

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2673 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

OIL AND NATURAL GAS CORP.LTD.

Versus

SAMARTH BUILDERS

Appearance:

1. Special Civil Application No. 2673 of 2004
M/S TRIVEDI & GUPTA for Petitioner No. 1-2
NANAVATI & NANAVATI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 30/09/2004

ORAL JUDGEMENT

1. Rule. Mr.Bhatt, learned Counsel appears for respondents and waives service of rule.

2. The short facts of the case appear to be that a contract was entered into by the petitioner with the respondent company for construction of development work on turnkey basis for a lumpsum amount of Rs.9,75,00,000/=. It appears that pending the contract, the payments were being made by the petitioner to the respondents and ultimately at the time of final payment the deed of settlement was entered into on 18th March, 1998 between the petitioner and the respondents, whereby the respondents accepted the net amount of Rs.19,23,355.19 as full and final settlement. It is the case of the petitioners that the said full and final settlement was under the free will. It is the case of the respondent that the said full and final settlement came to be entered into by the respondent under the coercion and duress. The respondent thereafter raised the dispute and as the matter was not referred to the arbitrator, the respondent preferred petition under Arbitration Act, 1996 being Case No.22/1999 before the Hon'ble the Chief Justice of this Court. In the said petition, the contention was raised regarding maintainability of the reference by the petitioner, who was respondent 2. However, as per the order dated 1.9.2000 the Hon'ble the Chief Justice observed as under:

"After hearing the learned counsel for the parties, I find that the preliminary objection raised stands squarely answered against the corporation. In the case of Rai Construction Private Limited (supra), by making a reference to the Supreme court decision cited at the Bar, I have held that provisions of section 16 of the Act empower the arbitrator to go into the question of his jurisdiction and existence of arbitration agreement. In this case, the question raised is whether the signing of settlement deed by the petitioner would debar him from invoking the arbitration clause. This question would require inquiry into the facts and consideration of the documents. This is a disputed question of fact and law which can be referred to arbitrator.

For the foregoing reasons, I overrule the preliminary objection raised on behalf of the corporation to the application made by the petitioner seeking reference to the arbitrator."

3. Therefore, it appears that it was found while

making reference that the question as to whether signing of the settlement by the petitioner would debar him from invoking arbitration clause, would require inquiry into the facts and consideration of the documents and it was observed that this disputed question of facts and law can be referred to the arbitrator and preliminary objection raised on behalf of the petitioner herein who was respondent in the aforesaid proceedings was overruled. Thereafter, it appears that the matter was further taken up by the Arbitrator, Mr. Justice D.V. Patel (Rtd.) (who shall now be referred to "Arbitrator" for the sake of convenience). Before the arbitrator, the petitioner herein submitted the application for raising preliminary objection and it was prayed that as per the petitioner herein the subject matter/claims are not maintainable and the same do not deserve to be entertained and the learned Arbitrator does not have the jurisdiction to arbitrate and to determine the same as the arbitration clause is exhausted and the prayer was made to declare accordingly in the said application. It appears that the learned Arbitrator thereafter heard the said application and passed the order on 24.10.2003, whereby the learned Arbitrator found that the agreement of settlement is void and the contractor is entitled to proceed with the reference. However, the learned Arbitrator also observed that as the deed of settlement dated 18.3.1998 is found to be void, the issue of coercion is not considered. It is under these circumstances the petitioner has approached this Court by preferring this petition, challenging the order of the learned Arbitrator dated 24.10.2003.

4. The learned Sr. Counsel, Mr. K.B. Trivedi appearing for the petitioner raised mainly two contentions; one was that the learned Arbitrator could not have decided the question as to whether the agreement is void or not, because the same was not the subject matter and Mr. Trivedi secondly contended that as such learned Arbitrator would not have any jurisdiction to decide the claim because whether the settlement is under coercion or under free will would be a question which would fall within the jurisdiction of Civil Court and not within the jurisdiction of the learned Arbitrator. He alternatively submitted that even if the said contention of the jurisdiction is kept aside, then also it was for the learned Arbitrator to decide first the preliminary question as to whether the agreement of settlement dated 18.3.1998 is by free will or by coercion and unless and until the said question is decided, learned Arbitrator would not have jurisdiction to proceed with the arbitration on the merits of the claim. He, therefore,

submitted that the order passed by the learned Arbitrator deserves to be quashed and set aside and appropriate directions deserve to be granted. Mr.Trivedi has relied upon the decision of the Apex Court in the case of "Nathani Steels Ltd. v. Associated Constructions" reported in 1995(Spl.) (3) SCC, 324 and the decision of Bombay High Court in the case of "Lloyds Industries Ltd. v. Oil & Natural Gas Corporation Ltd.", reported in AIR 1997 SC, 337.

