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

+ O.M.P. 396/2003

THE STATE TRADING CORPORATION
OF INDIA LTD.

..... Petitioner

Through: Mr. S.K. Bandyopadhyay, Advocate.

versus

IRANO HIND SHIPPING COMPANY

..... Respondent

Through: Mr. Manoj Khanna, Advocate and
Mr. Atul Bansal, Advocate.

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Date of Decision : April 27, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to as “Act, 1996”) challenging the majority arbitral Award dated 15th January, 2003.

2. Mr. S.K. Bandyopadhyay, learned counsel for petitioner-objector submitted that Arbitral Tribunal failed to appreciate that there was a limitation clause in the Charter Party Agreement and that

the said clause precluded claims for balance freight and demurrage if not filed within 90 days of completion of discharge. He stated that in the present case as respondent-claimant had failed to prosecute its remedy diligently and within limitation, it should bear the consequence of its negligence.

3. Mr. Bandyopadhyay further submitted that the majority arbitral Award had misconstrued and misinterpreted Clauses 8, 26, 35 and 41(B) of the Charter Party Agreement. He submitted that in view of the aforesaid clauses, petitioner-objector was exonerated from paying the balance freight and demurrage as respondent-claimant had failed to exercise its right of lien on cargo conferred on the respondent-claimant by the Charter Party Agreement. In this connection, he relied upon the reasoning given in the minority Award.

4. On the other hand, Mr. Manoj Khanna, learned counsel for respondent-claimant drew my attention to the conclusions arrived at on the aforesaid two issues by the majority Arbitral Tribunal. The relevant conclusion arrived at by the majority Arbitral Tribunal is reproduced hereinbelow:

“12.1.....The Tribunal after examining the documents on record and hearing the arguments of the parties is convinced that the Respondents reliance on clause 41(B) in defence of their argument of time bar is fallacious as the clause only mentions the time limit as to when the balance freight and demurrage becomes due for payment by Respondents. The presumption underlying the Respondents

contention that on the expiry of the 90th day after the date of discharge the claims of the claimants for balance freight and demurrage if any will stand extinguished if the claimants had not already put in their claim is not a valid one and there is no such commercial practice in shipping industry in India. The Respondents' own conduct in entertaining the claim processing it and seeking and obtaining Reserve Bank of India's approval for release of \$188383 supports this view. Cl. 41(B) specifies an outer time limit for the Respondents to pay the amounts due if the documents mentioned therein had been furnished. Even if it is assumed that the Claimants presented their Bill after the expiry of 90 days, the consequence can only be that the outer time limit of 90 days will get pushed back by a reasonable margin. A reading of Cl.41(B) also does not convey the import that time is the essence of this provision.

The Tribunal is also satisfied with the Claimant arguments that the time limit for commencing arbitration proceedings would expire only on 20.11.1998 and that they had commenced the proceedings on 13.04.1998 i.e., well within time.

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19.3 We have also considered the question whether the Claimants could have reasonably exercised his lien on the cargo in this case. A number of judicial pronouncements, all of them from abroad, have analysed the ambit and scope of similar provisions. What stands out from these is that it is not sufficient to merely give a right of lien to Claimants but that right has to be an effective one. In the "SINOE" (Llyod's Law Reports, 1972 Volume I) Lord Denning pronounced that "It seems to me that once it is accepted that the two parts of the Clause are coextensive, then it is sensible to require that the lien should be an effective lien. It is no use for the shipowner to be given a right of lien unless he can exercise it so as to get the money due to him... So I would hold the lien for demurrage must be effective at the time of discharge of cargo – unless it is so, the Charterers are not relieved of their liability" (Page 204-205). If the case of Respondents is, as in this case, that the Claimants had a practicable and effective right to exercise lien on the cargo, the question arises as to who is to establish that this right was an effective one. The Respondents in a supplemental written submission dated 26.02.2002 has argued that it is on the Claimants and has cited Lord Justice MEGAW in the SIONE Case. ".....The

