REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3161 OF 2006

Hyundai Corporation & Anr. .. Appellant(s)

Versus

Oil and Natural Gas Corporation Ltd. .. Respondent(s)

J U D G M E N T

R.F. NARIMAN,J.

1) The present appeal has a somewhat chequered history. It arises out of the respondent's floating a tender for two platform facilities for off-shore oil exploration and drilling in October, 1982. The appellant before us submitted two tenders for two such platforms on 13th January and 22nd March of 1983 respectively. Immediately after the submission and acceptance of these tenders, on 31st March, 1983, a Notification was issued by the Government of India extending the Income Tax Act, 1961 to the Continental Shelf and Exclusive Economic Zone

of India with effect from 1st April, 1983, in respect of income derived by every person *inter alia* from prospecting for, or extraction or production of mineral oil in the Continental Shelf or Exclusive Economic Zone of India. Fomal contracts were entered into between the Oil and Natural Gas Corporation Ltd.["ONGC"] and the appellant on 16th December, 1983. For the purpose of this appeal, two clauses are material and are set out below:

"13.2.8

> **The company shall not be responsible/obligated for making any payments or any other related obligations under the Contract to the Contractor's sub-contractor/vendors.The Contractor shall be fully liable and responsible for meeting all such obligations and all payments to be made to its sub-contractors/Vendors and any other third party engaged by the Contractor in any way connected with the discharge of the Contractor's obligation under the Contract and in any manner whatsoever.**

17.3 Change of law:

> **In the event of any change or amendment of any law, rule or regulation of any Government in India or public body of the Republic of India which becomes effective after the date of the Tender (the 25th day of March, 1983) and which results in**

any increased cost to the Contractor shall be indemnified for any such cost by the Company and the Completion Schedule shall be extended as required."

2) Some time in 1984, the appellant entered into a sub-contract with M/s McDermott International Incorporated, Panama, wherein a part of the work to be carried out by the appellant was sub-contracted. This back to back contract also had a provision which was similar to Clause 17.3. On 12th May, 1987, Section 44BB was introduced in the Income Tax Act, with retrospective effect from 1st April, 1983. Under this provision, a non-resident assessee engaged in the business of providing services or facilities, or supplying plant and machinery on hire for the prospecting, extraction or production of mineral oil, was notwithstanding anything to the contrary contained in various sections of the Income Tax Act, liable to pay income tax on a sum equal to 10% of the aggregate of the amounts specified in sub-section (2), which were then deemed to be profits and gains of

such business chargeable to tax under the head 'profits and gains of business' or profession. To complete the narration of facts, the work under the two contracts was done during the period 1984-85 to 1987-88. As a result of work done in this period, the Income Tax Department taxed the sub-contractor M/s McDermott International Incorporated after reopening its assessments to tax under Section 148 of the Act. As a result, the sub-contractor became liable to pay various amounts by way of tax, both under Section 44BB and otherwise, inasmuch as they opted under a particular Circular of the Government of India dated July, 1987, to pay tax on the basis of the said Circular. Given this fact situation, disputes arose between the appellant and the respondent on the application of Clause 17.3 of the agreement. The appellant and the respondent went to arbitration under the Arbitration Act, 1940, which was before two learned Arbitrators, on the question whether the respondent was liable to reimburse the amounts paid by the appellant to its sub-contractor by

way of tax inasmuch as, according to the appellant, a change in law had taken place after 25.3.1983 in that, from 1st April, 1983, Section 44BB was retrospectively brought in to tax various services in connection with off-shore exploration and drilling of mineral oils. Several issues were raised before the two learned Arbitrators, one of which was as to whether there was indeed a change of law, in that, tax had to be paid under Section 44BB for the first time with effect from 1st April, 1983. The two learned Arbitrators were of the opinion that, as the assessment orders indicated tax was indeed payable under Section 44BB, and that, therefore, Clause 17.3 would be squarely attracted on the facts of the case. However, they differed on the application of Clause 13.2.8 of the agreement. Whereas Shri D.Chandrashekhar, learned Arbitrator, by his award dated 10th March, 1999 stated that though Clause 17.3 did apply on the facts of the case, yet Clause 13.2.8 interdicted the payment of any amounts on account of the sub-contractor's liablity. On the other hand,

Justice D.M. Rege, learned Arbitrator, by his separate award dated April, 1999 agreed with Shri Chandrashekhar on all points except one, namely, the effect of Clause 13.2.8 on Clause 17.3. According to him, Clause 13.2.8 would not come in the way of ONGC having to pay amounts paid by the sub-contractor by way of tax because of a change in law. The learned Arbitrator held:

