

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 582/2010

Reserved on: April 23, 2012

Decision on: May 9, 2012

**THE GREAT EASTERN SHIPPING COMPANY
LIMITED**

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Senior Advocate
with Mr. Amitava Majumdar, Mr. Arvind
K. Gupta, Mr. Siddharth Ranka and
Ms. Atreyi Chatterjee, Advocates.

Versus

STEEL AUTHORITY OF INDIA LTD. & ORS Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with
Ms. Ruchi Gaur Narula and Mr. Vikrant
Nagpal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
9.05.2012

Introduction

1. The Great Eastern Shipping Company Limited has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') challenging the Award dated 7th/10th May 2010 passed by a three-Member Arbitral Tribunal in the dispute between the Petitioner and Respondent No.1 Steel Authority of India Limited ('SAIL') arising out of a Charter Party ('CP') dated 19th December 2007 whereby the Petitioner, as owner, undertook to transport 47000 Metric Tons ('MTs') of bulk coking coal in their vessel M.V. Jag Riddhi from Haypoint Australia to the ports of Visakhapatnam ('Vizag')/Paradip/Haldia in India.

2. The vessel loaded cargo of 47102 MTs at Haypoint on 18th January 2008. The vessel arrived at Vizag and part discharged 24938 MTs and then proceeded to Haldia where the discharge was completed on 20th February 2008. Disputes arose about the port demurrage/balance freight and the Petitioner invoked the arbitration clause on 29th August 2008. By the impugned Award, the Arbitral Tribunal ('Tribunal') held that the Charterer i.e. SAIL was required to refund to the Petitioner Rs.13,47,917 being the sum of excess dispatch deducted by them from freight. The Tribunal rejected the Petitioner's claim for demurrage and balance freight.

Relevant Provisions of the Charter Party

3. The facts are that a CP dated 19th December 2007 was entered into in New Delhi by the Petitioner through their Delhi office and Respondent No.1 through the Ministry of Shipping, New Delhi whereunder the Petitioner agreed to carry the cargo of Respondent No.1 of 47000 MTs of bulk coking coal from Haypoint, Australia to Vizag/Paradip/Haldia in India. The relevant clauses of the CP read as under:

“32. Notice of Readiness at the port of discharge to be served by Ship owners during normal office hours i.e. 9:30 a.m. to 4:30 p.m. on working days (Monday to Friday) and 9:30 a.m. to 12:00 noon on Saturday to Port Offices of Charterers as per details given below:-

(details omitted)

33. Time continuing Provision: At each discharge port, even if at second discharge port vessel arrives on demurrage, time to count 24 hours after Notice of Readiness is served on arrival of the vessel within port limits at each port of discharge and whether in berth or not and in free pratique and

ready in all respects to discharge the cargo. If turn time of 24 hours expires on Saturday afternoon, laytime will commence at 08:00 hours on first working day.

If the vessel is ordered to Haldia and is unable to give Notice of Readiness by reason of congestion at Haldia, time shall commence to count 24 hours after Notice of vessel's arrival off Sandheads has been given by radio to Charterers or their Agents and received by them during ordinary office hours. Whilst waiting off Sandheads Sundays, C/P Holidays and Saturdays after 12 noon until 8 a.m. Monday not to counter unless vessel is on demurrage. Time used in proceeding from Sandheads to Haldia not to count.

38. In the event of breakdown of gears/cranes and other equipment of the vessel by reason of disablement or insufficient power, etc. the period of such inefficiency shall not count as laytime.

41. Charterers guarantee to discharge the cargo at the following rates

For Geared Panamax Vizag/Paradip – 10000 tonnes PWWD SHINC, Haldia – 12000 tonnes PWWD SHINC bss minimum 4 x 25 tons cranes and 4 x 10 CBM grabs with discharge capability 10,000 mt per day – prefer higher capacity cranes/grabs with higher discharge capability – SHINC provision to be applicable after commencement of laytime.

