

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

**O.M.P. 242/2012**

MMTC LIMITED ..... Petitioner

Through: Mr. Sanat Kumar with  
Ms. Poonam Solanki, Advocates.

versus

INTERNATIONAL COMMODITIES EXPORT  
CORPORATION OF NEW YORK ..... Respondent

Through: Mr. Prashant S. Pratap and  
Mr. O.P. Gaggar, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**  
**26.04.2012**

1. MMTC Limited ('MMTC') is aggrieved by the Award dated 14<sup>th</sup> June 2008 passed by the Arbitral Tribunal allowing the claims of the Respondent arising out of an Agreement dated 23<sup>rd</sup> June 1992 entered into with the Petitioner for sale of 80,000 MT of sulphur.
2. The present objections have been filed by MMTC under Sections 30 and 33 of the Arbitration Act, 1940.
3. The first objection raised by Mr. Sanat Kumar, learned counsel for the MMTC, is that there is an inordinate delay in the pronouncing of the Award. While the final arguments in the arbitral proceedings concluded on 24<sup>th</sup> August 2005, the Award could be pronounced only on 30<sup>th</sup> June 2008. MMTC contends that the inordinate delay in the passing of the Award vitiates it.
4. A perusal of the arbitral record shows that one of the learned Arbitrators had serious health problems after the final arguments

concluded. Consequently, both parties agreed to the extension of time for pronouncement of the Award. The letters conveying to the Arbitral Tribunal the consent of the parties to extension of time form part of the arbitral record. Time had been extended finally upto 30<sup>th</sup> June 2008. The Award came to be finally passed on 14<sup>th</sup> June 2008. Consequently, this Court rejects the above objection raised by MMTC.

5. Secondly, it is submitted that it was only towards the end of the arbitral proceedings that the Respondent produced a copy of the Charter Party ('C/P') entered into with the shipper which indicated the rate of demurrage. Consequently, the Petitioner had no opportunity to make submissions in respect of the said document. It is submitted that the principles of natural justice were violated. Reliance is placed on the decision in ***Indu Engineering & Textile Ltd. v. DDA AIR 2001 SC 2668***. In response to the above submission, it is submitted by Mr. Prashant S. Pratap, learned counsel for the Respondent, that the Petitioner did not seek copy of the C/P for more than ten years and when it was finally argued for in the Arbitral Tribunal proceedings, it was produced on the very next date. The delay in not seeking the copy of the C/P was entirely due to the Petitioner.

6. The court finds merit in the submission of the learned counsel for the Respondent. It does appear that MMTC never really asked for a copy of the C/P and when it did, it was provided a copy. There is no substance in the submission that there was therefore a violation of the principles of natural justice.

7. As regards the objections on merits, it is submitted by Mr. Sanat

Kumar that the Arbitral Tribunal erred in holding that the Respondent was entitled to demurrage at Vishakapatnam ('Vizag') and Calcutta for 31 days 18 hours and 7 minutes @ US\$ 4000 per hour i.e. USD 125,541.67 less payment of US \$ 5866.11 resulting in a net amount of US \$ 121,333.09. It is submitted that the calculation of the demurrage was itself erroneous inasmuch as the demurrage could not have commenced during the period when the master of the ship did not hand over the original Bill of Lading ('B/L') to the Petitioner. If he had done so, it would have facilitated an early discharge of the cargo at the Vizag Port. It is submitted that the interpretation placed by the Arbitral Tribunal on the relevant clauses of the Agreement, in particular Clause No.11(c), was erroneous. Lastly, it is submitted that the burden was on the Respondent to show the precise amount of demurrage paid by it to the port authorities or the shippers, as the case may be. The Respondent ought not to be allowed to unjustly enrich itself by being awarded a sum it did not part with. It is submitted that the Arbitral Tribunal erred in mechanically applying the maximum of the pre-determined demurrage charges on a per day basis. Since the wording of clause 26 was "not exceeding 4000 USD", the actual value of the loss within that range was a matter of speculation which had to be calculated and proved.

8. In reply, Mr. Pratap referred to the clauses of the Agreement and pointed out that this was a C&F contract whereunder the seller i.e. the Respondent, had to charter the ship. Although the C/P stipulated demurrage at US\$ 4500 per day, the Agreement with the Petitioner provided for a lesser amount. He pointed out that this ground was not urged by the Petitioner before the Tribunal. The clause concerning demurrage was actually a provision for liquidated

damages ('LD') and there was a genuine pre-estimate of the losses likely to be suffered by the Respondent. Referring to the time sheet/day statement, he points out that even Petitioner acknowledged that the demurrage per day was US \$ 4000 although the Petitioner wrongly calculated the total demurrage amount as US \$ 5866.11. He submitted that in terms of the Agreement, the original endorsed B/L was sent to the Bank. The Canara Bank by letter dated 12<sup>th</sup> January 1995 acknowledged to the Respondent that it had received the original B/L dated 1<sup>st</sup> October 1992 and forwarded it to the Petitioner on 12<sup>th</sup> October 1992 itself. On its part, the Petitioner forwarded the original B/L to its agent under cover of a letter dated 2<sup>nd</sup> November 1992. He also referred to the letter dated 23<sup>rd</sup> February 1993 of the Vishakhapatnam Port Trust which stated that the vessel could not be berthed up to 8<sup>th</sup> November 1992 as the cargo receivers were not ready with documents up to 3<sup>rd</sup> November 1992.

