

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 124/2006**

Reserved on : April 30, 2009

Pronounced on : May 04, 2009

M.M.T.C Appellant
Through: Mr. Rakesh Tikku, Advocate.
versus

M/S AL BAMAR COMPANY LTD. Respondents
Through: Mr. O.P.Gaggar, Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

% **J U D G M E N T**

VALMIKI J. MEHTA, J

1 This appeal challenges the impugned order dated 25.10.2005 of the learned Single Judge, whereby, the learned Single Judge was pleased to

dismiss the objections filed by the appellant to the award dated 31.01.2002.

2. By the award, the respondent was held entitled to an amount of USD 52,913.97 being the balance of the freight charges payable by the appellant to the respondent with respect to a charter party agreement entered into between the parties. The award also granted interest at international lending rates (LIBOR) of 7% from the date of reference till the date of payment.

3. Before the learned Single Judge, there were principally four objections which were raised by the appellant to the award:-

- (i) that the counter-claim filed by the appellant has been wrongly dismissed as time barred and not permitting adjustment for the short delivery of goods,
- (ii) the respondent ought not to have been granted at least the freight charges on said short delivery of goods,
- (iii) the rate of interest granted until the award is on the higher side,
- (iv) the award should have been passed in rupees and not in dollars because there has been appreciation of value of dollars as against the Indian rupee.

4. For the reasons stated hereinafter, we find that the reasoning of the learned Single Judge while upholding the award and dismissing the objections to the same are completely justified. So far as the issue with

regard to the interest is concerned, we feel that in the facts and circumstances of the case, the same requires certain modifications as stated hereinafter.

5. The reasoning given by the learned Single Judge on all the three aspects of the dis-entitlement of the appellant for adjustment of its claim of short delivery on account of the same being barred by limitation, entitlement of the respondent to claim freight charges for short delivery and entitlement of the respondent to claim the award in dollars, we find, is detailed and correct, and we would do no better if we would simply adopt the said reasoning and reproduce the relevant portions of the impugned judgment.

6. On the issue with regard to the claim to the short delivery being barred by limitation, the learned Single Judge has referred to Clause-3, para-6 of Article III of the schedule to the Indian Carriage of Goods by Sea Act, 1925 and as per which provision, the claim of short delivery has necessarily to be filed within one year after delivery of the goods or the date when the goods should have been delivered. Applying the relevant provision of law, the learned Single Judge has affirmed the finding in the award that admittedly the claim was not brought within one year as required under law. On the related aspect of the contention of the appellant that even if, a claim with respect to short delivery is time barred, yet, the appellant was entitled to

adjust or make a counter-claim or at least a defence on such basis has also been rightly rejected by learned Single Judge by reference to the Supreme Court judgment in *The East and West Steamship Company Vs. S.K.Ramalingam Chettiar: 1960 SCR (3) 820*, which holds that not only the remedy is extinguished after the limitation expires but the right itself is extinguished.

Thus, we see no reason to differ with the reasoning of the learned Single Judge and portion that the appellant was not entitled to make a claim with respect to short delivery of the goods as alleged by it.

7. As regards the contention of the appellant that the respondent should not have been allowed the freight charges for the short delivery, the learned Single Judge in exhaustive reasoning from paras 11 to 17 of the judgment has considered the respective documents and the evidence which were considered for passing of the award and has thereafter arrived at the following finding in para 17 with which we agree and which reads as under:-

“ In my considered view the objection of the respondent cannot be accepted for two reasons: The first is that the methodology of draught measurement was adopted at the load port itself and was further the basis while discharging goods at Bhavnagar port. Even if there was some discrepancy in the total which was arrived at Kandla port on draught

measurement being made for the remaining goods, the petitioner cannot be deprived of the freight charges for the goods shipped as per the bill of lading on the basis that on actual measurement only at Kandla port, a different figure would be arrived at. The second aspect is that if the respondent was particular about the issue of short delivery of goods which itself would result in the plea of the respondent for non payment of freight charges on short delivery, the respondent would have taken recourse to legal proceedings to recover the amount. The respondent failed to take such recourse with the result that the respondent must be deemed to have accepted the delivery of goods by the petitioner as was so required to be done. Having failed to follow up its right for the same, in my considered view, it cannot now be said that the freight charges payable on such alleged short delivery of goods, for which short delivery no claim was filed in accordance with law, an adjustment should be made”.

