SUPREME COURT OF INDIA

Bharat Petroleum Corporation Limited

Vs.

Go Airlines (India) Limited

C.A.No.8227 of 2019

(R.Banumathi and A.S.Bhopana,JJ.,)

23.10.2019

JUDGMENT

R.Banumathi,J.,

SLP(C) No.5563 of 2012

1. Leave granted.

2. This appeal arises out of the judgment dated 07.12.2011 passed by the High Court of Bombay in Arbitration Appeal (Lodging) No.14228 of 2011 in and by which the High Court allowed the appeal filed by the respondent-Go Airlines by holding that the Arbitrator has the jurisdiction to consider the counter claim relating to CENVAT credit thereby setting aside the order passed by the Arbitrator.

3. Brief facts which led to filing of this appeal are as under- An Agreement for Aviation Fuel Supply dated 01.01.2007 was entered into between the parties under which the appellant-Bharat Petroleum Corporation Limited (BPCL) was to supply and sale of Aviation fuel to the respondent-Go Airlines (India) Limited. Initially, the agreement was entered into for the period from 01.01.2007 to 31.03.2009. By virtue of the second agreement dated 01.04.2009, another Aviation Fuel Supply Agreement was entered into between the appellant and the respondent for the period from 01.04.2009 to 31.03.2011. On 06.07.2009, the appellant issued letter to the respondent along with the statement giving details of invoices and requesting inter alia that the payment of outstanding dues as well as the interest amount of Rs.1.45 crores be released immediately. In reply to the said letter, the respondent by its e-mail dated 06.07.2009 stated inter alia that the outstanding interest was Rs.1.41 crores and not Rs.1.45 crores as mentioned in the said letter dated 06.07.2009. As the payments were not made, the appellant-BPCL put the respondent-Airlines on "Cash and Carry" terms on account of default in making payment for supply of fuel and interest on delayed payment.

4. Dispute arose between the parties when the appellant raised a claim for interest for the

delayed payments of the fuel supplied during the period from 01.04.2009 to 31.03.2011. The respondent did not accept any amount payable towards interest. Since the dispute in respect of the liability and payment of interest on delayed payment could not be resolved through mutual correspondence between the parties, the appellant vide its notice dated 25.03.2010 invoked arbitration clause i.e. Clause No.12 of the agreement dated 01.01.2007suggesting the name of Mrs. Justice (Retd.) Sujatha Manohar as the sole Arbitrator. The respondent vide its letter dated 27.04.2010 agreed to the dispute being referred for arbitration and accepted Mrs. Justice (Retd.) Sujatha Manohar as the Arbitrator. In the said letter, respondent stated that they are sure that the learned Arbitrator would be able to adjudicate the issues appropriately considering the respondent's various claims against appellant- BPCL. The appellant raised a claim for an aggregate sum of Rs.1,95,21,032/- with interest at the rate of 18% per annum from the date of presentation of the said claim till payment and/or realization.

5. The respondent filed its statement of defence denying the claims made by the appellant and it also raised two counter claims before the Arbitrator seeking an award directing the appellant to issue CENVAT invoices in favour of the respondent in respect of the Aviation fuel supplied under the agreement; in the alternative prayed for an award for a sum of Rs.11,60,44,466/- plus Rs.4,31,45,967/- being interest, as well as further interest on the principal amount computed at the rate of 15% per annum with effect from 01.10.2009 till payment. In its second claim, the respondent demanded damages for alleged imposition of "Cash and Credit" terms by the appellant with effect from 04.07.2009 when the appellant refused to supply the Aviation fuel to the respondent except on "Cash and Credit" terms.

6. The appellant filed its reply to the respondent's counter claim denying the claim of the respondent and inter alia stated that the counter claim filed by the respondent was beyond the scope and jurisdiction of the Arbitrator. It was stated that there was no dispute existing between the parties in respect of the alleged obligation to supply CENVAT invoices prior to commencement of the arbitration as it was never asked for by the respondent-Go Airlines. The appellant averred that the respondent had demanded CENVAT invoices from the appellant for the supplies made from the year 2005 onwards for the first time by its letter only on 05.05.2010 i.e. after the commencement of the present arbitration. The appellant averred that the respondent never asked for CENVAT invoices during the subsistence of the said agreement and that the counter claim raised by the respondent was an afterthought.