9. In order to appreciate the above submissions, certain relevant facts need to be referred to. Under the sale and purchase contract dated 23<sup>rd</sup> June 1992, the Respondent was to supply to the MMTC 80,000 MT of Sulphur on C&F basis. Under Clause 1, the Respondent was to arrange for chartering a suitable vessel to load the agreed quantity and was also responsible for fulfilling the conditions of C/P at the port. Clauses 11(a)(ii), 11(c) and 14 of the Agreement and Clauses 16 and 26 of the Annexure-I to the Agreement read as under:

#### **“11. Payments**

Payment will be effected on CAD basis at sight/against presentation of the following documents:-

(i)...

(ii) One set of clean, signed, “On Board” Charter party Bills of Lading with one negotiable and four non-

negotiable copies made to order and blank endorsed, evidencing that the goods have been shipped.”

(c) “Sellers will ensure that one original set of Bill of Lading duly endorsed in favour of the Buyers air-freighted/airmailed to the Buyer or its concerned Regional Office immediately on sailing of the vessel. Another original set of Bill of Lading will be sent to the buyers through the Master of the vessel.”

**“14. DEFAULT:**

Any wharfage or demurrage at the port of loading shall be accounted to the Sellers. If any wharfage or demurrage results at the port of discharge due to the negligence of the Sellers or their nominee by reason of failure to send correct documents in time connected with the shipment of goods under this contract and if in consequence thereof, clearance of consignment by the Buyers or delivery of goods to it is delayed resulting in wharfage or demurrage, such wharfage or demurrage shall be to the account of sellers. Wharfage or demurrage, for any other reason at the port of discharge shall be to Buyers account.”

“16. The cargo shall be discharged at the average rate of 1200 MT basis five or more workable hatches/holds made available and prorate for less number of hatches/holds per weather working day of 24 consecutive hours Sundays and holidays excepted, even if used, provided vessel can deliver at these rates. Time shall not count between noon on Saturday and 8 AM on Monday, nor between 5 PM (Noon if Saturday) on the last working day preceding a legal holiday and 8 AM on the first working day thereafter even if used unless the vessel is already on demurrage. Time shall begin to count from 24 running hours after vessel’s arrival within port limits and notice of readiness tendered and accepted during official working hours at each discharging port reported and in free pratique whether in berth or not, but not between the hours of 5PM and 8PM on a week day or during any of the period, excepted above even if used unless (at second or subsequent discharging port) the vessel arrives already on demurrage. Buyers have the right to work during excepted period, such time used not count as laytime.”

26. The Sellers shall pay to the Buyers dispatch money and Buyers to pay to the Sellers' demurrage money at the rate and in the currency as mentioned in the Charter Party per day and pro-rata the part of the day for all time saves in discharging. Demurrage/dispatch rate will be as per Charter Party but not exceeding UP\$ 4000/- 2000A.T.S. per day. In case such rates are higher, prior approval of the Buyers should be obtained.

10. A vessel named 'Alexander' was chartered. The vessel arrived at within the Vizag port limits at 8 am on 16<sup>th</sup> October 1992. A Notice of Readiness ('NOR') was tendered at 0930 hrs. on 16<sup>th</sup> October 1992. Lay time commenced 24 hours later i.e. from 0930 hrs. on 17<sup>th</sup> October 1992. Admittedly, the discharge could commence at the berth at Vizag Port only on 9<sup>th</sup> November 1992 and was completed on 20<sup>th</sup> November 1992. From there the ship proceeded to Calcutta where it arrived at 1800 hours on 29<sup>th</sup> September 1992. There the NOR was tendered and received on 1<sup>st</sup> December 1992. Lay time commenced from 1000 hrs. on 3<sup>rd</sup> December 1992. The discharge commenced at 0800 hrs. on 2<sup>nd</sup> December 1992 and was completed at 1430 hrs. on 18<sup>th</sup> December 1992.

11. The lay day statement/time statement accounts for the expected time and the prorata reduction in demurrage charges as permissible under the contract. The total demurrage at Vizag was 7 days, 7 hours and 52 minutes and at Calcutta it was 24 days, 10 hours and 15 minutes. The total demurrage time was 32 days, 19 hours and 22 minutes.

12. The period between 16<sup>th</sup> October 1992 and 9<sup>th</sup> November 1992 when the vessel finally berthed at Vizag port is the point of

controversy between the parties. The case of the Petitioners was that the port authorities would not allow berthing of the vessel which did not have a delivery order issued by the vessel's master. In this case, the master refused to hand over the shipping documents till such time the original endorsed B/L sent to the MMTC through the banking channels was delivered/surrendered to him or to the vessel's agents. The case of the MMTC was that the master acted in breach of the contract by not delivering/handing over the shipping documents carried on board in terms of Clause 11(c) of the Agreement. This led to the delay in MMTC obtaining delivery order/completing the documentation required for allotment of the berth by the port authorities. This could ultimately be completed only on 3<sup>rd</sup> November 1992. It was submitted by MMTC that had the master of the vessel handed over the shipping documents, MMTC would have been able to take delivery of the cargo against the said documents even before 26<sup>th</sup> October 1992. MMTC also contended that although a berth was available on 26<sup>th</sup> October 1992 at Vizag Port it was not accepted by vessel's agent as they wanted a berth with shore discharging cranes and wrongly described the vessel's cargo gears to be of a lower capacity.