8. The next aspect is the contention of the appellant that the award should not have been passed in dollars. The learned Single Judge has by reference to the claim petition arrived at a finding that the claim of the respondent in the claim petition was for dollars and therefore, it was justified for the award to grant dollars and not in rupees. We have seen the claim petition and particularly paras 9 to 11 and all of which paras clearly specified the claim only in US Dollars, and the figure in rupees is only as an

equivalent alternative. In addition to this, we may notice another basic fact which entitles the respondent to seek payment under the award in terms of US Dollars. The reason is that the Charter Party Agreement between the parties was for payment in US Dollars and therefore this factor clearly entitles the respondent for payment of freight in US Dollars and consequently, the respondent was entitled to and did in fact make a claim in US Dollars. The respondent therefore, was entitled to claim the award to be passed in dollars. At the very best the claim petition can be said to make a claim in the alternative either in the form of US Dollars or in the form of rupees and therefore, there can be said to be nothing amiss with the award when the same grants the awarded amount in US Dollars to the respondent.

9. We may note in the judgment of *Forasol Vs. ONGC 1984 Suppl. SCC 263* (and which was also considered by the learned Single Judge in another context), it is stated in paragraph 40 thereof that in case a person who is entitled to receive a foreign currency under an award/judgment is not able to remit the foreign currency from India due to certain legal restrictions, then at the option of the successful decree holder, he is entitled to claim, **purely at his option**, Indian rupees equivalent to the amount awarded in foreign currency. Though, we are affirming the award for grant of the amount to the respondent in dollars, however, we give liberty to the

respondent that in case at its sole option it is interested in receiving the amount in Indian rupees, then it will be entitled to the equivalent of Indian rupees of the US Dollars in terms of the Forasol's case. We would put it on record that counsel for the respondent had however stated that the respondent is only interested in receiving the amount in US Dollars, however, the above directions as stated in this para is given in order to further secure the respondent in terms of the said para 40 of the Forasol case.

10. That leaves us with the issue with regard to the interest and in fact was the only issue seriously urged before us by the counsel for the appellant. As per the award, the respondent has been granted its claim of US Dollars 52,913.97 along with interest at International Lending Rate (LIBOR) of 7%. We are inclined to interfere with this part of the award and the judgment of the learned Single Judge whereby interest has been granted at 7%. We find that in international transactions interest at 7% is indeed on the higher side more so, when the appellant is already prejudiced by the increase in the value of the dollar as compared to the Indian rupee. Also, internationally, and of which we take judicial notice, that the LIBOR rate has fluctuated in the intervening period and is presently around 3%. From January, 2002, till 2009, the LIBOR rate has fluctuated from around 3% in 2002 to 6/7% during 2006-2007 and thereafter came down again to about 3% and even

less. Therefore, considering the facts and circumstances of the case, and more particularly the trend in the reasoning in the recent judgments of the Hon'ble Supreme Court in reducing the interest granted in the award on account of passage of time from the date of passing of the award till the time the matter comes up in the court, we reduce the rate of interest as granted under the award from 7% to 3 ½% . The relevant judgments of the Supreme Court on this issue are the judgments of *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra*, 2007 (2) SCC 720.

11. We, therefore, dismiss the appeal and sustain the award and the finding and the judgment of the learned Single Judge with the modification as to the rate of interest and hold the respondent will be entitled to the awarded amount with interest at 3 ½ % from the date of reference till the date of payment by the respondent.

VALMIKI J. MEHTA, J

MUKUL MUDGAL, J

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