

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

+ O.M.P. 401/2003

STEEL AUTHORITY OF INDIA Petitioner
Through Mr. Sanjay Jain, Senior
Advocate with Mr. Prabhjit
Jauhar and Ms. Prabhsahay Kaur,
Advocates

versus

WESTERN BULK CARRIERS KS Respondent
Through Mr. Jayant Bhushan, Senior
Advocate with Mr. Buddy
Ranganathan and Mr. Gautam
Talukdar, Advocates

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Date of Decision : May 04, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 34(2) read with Sections 13(5), 16(5), 28(1)(a) and 28(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the majority arbitral Award dated 13th June, 2003 passed by an Arbitral Tribunal comprising Mr. H.M. Singh, Presiding Arbitrator, Mr. S. Venkiteswaran and Mr. R.S. Saran, Arbitrators.

2. Mr. Sanjay Jain, learned senior counsel for petitioner-objector impugns the arbitral Award on the sole ground that it counts part of a day, namely, 6th October, 1995, during which discharge was possible as a 'weather working day' even though the Vishakhapatnam Port Trust had issued a certificate that it was a 'non weather working day'. He submits that the Award is contrary to the Charter Party Agreement dated 6th June, 1995 executed between the parties. In this connection, Mr. Jain relies upon Clauses 29, 36 and 38 of the Charter Party Agreement.

3. Mr. Jain also submits that the said interpretation is contrary to law. In this connection, he places reliance upon a judgment of Queen's Bench Division in *Compania Naviera Azuero S.A. Vs. British Oil & Cake Mills Ltd. and Ors.* reported in (1957) 2 Q.B. 293.

4. Mr. Jain lastly refers to the Statement of Facts which had been prepared jointly by the parties in which 6th October, 1995 has been excluded while calculating lay time.

5. On the other hand, Mr. Jayant Bhushan, learned senior counsel for respondent-claimant submits that all the aforesaid submissions have been rejected by majority of the Arbitral Tribunal by a speaking and reasoned Award. The reasoning given by the majority of the Arbitral Tribunal is reproduced hereinbelow :-

Clause 36 of the charterparty reads as under:-

“Charterers guarantee to discharge the cargo at the average rate of 5000 MT basis five or more hatches and pro rata for less number of hatches, per weather working day, Saturday afternoon, Sundays, charterparty holidays excepted even if used unless the vessel is already on demurrage”. [Emphasis supplied].

It would be seen therefore, that under Clause 36, the obligation of the charterer is to discharge a certain quantity “per weather working day”.

Our determination is called for on the point as to what is “weather working day” and whether part of a day, during which discharge is possible, could be counted as a “weather working day” even if the Port authority issues a certificate that it was a “non-weather working day”.

In the case of Compania Naviera Azureo S.A. vs. British Oil and Coke Mills Ltd., and others, reported in 1957 LLR page-312, Pearson J, deals with this subject. “In my view, a correct definition of a “weather working day” is a day on which the weather permits the relevant work to be done, whether or not any person avails himself of that permission; in other words, so far as the weather is concerned, it is a working day.”

The Statement of Facts is a contemporary document signed by both parties.

The perusal of the Statement of Facts and timesheets indicate that certain day was declared as “non-weather working day” by the Port. This is under the heading, “Pre-berthing rain delays”. However, in the time-sheet, the rain delay shows only certain part of the day as excepted. One such day is 06-10-1995, which shows 1000-1800 hours as excepted due to rain and weather. In the case of the vessel M.V. “Nand Swasti”, even if day may be declared by Port as “non-weather working day”, what can be excepted is only 8 hours from one 1000-1800 hours, because rest of the time the rain or weather was not such as to prevent discharge, and the time sheet designed by the parties reflect 1000 to 1800 hrs as the time of rain delay.

