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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : April 12, 2012*
Judgment Pronounced on: May 01, 2012

+ FAO(OS) 501/2007

MMTC OF INDIA LTD. Appellant
Represented by: Mr. J. P. Sengh, Senior Advocate
instructed by Mr. Sanjay Grover,
Advocate.

versus

INTERORE FERTICHEM RESOURCES SA Respondent
Represented by: Mr. E. R. Kumar, Mr. D. P. Mohanty,
Ms. Pallavi Sharma and Mr. Faisal
Sherwani, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Briefly stated, the facts leading to filing of the present appeal are that on 25.05.1999 the appellant and respondent entered into a contract where under the respondent agreed to supply 25000 MT of bulk urea to the appellant @US\$87.45 PMT. As per the terms of the contract, the respondent was required to charter a vessel for shipment of the requisite quantity of urea, the respondent was responsible for fulfillment of the conditions of Charter Party at the loading

port and the appellant and its nominees were responsible for the fulfillment of conditions of Charter Party at the discharging port. The important terms of the contract entered into between the parties read as under:-

“XI WHARFAGE/DEMMURAGE

If any wharfage/demurrage results at the port of discharge due to negligence of the Sellers or their nominee including negligence of sending correct document in time connected with the shipment of material under this contract and if in consequence thereof, clearance of the 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 the Sellers. Similarly any wharfage or demurrage resulting from the negligence or default on the part of Buyers shall be to the Buyers account.

.....

XIX FORCE MAJEURE

If at any time during the existence of this contract either party is unable to perform the whole or in part any obligations under this contract because of war, hostility, civil commotion, sabotage, quarantine restrictions, acts of God and acts of Government (including but not restricted to prohibition of exports or import), floods, explosions, epidemics, then the date of fulfillment shall be of engagement shall be postponed during the time when such circumstances are operative.

.....

ANNEXURE-III (A)

SHIPMENT TERMS IN RESPECT OF C & F CONTRACTS

1. The Sellers will arrange for chartering suitable vessels to load the agreed quantity in full shiploads and the Sellers are responsible for fulfilling the conditions of the Charter Party at the loading port and the Buyers or their nominees are responsible for the fulfilling conditions of the Charter Party at

the discharging port. Vessels will be chartered on Ferticon Charter Party.

....

9. The cargo shall be discharged at the average rate of 1200 metric tonnes for single Decker vessel basis five or more available workable batches and prorate for less number of batches per weather working days of 24 consecutive hours....."

(Emphasis Supplied)

2. On 28.06.1999, a voyage charter party agreement was entered into between the respondent and M/s.Camlica Denizellik Ve Tie A.S. (hereinafter referred to as the 'owner') where under the vessel M.V.Sadan owned by the owner was chartered by the respondent to carry urea from Yuzhny (load port) to Chennai (discharge post). Inter-alia, the relevant portion of clauses 2, 4, 12 and 26 of Charter Party agreement read as under:-

"2. GIVING OF NOTICES—

A LOADING PORT—The Master or Owners shall give notice to Charterers and Charterer's Agent, on fixing of the Vessel, of the exact quantity of cargo required....

B DISCHARGING PORT—The Master or Owners shall give notice to Charterer's Agent at each discharging port, upon sailing the last loading port, indicating ETA at each discharging port and expected draft upon arrival....

4. Any of the following causes are excepted, regardless of where they occur: strikes or lockouts at Shippers' or Suppliers' mines or factory, on railways, trucks or barges, or at the ports of loading or discharging; war or effects of war; revolution; civil commotion; breakdown or on stoppage or

shortage of railways, trucks or barges; interruptions, stoppage or breakdowns at the factory of the Shippers' or the Suppliers' or the Suppliers' now or hereafter under contract; stoppage or destruction of goods in transit; epidemic; fire; frost, cyclones, storms, floods, earthquakes, unavoidable accidents to machinery or equipment, or other unavoidable hindrances or delay in mining, manufacturing, transporting, loading, discharging or receiving the material or goods; restraints of established authorities; any delay caused by the Vessel, Master or crew; and any other causes whatsoever or howsoever arising happening without the fault of the Charterers preventing or delaying the mining or manufacturing, supplying, transporting, loading or discharging or receiving of the cargo. Charterers shall not be liable for any loss or damage resulting from any such excepted causes and time lost by reason thereof shall not count as used lay-time or time on demurrage, unless vessel already on demurrage.