7. The appellant also filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 inter alia submitting that the counter claim filed by the respondent was beyond the scope and jurisdiction of the Arbitrator and that the respondent demanded the CENVAT invoices from the appellant for the supplies made from the year 2005 onwards for the first time only by letter dated 05.05.2010 i.e. after the commencement of the arbitration. The respondent filed its reply to the said application filed under Section 16 of the Act inter alia stating that the counter claim filed by the respondent was well within the scope and jurisdiction of the Arbitrator.

8. The learned Arbitrator vide order dated 18.04.2011 allowed the application filed by the appellant under Section 16 of the Act inter alia holding that the counter claim relating to CENVAT invoices is beyond the scope and jurisdiction of the Arbitrator and rejected that part of the counter claim. Insofar as the counter claim of the respondent praying for damages for the alleged imposition of "Cash and Credit", the learned Arbitrator held that the same is maintainable before the Arbitrator.

9. Being aggrieved by the order of the Arbitrator dated 18.04.2011, the respondent filed appeal before the High Court of Bombay under Section 37 of the Act. The High Court vide impugned judgment dated 07.02.2011 allowed the appeal preferred by the respondent and set aside the order of the Arbitrator dated 18.04.2011 by holding that the Arbitrator has jurisdiction to entertain the counter claim filed by the respondent relating to non-furnishing of invoices for CENVAT credit. Insofar as the observations of the Arbitrator, the High Court held that the learned Arbitrator may be well within the rights to reject the counter claim on merits after the parties put forth their case. The High Court however held that the rejection of the counter claim at the threshold, was not justified in view of the arbitration agreement between the parties. Being aggrieved, the appellant-BPCL has filed this appeal.

10. Mr. S. Guru Krishna kumar, learned Senior counsel appearing for the appellant has submitted that as per the arbitration clause in the agreement dated 01.01.2007, the Arbitrator could adjudicate disputes arising out of the terms and conditions of the agreement and the counter claim raised by the respondent in an arbitration proceeding does not arise from the terms and conditions of the contract/agreement under which the Arbitrator has been appointed. It was submitted that under Section 16 of the Act, the Arbitrator can refuse to entertain the said counter claim even at the time of filing of such counter claim on the ground that the same is beyond the jurisdiction and the findings arrived at by the learned Arbitrator is a possible view and the High Court ought not to have substituted its own view in the place of the finding arrived at by the Arbitrator. The learned Senior counsel further submitted that the levy of service tax on domestic air travel was introduced by the Finance Act, 2010 (w.e.f. 01.04.2010) and on economy class from 01.07.2010 and in any event, the need for issuance of CENVAT credit invoices arises only after 01.04.2010 and as such, the said counter claim could not be considered under Clause 7(ii) of the said agreement which expired on 31.03.2009. The learned Senior counsel further submitted that since the respondent was not liable to pay service tax on domestic air travel prior to 01.04.2010, there was no requirement for issuance of CENVAT credit invoices. It was submitted that at no point of time before the commencement of the arbitration proceeding, the respondent ever claimed furnishing of CENVAT invoices and the learned Arbitrator rightly held that the counter claim is beyond the specific reference to the Arbitral Tribunal and the High Court erred in substituting its view with the findings of the learned Arbitrator which is in contravention of the settled position.

11. Per contra, Mr. Ritin Rai, learned Senior counsel appearing for the respondent submitted that the counter claim raised by the respondent in respect to issuance of CENVAT invoices by the appellant falls within the terms of the agreement dated 01.01.2007 and the second agreement dated 01.04.2009 entered into between the appellant

and the respondent for supply of Aviation fuel. Taking us through the clauses of the agreement, the learned Senior counsel submitted that as per Clause 7(ii) of the agreement dated 01.01.2007, the appellant-BPCL was duty bound to provide invoices to the respondent-Company including those for taxes and duties as applicable on the date of supply of Aviation fuel. The learned Senior counsel further submitted that even assuming, though not admitting, that such liability to issue CENVAT invoices does not directly arise out of the Clause 7(ii) of the agreement dated 01.01.2007, considering the business efficacy, the same is to be held as an "implied term of the contract" and the appellant-Company was under a duty to issue CENVAT invoices pertaining to all taxes and duties as applicable.