> **"Firtly, the said Cl.13.2.8 is a part of Cl.13 dealing with Contract price payment/Discharge Certificate and was not connected with the subject covered by Cl.17.3 of the Contract on which the Claimants' claim is based. Further looking to the fact that Cl.17.3 of the Contract was inserted subsequently only at the request of the Claimants while Cl.13.2.8 was already there, it appears that Cl.17.3 was intended to cover those extra costs incurred by the Claimants due to the change of law which were outside of and not covered by Cl.13.2.8 of the Contract. Even the reading of Cl.13.2.8 itself would show that it does not and would not cover the Claimants' claim for compensation for extra costs under the said Cl.17.3 of the Contract."**

3) On this limited dispute, the Umpire, Retired

Chief Justice Y.V.Chandrachud, delivered his award dated 20th March, 2002. In paragraph 20 of the said award, the learned Umpire stated:

> **"The main question and, indeed, the only question which was pressed before me by learned Counsel for the parties, arises out of the provisions contained in Clause 17.3 of the SH Contract and the extension of the I.T. Act to the Continental Shelf of India and other Exclusive Economic Zones by the Notification dated March 31, 1983, issued by the Government of India, which is referred to in paragraph 9 above."**

4) However, instead of deciding this question, the learned Umpire went into a question already decided in favour of the appellant and arrived at a contrary conclusion, namely, that tax was not payable under Section 44BB at all but had in fact been paid pursuant to the Circular of the Central Government of July, 1987, and that this being the case, Clause 17.3 itself would not be attracted, as there was no change in law under which such tax had to be paid. The tax had to be paid in any case under the provisions of Sections 5 and 9 of the Income Tax Act and accordingly,

the claim of the appellant was rejected. However, before concluding the award the learned Umpire held:

> **"35. Before concluding the discussion on the aforesaid point, it would be useful to refer to clause 13.2.7 of the main Contract between the Claimants and the Respondents, it reads thus:**
>
> **"13.2.7. the Company shall not be responsible/obligated for making any payments or any other related obligations under this Contract to the Contractor's sub-contractors/vendors.The contractor shall be fully liable and responsible for meeting all such obligations and all payments to be made to its sub-contractors/vendors and any other third party engaged by the Contractor in any way connected with the discharge of the contractor's obligations under the contract and in any manner whatsoever".**
>
> **35.1 Since clause 17.3 of the Contract is not attracted and since, consequently, the Claimants are not liable to indemnify MII in respect of the Income Tax for which a demand has been made on MII, Clause 13.2.7 extracted above, would squarely come into play. The "Company" that is to say, the Claimants, are not responsible or obligated to reimburse MII in respect of the aforesaid tax demand."**

5) It will be noticed on a perusal of the award of the Umpire, that a decision has been

rendered on an issue which was never referred to the learned Umpire. The award was ultimately only on the said issue. In passing, the Umpire did refer to Clause 13.2.7, which was the only bone of contention left between the parties, but stated that since Clause 17.3 of the contract was not attracted, and since consequently the Claimants were not liable to indemnify the sub-contractor, Clause 13.2.7, would squarely come into play. From this it can be seen, that there was no independent reasoning or conclusion with regard to the applicability of Clause 13.2.7. This being the case, and the matter being a fairly old one, we are of the view that the award of the Umpire has to be set aside on the ground that his ultimate decision was on a matter not referred to him, but indeed on a matter which had been concluded in favour of the appellant. This being the case, it would be necessary to remit the matter to the Umpire. Inasmuch as the Former Chief Justice Y.V. Chandrachud is no longer alive, with the consent of the parties, we appoint Justice Aftab Alam to

be the Umpire in this case to decide the narrow issue as to whether Clause 13.2.8 would apply so as to interdict the application of Clause 17.3 which has been held by both learned Arbitrators to apply to the parties. We request the learned Arbitrator to take up the matter as early as possible and deliver his award within a period of three months from the date on which he receives the papers from the parties. By consent, it is recorded that the matter being an old one, this award would not be subjected to the drill of appeals before the High Court, but would come back directly to us for further adjudication.

6) The appeal is accordingly allowed and the judgment of the High Court is set aside.

.....J.
[ROHINTON FALI NARIMAN]

.. ..J.
[SANJAY KISHAN KAUL]

NEW DELHI,
AUGUST 03, 2017.

ITEM NO.101 COURT NO.13 SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No. 3161/2006

HYUNDAI CORPORATION & ANR. Appellant(s)

VERSUS

OIL AND NATURAL GAS CORP. LTD. Respondent(s)

(The matter remained part-heard vide Hon'ble Court's order dated 18.7.2017.)

Date : 03-08-2017 This appeal was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Appellant(s) Ms. Anushree Menon, Adv.
Mr. Vikas Mehta, AOR

For Respondent(s) Mr. Somiran Sharma, Adv.
Mr. K. R. Sasiprabhu, AOR

UPON hearing the counsel the Court made the following
O R D E R

The appeal is allowed in terms of the signed reportable judgment.

(USHA RANI BHARDWAJ) (SAROJ KUMARI GAUR)
AR CUM PS BRANCH OFFICER

Signed reportable judgment is placed on the file.