

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

+ O.M.P. 366/2002

MMTC LIMITED

..... Petitioner
Through Mr. Parag P. Tripathi, ASG with
Mr. Manish Sharma, Advocate

versus

LEGEND HOLDINGS PTE.
LTD.

..... Respondent
Through Mr. Jayant Tripathi with
Ms. Prabhsahay Kaur, Advocates

%

Date of Decision : April 29, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
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

MANMOHAN, J (ORAL)

1. This is a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the petitioner, MMTC Limited ('MMTC') against M/s. Legend Holdings Pte. Ltd. ('Legend'). The petitioner challenges the Award dated 29th July, 2002 wherein a sum of USD 294,505.26 has been awarded at the then prevailing exchange rate along with an interest of 18% per annum.

2. This Award relates to the deduction of an amount equivalent to the Discharge Port Demurrage paid by petitioner.

3. All the other Claims of the respondent were rejected along with all counter claims of the petitioner.

4. I may point out that the respondent had also challenged the same Award to the extent of the other claims of the respondent which were rejected by the Arbitral Tribunal in the Bombay High Court. The Section 34 petition was dismissed on 24th February, 2003 and the appeal preferred against it was also dismissed. It appears that the matter was not taken up any further by the respondent and that part of the matter attained finality.

5. Earlier, my predecessor had directed the examination of the issue as to whether this matter should also be transferred to the Bombay High Court. Now it transpires that the present objections were filed in the Delhi High Court prior to the filing of Section 34 objections by the respondent in the Bombay High Court. Therefore, the jurisdiction of this Court is not ousted. Also, both parties have no objection to the present Section 34 petition being heard and disposed of by this Court.

6. The facts entailing the dispute are as follows:

(i) On 23rd November, 1995, MMTC entered into a contract with M/s. National Food Authority of Philippines (“NFA”) for supply of 75,000 MT of Indian Non-Basmati Superfine White Rice to Philippines. Legend offered MMTC to perform the Contract on a Back to Back basis, which was agreed to by MMTC. A Back to Back Contract was entered into between MMTC and Legend on 11th

December, 1995. Under the terms of this Back to Back Contract, MMTC was to get USD 8.00 per MT on the total sale made to NFA as their service charges.

(ii) Legend in its turn entered into contracts with five Indian rice suppliers and Letters of Credit (LCs) were opened in their favour by MMTC as desired by Legend. These five suppliers on whom Legend placed the initial contracts to supply rice failed to perform their Contract within the stipulated time.

(iii) Non supply of rice to NFA resulted in their invoking the Grain and Food Trade Association (GAFTA) provisions as per the preliminary contract and in the reduction of the price of rice from USD 343.00 per MT, originally agreed, to USD 337.86 per MT with extended time for shipment. To ensure the supply of the contracted quantity, fresh contracts were awarded by Legend to seven Indian rice suppliers. Fresh LCs were opened by MMTC in favour of these parties. The supply of rice was completed. Admittedly NFA made payment of the rice purchased from MMTC in the sum of Rs. 88,32,72,532/-.

(iv) Disputes arose between MMTC and Legend on the amount to be paid to Legend out of the price received from NFA. Legend made a claim against MMTC. MMTC in its turn made a counter claim against Legend. These disputes were referred for arbitration to the Arbitral Tribunal comprising Justice S. Ranganathan, Justice Avadh Behari Rohatgi, and Justice R.C. Srivastava.

(v) Legend was wound up by an order dated 16th April, 1999 of the High Court of Singapore and the Official Liquidator (Receiver) was appointed. The Official Receiver was thus a party to the Arbitration and was representing Legend.

(vi) Price Waterhouse was given the task of examining the books of accounts and records. The summary of the report has been extracted in para 12 of the Arbitral Award.

(vii) After the receipt of the report from Price Waterhouse, Legend confined its claim to following three items :

- a) Bank Charges for Non Operating L/Cs.
- b) Pre-berthing Demurrage and Discharge Port Demurrage.
- c) Other Expenses.

7. The Claim as to the Discharge Port Demurrage was allowed by the Arbitral Tribunal. All the other Claims of the Respondent were rejected along with all the Counter Claims of the petitioner.

8. The principle arguments which have been canvassed by Mr. Parag P. Tripathi, learned ASG appearing on behalf of petitioner are that the payment of Discharge Port Demurrage was made by the petitioner as a "Settlement" in terms of the undated letter referred to in para 71 of the Award. The respondent had specifically agreed that it would be bound by any settlement made by MMTC while finalizing the claims of the Seven Shippers who had provided the ships for transport

of rice from India to Philippines. It is submitted by Mr. Tripathi that this Settlement, i.e., the payment of Discharge Port Demurrage, has to be understood as a settlement contemplated and provided for in the said undated letter. A copy of the said undated letter is to be found on the record of the Arbitral Tribunal at Exhibit D-V at page 26 of the Evidence Volume along with the affidavit evidence of Mr. D.S. Gulati, Chief General Manager, MMTC.

