

IN THE HIGH COURT OF DELHI AT NEW DELHI

(Not reportable)

O.M.P. 478 of 2006

Reserved on: 17th October, 2012

Decision on: 5th November, 2012

JAGSON AIRLINES LTD. Petitioner

Through: Mr. Sakal Bhushan, Advocate.

Versus

BANNARI AMMAN EXPORTS LTD. & ANR. Respondents

Through: Ms. Indu Malhotra, Senior Advocate with Mr. Vansdeep Dalmia and Ms. Nishtha Kumar, Advocates for R-1.

and

O.M.P. 482 of 2006

INDIAN PORTS WAREHOUSING CO. LTD. Petitioner

Through: Mr. Jayant Nath, Senior Advocate with Mr. Udit Gupta, Advocate.

Versus

BANNARI AMMAN EXPORTS LTD. & ANR. Respondents

Through: Ms. Indu Malhotra, Senior Advocate with Mr. Vansdeep Dalmia and Ms. Nishtha Kumar, Advocates for R-1.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

05.11.2012

1. An Award dated 10th July 2006 is the subject-matter of challenge in OMP No. 478 of 2006 filed by Jagson Airlines Limited ('JAL') and O.M.P. No. 482 of 2006 filed by Indian Ports Warehousing Co. Ltd. ('IPWC'), a

unit of Jagson International Ltd. ('JIL'), under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act').

Background Facts

2. The background facts are that on 10th April 1996, Bannari Amman Exports Ltd. ('Bannari') entered into a lease agreement with IPWC for the lease of Tank No.6 at New Mangalore Port ('NMP') for storage of cane molasses. The lease was for a period of six months, commencing from 7th May 1996. Bannari placed a security deposit of Rs.42,58,500 with IPWC and advance storage charges for three months in the like sum which was to be adjusted against 50% of the monthly hire charges of Rs.26,44,950.

3. The case of IPWC was that Tank No.6 had earlier been taken on lease by Bakelite Hylam Ltd. ('BHL') for storing molasses. After BHL vacated Tank No. 6, there was some residual molasses which was agreed to be taken over by Bannari. It is stated that on 7th May 1996, Bannari was informed by IPWC that the shipment by BHL was complete and that Bannari could bring in its cargo of molasses and also take over the left over quantity of molasses in Tank No.6.

4. JAL took on lease Tank No.5 at the NMP from IPWC. The said lease agreement between IPWC and JAL contained a clause that permitted it to further sub-lease Tank No.5. Bannari desired additional space for storing the molasses for export that it was procuring from suppliers in Karnataka and elsewhere after obtaining necessary statutory permission from the Karnataka Excise Authorities. On coming to know of Bannari's plan to increase the volume of molasses exports, IPWC offered Tank No.5 also to Bannari. Tank No.5 had a larger capacity of 17,633 Metric Tonnes (MTs)

as compared to Tank No.6 which had a capacity of 5,678 MTs. According to Bannari, during the course of negotiations IPWC revealed that it would not be directly leasing Tank No.5 to Bannari, but it would first lease it to JAL, which, in turn, would lease it to Bannari.

5. A lease deed was entered into on 12th September 1996 between JAL and Bannari whereby Tank No.5 was leased to Bannari for a period of six months, renewable for a further period, subject to the mutual consent of both the parties. The said lease deed referred to JAL as the party of the first part and Bannari as the party of the second part. The preamble clause clearly acknowledged that JAL was the lessee of Tank No.5 under IPWC and was authorized to sub-lease it to third parties. Bannari agreed to pay JAL an all inclusive charge of Rs. 150 per month per tonne for storage of molasses/non-hazardous liquid cargo.

6. Bannari paid JAL Rs.79,34,850 towards three months' security deposit, against which the security deposit already paid to IPWC for Tank No.6 in the sum of Rs.42,58,500 was to be adjusted. Consequently, the security deposit payable by Bannari to JAL under the agreement dated 12th September 1996 was Rs.36,76,350. This apart, Bannari paid JAL three months' advance rent in the sum of Rs.79,34,850 minus Rs.7,09,750 being 15 days' rent for Tank No.6 which still was available with IPWC. Consequently, the amount of advance rent payable by Bannari to JAL worked out to Rs. 72,25,100. Bannari was to pay JAL by demand draft monthly hire charges in advance by 15th of each month after adjusting 50% of the monthly hire charges or any other claim from either side. This worked out to Rs.13,22,475. The security deposit was to be refunded after adjusting dues from Bannari to JAL within 10 days of Bannari vacating the

Tank on completion of the agreement. The effective date of commencement of the six months period under the agreement was 27th September 1996.

7. It was stipulated under Clause 10 that Bannari “will not make any purchase of molasses from the Karnataka Agro Industries Corporation Limited” (‘KAICL’). Under Clause 17, for accounting purposes, the findings of the surveyors appointed by Bannari “in respect of quantity and quality as arrived, received, stored, shipped, etc. shall be final and binding on both the parties.” Under Clause 18, JAL was “responsible for any loss/damage accruing on account of any acts or omissions due to the negligence or default” of JAL. Under Clause 32, it was the responsibility of Bannari to clear out any molasses left over in the tank at the time of its surrender. Under Clause 35, in the event of any breach, negligence, default and non-performance of any of its obligations by JAL, Bannari would be entitled to be indemnified for any loss of damage sustained by it and that would be recovered from the hire charges payable by it to JAL.

8. Under Clause 36, if Bannari failed to remove the cargo and vacate the tank on the expiry of the date of the agreement, then Bannari would, during the grace period of 45 days, pay half a month’s hire charges if the tank was not vacated within 15 days from the date of the expiry and full month’s hire charges if the period of occupation of the tank by Bannari exceeded 15 days to one month. The grace period was limited to a maximum period of 45 days. Under Clause 37, in the absence of any mutually agreed renewal of agreement, if Bannari failed to remove the cargo and vacate the tank within the grace period of 45 days from the expiry of the contract, then Bannari would pay JAL Rs.250 per MT per month for 17,633 MTs.