As per Vizag port requirement, the vessel should be capable of discharging 18000 mt per day. The following clauses will be applicable for this vessel:-

“Owners to ensure discharge capacity of 18000 mt and SAIL shall endeavour to provide required facilities as is done in case of all other vessels. In case of any deficiency in respect of vessel equipment/facilities, a joint survey would be conducted and surveyor report will be final and binding on the owners. Consequently, if discharge

capability is not able to meet port's requirements and if the vessel is taken out of berth by the port authorities, time cease to count and the related expenses will be borne by Owners."

In case the vessel is unable to discharge as per port norms, then charterers at their sole option will have the right to engage alternative modes of discharge such as using floating cranes/shore handling facilities/barges, etc. with or without utilizing vessel's grabs. The time and cost for the same shall be borne by the owners.

42. Owners guarantee that vessel has minimum 4 number of cranes each of capacity minimum 25 tonnes and minimum 4 number of grabs each of minimum 10 cubic meters capacity with cycle time of about 4 to 5 minutes and serving all hatches and accordingly the minimum capacity to discharge is 10,000 tons per day of 24 consecutive hours. Owners also guarantee that vessel has fully automatic grabs, which do not require manual labour to open/close. A joint survey shall be conducted in order to ascertain the particulars of cranes and grabs as above. In the case of any deficiency, the Surveyors' report shall be binding on Owners and Charterers and the rate of discharge shall be reduced proportionately. The vessel to be preferably not more than 15 years of age.

43. Demurrage/Despatch rate at load/discharge ports shall be Rs.20,00,000/10,00,000 (Rupees twenty lakhs only/Rupees ten lakhs only) per day or prorata. Despatch at the load/discharge ports shall be calculated on the basis of "working time saved."

Laytime allowed for loading and discharging to be non-reversible.

44. Freight shall be paid at the rate of Rs.2153/- (Rupees two thousand one hundred fifty three only) per MT FIO trimmed basis one port load/one port discharge load rate 20000 MT-ex Haypoint only, less Rs.20/- (Rupees twenty) per Metric Ton if

loadrate 40000 MT.

Additional Rs.79/- (Rupees seventy nine only) per Metric Ton extra on entire quantity if 2nd discharge port used other than Halida.

45. Freight Payment Clause:

Freight is payable in Indian Rupees by telegraphic transfer to:

(details omitted)

90% payment shall be made initially on Bill of Lading quantity less 2% within Seven (7) working days of completion loading/sailing and on submission of Freight Bill, in triplicate, along with copy of Owners' Incorporation Certificate and Income Tax Registration Number on letterhead, by the Indian Broker on behalf of Owners to Charterers.

The balance 10% of the freight together with demurrage (if any) or less dispatch (if any) is payable by Charterers within 120 (One Hundred Twenty) days of completion of discharge on production of (1) Copy of Bill(s) of Lading (2) Copy of Charter Party (3) Receipt of payment of dispatchers / agency fee at the loading port(s) (if applicable)(4) Copy of Notice of Readiness/ Statement of Facts with supporting documents and (5) Time Sheets. Demurrage/Dispatch account both ends for this Charter Party would be settled by The Steel Authority of India Ltd.

Owners to confirm receipt of funds within ten days of remittance of initial and final payments.

Freight is deemed to be earned upon safe arrival of the vessel and the cargo at the first or sole discharging port. The entire freight shall be all times be at the risk of the vessel's Owners."

Petitioner's case

4. According to the Petitioner, Respondent No.1 loaded 47102 MTs of Cargo at Haypoint, Australia between 17th and 18th January 2008. Respondent No.1 earned despatch in the sum of Rs.11,78,470 which was accepted by the Petitioner and due credit was given by adjusting the same from the freight payable by Respondent No.1. The vessel MV Jag Riddhi arrived at Vizag Port and was ready to commence discharge in all respects at 0630 hours on 5th February 2008. According to the terms of the CP, Notice of Readiness ('NOR') was deemed to have been tendered at 0930 hrs on 5th February 2008. According to the Petitioner, lay time commenced at 0930 hours on 6th February 2008. There was congestion at the Vizag Port and the vessel could berth only on 12th February 2008. The discharge commenced at 0245 hours on that date and was completed at 1430 hours on 16th February 2008, during which 24,938 MTs were discharged.