12. Cargo shall be loaded and discharged by the Charterers.....The Charterers, Suppliers or Receivers shall appoint Stevedores for loading and discharging.

26. The Pilot, Master, Officers and crew of the Vessel or any Stevedores or any towboat person or facility assisting in the Vessel shall not be agents or employees of the Charterers and the Charterers shall not be liable for any loss, damage or claims including but not limited to loss, damage or claims with respect to the cargo or the vessel, resulting from or arising out of negligence, default or error or any of them."

(Emphasis Supplied)

3. The appellant nominated Indian Potash Limited (hereinafter referred to as the 'IPL') as receiver for the

purpose of handling of the cargo, which in turn engaged the services of M/s.Sea-Shore Logistics Pvt. Ltd. (hereinafter referred to as the 'SSL') as Stevedores.

4. The vessel arrived at Chennai port on 27.07.1999 and docked at the berth on 31.07.1999. The unloading of cargo from the vessel commenced on 31.07.1999. Since SSL could not maintain the minimum discharge rate of cargo prescribed by the port authorities, the Traffic Manager of the port of Chennai ordered the vessel to shift from the berth on 12.08.1999. The vessel returned to the discharge berth on 17.08.1999. In view of the poor performance of SSL, IPL terminated its services on 20.08.1999 and appointed another Stevedore namely M/s.Express Clearing Agency in its place.

5. M/s.Express Clearing Agency commenced working on 20.08.1999. However, before M/s.Express Clearing Agency could complete unloading the cargo from the vessel, SSL filed a suit in the court of Assistant Judge, City Civil Court, Chennai challenging the action of IPL of terminating the services of SSL. Together with the said suit, SSL filed an application under Order XXXIX Rule 1 and 2 CPC inter-alia stating therein that IPL be restrained from unloading the cargo which remained to be unloaded from the vessel for the reason IPL had terminated the services of SSL without ascertaining the quantity of cargo unloaded by IPL and settling the accounts of SSL. Vide order dated 23.08.1999 the Assistant Judge allowed the aforesaid application filed by SSL and restrained IPL from unloading cargo which remained to be unloaded from the

vessel. On 24.08.1999 the vessel was shifted to the anchorage.

6. Two days thereafter i.e. 25.08.1999 IPL filed an application under Order XXXIX Rule 4 CPC before Assistant Judge, City Civil Court, Chennai seeking vacation of the injunction granted vide order dated 23.08.1999 inter-alia stating therein that IPL was constrained to terminate the services of SSL due to the poor performance of SSL in unloading the cargo from the ship. Vide order dated 03.09.1999 the Assistant Civil Judge allowed the application filed by IPL and vacated the injunction granted vide order dated 23.08.1999. On 08.09.1999 the vessel returned to the discharge berth.

7. Aggrieved by the order dated 03.09.1999 passed by the Assistant City Civil Judge, SSL filed an appeal before the Principal Judge, City Civil Court, Chennai. Together with the said appeal, SSL filed an application under Section 151 CPC inter-alia stating therein that IPL be restrained from unloading the cargo from the ship during the pendency of the appeal. Vide order dated 08.09.1999 the Principal Judge restrained IPL from unloading the cargo from the vessel till 10.09.1999. Pursuant thereto, the vessel was again removed to the anchorage. Vide order dated 21.09.1999 the Principal Judge dismissed the appeal filed by SSL. Needless to state, the interim injunction granted by the Principal Judge vide order dated 08.09.1999 stood vacated with the dismissal of the appeal filed by SSL.