9. Under Clause 39, if Bannari failed to pay the hire charges for a continuous period of one month, the title and ownership of the cargo in the tank was to stand automatically transferred to JAL, which would have the option to export the said cargo or otherwise to dispose it of. After such disposal, any amount remaining in excess after deducting the dues was to be paid by JAL to Bannari and if the amount realized by disposal of the cargo did not cover the dues, then Bannari would indemnify the balance due to JAL. Clause 41 provided for settlement of disputes by arbitration at New Delhi in accordance with the rules of the Indian Council of Arbitration ('ICA').

10. On 12th September 1996, IPWC wrote to Bannari confirming that it had entered into a lease agreement with JAL in respect of Tank No.5 and that a provision of the agreement permitted JAL to sublease the tank to any third party. It was confirmed by IPWC that "the tenure of our agreement with M/s. Jagson Airlines Ltd. is for a period in consonance with the agreement between Jagson Airlines Ltd. and yourself." It was further confirmed by IPWC that it would transfer the residual cargo in Tank No. 6 to Tank No. 5 on or before 27th September 1996, which was the date for commencement of the lease in respect of Tank No.5. It was also confirmed that the security deposit of three months rentals for Tank No.6 that remained with IPWC would be adjusted towards the three months' security deposit payable by Bannari to JAL.

11. It is the case of Bannari that on 8th September 1996 IPWC dumped over 300 MTs of molasses into Tank No.6 without any prior intimation to Bannari. The case of IPWC, on the other hand, is that 358.106 MTs of molasses was transferred to Tank No.6 on the said date pursuant to the

request made by Bannari. The case of JAL is that it had nothing to do with the actions of IPWC in relation to transfer of molasses from Tank No.6 to Tank No.5.

12. On 9th September 1996, Bannari wrote to IPWC (Ex. C-5), protesting against the transfer of molasses stock on 8th September 1996 from Tank No.6 to Tank No.5 without even informing it. Bannari reminded IPWC that molasses was an excisable commodity and was subject to various rules and regulations of the Government. It stated: “This action of simply transferring cargo is highly irregular.” Bannari reminded that the stock could be transferred only with the specific approval of Deputy Commissioner and Excise Commissioner. Consequently, Bannari held IPWC “responsible for all costs and consequences of our account of this unilateral decision and action of transfer without proper permission from the concerned authorities.” Bannari further pointed out that to the extent of the quantity so transferred, the capacity for storage in Bannari’s tank was restricted and that IPWC’s action “has put us in all embarrassing situation for no fault of ours.”

13. As a result of the above events, even prior to the execution of the lease agreement dated 12th September 1996 between JAL and Bannari and long prior to its effective date of commencement, i.e., 27th September 1996, a quantity of 358.106 MTs of molasses stood transferred from Tank No.6 to Tank No.5, against which transfer Bannari registered its protest forthwith. On 11th November 1996, a bill was sent by JIL to Bannari for a quantity of 306 MTs @ Rs.1,491 per MT in the sum of Rs.4,56,246 towards “cost of Indian cane molasses sold for export.” At this stage it may be noted that by a decision dated 24th May 1996 of this Court in Co. Pet. No.7 of 1996,

sanction was given for amalgamation of JIL and IPWC with Jagson India Ltd. (Jagson India) with effect from the transfer date, i.e., 1st April 1994.

14. Bannari protested against the aforementioned bill. It stated in its letter dated 15th November 1996 addressed to JIL that “Prima facie, the debit note can be raised only after the completion of all the formalities with the State Excise. This we have clearly pointed in our letter dated 09.10.96 (*sic*. 9.9.96) [copy enclosed]”. Bannari asked JIL to instruct its personnel for obtaining clearance and stated that “We shall agree the other terms and conditions on the prevailing market conditions.”

15. On 2nd December 1996, Bannari again wrote to IPWC (Ex.C-16) stating that for the period from 2nd November 1996 to 24th November 1996, there was no movement due to non-renewal of M2 storage licence. Further, the transfer by IPWC of the left over molasses into Tank No.5, without adhering to excise formalities was “one among the many reasons which attributed to the delay in renewal of M2 licence.” It was further pointed out that the earlier letter dated 9th September 1996 was still to be replied by IPWC. According to Bannari, it informed JAL by its letter dated 5th March 1997 (Ex. C-17) that JAL’s attempt to export over 300 MTs of molasses from Tank No.5 on 16th February 1997, without valid papers, invited the adverse reactions of the Excise Department, both in Bangalore and Mangalore. Consequently, the EC was not considering Bannari’s application for new No Objection Certificates (‘NOCs’). The Excise Commissioner had even gone to the extent of ordering the Deputy Commissioners (DCs) not to issue transfer permits for the present allotments. It was apprehended that the M2 licence may be cancelled as regards Tank No.5. Since the movement of molasses had totally stopped,

Bannari requested JAL to resolve the crisis. Having lifted over 7000 tonnes from the mills up to 25th February 1997, Bannari had to suspend the issuance of transport permits for its allotment at Nandi Sugar Mills. The lorries had been stranded at sugar mills and Bannari was facing a lot of problems with the transport Contractors. Bannari pointed out that “our plan of making a shipment on 10th of about 10,000 MTS has been greatly affected due to this.” Bannari further pointed out that “We register our strong protest for the arbitrary and unlawful actions causing inconvenience to us. We once again repeat the gravity of the situation and your immediate action is expected with top most priority.”

16. There was no reply by IPWC to Bannari’s letter dated 9th September 1996. There was also no reply by it to the letter dated 2nd December 1996. Bannari’s letter dated 15th November 1996 to JIL was also not replied to. JAL also failed to reply to the letter dated 5th March 1997.

17. On 17th March 1997, Bannari again wrote to JAL (Ex.C-18), pointing out that there had been total stoppage of molasses movement for 20 days. Bannari pointed out that it had lost precious time between 25th February 1997 and 15th March 1997 during which it could have moved 8000 MTs from Bijapur for shipment of 15000 MTs by the middle of the said month. Bannari also adverted to the market situation under which there was also shortage of production of molasses in Maharashtra and the cut throat competition had pushed up the domestic market to uneconomical levels. It was also pointed out in this letter that due to the stoppage of lifting and movement of molasses from 25th February 1997 onwards, Bannari was unable to accept the vessel for loading, resulting in losses to Bannari for no fault of its. Accordingly, Bannari requested JAL “to consider and offer

suitable relief to us in tank rentals.” In the circumstances, Bannari advised that it was not in a position to renew the storage contract for Tank No.5 which could be offered to others. Bannari requested for return of its security deposit within 10 days after adjustment of final settlements.