5. According to the Petitioner, the vessel arrived at the second port of discharge at Haldia and was ready to commence discharge in all respects at 0536 hours on 18th February 2008. At Haldia, NOR was tendered at 0536 hours on 18th February 2008. The discharge commenced at 0220 hours on 19th February 2008 and was completed at 1215 hours on 20th February 2008.

6. According to the Petitioner, Respondent No.1 utilized an aggregate time of 10 days 13 hours and 37 minutes at the two discharge ports as against 4 days 8 hours and 11 minutes which it was entitled to use under the CP terms. The total time of demurrage at the discharge ports was 6 days 5 hours and 26 minutes for which the Petitioner earned demurrage in the sum of Rs.1,24,52,780. Together with debit notes for

the balance freight of Rs.1,04,87,542.91, the demurrage of net of 1% service charge payable at Transchart and accounting credit note for the load port despatch of Rs.11,78,470 dated 16th July 2008, a sum of Rs.2,16,37,325.11 was claimed as due to the Petitioner by Respondent No.1.

7. Before the Tribunal, the Petitioner filed a statement of claim against Respondent No.1 for a sum of Rs.2,32,05,882.98 together with interest @ 18%. Respondent No.1 in its reply admitted liability to the extent of Rs.72,22,949 to deny the claim made by the Petitioner for demurrage. The contention of Respondent No.1 was that the NOR issued by the Petitioner at Vizag was premature as the vessel was not physically ready to discharge cargo with all the four hooks. It was contended that since there was a breakdown in the vessel's equipment at the berthing and at the time of loading, lay time would commence only from the time when all the four hooks were in operation.

The impugned Award

8. By the impugned Award dated 7th/10th May 2010, the Tribunal held as under:

(i) The statement of facts for Vizag indicated that “full discharging equipment was not ready when notice was tendered. Nor was it available for use when required on berthing. Therefore, NOR tendered on 5.02.2008 was not a valid notice.”

(ii) In the time sheet, the Petitioner had conceded the *pro rata* deduction even before the berthing of the ship. In fact in the time sheet there was an admission by the Claimant/Petitioner that all the four hooks were not ready ‘in every respect’ when the NOR was given. The

exception clause came into application only after the commencement of the lay time and not before that. The surveys arranged corroborate the deficiency with regard to Cranes No.1 and 3.

(iii) As far as Vizag was concerned, lay time would count from 0245 hours to 1430 hours on 12th February 2008. After accounting for the breakdowns and for the *pro rata* deductions, the charterers on 12th February 2008 used an additional time of about 5 hours 36 minutes after commencement of discharge. The lay time used at Vizag was, therefore, 2 days 11 hours and 43 minutes.

(iv) The calculation of the Petitioner for the lay time used at Haldia as 1 day 2 hours and 45 minutes was correct.

(v) The claim of the Petitioner for demurrage and balance freight did not survive. In terms of the lay time allowed and used and the dispatch amount deducted in excess, it was held that SAIL required to refund to the Petitioner Rs.13,47,917 together with interest @ 8% per annum from 19th June 2008 till the date of the Award. SAIL was also directed to pay interest at 8% per annum on the balance of the 10% freight amounting to Rs.72,22,959 that was withheld from 20th May 2008 to 4th March 2009.

