

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

Date of Decision : 14th July, 2009

+ **FAO(OS) 91/2006**

State Trading Corporation Ltd. Appellant
Through : Mr. Rakesh Tiku and Ms. Manjusha
Wadhwa and Ms. Purbali Bora,
Advocates.

versus

Indian Cements Ltd. & Anr. Respondents
Through : Mr. Amitava Majumdar, Mr. Arvind
Kumar Gupta and Mr. Bipin B. Singh,
Advocates, for respondent no.1.

AND

+ **FAO(OS) 92/2006 & CM No. 2916/2006**

State Trading Corporation Ltd. Appellant
Through : Mr. Rakesh Tiku and Ms. Manjusha
Wadhwa and Ms. Purbali Bora,
Advocates.

versus

Indian Cements Ltd. & Anr. Respondents
Through : Mr. Amitava Majumdar, Mr. Arvind
Kumar Gupta and Mr. Bipin B. Singh,
Advocates, for respondent no.1.

AND

+ **FAO(OS) 93/2006 & CM No. 2926/2006**

State Trading Corporation Ltd. Appellant
Through : Mr. Rakesh Tiku and Ms. Manjusha
Wadhwa and Ms. Purbali Bora,
Advocates.

versus

Indian Cements Ltd. & Anr. Respondents
Through : Mr. Amitava Majumdar, Mr. Arvind
Kumar Gupta and Mr. Bipin B. Singh,
Advocates, for respondent no.1.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MS. JUSTICE NEERAJ KISHAN KAUL

1. Whether 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

JUDGMENT (ORAL)
14.07.2009

MUKUL MUDGAL, J. :

1. The above three appeals are being disposed of by a common order as the principle issue involved in all the three appeals is the same. However, for the

sake of illustration, the facts of the first appeal, that is, FAO(OS) NO. 91/2006 are being referred to.

2. The appeal bearing no. FAO(OS) NO. 91/2006 challenges the judgment dated 24th November, 2005 rendered by the learned Single Judge upholding the award. The dispute between the parties arose from the charter party agreement on the ground whether the ‘ousting priority berthing charges’ were payable by the respondent or the appellant and which out of them was entitled to the reimbursement of the amount. One of the main issues which arises for consideration in the present appeal is the interpretation of clause 56 of the Charter Party which reads as under: -

“CLAUSE 56 : TAXES

Any dues and/or taxes on cargo to be for Charterers account, but customary vessel’s port charges, including berthing expenses and any dues and/or taxes on vessel/freight, even if measured by quantity of cargo on board to be for owners’ account.”

3. The plea of the learned counsel for the appellant, Mr. Tiku, is that the term ‘berthing expenses’ would include ‘priority ousting charges’, and therefore, had to be borne by the ship owner defined as ‘owner’ in the said clause 56. However, the contention of the learned counsel for the respondent, Mr. Majumdar, is that the ‘ousting priority berthing charges’ were not customary vessel port charges and therefore, the said charges ought to have

been borne by the charterer, that is, the appellant. Per contra it was contended by Mr. Majumdar that the decision to bear the priority berthing charges for all vessels was a decision taken by the government of India and could not come within the definition of customary vessel's port charges in clause 56 of the Charter party.

4. Mr. Majumdar has further contended that apart from the interpretation of clause 56 of the Charter Party, he was also placing reliance on circular dated 28th November, 1997 which was accepted by the Arbitrator and which related to the payment of priority ousting charges for all vessels as opposed to the earlier circular dated 24th January, 1997 which was only upto the period of 31st March, 1997. He has relied upon the circular of 28th November, 1997 to contend that this circular would also include the transactions between the period 31st March, 1997 and 28th November, 1997 in view of the language of the said circular which reads as follows: -

“Minutes of the Fifth meeting of the Task Force set up to co-ordinate the arrivals of shipments and despatches of imported wheat held in the chamber of the Secretary (F&CS), Ministry of Food and Consumer Affairs on 28.11.97 at 11 A.M.”