12. The learned Senior counsel for the respondent further contended that the question whether or not the counter claim raised by the respondent-Company falls within the scope of the agreement entered into between the parties or within the terms of reference is a question of fact and the same could be decided by the learned Arbitrator after due enquiry and the learned Arbitrator was not right in rejecting the counter claim at the threshold which is not in accordance with the settled position of law.

13. We have carefully considered the rival contentions and perused the impugned judgment and materials on record. The points falling for consideration are whether the counter claim regarding CENVAT invoices was beyond the scope of reference to arbitration and whether the High Court was right in holding that the learned Arbitrator had jurisdiction to consider the counter claim regarding CENVAT invoices raised by the respondent.

14. Relevant facts are not in dispute. Admittedly, there is Aviation Fuel Supply Agreement dated 01.01.2007 (for the period from 01.01.2007 to 31.03.2008) and another Fuel Supply Agreement dated 01.04.2009 (for the period from 01.04.2009 to 31.03.2011). Dispute arose between the parties relating to payment and interest payable on the delayed payment. The appellant sent notice dated 25.03.2010 suggesting the appointment of Arbitrator Mrs. Justice Sujatha Manohar. The respondent sent the reply dated 27.04.2010 whilst accepting the appellant's suggestion has recorded that ".... we are sure that she would be able to adjudicate the issues appropriately considering our various claims against BPCL". According to the respondent, they have accepted the nomination of a Single Arbitrator conditional that the Arbitrator would also adjudicate its counter claim against the appellant. According to the respondent, in their reply dated 27.04.2010, they have laid the basis for making the counter claim though they have not specifically stated about CENVAT invoices. Once a claim is made, the defendant has a right to make a counter claim. The respondent relies upon clause 7(ii) of the agreement in the counter claim of CENVAT invoices. Whether or not the counter claim is part of the reference and whether it is arbitrable and whether the dispute are traceable to contractual rights or obligations or wholly outside the contract could be determined only after the enquiry by the Arbitrator.

15. Contention of the respondent is that as per Clause 7(ii) of the agreement, the appellant was required to issue CENVAT invoices pursuant to supply of Aviation fuel under the

agreement and the appellant did not do so and therefore, issuance of CENVAT invoices and dispute between the parties relating to the terms and conditions set forth in the agreement and consequently, the Tribunal has the jurisdiction to adjudicate upon the same.

16. Clause 7(ii) of the agreement requires issuance of taxes invoices by the appellant. Clause 7 of the agreement reads as under:-

> "7. Invoicing and Payment Terms:
>
> i. Seller shall invoice Buyer for the fuel deliveries (Jet A-1);
>
> ii. Invoices in Indian Rupees containing the date of delivery, locations, Aircraft Registration No., Grade, Quantity of Fuel, Unit Price, taxes and duties (applicable on the date of delivery) with delivery ticket attached shall be submitted to Buyer's local office/designated bank for payment/factoring in full. Cost of factoring & insurance shall be borne by Go Air.
>
> iii. Seller will invoice the Buyer as per the following periodicity, to the designated persons/address:-
>
> Billing period Date of Credit into BPC A/c by Bank
> 1st to 7th 16th
> 8th to 15th 23rd
> 16th to 23rd 30th/31st
>
> 24th to month end 8th (next month) In case the above dates are weekend or holidays payment will be made on the next working day.
>
> iv.In case of any delay in payment beyond due date, the outstanding amount will attract interest at PLR plus 2%.
>
> v.In case Bank limits get choked, payment shall be made by due dates directly by Go Air.
>
> vi.In case the factoring limit remains choked, exposure would need to be covered with adequate BG, in absence of which would be constrained to review the discount arrangements & payments terms.

17. Contention of the learned Senior counsel for the respondent is that Clause 7(ii) of the agreement requires issuance of invoices inter alia the invoices of taxes and duties available on the date of delivery. According to the respondent, the request for issuance of CENVAT invoices were in the nature of oral requests/demands which were made by the respondent's representative during the course of the discussion and despite such requests, CENVAT invoices were not issued and therefore, there is a "dispute" between the parties relating to the terms and conditions set forth in the agreement.

18. Case of the appellant is that the counter claim regarding CENVAT credit is beyond the scope of reference to arbitration and is not expressly covered under the terms and conditions of the agreement nor impliedly arising under the agreement dated 01.01.2007. It is submitted that in response to the said notice dated 25.03.2010-for appointment of Arbitrator, the respondent sent the reply on 27.04.2010 accepting the Arbitrator and stating that the Arbitrator would be able to adjudicate the respondent's various claims against BPCL and in the said reply, the respondent has not specifically raised the plea of CENVAT invoices.