The expression, “weather working day”, is found in the contract entered into between the Claimants and the Respondents and it can and should only be construed and interpreted as commercial men would do. The English

judgements that we have perused do not support the view that the interpretation should be with reference to what the port authorities declare and it must be noted that the internationally accepted practice is to only exclude the time during which discharge was interrupted or was not possible, due to rain. In our opinion, a non-weather working day has certainly to be understood in all respects, as a day when the weather, in fact, interrupts or makes it impossible to work. This is a question of fact, which is ascertainable from the Statement of Facts and time-sheets.

Such a point was raised in Benetts & Co. V.J. and A. Brown, reported in 1908 King's Bench Division at page 490. In this case, evidence was given that, by a custom of the port, the Port Captain could declare days on which it was dangerous to discharge on to the beach as Surf days, which were deemed not to be weather working days. On the days so declared, discharge into lighters continued, but those lighters which were then to discharge on to the beach were unable to do so. The court said that, in these circumstances, the custom or the port gave a meaning, to the words "weather working days", different from their plain and natural one and held that it was not competent for the charterers to adopt it under the terms of the charter [emphasis supplied].

It would, therefore, be seen that even though evidence was led on the custom of the port, that the lighters could not have discharged the cargo, the court held that that would not change in the natural meaning of the word "weather working day", because it was possible for the vessel to discharge cargo.

The Respondents have annexed, as R-2, a telex message from Transchart to Great Eastern Shipping. This is a third party document, and not a document to which the Claimants are a party and we do not know on what basis that message had been sent and, therefore, we cannot take notice of the same.

Another argument was advanced that, under clause 29 of the Charter Party, the expression used is "per weather working day of 24 consecutive hours" and that therefore, even if there is an interruption of two hours, the entire day has to be omitted because, unless there are 24 consecutive hours, it cannot be considered as a weather working day of 24 consecutive hours.

This argument has to be rejected outright. First of all, the expression, “consecutive”, is used only in clause 29, which relates to “loading”. Clause 36 is relevant for discharge, and the word “consecutive” is absent. “Consecutive” only denotes a day as “24 hours”, rather than a calendar day.

In any event, it is very clearly understood in the commercial and legal parlance that, unless weather would actually prevent discharge operation, no exception can be claimed.

It is the case of the Claimants that other vessels were working in the Port on that day. The Respondents have not specifically denied this allegation.

In paragraph 9 of the Statement of claim, the Claimants aver about other vessels discharging and refer to and rely upon the daily report sheet for 6th October, evidencing discharge of cargo by other vessels. Paragraph 9 of the Statement of Claim is replied to in page 11 of the Written Statement, in which it is simply stated that “it has already been explained, in paragraph 6 above, regarding non-weather working day declared by the Port.” But the averment in the statement of claim is not specifically denied.

It is contended in the Written Statement by SAIL that Saturday, Sunday and holidays should be excluded, even if the charterers have unloaded the cargo on these days. The argument is that, similarly, if a day is declared by the Port authority as a “non-weather working day or bad weather day”, the same should be treated like Sundays and holidays and that it should be excluded – even if used. Sundays and holidays are fully excepted because no work is possible. Therefore, even if issued, it will be a charterparty holiday. The words, “if used”, in the clause are only applicable to Saturday, Sunday and holidays. This would not change the commercial understanding of the expression, “weather working day”. Any time can be excluded as “non-weather working day” only if discharge was not possible due to interruption of weather. If discharge was possible, it ceases to be a “non-weather working day”. It is very interesting, in this aspect, to see the pleading in paragraph 4 of the Written Statement, at page 6, which reads as follows:

“SAIL further submits that a particular day is declared non-weather working day by the Port authority when the loading and unloading operations of most of the vessels are affected totally partially due to bad weather.” [Emphasis supplied]

As seen above in the judgments, if working is possible, it ceases to be a non-weather working day for that vessel. The pleading itself says: “the operations of most of the vessels are affected totally/partially”. This would mean that some of the vessels could still discharge. SAIL presumes, even if there is no interruption by weather for some time it cannot be treated as a weather working day. If weather permits discharge, how can it be “non-weather working”?