onus of establishing that the lien is not effective at the port of discharge rests upon the shipowners; it is for him to show, if they can, by convicting evidence that the lien is not effective either because of illegality or because of impossibility, the word impossibility means impossibility....” (LLR 1972 Vol.I, I.P. 206). Many subsequent pronouncements have not followed Lord Justice Megaw. Parker J. analysed the other judgments as well as that of Lord Justice Megaw’s judgment in the SIONE case and concluded that Lord Justice Megaw’s comments should not be taken literally not as doing morethan”.....lending emphasis to the warning that inconvenience and difficulties are not enough...”(LLR Part 2 1981 Vol.2, P. 166). After analyzing various judgments having a bearing on this subject, M/s. Julian Cooke, John Kimball, Timothy Young, Davind Martowski, Andrew Taylor and Leroy Lambert in their book “Voyage Charters” (Llyod’s of London Press, 1993) have concluded as follows “As the law is clearly that the cessation of liability is coextensive with the creation of an effective lien, the charterers ought to establish that there is a lien and that it is effective in order for their liability to cease.” (Page 342). The distinguished authors, after analysing American decisions on similar lien observe :

In more recent awards, Arbitrators emphasise that a large portion of the freight is pre-payable, with the balance dues including deadfreight, demurrage and despatch on a “settlement” date following the discharge. Commercially Arbitrators tend to find that it is unrealistic to expect owners to assert their liens prior to or during discharge since they do not know the amount of demurrage due, if any, until after the discharge is complete. (P. 366 ibid). In this case the Respondents have not even attempted to establish that the Claimants have an effective lien under the facts and circumstances of this case.

19.4 It is also clear that it would have been impracticable for the Claimants to exercise the lien. It may be recalled that the Claimants cause of action is in respect of 10% balance freight and demurrage at the discharge ports. The partial discharge was completed at Chittagong on 08.06.1995 and balance at Mongla on 21.08.1995 where the demurrage claims had arisen. Under Clause 41(B) of C/P the Respondents are required to settle the balance freight and demurrage claim within 90 days from the date of completion of discharge ie, within 90 days after 21st August, 1995. The Claimants could have effectively exercised his

lien only by stopping the delivery of cargo at some point of time when the ship was still at berth and when they had effective control over the cargo.

No port will allow a ship to idle merely because the ship owner is in the process of exercising some right of his against the Charterer/Cargo receiver. Any such action on the part of the shipowner would have resulted in the ship losing her discharging turn and in order to regain her turn the shipowner would have had to join the ships queuing for discharge at the port. This is not a feasible option for any shipowner to take especially in Bangladesh ports where delays in getting berths and delays caused by cyclones etc are by no means unusual. The fact that in this very case the ship had to wait for 9 days to enter berth due to bad weather should not be lost sight of.

19.5 The vessel owner will have a lien on the charterer's cargo only so long as he retains possession of the cargo. In this case the Shipper/Charterer is STC, a Public Sector Undertaking and the Cargo Receivers are the Bangladesh Government. The Original Bills of Lading issued to STC have been endorsed to the Bangladesh Government. Even though the Charter Party does mention that the Bills of Lading shall be deemed to contain all the conditions of the Charter Party, neither the Claimants nor the Respondents have produced before the Tribunal the original Bills of Lading and it is not, therefore, clear whether the endorsee as an innocent third party has been made aware of the charter party provisions and that the Claimants have a lien on the cargo.

Further it is noted that the Bills of Lading have been endorsed "Freight Prepaid" and under these circumstances it is neither possible nor legal for the vessel owner to deny delivery of the cargo to an endorsee especially if it is the Government of Bangladesh. It is, therefore, clear to us that it would have been impracticable to exercise lien in the Bangladesh port and any attempt to exercise lien while the ship was in Bangladesh waters would have invited serious consequences for the ship, perhaps including seizure of the vessel. We hold that under the facts and circumstances of this case, the lien given by Clause 8 was not an effective or practical one and therefore failure to exercise the lien does not weaken, much less invalidate, the right of Claimants to recover demurrage at discharge port from the Respondents. Similar ineffectiveness of the lien is applicable to recovery of freight also and therefore Clause 35 which exonerates the

Charterer of all liability for freight and demurrage cannot have any effect. So far as freight is concerned Charterer has not disputed his liability to pay 10% balance freight despite the wordings of cesser clause 35. In other words, in our view either clause 35 is applicable in toto or not applicable at all against the Claimants and cannot be truncated to suit Respondents' convenience.