18. There was no reply by JAL or IPWC to Bannari’s letter dated 17th March 1997. On 1st April 1997, JAL raised an invoice for the storage and handling charges of Tank No.5 from 1st April 1997 to 30th April 1997 in the sum of Rs. 26,44,950. On 9th April 1997, Bannari wrote to JAL (Ex.C-20) drawing the attention of the latter to its earlier letter dated 5th March 1997 in which it had threatened to cancel the storage licence. It was pointed out that in view of the intervention by Mr. Alagappan of JAL, the problem had been sorted out and the movement of molasses “could be finally restored from 19.03.1997 after a lapse of almost one month.” Bannari made the following request in its letter dated 9th April 1997:

“On account of above delays and our missing a shipment in time had resulted in carrying over the stock at your terminal and our program of discontinuing the operations as per our letter 17:03:97 could not be carried out effectively. As we had to built up the sufficient quantity due to above, we were not able to vacate the tank within the period under contract. As per our contract we will have to vacate the tank and within 15 days the stock if any lying shall be cleared. The extension of period is a result of disruption of operation for sometime as noted above.

In view of these difficulties, damages and losses suffered by us, we request you to waive tank rentals for the extended period.”

19. There was no reply to the above letter immediately by IPWC or JAL. It appears that, in the meanwhile, on 25th April 1997, the Excise Commissioner in Karnataka, Bangalore, informed the Deputy Commissioner of Excise in Mangalore that permission had been granted for

transfer of 358.106 MTs of molasses to Bannari. The letter reads as under:

“Permission is hereby accorded to transfer the unshipped stock of 358.106 MTs of molasses possessed by M/s Karnataka Agro Industries Corporation Ltd., at New Mangalore Port to M/s. Bannari Amman Exports Ltd., at New Mangalore Port for the purpose of export. This permission is for the period upto 31.10.1997 as recommended by the Deputy Commissioner of Excise, Dakshina Kannada district.”

20. On 28th April 1997, JIL raised a further invoice (Ex.C-21) on Bannari in the sum of Rs.5,01,348.40 for 358.106 MTs of molasses at Rs. 1,400 per MT. The description of the commodity in the said invoice reads as under:

“Cost of molasses transferred to you for shipment as per approval dated 25.4.97 of Excise Commissioner, Bangalore”

21. On 29th April 1997, Bannari vacated Tank No.5. According to Bannari, it took out from Tank No.5 the entire quantity of molasses that it had stored. Reliance is placed on a Surveyor’s Report which will be referred to hereafter. On 1st May 1997, JAL raised an invoice on Bannari in the sum of Rs. 26,44,950 for the storage and handling charges for the period 1st May 1997 to 31st May 1997 for Tank No.5. On 2nd May 1997, IPWC wrote to Bannari, asking it to empty its residual molasses lying in Tank No.5 within 2 days and hand it over in clean condition so that IPWC could make the tank available to prospective customers. On 3rd May 1997, Bannari wrote to IPWC stating that it had pumped out its entire cargo on 29th April 1997 itself. It was further stated that “The possibility of residual cargo remaining in the Tank No.5 does not arise at all. We have asked our Surveyors to survey and report to us today. On receipt of their report we will revert back to you.”

22. On 7th May 1997, Ericson & Richards (Karnataka), the Surveyors

engaged by Bannari, submitted their Survey Report of Tank No.5. The Surveyors certified that the total quantity of 299.715 MTs of molasses remained in Tank No.5. The survey was undertaken in the presence of the representatives of IPWC.

23. On 9th May 1997, JAL wrote to Bannari, stating that there was a balance stock of 366.815 MTs in Tank No.5 and requested Bannari to clear the said left over molasses. Enclosed with the said letter was the bill for the month of May 1997. It was stated that if the left over molasses was cleared by 15th May 1997, the amount would be correspondingly reduced. Bannari, on 9th May 1997 itself, wrote to JAL protesting against the invoice for the month of May 1997 as well as the claim of JAL that there was any residuary quantity of molasses in Tank No.5 belonging to JAL. Bannari reiterated that the stock reported by JAL “represents the quantity held by you and not our material. As per the molasses receipts at your terminal and the shipment records, we are left with nil stock.” Bannari reminded JAL of the previous correspondence, including the letter dated 9th September 1996, in which Bannari had protested against the unauthorized transfer of molasses into Tank No.6 and protested against the bill sent for that transfer which had been made without the permission of the excise authorities. The discrepancy in the bill dated 11th November 1996 and the one raised on 28th April 1997 was also highlighted. Bannari reiterated: “For all purposes, we had handed over the tank to you on time as per the contract and the extended period was the consequence of your unwarranted intervention against the terms of contract by transferring unauthorised quantity without our knowledge, leading to delayed shipments and loss of business and income to us.” Accordingly, Bannari requested JAL to refund the advance of Rs.79,34,850 as well as the hire charges for the period of interruption of

operation between 25th February 1997 to 15th March 1997. On 16th May 1997, Bannari again wrote to JAL, seeking refund of the security deposit.

24. On 26th May 1997, JAL wrote to Bannari (Ex.C-30) in which it referred to the stock of 358.106 MTs of molasses remaining in Tank No.5 as “our stock.” The relevant portions of the said letter where such claims were made read as under:

“(iv) As per the statement of Molasses received in Tank No.6 on your account as on 22.9.96, the opening stock was 2537.946 M.T., the stock belonging to us was 358.106 M.T., the stock received was 83.800 M.T. and thus the closing stock as on 22.9.96 in Tank No.6 was 2979.852 M.T.

....

(vi) The stock belonging to us was 358.106 M.T. which was transferred along with your stock from Tank No.6 to Tank No.5 by the effective date of the Agreement i.e. 27th September, 1996.