Submissions of counsel

9. Mr. Neeraj Kishan Kaul, learned Senior counsel and Mr. Amitava Majumdar, learned counsel appearing for the Petitioner submitted that the finding of the learned Tribunal that the vessel was not ready in all respects when NOR was given was based on no evidence at all and resulted from a misreading of the time sheet of the Petitioner. The

glaring error in the impugned Award was that the Tribunal concluded that the Petitioner had conceded *pro rata* deduction “before the berthing of the ship” when, in fact, the time sheet did not indicate it. Secondly, the survey report was prepared unilaterally by the surveyor appointed by Respondent No.1. This was not a joint survey as stipulated in Clauses 41 and 42 of the CP. No evidence was adduced by Respondent No.1 to show that the full discharging equipment was not ready when NOR was tendered on 5th February 2008. The Tribunal failed to appreciate that Respondent No.1 was not in a position to give instructions for discharge of cargo on 5th February 2008 when NOR was tendered on the vessel’s entry to Vizag Port in accordance with the CP terms. Referring to Clause 33 of the CP, Mr. Kaul submitted that the lay time started 24 hours after NOR was served “whether the vessel was in berth or not.” Under Clause 35, the streaming time was not to count even when the ship was on demurrage. For the purpose of calculation, the berth charter was made a port charter. There was a separate Clause 38 concerning cranes and grabs and in the event of breakdown of the gears and cranes and other equipment by reason of disablement or insufficient power, etc. the period of such insufficiency was not to count as lay time. Consequently, the Petitioner had itself granted *pro rata* deduction during the time when any of the vessel’s equipments had to undergo repair. There was no *pro rata* reduction prior to 11th February 2008. Mr. Kaul referred to the judgments in ***Armement Adolf Deppe v. John Robinson & Co. Limited* (1917) 2 KB 204**, ***Compania De Naviera Nedelka S.A. v. Tradax International S.A. (The “Tres Flores”)* (1973) 2 LLR 247** and ***United Nations/Food and Agriculture Organisation-World Food Programme v. Caspian Navigation Inc. (The “Jay Ganesh”)* (1994) 2 LLR 35**. He sought to distinguish the decisions relied upon by the Respondent No.1,

Transgrain Shipping B.V. Global Transporte Oceanico S.A. (The “Mexico 1”) (1990) 1 LLR 507, Unifert International Sal v. Panous Shipping Co. Inc. (The “Virginia M”) (1989) 1 LLR 603 and Glencore Grain Ltd. v. Flacker Shipping Ltd. (The “Happy Day”) (2002) 2 LLR 487.

10. Mr. Sandeep Sethi, learned Senior counsel appearing for SAIL, referred to the statement of facts and submitted that even when the cargo discharge commenced at the berth of Vizag Port at 0245 hours on 12th February 2008 there were delays/stoppages of work and no work could be commenced at Hatch-I due to Grab-I being under repair from 0245 hours to 0330 hours on 12th February 2008. Further, no work could be done in Hatch-II from 0245 hours to 1430 hours due to Grab-II being under repair. Consequently, the cargo in Hatch-I and 2 was not accessible to SAIL at the port of discharge. Therefore, the vessel was not “ready in all respects” for discharging the cargo as contemplated by Clause 33 of the CP. It was only at 1430 hours on 12th February 2008 that all the four hooks were made available for discharge and that is when the NOR was accepted by SAIL. The fact that the two grabs were not functioning at the time of berthing was admitted by the Petitioner in its message dated 12th June 2008. Referring to the judgment in ***Tres Flores*** it was submitted that the vessel had to be ready at the time NOR was given and “not at the time in the future”. Referring to the decision in ***The Mexico 1***, it was submitted that the readiness of the vessel had to be at the time when NOR was tendered. It was not sufficient that the vessel was ready to discharge some of the cargo if she was not ready to discharge the remainder. Reference was also made to the decision in ***The Virginia M***. According to Mr. Sethi, Clause 38 could not negate the requirement

of absolute readiness under Clause 33. He supported the finding of the Tribunal that Clause 38 which was an exception clause and came into operation only after commencement of lay time and when both clauses are read harmoniously. Referring to the survey report, he maintained that this was not a unilateral report but a joint survey by both the Petitioner and Respondent No.1 as mentioned in Para 11.2 of the SOF. The report mentioned that the cranes/grabs of the vessel were not in good condition and were frequently breaking down. The observation of the Tribunal that *pro rata* reduction had been given by the Petitioner before berthing did not prejudice the case of Respondent No.1 as the finding of non-readiness of the vessel even otherwise stood proved by the contents of the SOF. Lastly, it was submitted that the Arbitrators were experts in the field of maritime law and each of the contentions of the Petitioner has been dealt with citing cogent reasons and the applicable law. They were commercial men who understood the shipping trade and law well. Consequently, this Court ought not to exercise its power under Section 34 of the Act to interfere with the impugned Award as it does not disclose any patent illegality.