19. Clause 12 of the agreement dated 01.01.2007 deals with the arbitration clause. Clause 12 provides for reference of dispute to an Arbitrator nominated by mutual consent. If the parties fail to decide the Arbitrator by mutual consent, each party will nominate an Arbitrator of their choice and the Arbitrators so nominated shall choose the third Arbitrator. As rightly contended by the learned Senior counsel for the respondent, in response to the notice dated 25.03.2010 issued by the appellant suggesting the appointment of Mrs. Justice Sujatha Manohar as Arbitrator, the respondent accepted the same by expressing hope "that she would be able to adjudicate the issues appropriately considering our claims against BPCL". Merely because the respondent did not specify the nature of claims against BPCL in the letter dated 27.04.2010, that may not be a ground to reject the counter claim of CENVAT invoices at the threshold. Whether the counter claim regarding CENVAT invoices is outside the terms of arbitration agreement and whether it is arbitrable or outside the scope of reference to arbitration could be seen only after enquiry by the learned Arbitrator.

20. Taking us through the relevant materials, the learned Senior counsel for the appellant made earnest submissions that before 05.05.2010, the respondent did not make any claim of CENVAT invoices and only for the first time on 05.05.2010 that is after the commencement of the arbitration proceeding, the respondent called upon the claimant to issue CENVAT invoices. According to the appellant, as per the terms of the agreement, the appellant was not bound to issue CENVAT invoices to the respondent and levy of service tax on domestic air travel came into force only by the Finance Act, 2010 and therefore, the learned Arbitrator has rightly held that the counter claim is beyond the specific reference and would not fall within the jurisdiction of the Arbitrator.

21. The learned Senior counsel for the appellant submitted that when the jurisdiction of the Arbitrator is circumscribed by specific reference, the Arbitrator can decide only those specific disputes. In support of this contention, the learned Senior counsel placed reliance upon *State of Goa v. Praveen Enterprises*[1], in which it was held as under:-

> "11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement

provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes."

22. The learned Senior counsel for the respondent contended that Clause 7(ii) of the agreement requires the invoices issued by the respondent to contain inter alia the taxes and duties and this has been refused by the appellant and therefore, there is a dispute between the parties relating to the agreement and the learned Arbitrator ought not to have rejected the counter claim at the threshold by holding that the counter claim is outside the jurisdiction of the Arbitrator. In this regard, the learned Senior counsel for the respondent also placed reliance upon Praveen Enterprises in which it was held as under:-

"27. Similarly, Section 23 read with Section 2(9) makes it clear that a respondent is entitled to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and the respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation.

29. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under Section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under Section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under Section 11 of the Act and not the counter claims of the respondent."

23. The questions whether the issue regarding CENVAT invoices was outside the terms of agreement or whether CENVAT invoices relates to the agreement dated 01.01.2007 and 01.04.2009 and whether it is arbitrable and whether it falls beyond the scope of reference to arbitration and such other related questions, are to be determined only during the enquiry. It may be that after enquiry, the Arbitrator might reject the counter claim for CENVAT invoices as not arbitrable and the counter claim beyond the scope of reference to arbitration. But to reject the counter claim at the threshold on the ground that the Arbitrator has no jurisdiction would not be proper. The High Court, in our view, has rightly set aside

the order of the learned Arbitrator dated 18.04.2011.

24. The learned Senior counsel appearing for the parties have inter alia raised various contentions. We are not inclined to consider those contentions at this stage. Lest, expressing any opinion on such contentions might prejudicially affect the parties either in the proceedings before the Arbitrator or any other proceedings that may be initiated by the parties.

25. In the result, the impugned judgment of the High Court of Bombay dated 07.12.2011 in Arbitration Appeal (Lodging) No.14228 of 2011 is affirmed and this appeal is dismissed. The observations of the High Court in the impugned order in para No. (10) as to the availability of CENVAT credit allegedly specified in the CENVAT Rules, 2004 may not be considered as expression of opinion on the merits of the matter. The learned Arbitrator shall proceed with the matter on its own merits and in accordance with law. No costs.

Judgment Referred.

[1]*(2012) 12 SCC 0581*