(vii) You have shipped/exported our said stock as well; and till now you have not accounted for the proceeds of the same in our favour. The fact that you had exported our stock together with your stock is evident from the daily operation report as on 1st January, 1997, duly found and verified by your Surveyor and binding on both the parties to the Agreement which shows the closing stock of Molasses as 56.180 M.T. You had the full capacity of the tank No.5 available under the said Agreement.

....

3. Thus undisputably we are entitled for the following amounts that have fallen due from you and for the rights, viz.,

(a) the value/proceeds of the export of our stock of 358.106 M.T. affected by you prior to 01.01.1997;

(b) hire charges at the rate of Rs.150 per M.T. per month for 17633 M.T. from the date of expiry of the contract i.e. 26th March, 1997 till 9th May, 1997, and at the rate of Rs.250 per M.T. per month for 17633 M.T. from 10th May, 1997 till date;

(c) in case you fail to pay the said hire charges for a continuous period of one month, the title and ownership of the Cargo in the tank shall

automatically stand transferred to us;

(d) adjustment of the amount due to us against the security deposit;

(e) other consequences as per the terms of the Agreement; and

(f) interest on the amounts due to us.”

25. The above allegations were refuted by Bannari by letter dated 10th June 1997. On 2nd July 1997, Bannari wrote to the Commissioner of Excise (Ex.C-34) in relation to the permission granted on 25th April 1997 for the transfer of molasses into Tank No.5. The said letter reads as under:

“Please refer to your order dated 25:04:97 permitting to transfer the unshipped stock of 358.106 Mts. of molasses by M/s. Karnataka Agro Industries Corporation Ltd., at New Mangalore Port to us. We wish to state that we could not purchase the said quantity as we had completed our exports from New Mangalore Port by the time this transfer was permitted by your good self. The said quantity is still lying in the Tank farm of M/s. Indian Port Warehousing Corporation Limited, at New Mangalore Port.

We also do not anticipate further exports in the near future therefore the permission granted may please be cancelled. We had also surrendered the storage tanks leased by us to the concerned once we completed our exports.”

Arbitral proceedings

26. With the security deposit not being returned to Bannari, it filed Suit No.181 of 1998 in the High Court of Madras against IPWC and JAL. JAL and IPWC filed applications under Section 8 of the Act, pointing out that there was an arbitration clause governing the parties. It was agreed by the parties before the Court that their *inter se* disputes would be referred to the learned sole Arbitrator. On 27th July 2001 Bannari filed its statement of claims before the learned Arbitrator, *inter alia*, raising the following claims against IPWC (arrayed as Respondent 1) and JAL (arrayed as Respondent

2):

(a) For a sum of Rs.17,63,300 towards tank hire charges for a period of 20 days from 25th February 1997 to 15th March 1997 together with interest @ 24% per annum for the period from 15th March 1997 to 3rd February 1998.

(b) Rs.3,76,005 towards tank hire charges for 358.106 MTs of molasses illegally dumped by IPWC and JAL @ Rs. 150 per MT per month for the period September 1996 to March 1997 together with interest @ 24% per annum for the period 1st April 1997 to 3rd February 1998.

(c) Future interest @ 24% per annum.

(d) Damages in the sum of US Dollar ('USD') 40,200 together with interest @ 24% per annum.

(e) Rs.95,21,820 towards the refundable security deposit together with interest @ 24% per annum from 7th April 1997 to 3rd February 1998 and future interest thereon @ 24% per annum.

27. It may be mentioned herein that on 21st April 1998, JAL emptied Tank No.5. A joint counter and counter claim was filed, both on behalf of IPWC and JAL before the learned Arbitrator on 2nd April 2003. The counter claim was for a total sum of Rs.4,78,04,391 together with interest @ 24% per annum, which included a sum of Rs.22,52,474 towards storage charges from 16th July 1997 to 21st April 1998.

28. On behalf of Bannari Mr. T.M. Shankar, Assistant General Manager filed his affidavit by way of evidence dated 19th April 2004. He was

extensively cross-examined during hearings held in July-August 2004. Mr. Ranjan Poddar, Manager of IPWC was examined as RW-1. He filed his affidavit by way of evidence on 26th July 2004 and was cross-examined on 26th February 2005. Mr. Danvir Khera (RW-2) and Mr. P.P. Alexander filed their respective affidavits dated 26th and 24th July 2004 respectively by way of evidence on behalf of JAL. They were cross-examined on 27th February 2005.

Applications by IPWC and JAL before the Arbitrator

29. In April 2005, IPWC and JAL filed applications under Section 27(2)(c) of the Act before the learned Arbitrator seeking the summoning of records from the office of the Excise Commissioner, Bangalore and Mangalore. On 7th September 2005, a detailed order was passed by the learned Arbitrator rejecting both applications holding that whatever correspondence had taken place with the excise authorities were already on record and there was no possibility of any other records being available with the excise authorities regarding the alleged export by Bannari of the stock of molasses belonging to IPWC or JAL. The learned Arbitrator noted that there were three versions put forth by IPWC and JAL. One was that Bannari had exported molasses belonging to BHL. The second was that molasses belonging to JIL had been exported. The third was that molasses belonging to IPWC and JAL had been exported. Further confusion was created by the fact that the excise permit referred to stock of molasses possessed by KAICL. Consequently, the learned Arbitrator held that the applications filed by IPWC and JAL under Section 27(2)(c) were without merit.

30. Application No.1 was filed by JAL under Section 17 of the Act. Application No.2 was filed by IPWC seeking amendment of the counter

claim. The prayer in Application No.1 was that Bannari should be directed to deposit the entire sum as claimed by IPWC and JAL as counter claim which should then be permitted to be withdrawn by them upon furnishing a security. It was alternatively prayed that Bannari should be asked to furnish a bank guarantee ('BG') in lieu of such deposit. By a detailed order dated 2nd March 2006, the said application was dismissed by the learned Arbitrator primarily for the reason that Bannari had shown profit of Rs.5.16 million in the year 2005. Secondly, the application had been filed only to drag on the arbitral proceedings.