Notice of Readiness and commencement of lay time

11. The law relating to commencement of the lay time under a CP for the purposes of calculation of demurrage is discernible from some of the reported decisions of foreign admiralty courts. In ***Armement Adolf Deppe v. John Robinson & Co. Limited*** it was held that the vessel was not required to be ready when it was awaiting a berth to be provided by a charterer till she got alongside the pier. It was observed:

“The practical question of business was on whom should the risk of losing time in waiting till a berth was ready fall, on the goods owner or the shipowner. **When the charter was to a dock, time began when the ship got into the dock though**

she had to wait for a berth, and the risk of loss of time was placed on the goods owner. When the charter was to “a berth as ordered,” time did not begin till the vessel reached the berth though the goods owner ordered a berth which the shipowner could not reach at once, and the risk of loss of time was placed on the shipowner. On whom did the risk fall when the ship was chartered to a port and the goods owner had the right to name the berth in the port to which the ship should go? The Court of Appeal in *Leonis S.S. Co. v. Rank* (1908) 1 K.B. 499 held that the time began when the ship had reached the port in the commercial sense, where she was at the disposal of the charterer “as a ship ready as far as she is concerned to discharge,” though not at the discharging.”

12. In the same decision, it was observed in the concurring opinion of the Buckley, L.J. as under:

“This decision at once added largely to the number of cases where time would begin before the ship was at her discharging berth. And I cannot bring myself to hold that it was necessary for such a ship before her time would begin — that is, when the risk of loss of time is transferred to the goods owner — to make preparations for discharging at a place where on the hypothesis discharging will not take place. In *Leonis S.S. Co. v. Rank* time began while the vessel was lying in the river Parana, where ships were usually loaded when they got alongside quays and piers. I do not think any Court containing judges so conversant with commercial matters as Lord Alverstone and Kennedy L.J. would have held that the ship, when her time began in the river, was required to have her derricks rigged and men on board to do work, which work could not be required till she got alongside the pier. Where time begins at a usual discharging place I think it may well be that the ship must then be ready for a state of things which may at once happen. **But when the ship's time begins at a place which is not a usual discharging berth (and she cannot be required to**

discharge at any other place) I think her obligation to be ready to discharge is fulfilled if she is free from customs or quarantine restrictions and ready to proceed to her actual discharging berth and to be ready to discharge when she reaches it.” (emphasis supplied)

13. Clause 33 in the present case is an instance of a port charter where laytime begins when the NOR is tendered when the vessel enters the port area before she actually berths. The service of the NOR (and not necessarily its acceptance) is relevant for the commencement of the lay time. In terms of Clause 33, lay time would commence 24 hours after the NOR is served. In the decision reported Lloyd’s Maritime Law Newsletter (‘LMLN’) 1/92 a distinction was drawn between ‘serving’ an NOR on the charterer and its ‘acceptance’ by the charterer. Clause 33 only provides for the NOR having to be served on the charterer. The admitted position in the present case was that the vessel arrived at Vizag on 5th February 2008 and served the NOR on the same day at 0930 hours.