5. On behalf of respondent, it has been submitted by Mr.Shelat, learned Sr. Counsel appearing with Mr.Bhatt, learned Counsel, that as such the petitioner has alternative efficacious remedy of preferring appeal and it was submitted that even if this Court finds that the question of voidity of the settlement should not have been decided, then in that case the matter may be remanded to the learned Arbitrator for deciding the issue. Mr.Shelat also submitted that as such whether the settlement is under free will or under coercion is a question which can be decided by the learned Arbitrator and it would be incorrect to conclude that there is no jurisdiction with the learned Arbitrator to decide such question, more particularly when the reference is made by the Hon'ble the Chief Justice in the proceedings of Arbitration Petition No.22/1999 as per the order dated 1.9.2000. Mr.Shelat for supporting his contention also relied upon the decision of the Full Bench of this Court, reported in 24 (2) GLR, 1146.

6. Therefore, the first question which may be required to be considered by this Court would be as to whether the learned Arbitrator will have the jurisdiction to decide the preliminary issue and if yes, on what aspects and the scope and ambit thereof. So far as the question of referability of dispute to the arbitrator is concerned, in my view, as it has been expressly overruled in the order dated 1.9.2000 passed by the Hon'ble the Chief Justice in arbitration petition No.22/1999, the petitioner cannot raise the contention that the dispute is not referable to the arbitrator. It is true that the power of the Hon'ble the Chief Justice under the Arbitration Act, 1996 while making reference is having administrative character, but it was, for the petitioners at the relevant point of time, to challenge the decision, if they were aggrieved by the reference made as per the order dated 1.9.2000 in the proceedings of Arbitration Petition No.22/1999. Further, in view of the decision of Full Bench of this Court in the case of "New India Assurance Co. Ltd. v Hanjer Fibres Ltd.", reported in 2003(2) GLR, 1146, it cannot be said that such dispute

was not referable to the Arbitrator and the Arbitrator would have no jurisdiction to decide such dispute.

7. Once a reference is made as per above referred order passed in Arbitration Petition No.22/1999 and once the petitioner having not challenged the said order of the Hon'ble Chief Justice, it cannot be said that only Civil Court will have jurisdiction and not the learned Arbitrator to decide as to whether the deed of settlement was under free will or under coercion. As such Arbitration Act, 1996 provides for a special mode/mechanism for adjudication of the disputes pertaining to contracts containing Arbitration clause. Once a reference is made all questions arising therefrom directly and incidental thereto would fall within the jurisdiction of the learned Arbitrator subject to the provisions of the said Act. Therefore, the said contention raised on behalf of the petitioner cannot be accepted.

8. The contention raised on behalf of the petitioner that the learned Arbitrator could not have decided that the settlement is void, deserves consideration. The perusal of the impugned order passed by the learned Arbitrator shows that at para 13 it has been observed that for maintenance of any contract, there must be consideration and if there is no consideration the contract would be void. It has been further observed that the payment made as per the agreement cannot be said as consideration and, therefore, it is found that the agreement is void. In my view, once there was a contract, the said contract is an independent contract and it cannot be read with the deed of settlement as observed by the learned Arbitrator. The agreement of settlement or deed of settlement dated 18.3.1988 expressly provides as under:

" Whereas the parties hereto set hands on
the above settlement of deeds in consideration
whereof receiving full and final settlement of
the total amount pending against ONGC including
extra items carried out. The aforesaid contract
shall be deemed to have been closed and both the
parties are hereby discharged of all the
obligations towards the amount due payable by
ONGC to M/s.Samarth Builders, Surat under the
aforesaid contract for all times to come.

Whereas M/s.Samarth Builders, Surat have
settled the dues on their sub-contractors, that
the builder hereby indemnify ONGC that in case

there is any claim from any of the sub-contractors to ONGC, whereas the builder will not be entitled to any interest on the said amount which is being paid under this memorandum of understanding."

9. The aforesaid shows that the payment is being made under the memorandum of understanding. It is not the case of the respondent that the amount of Rs.19,23,355.19 is not paid, but the learned Arbitrator has proceeded on the basis that the said amount is forming part of the original contract and there is no consideration for such purpose. I find that when in a deed of settlement there are rights and claims based on the receipt of the payment as per the settlement and when the payment is actually received, it cannot be said that the contract or deed of settlement would be void. Further, whether the deed of settlement is void or not, possibly was not the question which is referred to the Arbitrator. It may be that while deciding the question as to whether the deed of settlement is under free will or coercion, the incidental question may be decided by him, but such was not the question before the learned Arbitrator to rule as to whether the deed of settlement would fail for want of consideration and/or as the same is void. Therefore, the impugned order passed on the finding at para 13 and 14, in my view, cannot be sustained in the eye of law. Consequently, the order dated 24.10.2003 passed by the learned Arbitrator deserves to be quashed and set aside. However, as the learned Arbitrator has not decided the question of issue of coercion with reference to the agreement dated 18.3.1998, the learned Arbitrator may decide the question of issue of coercion with reference to the agreement dated 18.3.1998, in accordance with law.

10. In view of the above, the impugned order dated 24.10.2003 passed by the learned Arbitrator is quashed and set aside with the further observations that it will be open to the learned Arbitrator to decide the question regarding the preliminary issue after giving opportunity of hearing to both the sides. However, he shall be at liberty to decide such question of preliminary issue keeping in view the observations made by this Court hereinabove and in accordance with law.

11. The petition is allowed to the aforesaid extent. Rule made absolute accordingly. Considering facts and circumstances there shall be no order as to cost.

30.9.2004 (Jayant Patel, J.)

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