31. Application No.2 filed by IPWC on 19th December 2005 was for amendment of the counter claim. Certain additional paragraphs were sought to be added to the counter claim pertaining to the transfer of 358.106 MTs of molasses from Tank No.6 to Tank No.5 by stating that the said cargo had been purchased by IPWC and JAL from KAICL, thereafter transferred to Bannari and later exported by Bannari. The fact of IPWC and JIL having merged with Jagson India Ltd. by the order dated 24th May 1996 of this Court was also sought to be brought on record.

32. By a detailed order dated 2nd March 2006, the said application was rejected by the learned Arbitrator on the ground that a new version of the case was sought to be put forward by IPWC and JAL after an unexplained delay. Moreover, the amendment sought by the additional Paragraph No.5 was not merely a statement of facts but pleadings of an argumentative nature to overcome the mistaken stand taken by IPWC and JAL in their pleadings. The merger of IPWC and JIL with Jagson India did not advance the case of IPWC and JAL in any manner and, therefore, the amendment by way of additional Paragraph No.6 was held to be neither relevant nor

necessary. It was held that allowing the amendment would prejudice the case of Bannari and, therefore, the said application was rejected.

The impugned Award

33. In June 2006, written submissions were filed by both the parties. The impugned final Award was passed by the learned Arbitrator on 10th July 2006. The conclusions in the impugned Award were as follows:

(i) In view of the stand taken by IPWC and JAL the questions that arose were to be decided on the basis that IPWC was the owner of excess quantities of 358.106 MTs molasses that was stored in Tank No.6.

(ii) Bannari had neither authorized nor acquiesced in the transfer of the excess molasses from Tank No.6 to Tank No.5. JIL was a stranger with which Bannari had neither an agreement nor any dealings. The stand of IPWC that its case was not weakened by JIL raising bills (Ex.C-14 and Ex.C-21) could not be accepted.

(iii) The permission granted in Ex.C-31 by the Excise Commissioner for transfer of 358.106 MTs of molasses referred to the said quantity as being possessed by KAICL at NMP. However, the application purportedly made by Bannari on 25th March 1997 (Ex. RW 1/7), signed by one Mr. Sethu Balaji acting on its behalf, sought permission to buy and export 358.106 MTs of molasses from JIL. Therefore, even if Bannari's objection to the marking of Ex. RW 1/7 was overruled, the case of IPWC and JAL was not advanced in any manner by that document.

(iv) What was written in Ex.C-34 by Bannari to the Excise Commissioner was only a reproduction of the words contained in Ex. C-31 and did not explain the obvious inconsistent version put forth by IPWC and JAL.

(v) The wording of Ex. RW 1/7, being the purported application made by Bannari to the excise authorities for permission to acquire 358.106 MTs of molasses from JIL, referred to “unshipped stock of 358.106 MTs of molasses”. This indicated that the export had not yet taken place, whereas it was the case of IPWC as well as JAL that such export had already taken place and only an *ex-post facto* sanction was being sought.

(vi) The licence Ex.C-13 granted to Bannari specifically prohibited Bannari from exporting any molasses without the permission of the excise authorities. Therefore, Bannari could neither have acquired nor exported 358.106 MTs molasses without such permission.

(vii) In the lease agreement Ex.C-6, there was a specific provision prohibiting Bannari from buying molasses from KAICL. Therefore, any acquisition of molasses from KAICL would have been contrary to the lease agreement.

(viii) IPWC and JAL stored a certain quantity of molasses not belonging to Bannari in Tank No.6. Thus IPWC had committed breach of the lease agreement. JAL was a willing party to the storage of molasses belonging to IPWC in Tank No.5.

(ix) Bannari had neither authorized IPWC to purchase molasses on its

behalf, to store it in Tank No.6 and later transfer it to Tank No.5. It had not acquiesced in the storage of molasses belonging to others either in Tank No.5 or Tank No.6.

(x) There was no merit in the submission of IPWC and JAL that Bannari illegally exported molasses belonging to them without payment or without excise permission. It was a mystery as to how JIL was able to get a copy of Ex.C-31. Bannari's letters Ex.C-17 and C-35 were not refuted by IPWC and JAL. This only meant that the said averments were true.

(xi) The argument that Bannari ought to have written a strongly worded letter to the excise authorities denying that it had applied for any permission to export molasses in the quantity of 358.106 MTs was without merit because there was no need for Bannari to quarrel with excise authorities without any such application being made by it.

(xii) Bannari was justified in seeking remission of rent for the period 25th February 1997 to 15th March 1997, as it had proved that there was a stoppage of movement of molasses by it by the excise authorities during the said period. However, in view of the fact that a certain quantity of Bannari's stock of molasses remained in Tank No.5 during the period of non-operation and since IPWC and JAL had extended the storage period of the tank till 4th May 1997, Bannari was entitled to only 50% of the amount claimed i.e. Rs.8,81,650 together with interest.

(xiii) Bannari's claim for relief of payment of countervailing rent for the period September 1996 to March 1997, was rejected.

(xiv) JAL had no right to retain the security deposit amount which it should have returned to Bannari within ten days of the emptying of Bannari's stock of molasses on 29th April 1997.

(xv) Bannari had not adduced the requisite proof for its claim for damages. The claim was, therefore, rejected.

(xvi) The question, whether the counter claim were barred by limitation was not germane and in any event, it was not barred by limitation. However, there was no merit in the counter claim of IPWC and JAL. They were not entitled to claim higher charges or adjust the refundable deposit.

(xvii) Bannari was held entitled to the following reliefs:

- (a) Refund of security deposit of Rs.79,34,850 together with interest @ 18% per annum from 10th May 1997 till the date of payment.
- (b) Rs.8,81,650 towards remission of rent for the non-operation period of 25th February 1997 to 15th March 1997 together with interest @ 18% per annum from 3rd February 1998 till the date of payment.
- (c) Cost of Rs.25,24,650 together with interest @ 12% per annum from the date of Award till the date of payment.