19.6 As regards Clause 41 (B) it clearly provides that the balance 10% freight together with demurrage is payable by Charterers within 90 days of completion of discharge. It may be noted that this is a typed Clause in its entirety; whereas Clause 8 (lien Clause) is printed clause with some minor deletions concerning damages for detention to vessel which is irrelevant to the subject case. It has been held by the Queens Bench in the UK (Justice J. Mocatta) in the ATHINOULA case that "It is well established, where there was a conflict between a typed Clause and printed Clause, the typed Clause should prevail" and hence Clause 41(B) being the typed clause prevails over the printed lien clause 8 in case of a conflict between the two. Apart from this in the same ATHINOULA case similar situation prevailed with regard to Lien Clause and Freight/Demurrage payment Clause Viz demurrage would be paid by Charterers within one week after presentation of Statement of Facts and Time Sheet for the voyage and since these developments cannot take place until after the cargo has been discharged and by then the possibility of exercise of lien would have vanished and in the circumstances Justice Mocatta held that the Charterers were liable to owners for discharge port demurrage. In the case of M.V. SAADI also, the demurrage as well as balance 10% freight became payable by Respondents within 90 days of completion of discharge. Hence, the question of exercising lien for demurrage at discharge port either during or immediately on completion of discharge would have been a breach of Clause 41(B) of the Charter party as the liability for demurrage was only accruing due but not yet due till completion of discharge and submission of some documents and as argued in the above case, a lien can only be exercised for money actually due and not for sums accruing due but yet due. Moreover, in this case the quantum of demurrage is a matter on which there has not been any agreement between the parties and the determination of the correct entitlement would have required a dispute resolution by arbitrators as has happened in this case. It is not possible to conduct the business of shipping if despite all these practical difficulties,

the owner must exercise his lien on the cargo before parting with its control and if he does not do so, he loses all rights to the amounts due to him under the Charter Party. Hence, in our opinion, non-exercise of lien on cargo by the claimants at discharge ports had not prejudiced in any way their right to claim demurrage at discharge ports as per terms of Clause 41(B) which clearly states when the demurrage would become actually due for payment.

19.7 It is plausible to argue that given the right of lien by the Claimants under Clause 8 of C/P it was incumbent on them to attempt to exercise lien for recovery of demurrage at discharge port and their failure to do so is fatal to their right to proceed against the Respondents. The Tribunal is unable to subscribe to this view. Clause 41(B) contemplates the completion of discharge, the submission of specific documents by the Claimants and the payment to the Claimants of balance 10% freight and demurrage within 90 days of completion of discharge. Any attempt to enforce the lien before the completion of the above time frame is liable to be deemed premature and an attempt to exercise the lien after the above time frame would have been infructuous. Apart from Clause 41(B) of C/P there were other practical difficulties also which have been referred to in the earlier paragraphs. These factors would have rendered the exercise of lien or an attempt to exercise it, under the circumstances of the case, an impossibility, not merely an inconvenience.

19.8 The Tribunal taking into account the various factors mentioned in the paras 19.2 to 19.7 severally as well as in conjunction with each and others has come to the conclusion that the Claimants at the discharge port did not have an effective lien which they could have exercised to realise the amounts due to them.

5. Mr. Khanna further stated that the Bombay High Court in ***The Minerals and Metals Trading Corporation Ltd. vs. M/s. John Frangos (Brokerage) Ltd.*** in Arbitration petition No. 163/2003 and this Court in ***M.M.T.C. vs. M/s. Irano Hind Shipping Co.*** in OMP 235/2003 had upheld similar awards passed under similar Charter Party Agreements.

6. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80, after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd. Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy. Even though Section 34 of Act, 1996 permits a Court to interfere on the ground of an arbitral award being violative of public policy, various judgments of the Supreme Court place an extremely restricted and limited interpretation on the term 'public policy'. (Refer to *State of Rajasthan & Ors. Vs. Basant Nahata* reported in (2005) 12 SCC 77).

7. It is settled legal position, both under Arbitration Act, 1940 and to a even greater extent under Act, 1996, that arbitral tribunal's decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisalment of evidence. The arbitrator is the sole judge of the quality as well as the

quantity of evidence and it will not be for the Courts to take upon itself the task of being a judge on the evidence before the arbitrator (Refer to *M/s. Sudarsan Trading Co. Vs. Government of Kerala and Anr.* reported in (1989) 2 SCC 38).