13. There is merit in the contention of learned counsel for the Respondent that in terms of Clause 11 (a) (ii) there is only one endorsed original B/L which is sent to the Petitioner's bankers. Unless the master of the ship is able to be satisfied of the existence of the original endorsed B/L, he would not be able to issue the delivery order. MMTC wanted the Master to deliver the cargo against one set of the B/L (unendorsed) carried on board. This was impermissible. The cargo could be given only to the holder of the original B/L duly endorsed in his favour by the charterer. The

original B/L was indeed available with the Petitioner's bank and was in turn presented by them to MMTC with a letter dated 12<sup>th</sup> October 1992. The letter dated 12<sup>th</sup> January 1995 from Canara Bank to the Respondent which formed part of the arbitral record confirmed this. The letter dated 23<sup>rd</sup> February 1993 of the Vizag Port Trust further stated that the MMTC was not ready with the documents upto 3<sup>rd</sup> November 1992 and thereafter the vessel waited for want of berth. Therefore, as on 26<sup>th</sup> October 1992, MMTC had not produced the original endorsed B/L for satisfaction of the master of the ship. Although the said document was available with it, it was produced only on 3<sup>rd</sup> November 1992. This delay by the MMTC in producing the original endorsed B/L was not satisfactorily explained before the Arbitral Tribunal or before the Court.

14. The finding of the Tribunal that the vessel had arrived at Vizag on 16<sup>th</sup> October 1992 and did not berth till 9<sup>th</sup> November 1992 is on the basis of lay day statement/time sheet. Consequently, the vessel was on demurrage for 7 days, 7 hours and 52 minutes at Vizag. This Court is not persuaded to interfere with this finding of fact. This Court does not find any error having been committed by the Tribunal in interpreting Clause 11(c) of the Agreement and Clauses 14, 16 and 26 of Annexure-I to the Agreement.

15. The contention of MMTC that the Respondent was required to prove the actual demurrage paid by it, overlooks the legal position explained by the Supreme Court in ***Oil and Natural Gas Corporation Limited v. Saw Pipes, 2003 (5) SCC 705***. After discussing Sections 73 and 74 of the Indian Contract Act, 1872, the Supreme Court observed in para 46 as under:-

“From the aforesaid Sections, it can be held that

when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. however, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.”

16. The Supreme Court then proceeded to discuss the decisions in ***Fateh Chand v. Balkishan Das*, AIR 1963 SC 1405, *Maula Bux v. Union of India*, (1969) 2 SCC 554, *Union of India v. Rampur Distillery and Chemical Co. Ltd.*, (1973) 1 SCC 649 and *Union of India v. Raman Iron Foundry* (1974) 2 SCC 231.** It was held that a genuine pre-estimate of damages by mutual agreement was in effect a stipulation naming liquidated damages and was binding on the parties. Going by the above principles, there was no need for the Respondent in the instant to have proved any actual demurrage or loss suffered by it. All that was required to be seen was whether there was a genuine pre-estimate of demurrage as per the agreed rate. That is what the Tribunal has done in the instant case.

17. The Tribunal also referred to Clause 16 of the shipment terms which made it clear that once a ship was on demurrage, it was always on demurrage. Therefore, when the vessel reached at Calcutta, it was already on demurrage and the demurrage has been calculated on that basis.

18. There is no merit in the contention of the learned counsel for MMTC that the Respondent should not be allowed to unjustly enrich itself seeking payment of an amount in excess of the demurrage actually paid by it. The above submission is misconceived as the clause in the agreement between the parties clearly provides for payment of demurrage on a fixed pre-determined basis. The argument that the demurrage clause states “not exceeding 4000 USD” and therefore the precise value is a matter of speculation is belied by the Petitioner’s admission in the lay day statement that the demurrage is USD 4000 per day. The parties have agreed to be bound by those terms. The Arbitral Tribunal was bound to ensure that the clauses of the agreement were applied and followed.

19. The plea of the Petitioner that it should not be made to pay interest for the period during which pronouncement of the Award was delayed is also without merit. The parties themselves had agreed to the extension of time for pronouncing the Award.

20. This Court does not find any ground having been made out under Sections 30 and 33 of the Arbitration Act, 1940 to interfere with the impugned Award. The objections are accordingly rejected. The Award is made rule of the Court.

21. OMP No.242 of 2012 is disposed of. Decree sheet be drawn up

accordingly.

22. The arbitral records have been placed in OMP No. 231 of 1999.  
They be placed on the record of the present petition.

**S. MURALIDHAR, J.**

**APRIL 26, 2012**

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