14. In ***Tres Flores*** the facts were that under a CP dated 27th October 1970 the vessel was to carry maize which was to be loaded at the port. NOR to load was to be given only after the master took “necessary measures for the holds to be clean, dry, without smell and in every way suitable to receive grain to shippers’/charterers’ satisfaction.” NOR was given on 22nd November 1970 but no berth was available. Prior to commencing the loading when the vessel was inspected by the port authorities, pests were found in the cargo spaces and fumigation was ordered. This took place between 1500 hours and 1930 hours on 30th November 1970 while the vessel was still in the roads. The charterer accepted the NOR at 1100 hours on 1st December. The ship owners

claimed demurrage contending that the lay time had started at 1400 hours on 23rd November 1970 whereas charterers maintained that it started at 1400 hours on 1st December 1970. The Award of the Arbitrator was in favour of the ship owners. On appeal by the charterer it was held by the Court that the vessel was not ready to load on 22nd November 1970 and, therefore, no NOR could have been issued on that date. On further appeal by the ship owners, the Court of Appeal held that the vessel ought to have been completely ready in order to receive the cargo at any moment. There was a condition precedent to be satisfied for the loading to take place that the holds had to be clean, dry, without smell and in every way suitable to receive grain. That being the condition precedent it was held that “in order for a notice of readiness to be good, the vessel must be ready at the time that the notice is given, and not at a time in the future.” Lord Justice Roskill held that “it is axiomatic at common law that before a ship can properly give notice that she is ready to load she must at that time be in fact ready to load. Notice of readiness that the ship will be ready to load at some future time is a bad notice.”

15. In *Tres Flores*, Lord Roskill acknowledged that there may be situations where the ‘degree of readiness’ of the ship for her part would be relative to that of the charterers for theirs. He observed:

“A ship in order to be ready and thus entitled to give valid notice of readiness must be ready to obey the charterer's orders whenever they are given. In the present case the ship was not in a position to do this since at the time when she gave notice she could only be made ready by fumigation of then unknown extent at some future time. The fallacy in the appellants’ argument was (if I may say so) aptly pointed out by my Lord, Cairns L.J. during yesterday's argument when he said that if the argument be right, a charterer might have to pay

demurrage as liquidated damages for failing to load when the ship was in fact unfit to load. That is not and never has been the law.

In my judgment the law is correctly set out in the first full paragraph on p. 130 of *Scrutton on Charterparties*, 17th ed. (1964):

“The degree of necessary readiness of the ship for her part is relative to that of the charterers or consignees for theirs. **Therefore the ship need not be absolutely ready (e.g., by having all her gear fixed up for the work) at a time when the charterers or consignees are not in a position to do any of their part of the work, so long as the ship can be absolutely ready as soon as they are.**”

I would qualify this statement in only two respects. First, a short delay after berthing while the vessel carries out the usual preliminaries for loading or discharging will not affect her readiness if she is otherwise ready - that is clear from *Armement Adolf Deppe v. John Robinson & Co. Ltd.* [1917] 2 K.B. 204. Secondly, I venture to think that there might usefully be added in the next edition of *Scrutton* at the end of the passage I have quoted, the words suggested this morning by Mr. MacCrimmon, “whenever that may be.” That addition would I think put the position beyond all doubt and is in accord not only with *Armement Adolf Deppe v. John Robinson & Co. Ltd.* but also with the judgments of Devlin J. and of Tucker and Cohen L.JJ. in *Noemijulia Steamship Co. Ltd. v. Minister of Food* [1951] 1 K.B. 223.” (emphasis supplied)

16. The law as explained in *Tres Flores* has to be understood in the context of a ship being ready to load food grains where the requirement of the ship’s holds being pest free was absolutely essential. In that case it was possible for an inspection to be undertaken of the ship’s

holds even before the loading commenced. Thus it was possible to ascertain whether the ship was in fact ready to load when the NOR was issued. However, in the present case, between dates when the NOR was given and the time that the ship berthed, there was no inspection done to show that the vessel was not ready to discharge cargo when NOR was issued. Further, it is not as if all the equipments of the ship necessary for discharge were not functioning. In terms of the SOF, at the time of commencement of discharge, Grabs-I and II were under repair as a result of which Hatch-I could not be opened. Therefore, 50% of the cargo was able to be discharged and a *pro rata* discount was given as regards lay time.