In the circumstances, in our opinion, the expression, “weather working day”, would not permit the charterers to deduct the entire day, only on the basis of the certificate of the Traffic Manager, unless other evidence available before us indicate that discharge would never have been possible on that day, due to interruption of rain, particularly when the time-sheet reflects the time when there was rain/weather interruptions.

Hence, any deductions made by the Respondents, to arrive at a calculation, on the basis of which they made payment, cannot be allowed.”

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. I am also of the view that construction of a contract is within the jurisdiction of the Arbitral Tribunal and interpretation of a contract is a matter for the Arbitral Tribunal to determine even if it amounts to determination of a question of law. (Refer to *Mcdermott International Inc. Vs. Burn Standard Co. Ltd.* reported in 2006 (11) SCC 181, *Pure Helium India Pvt. Ltd. Vs. Oil & Natural Gas Commission* reported in 2003 (8) SCC 593 and *D.D. Sharma Vs. Union of India* reported in 2004 (5) SCC 325). 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.

8. In my opinion, the impugned Award is a well reasoned one in which the majority of the Arbitral Tribunal has given cogent reasons for its conclusions. I am further in agreement with the majority view of the

Arbitral Tribunal that a non-weather working day is a day on which the weather, in fact, interrupts or makes it impossible to discharge the cargo. If on a particular day, discharge is possible, in my view it ceases to be a 'non-weather working day'. I also find that there is no provision in the Charter Party Agreement executed between the parties which stipulates that declaration by the Port Trust would be determinative of the fact as to whether a particular day is a 'weather working day' or 'non-weather working day'.

9. In fact, as rightly pointed out by the majority arbitral Award that in *Bennetts & Co. Vs. Brown* reported in *1908 (1) King's Bench Division 490*, the Courts have held that the plain and natural meaning of the expression 'weather working day' in the Charter Party Agreement has to be preferred and accepted in contrast to any declaration made by a port trust authority.

10. Insofar as judgment of *Compania Naviera Azuero S.A.* (supra) is concerned, I am of the opinion that it offers no assistance to the petitioner-objector inasmuch as it defines '*weather working day as a day on which the weather permits the relevant work to be done, whether or not a person avails himself of that permission. In other words, so far as the weather is concerned, it is a working day.*' In any event, the interpretation of contractual provisions made by the majority of the Arbitral Tribunal cannot certainly be said to be one that is perverse or contrary to the terms of the contract/agreement.

Accordingly, in my opinion on this ground the impugned Award is not liable to be set aside.

11. As far as the Statement of Facts is concerned, I find that the remark “06.10.95 –*FRIDAY – Non-weather working day declared by Port*” in the said statement is not an admission on the part of the respondent-claimant but is actually a remark made by petitioner’s representative. Moreover, below the aforesaid note of the receivers/charterers agents, the master/owners/owners agent’s remark is that lay time has to be counted as per the terms and conditions of the relative Charter Party. Consequently, there is no admission in the statement of facts by respondent-claimant.

12. In fact, as pointed out by the Arbitral Tribunal, on the contrary there is an admission by petitioner-objector in its written statement that if discharge was possible on a particular day, it ceases to be a non-weather working day. Since admittedly discharge was possible on 6th October, 1995 for 16 out of 24 hours, the opinion of the Arbitral Tribunal is a plausible and possible one and it calls for no interference in Section 34 jurisdiction.

13. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 6% per annum simple interest for the post award period. 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.

14. Consequently, keeping in view the aforesaid judgments and the rate of interest prevalent at the relevant time internationally, I reduce the post Award rate of interest to 6% per annum simple interest. However, it is made clear that in case the amount awarded under the impugned Award is not paid within a period of 90 days from today, the rate of interest post-judgment would stand increased to 9% per annum simple interest. With the aforesaid modification in the rate of interest, present petition being devoid of merits is dismissed but with no order as to costs.

MANMOHAN,J

MAY 4, 2010
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