Submissions of counsel

34. This Court has heard the submission of Mr. Jayant Nath, learned Senior counsel appearing for IPWC, Mr. Sakal Bhushan, learned counsel appearing for JAL and Ms. Indu Malhotra, learned Senior counsel and Mr. Vansdeep Dalmia, learned counsel appearing for Bannari.

35. On behalf of IPWC, it was contended by Mr. Jayant Nath, learned Senior counsel that the learned Arbitrator had rendered a total perverse finding contrary to the evidence on record in the form of Ex.C-31 and Ex.C-34, which showed that Bannari had in fact applied for and obtained permission to export 358.106 MTs of molasses which it had purchased from KAICL. The said transaction would have been verified if the learned Arbitrator had allowed the application filed by IPWC and JAL for summoning of the record of the excise authorities. The learned Arbitrator committed a patent illegality in rejecting the said application. Although, no Award as such was passed against IPWC in the operative part of the Award, the findings were against it and, therefore, IPWC was aggrieved by the final impugned Award. According to Section 114 Illustration (g) of Evidence Act, 1872, if the material documents which were required to be produced were withheld, then an adverse inference had to be drawn against the party resisting the production of such document. Relying on the decision of the Supreme Court in **Kundan Lal Rallaram v. The Custodian, Evacuee Property, Bombay AIR 1961 SC 1316**, it is submitted that the truth of the application of Ex. RW 1/7 made by Bannari to the excise authorities could have been established only by summoning the record of the excise authorities. No prejudice would have been caused to any party if the said application had been allowed.

36. According to Mr. Nath, the raising of bills by JIL was explained by the fact that IPWC and JIL had merged with Jagson India. Therefore, there was no inconsistent case pleaded by IPWC and JAL. In regard to the application for amendment, Mr. Nath relied on the decision in **Usha Balashaheb Swami v. Kiran Appaso Swami (2007) 5 SCC 602** and submitted that the amendment was only to bring on record certain undisputed facts which

would not have materially altered the case of either IPWC or JAL and should have been allowed by the learned Arbitrator. Relying on the decision in ***Indowind Energy Ltd. v. Wescare (India) Ltd. (2010) 5 SCC 306***, Mr. Nath submitted that merely because two companies have common shareholders or common Board of Directors, would not make them a single entity. He submitted that the fact that JIL and IPWC had merged with Jagson India did not make them the same entity. They continued to remain distinct entities. JIL could not be made liable for the acts of IPWC or JAL and *vice-versa*.

37. As regards the remission granted to Bannari for rent for the period from 25th February 1997 to 15th March 1997, Mr. Nath submitted that unless there was a written order of the excise authorities stopping the movement of molasses being exported by Bannari, no such inference could be drawn only on the basis of the correspondence between the parties. Even for this, the excise records ought to have been examined. It was wholly untrue that there was a delay of nine years in IPWC and JAL seeking amendment to the counter claim when the arbitral proceedings itself commenced only in 2004 and the amendments were sought in 2005.

38. On the question of costs, Mr. Nath referred to the documents submitted by Bannari without bills or invoices in support of the claim for exorbitant costs. The claim included costs of the proceedings in the Delhi High Court and Madras High Court which amounts could not have been claimed before the learned Arbitrator. He accordingly submitted that the award of costs of approximately Rs.25 lakhs was perverse and patently illegal. Lastly, it was submitted that the award of interest @ 18% per annum was exorbitant and not justified. Mr. Nath also relied on the decisions in ***New Delhi Apartment***

Group Housing Society v. Jyoti Swaroop Mittal (2008) 100 DRJ 439 (DB), Seth Mohanlal Hiralal v. State of M.P. (2003) 12 SCC 144, Commissioner, Income Tax, Delhi v. Mayawati 183 (2011) DLT 617 (DB), MSK Projects India (JV) Ltd. v. State of Rajasthan (2011) 10 SCC 573, Veena Jain v. Sunil Sood 192 (2012) DLT 221 and Mellcon Engineers Pvt. Ltd. v. Bhushan Steel & Strip Ltd. (2010) II AD (Delhi) 504.

39. Supplementing the above submissions, Mr. Sakal Bhushan, learned counsel appearing for JAL first submitted that JAL was a separate entity and could not be liable to Bannari's claim for the acts of IPWC. JAL came into picture only as the sub-lessee of Tank No.5. It was only concerned with IPWC paying the stoppage charges to JAL pursuant to the lease agreement dated 12th September 1996. Referring to various clauses of the said agreement, he submitted that once the period of lease came to an end on 27th March 1997, Bannari was requested to pay the enhanced rentals. Admittedly, even according to Bannari, it removed its stocks only on 29th April 1997 and was, therefore, liable to pay the rental charges till then. JAL was not concerned at all with the stoppage of export of Bannari by the excise authorities for the period from 25th February 1997 to 15th March 1997. No liability could be fastened on JAL. It was not the owner of the molasses in Tank No.5 and, therefore, could not be liable in respect of those stocks. He sought to explain the submissions made by JAL in its letter dated 26th May 1997 with reference to the counter claim made by it since by the time counter claim was made, the stock was reverted to it under the agreement and it was free to dispose of the said stock. Acknowledging the mitigation clauses, Mr. Bhushan submitted a statement restricting the claim. The rental up to 10th June 1997 worked out to Rs.94,46,927.20. After

deducting the security amount of Rs.79,34,850, a balance of Rs.15,12,077.20 was still owing by Bannari to JAL. He accordingly prayed that the impugned Award should be set aside in totality.

40. Ms. Indu Malhotra, learned Senior counsel appearing for Bannari referred to the conflicting stands taken by IPWC and JAL throughout. In the first place, Bannari was alleged to have exported the stock of molasses without prior permission of the excise authorities. Then it was stated that the said stocks had actually been purchased from KAICL and transferred to Bannari pursuant to Bannari's request. There was no document at all to prove this. There was no question of JIL raising bills for molasses stated to have been purchased from KAICL and sold by Bannari. At one stage, it was pleaded that no prior permission of excise authorities was needed for such transfer of molasses. Later, this stand was changed and it was made to appear that such an application had in fact been made and permission of the excise authorities obtained. She submitted that the stand of Bannari was that it had never applied for permission to export 358.106 MTs of molasses; that it had never purchased such molasses from IPWC or KAICL much or less to JAL; that it had nothing to do with JIL and there was no question therefore of JIL raising invoices for the sale of such molasses; that the purported application (Ex. RW 1/7) was in fact a forged and fabricated document; and that there was no reply to the rebutted letters written by Bannari to IPWC and JAL about the excise authorities taking an adverse view on the illegal dumping of molasses into Tank No.6 from Tank No.5. Thus, there was stoppage of Bannari's export for a period over twenty days between 25th February 1997 and 15th March 1997.