9. At first blush, the argument may look attractive. However, on an examination of the Award, it is clear that the Award proceeds on the basis that NFA itself has admitted that the payment for Discharge Port Demurrage was to be made by NFA (para 77 page 53). Therefore, on the basis that since this payment was admitted by NFA, MMTC cannot be allowed to mulct the liability on Legend and debit this payment to the account of Legend.

10. It has been further contended by the learned Counsel for MMTC that MMTC had communicated the message received from NFA by its letter of 31.10.1997 to the respondent. The said letter of MMTC extracted in full, the communication received from NFA to MMTC. This letter of MMTC is extracted at para 40 of the Award. This communication is in the form of a Table/Chart which in Column 3 makes it clear that even as per NFA's own computation, the Discharge Port Demurrage was payable by NFA to the tune of USD 2,34,052.10.

11. Further, in Column 4, as per NFA calculation, after deducting this amount, the balance dues payable to NFA by MMTC were USD 303,866.52.

12. Once this is so, it follows that as per NFA's own computation, NFA was liable to pay Discharge Port Demurrage though only to the extent of USD 234,052.10. In this background, the decision of the Tribunal that this money could not be withheld by MMTC from Legend on the ground that NFA had not actually paid this amount, appears to me not only to be a plausible view but in fact the correct view. Once NFA itself has admitted in writing that the sum of USD is payable by NFA towards Discharge Port Demurrage, then surely irrespective of whether or not, MMTC decided to litigate with NFA, MMTC cannot be allowed to recover these monies from Legend. This contention therefore is without any merit and is rejected.

13. The second contention raised by MMTC is that there is an overlap between the Claims of the respondent and the counter claims raised by MMTC. Therefore, it is argued on behalf of MMTC that since all the other Claims of the respondent have been rejected, the corresponding counter claims of the petitioner should be accepted. The Arbitral Tribunal has proceeded on the basis that by a letter dated 25.5.1996, MMTC itself returned the Bank Guarantee to Legend which had been furnished to MMTC for the performance of the Back to Back Contract, by stating that the Contract was completed by Legend "in

full”. The Tribunal invoking the principle of estoppel, proceeded to hold that since the bank guarantee was discharged on account of the contract being performed in full, MMTC was not be allowed to turn back and raise counter claims.

14. I find no fault with the approach adopted by the Arbitral Tribunal. It is settled law that if the view of the arbitrator is a plausible one, the Court cannot substitute its own view in its place and would not, therefore, merit any interference. (Refer *Smita Conductors Ltd. Vs. Euro Alloys Ltd.* reported in (2001) 7 SCC 728, para 15, page 739; *BOC India Ltd. Vs. Bhagwati Oxygen Ltd.* reported in (2007) 9 SCC 503, para 27, page 512).

15. I am also reminded of what Colman J. in his Master’s Lecture delivered in London on 14th March, 2006 on the subject “Arbitration and Judges – How much interference should we tolerate?” had to say on the question of error apparent and the jurisdiction which the Court should exercise while examining a challenge to an arbitration award:

“What is obviously wrong? Is the obviousness something which one arrives at On a first reading over a good bottle of Chablis and some pleasant smoked salmon, or is ‘obviously wrong’ the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter.” (Refer to Russell on Arbitration, Twenty-Third Edition, Chapter 8-138)

16. In this view of the matter, there is no need to further examine the contention of MMTC that the counter claims ought to have been allowed in view of the rejection of the claims of Legend.

17. However, before concluding, there are two other arguments of Mr. Tripathi which require consideration. Firstly, it is contended by him that since the Arbitral Tribunal has proceeded on the basis that NFA itself has admitted its liability to pay the Discharge Port Demurrage, the Award could be limited only to the extent of the admission. The admitted amount, as mentioned in para 40 of the Award is USD 234,052.10. The amount awarded by the Arbitral Tribunal is USD 294,505.26. This latter figure seems to have arisen from the counter claim made to this effect by the petitioner, which has been extracted as Counter Claim no. 4 in para 80 to the Award. There is merit in this submission and I accordingly reduce the Award amount of USD 294,505.26 to 234,052.10.

18. The second point of contention is that the interest granted by the Arbitral Tribunal @ 18% per annum is excessive. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 9% per annum simple interest for the period for which interest has been awarded. The Supreme Court in ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority and Ors.*** reported in (2005) 6 SCC 678; ***McDermott International Inc.***'s case (supra) and ***Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd.*** reported in (2006) 7 SCC 700 has reduced the rate of interest. In fact, in ***Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.*** reported in (2007) 2 SCC 720 the Supreme Court has held as under :-

“11. here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

19. Consequently, keeping in view the aforesaid judgments and the current rate of interest, I reduce the interest from 18% per annum to 9% per annum from 1st January, 1997 (i.e. from the date when the monies were withheld by MMTC) till the date of payment.

20. Accordingly, present petition is disposed of with aforesaid modification.

MANMOHAN,J

April 29, 2010.

rn