

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.3275 OF 2007

OIL AND NATURAL GAS COMMISSION

.....APPELLANT

VERSUS

GOWTHAMI SOLVENT OILS LTD.

.....RESPONDENT

O R D E R

1. The parties entered into an agreement, dated 19.05.1987, whereunder the appellant before this Court, namely, the Oil and Natural Gas Commission ('ONGC') was to supply natural gas for commercial purposes to the respondent. It is not a matter of dispute, that consequent upon the assertion made by the appellant, the parties were relegated to settle their differences under clause 15.01 of the agreement dated 19.05.1987, to an arbitrator. In the first instance, Sri A. T. Thomas, who was also then an employee of the ONGC, was appointed as an arbitrator. The postulated period of arbitration under Clause 3 read with Item No.3 of the First Schedule of the Arbitration Act, 1940, was four months.

2. After the expiry of a period of four months, from the date of commencement of arbitration proceedings, O.P. No. 101 of 1992, came to be filed before the Subordinate Judge, Rajahmundry, in the

State of Andhra Pradesh. The aforesated Subordinate Judge, by an order dated 22.09.1993, declined the prayer of the ONGC (to extend the period of time) on merits, as also, on account of the fact, that the prayer had been rendered infructuous. In this behalf, the following observations were recorded by the Sub-ordinate Judge:-

"7. After filing of this petition the Arbitrator by name A. T. Thomas retired from service. A. T. Thomas was in the Service of the petitioner. After retirement the petitioner addressed Ex. B-1 letter dated 10-3-93 to the respondent stating that as A. T. Thomas has retired for the service of the ONGC. He can no more act as Arbitrator and that as such ONGC is contemplating to appoint another Arbitrator who will conduct Arbitrator proceedings de nove; and the respondent was requested to provide consent for the same. In view of the stand taken by the petitioner in EX.B-1 letter, undoubtedly this petition for extension of time for passing award by the arbitrator by name A.T. Thomas, has virtually become infructuous, Now, the petitioner counsel stated before the court that even after retirement, A.T. Thomas is willing to continue the Arbitration proceedings. When the petitioner is not interested in continuing A.T. Thomas as Arbitrator and expressed it's contemplation is Ex.B-1 to appoint another Arbitrator for conducting de novo arbitration proceedings, the willingness of A.T. Thomas to continue as arbitrator its (sic) absolutely irrelevant. It is not as if the arbitrator is the petitioner in this petition. This petition is filed by one of the parties to the agreement who addressed Ex.B-1 letter to the other party expressing that A.T. Thomas can no more act as Arbitrator as he retired from ONGC service.

8. Therefore, for all the above reasons, I find that this petition does not deserve any consideration as it lacks merits and as the petition has become infractions.

9. In the result, the petition is dismissed. No costs Typed to dictation, corrected and pronounced by me in Open Court, this the 22nd Day of September, 1993."

3. Finding itself in the aforesated predicament, the Oil and Natural Gas Commission, appointed one K.V. Chandran, as an

arbitrator. The aforesaid K.V. Chandran issued a notice to the parties on 07.03.1994, intimating the parties with reference to the initiation of arbitration proceedings. The appointment of the aforesaid K.V. Chandran as arbitrator, was assailed by the respondent herein, by preferring O.P.No.34/94 before the Subordinate Judge, Rajahmundry. The Subordinate Judge allowed the prayer of the respondent by observing as under:-

"10. It is also clear from the terms and conditions laid in Arbitration clause that there was no agreement between both parties for supplying second arbitrator in place of first arbitrator. In the absence of such specifies clause the second arbitrator cannot be supplied to the previous vacancy by unilateral decision of the first respondent. As per the findings in the above decision referred by the petitioner it is clear that this court empowered to appoint an arbitrator for deciding the dispute between both parties. The first respondent is at liberty to approach this court for the appointment of an arbitrator. Since the first respondent is not empowered to appoint the second respondent as a second arbitrator as per the arbitration clause, it is find that the appointment of the second respondent as sole arbitrator is null and void. Further for the foregoing reasons the agreement with regard to arbitration under clause 15 has come to an end because of the appointment of A.T Thomas as an arbitrator by the first respondent and as such power can be exercised only as per the arbitration clause. Exs. A3 to A5 are only a correspondence between both the parties to the present application which simply reveals about the appointment of arbitrators and as there is no dispute on the genuineness of Exs. A3 to A5."

4. A perusal of the aforesaid order dated 07.04.1994 reveals, that since the arbitration clause 15.01 did not contain a stipulation between the parties for supplying a second arbitrator (in place of the first arbitrator), it was not open to the ONGC to unilaterally appoint K.V. Chandran, as an arbitrator. Despite recording the aforesaid determination, the Subordinate Judge, vide order dated 07.04.1994, allowed the parties to approach a competent

Court for appointment of an arbitrator.