8. Consequently, this Court is of the view that findings of fact given by the Arbitral Tribunal are not liable to be interfered with unless such findings are perverse and unconscionable. Moreover, as held in *Lesotho Highlands Development Authority Vs. Impregilo SpA and others* reported in 2005 UK HL 43, arbitrators do not exceed their powers simply by making a mistake. In *Burchell Vs. Marsh* reported in 58 U.S. 344 (1855), the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

9. In the present case, the finding arrived at by the majority of the Arbitral Tribunal with regard to limitation is plausible and a possible one and the same cannot be interfered with in Section 34 proceedings. This is more so keeping in view the petitioner-objector's own conduct of not only entertaining and processing the claim but also seeking Reserve Bank of India's approval for release of the amount under the

Charter Party Agreement. In any event, the contractual period of limitation can be extended by this Court in exercise of its power under Section 43(3) of Act, 1996—which keeping in view the facts of the present case, I exercise.

10. As far as the interpretation of Clauses of the Charter Party Agreement is concerned, I am of the opinion that the same is within the domain of the Arbitral Tribunal and the same cannot be interfered with in Section 34 jurisdiction. In fact, as rightly pointed out by Mr. Khanna, learned counsel for respondent-claimant, this Court while upholding a similar award in the case of **MMTC Ltd. vs. M/s. Irano Hind Shipping Co.** (supra) had observed as under:-

“24. In AIR 1991 SC 945, S Harcharan Singh Vs Union of India; AIR1992 SC 2192, Hindustan Construction Co Ltd. Vs State of J & K and(2003) 8 SCC 4, Continental Construction Ltd. Vs State of U.P it was held by the Apex Court regarding interpretation of the terms of the contract that the Court cannot substitute its own interpretation with that of the arbitrator so long as the interpretation of the arbitrator is a possible one. If an interpretation to a particular clause of agreement is given by the Arbitrator, such an interpretation although may be erroneous, is final and binding and Court does not have power to upset the findings. However, if Arbitrator passes an award by ignoring the stipulation and prohibition contained in the agreement, then Arbitrator travels beyond his jurisdiction. The objector is unable to show as to which clause or term of the agreement has been ignored by the Arbitrators.

25. The arbitrator has given sufficient and cogent reasons for deciding the claims of the claimant and for rejecting counter claim nos. 1 & 2 of the objector in the present facts and circumstances. In the circumstances, it cannot be said that the Arbitrator has exceeded in his jurisdiction. There does not seem to be any errors in the inferences. Even if it is presumed that there is any error in the inferences, the same shall be error within their jurisdiction and this Court will not substitute its decision with the decision of majority

Arbitrators who has considered all the material which is also relied on by the objector. Though a ground has been taken that the Arbitrator has not considered a material document but no such document has been pointed out by the learned counsel for the objector.

26. Under the award, the petitioners have been directed to pay respondent 10% of the balance freight and the petitioner's contention of being not liable to pay demurrage at discharge port was rejected. The award rejecting the contention of the petitioner about being not liable to pay demurrage at discharge port is, therefore, sustained. The other claims awarded to the respondents have not been challenged. The majority award had also awarded reimbursement of US\$ 8594.86 to the petitioner on production of original voucher or other satisfactory proof of payment in respect of which no original voucher or other satisfactory proof of payment has been produced and consequently the petitioner will not be entitled for over-age insurance premium of US\$ 8594.86 which is now disallowed as the petitioner has still not produced any original voucher or any other satisfactory proof of payment. No other findings of the Arbitrators have been challenged. The objections by the petitioner in the facts and circumstances are without any merit and, therefore, they are dismissed. However, parties are left to bear their own costs."

11. I may also mention that it is settled law that it is not permissible to look at the minority award while considering an objection petition seeking to set aside the majority award. (***Ref. Chowgule Brothers vs. Rashtriya Chemicals and Fertilizers Ltd.*** reported in **2006 (3) Arb. L.R. 457**).

12. In view of the aforesaid, the objections raised in the present case are no longer res integra.

13. However, I am of the view that the rate of interest awarded by the Arbitral Tribunal is excessive especially keeping in view the fact

that the Award is in foreign currency and the rate of interest prevalent in the international markets is extremely low. Even, the Supreme Court in recent judgments has reduced the rate of interest awarded by the Arbitrators on the ground that after economic reforms the interest regime in the country has changed and that rates have substantially reduced.

14. Consequently, keeping in view the rates of the interest which have been prevalent in the international market for the last few years, I reduce the rate of interest on the awarded sum to a uniform rate of 6% per annum simple interest from the date of Award i.e. 15th January, 2003 till the date of payment.

15. In view of the aforesaid observations, present petition is disposed of.

MANMOHAN,J

APRIL 27, 2010

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