“IV. Miscellaneous

(a) Priority Berthing

CCC, MOST referred to para IV (a) of the minutes of the 4th meeting of the Task Force held on 29.10.97 and clarified that priority berth was given to FCI at various ports for a period

and not for vessels on case to case basis and therefore, priority berth hire charges were payable by FCI. It also mentioned that the competitiveness of freight rates had direct connections with priority berthing. It was agreed that priority berthing was not discretionary on case to case basis and that FCI would pay priority berth hire charges for all vessels. The Manager (I&I) also referred to his FAX message dated 26.11.1997 regarding vessels handled at Kandla, for which the FCI had not released payment during last imports. Chairman, FCI stated that since it has been decided that priority berth hire charges were not discretionary on case to case basis. FCI would now take necessary action to release the payment regarding priority berthing hire charges.

- (b) CC, MOST informed that some problems are being faced by Transchart in respect of settlement of cases relating to freight payment etc. resulting in delay in settlement of cases as FCI officials raise minor issues which had already been clarified to them on previous occasions. He added that during 1992-93 import of Wheat an agreement was reached between FCI & Transchart through Secretary Food that the laytime calculations for working out dispatch/demurrage would be prepared by Transchart and same would be accepted by FCI without any objection except for some patent errors. In order to smoothen the working system and to avoid the delay in settlement of cases, it was mutually agreed by FCI/STC/Transchart that the same practice will be followed for the present Wheat import also i.e. laytime calculations prepared/sent by Transchart would be accepted by FCI without any objection except in case of some arithmetical error or some other serious error.”

5. It is relevant to refer to some of the findings of the Arbitrator in the Award dated 27th March, 2001 which are as follows: -

“...It is the claimant’s stand that the ‘ousting priority charges’ are cargo related charges and they are over and above the berthing hire charges which they have paid vide item 4 of the Kandla Port Trust bill referred to above. The ‘ousting priority berthing has been given in pursuance of Government of India instructions and not on their request and they are not liable to bear the same.

They also drew attention to charterers Telex dated 8.8.97, directing FCI to reimburse the berth hire charges. According to documents filed in response to Tribunal's directions of 10.01.2001 by ICL is FCI's letter dated 9.9.1998 requesting refund of excess payment towards priority charges of ICL Raja Mahendra of 11.5.1998 from J. M. Baxi, Kandla paid by FCI.

STC's defence is on two grounds (i) that FCI the handling agency's concurrence for priority berthing has not been obtained. STC wanted to refer to the minutes of the Task Force of the Government of India which took decisions about the handling of these vessels. It was STC's submissions that according to these minutes FCI's prior concurrence was mandatory before priority berthing could be requested and since that has not been done the owners are not entitled to any refund. No documentary evidence was, however, produced to support this contention.

In the meanwhile, STC's contention was that these are ship related charges and under clause 56 are payable by the owners of the vessel. They also drew attention that the circular of the Ministry mentions that the charges are to be collected from the vessel. They Government of India circular does not mention charges to be collected from the cargo owner but instead stated these charges were to be paid by owners.

At the hearing ICL produced the minutes of the Task Force. These are dated 19th December 1997 but relate to the meeting held on 28th November 1997 Part IV (Miscellaneous) (Encl(a)) states that priority berthing was must and was not discretionary on case to case basis and FCI should pay the priority berthing hire charges for all vessels. Chairman, FCI undertook, after this clarification, to pay the pending charges in this connection. STC representative had attended this meeting and are privy to its contents. ICL also produced the Kandla Port trust circular issued to the Kandla Stevedore Association, Kandla laying down that the Ministry has decided to accord 'ousting priority' for one berth for all vessels of STC arriving till 31st May 1997.

It is admitted that the FCI did not make any request to the Port Trust for according 'priority berthing' and STC's defence is that the purported commitment given by the Chairman, FCI is not binding on the STC. They reiterated their defence on (a) FCI did not make any request for according 'priority berthing' and (b) the dues, if any, under clause 56 are payable by the ship owners, are not

cargo related and hence not payable by STC.