5. It is in furtherance of, and in consequence of the order passed by the Subordinate Judge, in O.P. No.34 of 1994, that O.P. No. 90 of 1994 was filed by the Oil and Natural Gas Commission, for appointment of an arbitrator. The instant prayer made in O.P. No.90 of 1994 was accepted by the Principal Senior Civil Judge, Rajahmundry, on 09.12.1998, and one S. Sundara Rao, retired District Judge, was appointed as an arbitrator.

6. Dissatisfied with the order dated 09.12.1998, whereby, S. Sundara Rao, retired District Judge, was appointed as an arbitrator, the respondent - Gowthami Solvent Oils Ltd. approached the High Court of Judicature of Andhra Pradesh, at Hyderabad (hereinafter referred as 'the High Court'), wherein the appointment was assailed. The High Court accepted the prayer made by the respondent, vide the impugned order dated 24.9.2004. The High Court recorded its conclusion as under:-

"In our view, firstly the matter had been concluded by O.P. Nos.101 of 1992 and 34 of 1994, secondly the conditions contemplated under Section 8 of the Act were not satisfied and thirdly there was no case before the trial court to appoint an arbitrator in terms of Section 8 of the Act. Therefore, the order of the trial court needs to be set aside."

The above determination rendered by the High Court has been assailed by the ONGC, through the instant Civil Appeal.

7. In our considered view, only one question arises for consideration before this Court, namely, whether the determination rendered by the High Court to the effect, that the conditions contemplated under Section 8 of the Arbitration Act, 1940, could be

considered as not having been satisfied, was justified in the facts and circumstances of the present case. Needless to mention, as is apparent from the extracts reproduced hereinabove, that the High Court had answered the aforesaid query in the negative. We are, however, of the view, that the High Court erred in recording its aforesaid conclusion. In this behalf, it is essential to extract hereunder Section 8 of the Arbitration Act, 1940, which is reproduced hereinbelow:

"8. Power of Court to appoint arbitrator or umpire.-

(1) In any of the following cases:-

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

8. In our considered view, Section 8(1)(b) of the Act is relevant to determine the present controversy. It is apparent from the factual position noticed herein above, that the first arbitrator, namely, A. T. Thomas had become incapable of acting as an arbitrator, on the expiry of four months, from the date of his appointment as arbitrator, in terms of Section 3 read with item No.3 of the First Schedule of the Arbitration Act, 1940. It is in the aforesaid circumstances, that the ONGC filed O.P. No.101 of 1992, claiming extension of eight months' time, so as to enable the first arbitrator - A.T. Thomas to complete arbitral proceedings. By an order dated 22.09.1993 (extracted above), the prayer for extension of time was declined on merits, as also, on account of the fact, that the same had been rendered infructuous. The order dated 22.09.1993 was not assailed by either of the parties. The same became final and binding between the parties. Consequent upon the passing of the order dated 22.09.1993, A. T. Thomas, was incapable of acting as arbitrator. It is, therefore, that we are satisfied, that Section 8 empowered the Court to appoint an arbitrator - S.Sundara Rao in place of the first arbitrator - A. T. Thomas, who had become incapable of acting as an arbitrator.

9. For the reasons recorded hereinabove, we are satisfied, that the impugned order passed by the High Court, deserves to be set aside. The same is accordingly hereby set aside.

10. The third arbitrator - S. Sundara Rao, retired District Judge, was appointed as arbitrator, by the Principal Senior Civil Judge, Rajahmundry, on 09.12.1998. We have been informed by the

learned counsel, that S.Sundara Rao, has since expired. In the above view of the matter, we consider it just and appropriate to appoint Sri A.M.L. Narasimha Rao, retired District and Sessions Judge, Flat No.301, Saisri Residency, 73-23-7/19, Nrarayanapuram, Rajamahendravaram - 533103, East Godavari District, Andhra Pradesh, as arbitrator, for the simple reason, that relegating the parties back to seek the appointment of an arbitrator afresh, under Section 8 of the Arbitration Act, 1940, may take further time, which may not be in the interest of justice, and also in the fitness of the matter. Ordered accordingly.

11. The instant appeal is disposed of, in the above terms.

.....CJI.
(JAGDISH SINGH KHEHAR)

.....J.
(Dr.D.Y.CHANDRACHUD)

NEW DELHI;
MARCH 30, 2017.

ITEM NO.101

COURT NO.1

SECTION XIIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G SCivil Appeal No(s).3275/2007

OIL AND NATURAL GAS COMMISSION

Appellant(s)

VERSUS

GOWTHAMI SOLVENT OILS LTD.

Respondent(s)

(With office report)

Date : 30/03/2017 This appeal was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUDFor Appellant(s) Mr. G. Ramakrishna Prasad, Adv.
Ms.Filza Moonis, Adv.For Respondent(s) Mr. Guntur Prabhakar, Adv.
Ms.Prerna Singh, Adv.Upon hearing the counsel the Court made the following
O R D E RThe instant appeal is disposed of in terms of the signed
order.(SATISH KUMAR YADAV)
AR-CUM-PS(RENUKA SADANA)
ASSISTANT REGISTRAR

(Signed order is placed on the file)