41. Ms. Malhotra referred to the decision in ***Rajkumar Gurawara v. S.K.***

Sarwagi & Co. Pvt. Ltd. (2008) 14 SCC 364 to urge that amendment of pleadings that would result in a new case being put forth could not be permitted. On the question of claim of interest, she placed reliance on the decisions in ***State of Haryana v. S.L. Arora & Co. (2010) 3 SCC 690*** and ***Sayeed Ahmed & Co. v. State of U.P. (2009) 12 SCC 26*** to urge that the learned Arbitrator could not have reduced the rate of interest from 2% per month as was agreed i.e. 24% per annum to 18% per annum. She submitted that since counter claim of IPWC and JAL was rejected and fictitious applications were filed repeatedly by them, the award of cost of approximately Rs.25 lakhs was justified. Relying on the decisions in ***Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran (2012) 5 SCC 306***, ***Steel Authority of India Ltd. v. Salzgitter Mannesmann International GMBH (2012) 2 Arb.LR 296 (Delhi)***, ***Ravindra Kumar Gupta & Co. v. Union of India (2010) 1 SCC 409***, ***Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. (2009) 17 SCC 796*** and ***Ispat Engineering & Foundry Works, B.S. City, Bokaro v. Steel Authority of India Ltd., B.S. City, Bokaro (2001) 6 SCC 347***, Ms. Malhotra submitted that given the limited scope of interference by the Court under Section 34 of the Act, there was no ground made out for interference with the impugned Award.

Transfer of stock from Tank 6 to Tank 5

42. The most critical fact in the above narration concerns the transfer of 358.106 MTs of molasses from Tank No.6 to Tank No.5. The consistent case of Bannari was that this was done without its consent by IPWC and at the earliest point in time it had lodged a protest. Indeed, the letter dated 9th September 1996 to which there was no response by IPWC or JAL records the protest of Bannari regarding the said transfer of stock from Tank No.6

to Tank No.5. What is significant was that this was even before the date of the lease agreement and much prior to the effective date of commencement of the lease agreement in respect of Tank No.5 i.e. 27th September 1996. Consequently, the burden was on IPWC and JAL to show that the said stock of 358.106 MTs of molasses was transferred from Tank No.6 to Tank No.5 pursuant to the specific instructions of Bannari. It was incumbent on them to prove that the said quantity of molasses was sold either by KAICL or by IPWC to Bannari.

43. The evidence produced before the learned Arbitrator by IPWC and JAL failed to substantiate any of their changing stands. It requires to be noted at this stage that although before this Court IPWC and JAL have sought to project themselves as distinct and separate entities, and have therefore filed separate petitions under Section 34 of the Act, before the learned Arbitrator they made common grounds. Not only was a common reply statement and counter claim filed on their behalf but both were represented by the same counsel. It was much later in the course of arguments that an application was made before the learned Arbitrator to show that IPWC and JAL were separate entities. For the reasons hereinafter noted the said attempt was rightly rejected by the learned Arbitrator.

44. One issue before the learned Arbitrator arose from the order passed by this Court on 24th May 1996 in Company Petition No.7 of 1996. This Court has summoned the file of Company Petition No.7 of 1996 and perused the order in original. As rightly observed by the learned Arbitrator, it only approved the merger of JIL and IPWC with Jagson India. Before the learned Arbitrator, Jagson India was nowhere in the picture. The fact that IPWC and JIL merged with Jagson India did not advance the case of either

IPWC or JAL. Before the learned Arbitrator, IPWC and JAL presented themselves as a joint front. The correspondence placed on record between them and Bannari belies their case of their being separate and distinct entities. This is further evident from the fact that when Bannari wrote to JAL on 9th April 1997 seeking relaxation in the rental, a response was sent by IPWC on 2nd May 1997 granting Bannari time to clear out Tank No.5 within two days. The letter written by JAL to Bannari on 26th May 1997, extracted hereinabove, shows that JAL was terming the 358.106 MTs of molasses as “our stock” – meaning stock of IPWC and JAL. How JIL came to raise bills for the sale of such molasses to Bannari before the learned Arbitrator is a mystery.

45. Further, as pointed out by the learned Arbitrator a comparison of the first invoice dated 11th November 1996 (Ex. C-14) raised by JIL and the subsequent invoice dated 28th April 1997 (Ex. C-21) again raised by JIL revealed significant differences. The difference is not only as regards the quantity – it is 306 MTs in invoice dated 11th November 1996 and 358.106 MTs in invoice dated 28th April 1997- but the rate of sale as well. It is USD 42 or Rs.1400 per MT in the first invoice dated 11th November 1996. There was a discrepancy in the description of the transaction. While in the first invoice it was for sale, in the second it was for transfer.

46. The other glaring discrepancy demonstrated before the learned Arbitrator was in the form of Ex. RW 1/7 which was purported to be an application by Bannari to the excise authorities. This is even without going to the question whether such document is a forged and fabricated one as contended by Bannari. Even taking the document to be correct, it is seen that it is an application made for a proposed sale of 358.106 MTs of

molasses by JIL to Bannari. There is no document to substantiate any such sale. Accordingly, the permission granted in Ex. RW 1/7 by the Excise Commissioner, is not for such sale at all. It is for the purported sale of KAICL to Bannari of molasses for which again there is no evidence.