17. In the present case, the expression 'ready in all respects' in Clause 33 had to be interpreted in the context of readiness to 'discharge' and not to load. It also had to be interpreted in the context of the fact that the CP was a port charter and not a berth charter and that Clause 38 of the CP provided for *pro rata* discount in lay time to the extent any of the equipments were non-functional. Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time the NOR was served. This was a question of fact that had to be established by the party alleging it. It was not a matter for surmise or conjecture. There is nothing placed on record before the Tribunal by the charterer to show that on the date of the issuance of the NOR by the master of the vessel, none of the equipments on board were working. Consequently it was erroneous on the part of the Tribunal to conclude that the NOR issued in the present case was not valid. In a port charter when such NOR is issued it is normally some days before the actual berthing. If some of the equipments were temporarily non-

functional at the commencement of discharge, it did not mean they were in that position even when the NOR was issued. The portion of the passage in *Scrutton on Charterparties and Bills of Lading*, 17th ed. (1964) highlighted in the extract from ***Tres Flores*** supports the conclusion that the ship's gears did not have to be shown to be functional at a time when it was not physically possible for her to commence discharge. This view would be consistent with a harmonious interpretation of Clause 33 and Clause 38 which envisages *pro rata* reduction in the lay time. Factually, in the present case, there has been a *pro rata* reduction given in the lay time, as can be seen from the time statement itself.

18. In ***The Jay Ganesh*** a similar clause (i.e. Clause 8 (a) of the CP in that case) concerning the issuance of NOR by the vessel when it “in all respects ready to load and discharge” came up for interpretation. The Queen’s Bench Division (Commercial Court) held as under:

“The overall effect of cl. 8 and 9 is accordingly, that this form of charterparty requires that the charterers must pay for waiting time at the anchorage when they have not provided a berth, but that if the vessel then causes delay after arrival in berth because she was not in truth then ready to load or discharge, that loss of time is to be borne by the owners. This is an entirely logical division of the risk of delay between the parties.”

19. The other decisions relied upon by Mr. Sethi are distinguishable on facts. In ***The Mexico 1***, the issue was whether the vessel could tender NOR for the second cargo before the first cargo had been discharged. That is not the situation in the present case. In ***The Virginia M*** again, there was an essential pre-condition that fresh water of a certain quantity had to be available in the vessel throughout the

cargo operations. Knowing that discharge would have to be stopped to get fresh water, an NOR in that case was issued by the master of the vessel despite having only 15 tons of fresh water, as against the normal consumption of 20 tons of fresh water per day. In the present case, it was not possible to anticipate any partial failure of the cranes and grabs. In *The Happy Day* the CP was a berth charter party and the NOR was given at the anchorage. This was held invalid because the failure of the ship to berth was not on account of port congestion but because the ship missed the tide and could not occupy the berth made available.

20. Consequently the Court is of the view that the Tribunal's conclusion that when the NOR was issued, the ship was not 'ready in all respects' is not based on any evidence but on a conjecture and suffers from a patent illegality. Another instance of such patent illegality is in the Tribunal erroneously observing that the Petitioner gave a *pro rata* reduction in lay time even prior to ship berthing at the port when in fact the time sheet shows to the contrary. The inescapable conclusion therefore is that the impugned Award of the Tribunal was based on a misreading of the documents on record. In the circumstances, the rejection by the Tribunal of the Petitioner's claim for demurrage and balance freight cannot be sustained in law.

Conclusion

21. The impugned Award dated 7th/10th May 2010 of the Tribunal holding that lay time did not commence till 12th February 2008 when the vessel actually berthed at Vizag Port and consequently rejecting the Petitioner's claim for demurrage and balance freight cannot be sustained in law and is hereby set aside.

22. The petition is accordingly allowed with costs of Rs. 20,000 which will be paid by Respondent No.1 to the Petitioner within four weeks.

S. MURALIDHAR, J.

MAY 9, 2012
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