Notwithstanding the provisions of the Charter Party we find and hold that the charterers had taken a conscious decision to reimburse the priority charges to the shipowners in the interest of attracting tonnage and pressing need to reach the cargo of wheat to the required areas. The amount of priority charges claimed is not disputed by the Respondents. On the question of interest we find that considering the nature of reference, it is not a fit case for award of interest except to the extent envisaged by Section 31 sub sec. 7(b) of the Arbitration & Conciliation Act 1996....”

6. Though, the Arbitrators have held that notwithstanding the provisions of the charter party, the charterers have taken a conscious decision to reimburse the priority charges to the ship owners in the interest of attracting tonnage and the pressing need to reach the cargo of wheat to the required areas, nevertheless, the learned Single Judge did analyze clause 56 and held that the priority ousting charges would not be included in the customary berthing charges. In our considered opinion, the view taken by the learned Single Judge is a plausible view, in contrast to the view contended by Mr. Tiku, that this ousting priority charges was part of the berthing charges and ought to have been on account of the respondent-ship owner. That being the position, it does not warrant any interference in appeal. This apart, the view taken on the memorandum dated 28th November, 1997 by the Arbitrator is also a plausible view and is not liable to be interfered with, particularly when it is has been

upheld by the learned Single Judge. Accordingly, we find no merit in the appeal.

7. However, there is one plea raised by Mr. Tiku which merits consideration. Mr. Tiku has pointed out that the Arbitrator awarded interest @ 18% per annum on the awarded sum and the said interest was sustained by the learned Single Judge. In light of the view taken in a judgment of this Court in the case of M/s. India Furnishers vs. Punjab National Bank FAO(OS) No. 261/2001 decided on 22nd April, 2009 which in turn relied on the judgments of the hon'ble Supreme Court in the cases of Rajendra Construction Co. vs. Maharashtra Housing & Area Development Authority and Ors. 2005(6) SCC 678, McDermott International Inc. vs. Burn Standard Co. Ltd. And Ors. 2006 (11) SCC 181, Rajasthan State Road Transport Corporation vs. Indag Rubber Ltd. (2006) 7 SCC 700 and Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra 2007 (2) SCC 720, the interest of justice would be sufficiently met if the interest awarded is reduced uniformly to 9% per annum, provided the payment is made not later than eight weeks from today.

8. There is another facet of this case raised by Mr. Tiku which also requires our attention. He has pointed out the correspondence by the respondent with the FCI, where the FCI had declined to pay the priority ousting charges. Mr. Tiku has touched on the fact that the wheat was imported on priority basis in

view of the emergent national need and the FCI ought not to have taken such a stand particularly when the wheat was imported at their behest. There is merit in this plea of Mr. Tiku. We, therefore, make it clear that this judgment will not stand in the way of the State Trading Corporation in recovering the priority ousting charges, liable to be paid by the virtue of this judgment to the respondent from the FCI, in accordance with law.

9. The respondent is permitted to withdraw the amounts deposited in Court by filing an application and if such an application is filed, the Registry is directed to ensure that the amount along with interest is released not later than four weeks from the date of the application.

10. The learned counsel for the respondent, Mr. Majumdar, pointed out that in order to withdraw the amount, they had moved an application by furnishing a bank guarantee, though the amount has still not been withdrawn. We make it clear that as the respondent has been permitted to withdraw the amount, the bank guarantee furnished by the respondent has become otiose and shall be returned to the respondent within the said period of four weeks. We also make it clear that the appellant is required to deposit the interest amount at the rate of 9% per annum only.

11. In view of the discussion hereinabove and fact that we have permitted the withdrawal of the principle amount plus interest accrued therein, the

appeals stand disposed of accordingly. All the pending applications stand disposed of accordingly.

(MUKUL MUDGAL)
JUDGE

(NEERAJ KISHAN KAUL)
JUDGE

July 14, 2009
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