47. Extensive arguments have been advanced on Ex.C-34 which according to both IPWC and JAL constitutes the lynchpin of their case against Bannari. A careful scrutiny of Ex.C-34 shows that Bannari has merely reproduced in the first portion the contents of Ex.C-31. There is no admission by Bannari in the said letter to having purchased any stock of molasses from KAICL. The criticism by JAL and IPWC that there is no discussion of Ex.C-34 in the impugned Award is not correct. There is a very detailed discussion of Ex. C-34 in paras 80 and 81 of the impugned Award. The Court finds no legal infirmity in either the reasoning or the conclusion of the learned Arbitrator in this regard.

48. The criticism on behalf of JAL that there is no discussion in the impugned Award as to how it could be held liable is also without justification. The impugned Award contains a detailed discussion on the basis of which the learned Arbitrator has held JAL to be liable. There is also no merit in the contention on behalf of IPWC and JAL that the order passed by the learned Arbitrator on 2nd March 2006 rejecting the application for amendment was erroneous. The said amendment sought to project a new case as pointed out by the learned Arbitrator. The said decision was consistent with the law explained by the Supreme Court in ***Rajkumar Gurawara***'s case (supra).

49. The application to summon the records from the office of the excise

authority was indeed belatedly, after the cross-examination of the witnesses in arbitral proceedings had concluded. Moreover, Ex.C-31 and C-34 did not advance the case either of IPWC or JAL. They raised more questions than they answered. There were contradictions in the case put forth by JAL and IPWC. They failed to even *prima facie* establish their case that there was a transfer of molasses from KAICL to IPWC and thereafter to Bannari. The document if any to prove such transactions should have been in the possession of IPWC and ought to have been produced by it before the learned Arbitrator. The initial burden of showing that there was a legitimate transfer of molasses from Tank 6 to Tank 5 was on IPWC and JAL. They failed to discharge it.

Remission of rent

50. On the question of remission of rent for the period 25th February 1997 to 15th March 1997, the learned Arbitrator rightly referred to the silence maintained both by IPWC and JAL to the numerous letters written by Bannari. They failed therefore to counter Bannari's case that their illegal actions had resulted in the movement of molasses by way of export by Bannari being stopped by the excise authorities. When there was no denial, much less a response, by IPWC and JAL to Bannari's numerous letters, there was no need for production of an order by the Excise Commissioner stopping such movement. In any event, it appears to have been a temporary stoppage of movement which was then removed with the intervention of JAL itself. The cross-examination of the witnesses, in particular Mr. P.P. Alexander, bears this out.

51. The reference to the document dated 9th May 1997 by JAL setting out the quantities of stocks in Tank No.5 is contradicted by the Surveyor's

report produced by Bannari which is dated 7th May 1997 and which shows the existence of the stock of almost 300 MTs of molasses in Tank No.5 as on 4th May 1997. In this regard, the learned Arbitrator has rightly observed in para 76 as under:

“76. Incidentally, I may digress for a moment and refer to a ludicrous element in the contention of the Respondents that the stock statement showing 56.180 MT of molasses as closing stock on 1.1.97 would prove that the Claimant had exported 358.106 Mt of molasses by 31.12.96. This argument overlooks the elementary fact that if the Claimant was in need of and had made use of excess stock of molasses belonging to the Respondents, the Claimant would have utilized its own stock of molasses in the first instance and then only resorted to taking extra quantity from the Respondents’ molasses. The Claimant would not have left a quantity of 56.180 MT of molasses from its own stock and made use of the full quantity of 358.106 MT of molasses belonging to the Respondents for export.”

52. This Court is also not impressed by the submissions of Mr. Sakal Bhushan that Bannari could not be granted remission in rent. Once it was satisfactorily proven that Bannari was prevented from moving its stocks for about twenty days, then its plea for being granted remission in the rent for that period merited acceptance. In any event, the learned Arbitrator granted only 50% of the amount. With IPWC itself having granted time up to the end of April 1997 to Bannari to move its stock, no case was made out for charging any penal rent. The Award of the learned Arbitrator directing refund of the security deposit to Bannari was, therefore, justified.

53. For the aforementioned reasons, this Court finds no ground having been made out to interfere with the impugned Award of the learned Arbitrator holding that Bannari is entitled to a sum of Rs.88,16,500 (Rs.79,34,850 + Rs.8,81,650) together with interest @ 18% per annum on Rs.79,34,850

from 10th May 1997 till the date of payment and on Rs.8,81,650 from 3rd February 1998 till the date of payment.

Interest and costs

54. The learned Arbitrator has not awarded interest @ 24% per annum as mentioned in the contract but has restricted it to 18% per annum. The said part of the Award does not call for interference.

55. On the question of costs, Mr. Jayant Nath, learned Senior counsel drew the attention of the Court to the document enclosed with the written submissions of Bannari before the learned Arbitrator which purportedly explained the basis for the claim of costs of over Rs.25 lakhs. The said document gives a break-up of the costs. This included the fees paid to the Arbitrator (Rs.3,90,000), the secretarial charges (Rs.22,500), expenses for venue (Rs.39,609) and travelling expenses (Rs.7,18,231). Advocates fees (Senior Advocates & Junior Advocate) were quantified as Rs.9 lakhs without enclosing any bills raised and receipts of the Advocates. Also, the costs of proceedings before Delhi High Court and Madras High Court in the sum of Rs.4,54,220 have been claimed. This again, without enclosing any proof of such expenses. It was not shown how costs of the proceedings before the High Courts could be claimed before the learned Arbitrator. Consequently, neither of the said amounts i.e. Rs.9 lakhs towards Advocates' fees and Rs.4,54,220 towards costs of High Courts proceedings should have been allowed by the learned Arbitrator. Even, travelling expenses ought to have been supported by necessary proofs. However, it is a fact that the venue of arbitration was both at Delhi and Chennai which involved travel of witnesses and counsel. Considering all the above factors this Court is of the view that award of costs of Rs.25 lakhs to Bannari

should be set aside. Instead Bannari is held entitled to costs of Rs.10 lakhs which is both reasonable and justified in the circumstances. Further no interest would be payable on the said amount of costs.

56. Except to the extent of the amount payable to Bannari towards costs as explained above, the impugned Award is upheld as such. Both petitions are disposed of in the above terms with no order as to costs.

Sd/-
S. MURALIDHAR, J

NOVEMBER 5, 2012
tp/bs