicant further states that the respondent did not respond to the arbitration notice in the manner as provided in the arbitration clause in the agreement and hence, it was forced to move this application before the court.

3. Mr. Gaurav Agrawal, learned counsel appearing for the respondent, accepted the provision for arbitration vide clause 28 of the agreement dated October 17, 2003. He also acknowledged that the dispute(s) raised by the applicant in the arbitration notice dated January 29, 2008 arose under the agreement dated October 17, 2003 and was/were fully arbitrable. Nevertheless, he resisted the applicant's prayer to refer the dispute(s) raised in the arbitration notice dated January 29, 2008 to arbitration on the plea that the applicant had already invoked the arbitration clause albeit in connection with a different dispute earlier arising under the agreement.

4. Mr. Agrawal submitted that the remedy of arbitration under clause 28 of the agreement was a one-time measure and it could not be taken recourse to repeatedly even though the disputes may be different and unconnected to each other. Learned counsel further submitted that the arbitration was an expensive proposition and even though the respondent was liable to bear only half of the expenses, the financial burden cast by the arbitration proceedings in terms of fees for the learned arbitrators and counsel/solicitors and other incidental expenses was quite onerous. Hence, the arbitration clause in the agreement envisaged one, single arbitration for all disputes between the parties and not repeated arbitrations for different disputes arising between the parties at different times under the same agreement. The gist of the respondent's objection is contained in sub-paragraphs (d) and (e) of paragraph 4 of its counter affidavit which are reproduced below:

"(d) The respondent would further beg leave of this Hon'ble Court to submit that in the List of Dates and in the Arbitration Application, the Petitioner did not refer to the fact that the petitioner had already invoked clause 28 of the agreement in 2004. Pursuant to the said request for arbitration, an Arbitration Tribunal

consisting of Hon'ble Mr. Justice B.P.

Sharaf (Retd.) Hon'ble Mr. Justice S.C. Pratap and Hon'ble Mr. Justice A.K. Dutta (Retd.) was constituted in the year 2005. The said arbitration has continued for the last more than four years. Needless to mention, the Respondent has incurred heavy expenses in the arbitration which is at the concluding stage, i.e. arguments have been completed and written submissions to be filed.

(e) In view of the aforesaid invocation of Clause 28 by the Petitioner, the notice issued by the Petitioner on 29.01.2008 purportedly invoking the arbitration clause once again and raising further disputes was not permissible under the contract. It is most respectfully submitted that there cannot be repeated arbitrators in relation to the very same contract. The arbitration agreement cannot be interpreted to imply that for every dispute under the contract, the parties can invoke a fresh arbitration. As per the contract, all disputes should have been referred to arbitration at one go."

5. The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time consuming means for resolution of disputes. But on that basis it is difficult to read the arbitration clause in the agreement as suggested by the respondent. Clause 28 of the agreement dated October 17, 2003 reads as follows: "28. SETTLEMENT OF DISPUTES

28.1 Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement or matter whatsoever shall,

before or after completion or abandonment of

work or during extended period, hereafter arises between the parties hereto or respective representative or assignees concerning with the

construction, meaning, operation or effect of

the Agreement or out of or relating to the

Agreement or breach thereof shall be referred to arbitration.

28.2 The reference to arbitration shall be to an arbitral tribunal consisting of three arbitrators. Each party shall appoint one

arbitrator and the two appointed arbitrators

shall appoint the third arbitrator, who shall

act as the presiding arbitrator.

28.3 The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating all disputes to be

decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to

appoint its own arbitrator within 30 days. If the other party fails to appoint its arbitrator

within stipulated period or the two arbitrators

fail to appoint the third arbitrator, Chief

Justice of High Court of competent jurisdiction

or Chief Justice of India as the case may be or

any person or institution designated by them

shall appoint the Second Arbitrator and/or the

Presiding arbitrator as the case may be.

xxx xxx xxx xxx

xxx xxx xxx xxx"

6. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form clause 28 of the agreement cannot be said to be a one time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

7. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time -barred etc. and for that reason alone being rendered non- arbitrable.

8. For the reasons aforesaid I am unable to sustain the objection raised on behalf of the respondent.

9. In the result, the application is allowed. The applicant has nominated Justice S.P. Bharucha, a former Chief Justice of India, as its arbitrator. Justice Mrs. Sujata V. Manohar, a former judge of this court, is appointed arbitrator on behalf of the respondent, subject to her consent and on such terms as she may deem fit and proper.

10. The Registry is directed to communicate this order to the learned Arbitrator to enable her to enter upon the reference and decide the matter as expeditiously as practicable.

11. The petition stands disposed of with no order as to costs. ....

J

(AFTAB ALAM)

New Delhi,

February 17, 2010.