



SUPREME COURT REFUSES REFERENCE TO ARBITRATION IF A DISPUTE DOES NOT EXIST!

M/s ONGC Mangalore Petrochemicals Ltd. (“ONGC”) v. M/s ANS Constructions Ltd. & Anr. (“ANS Construction”) (February 7, 2018)

INTRODUCTION

ONGC awarded ANS Construction a contract (“**Contract**”) for construction works in the Mangalore SEZ. On September 21, 2012, post the completion of the contractual works, ANS Construction submitted a ‘no dues / no claim certificate’ (“**No Dues Certificate**”) endorsing that all bills and claims against the Contract were settled in full. On October 10, 2012, ONGC made a payment of INR 20.34 Crores against the final bill of ANS Construction.

Subsequently, on October 24, 2012, ANS Construction withdrew the No Dues Certificate, stating that it was coerced into issuing the No Dues Certificate by ONGC as a pre-condition for release of its legitimate dues for works previously done under the Contract. Then, on January 12, 2013, ANS Construction submitted a claim letter claiming INR 96.88 Crores from ONGC, for losses it purportedly incurred during execution of the Contract due to various delays. The said claims were denied by ONGC.

Aggrieved by this denial, ANS Construction initiated arbitration under the Contract and appointed its nominee arbitrator. ONGC denied the request for arbitration on the grounds that the same was untenable in law. Consequently, ANS Construction filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) before the High Court of Karnataka (“**the HC**”) for appointment of an arbitral tribunal. The HC was pleased to allow the petition and appoint the arbitrators. Being aggrieved by the decision of the HC, ONGC approached the Supreme Court (“**the SC**”) through the present appeal.

RULING

The only issue which arose for the SC’s consideration was whether a case had been made out by ANS Construction for referring the dispute to arbitration.

ONGC primarily contended that ANS Construction failed to demonstrate that there existed a dispute regarding its claim and that the No Dues Certificate was issued under duress. ANS Construction contended that a *prima facie* dispute existed, and in light of an arbitration clause in the Contract the High Court was right to allow the Section 11 petition.

The SC noted with approval the authorities cited by ONGC viz. *Union of India and Ors. v. Master Construction Co.*¹ and *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.*² to hold that when a party issued a full and final discharge receipt in respect of a contract, but subsequently alleged that such issuance was carried out under coercion or duress, the burden of proof to establish such coercion is upon party who asserts coercion. If the claim of coercion is established, the receipt would naturally be void. However, if the party is unable to establish the same, or the claim appears implausible, then the courts cannot refer the dispute to arbitration.

After reviewing the conduct of ANS Construction, the SC noted that there was nothing before it to suggest that the No Dues Certificate was issued under coercion or duress; it further noted that the certificate was given voluntarily and accordingly, the contract was discharged voluntarily. Hence, the SC was not satisfied that a *prima facie* case for a dispute was made out. Accordingly, the HC’s decision of referring parties to arbitration was set aside.

ANALYSIS

While Section 11 of the Act provides, if an arbitration agreement exists between parties, for assistance from courts for appointment of an arbitral tribunal to settle a dispute, it is interesting to note that through a line of judgments, it has

¹ (2011) 12 SCC 349.

² (2015) 2 SCC 424.

seemingly become settled law that the courts can examine the veracity of the purported dispute and, if it is found to be unsustainable, decide against referring the alleged dispute to arbitration.

While the courts under the un-amended provisions of the Act have taken the foregoing view, it remains to be seen if such a view is tenable under the amended provisions of the Act in as much as the court's scope in appointing an arbitral tribunal under the amended Act is confined to the examination of the existence of an arbitration agreement. Whether under the amended Act the courts will refer, provided an arbitration agreement exists, all disputes to arbitration (leaving it to the tribunal to examine the existence of dispute) or whether in the broader interest of parties, the courts will continue to also examine the existence of a genuine dispute, remains to be tested.

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