8. Aggrieved by the order dated 21.09.1999 passed by the Principal Judge, SSL filed a revision petition before High Court of Judicature at Madras. Vide order dated 24.09.1999 the High Court restrained IPL from unloading the cargo from the vessel during the pendency of the said petition. While adjudicating said petition, the High Court passed an order on 28.09.1999, the relevant portion whereof reads as under:-

“.....Heard the submissions of the learned counsel for both. In order to avoid unnecessary expenses and detention of the cargo-vessel and to safeguard the interest of both the parties, the following order is passed:-

The Cargo vessel M.V.Sadan Kaptanoglu berthed in the outer anchorage shall be brought to the berth in Chennai port and the cargo now lying in the vessel shall be removed in the presence of both the parties and the 4th defendant.

2. Thiru K.Kannan is appointed as second Advocate Commissioner to assist the first Advocate Commissioner Thiru Gandhi already appointed to measure the cargo. The cargo shall be removed from the vessel without any delay.....The cargo which is removed from the vessel shall be kept separately and both the Commissioners shall measure the same in turn with the help of licensed surveyor and give a report to the ship....

....

4. After the cargo lying in the vessel is removed completely, the Commissioner shall in turn measure the quantity of the cargo removed by the plaintiff/petitioner and kept in the godown in the presence of both the parties and the 4th defendant and give a consolidated report to the court about the total quantity of the cargo. The 4th defendant in the suit shall file an affidavit as to the quantity of

cargo removed by him between 20.8.99 to 23.8.99 in one week.

5. The Port Trust authorities are directed to permit the cargo vessel i.e. M.V. Sadan Kaptanoglu to be berthed in the Harbour from the outer anchorage.
.....”

9. The vessel returned to the discharge berth on 03.10.1999. The discharge was finally completed on 06.10.1999.

10. Subsequently the respondent demanded a sum of US\$274,154.16 as demurrage charges from the appellant. When the appellant failed to make the payment of the aforesaid amount the respondent invoked the arbitration contained in clause XX of the contract between the parties.

11. An arbitral tribunal comprising of 3 members was constituted to resolve the disputes which had arisen between the parties.

12. The respondent filed a claim petition before the Arbitral Tribunal claiming a sum of US\$425,121.71 from the appellant inter-alia stating therein that discharge of cargo commenced on 31.07.1999 and was completed on 06.10.1999. The lay time under the contract was 19 days, 18 hours and 3 minutes, which expired on 21.08.1999. The time consumed for discharging the cargo was 65 days, 10 hours and 40 minutes. Accordingly, the demurrage charges @US\$6,000/- per day works out to US\$274,154.16. The appellant is also liable to pay interest 24% per annum on the demurrage charges which works out to US\$150,967.55.

13. In its reply filed, the appellant admitted that the discharge of cargo from the vessel could not be completed within the prescribed period. However, it denied its liability to pay demurrage charges to the respondent for said delay on the grounds that: - (i) in terms of clause XI of the contract between the parties, the appellant is liable to pay demurrage charges to the respondent only when demurrage results from negligence or default on part of the buyer i.e. the respondent and its agents, which was not the position in the present case inasmuch as demurrage had not resulted from any negligence or default on part of the appellant and its agents but was caused due to the restraint imposed upon IPL by the courts at Chennai from discharging the cargo from the vessel; (ii) the period of about 38 days during which the receiver IPL was restrained from discharging the cargo from the vessel would not be counted towards lay time for the said period would fall under 'Force Majeure' clause in the contract between the parties inasmuch as restraint imposed upon IPL by the courts at Chennai from discharging the cargo from the vessel tantamount to 'acts of Government' and (iii) the appellant is liable to pay demurrage charges to the respondent only when same are payable by the respondent to the owner of the vessel, which was not the position in the present case. In terms of clause 4 of the charter party agreement entered between the respondent and the owner of the vessel, the period during which restraints are imposed by the established authorities upon the discharging of the cargo from the vessel cannot be counted towards lay time and therefore the

respondent is not liable to pay any demurrage charges to the owner of the vessel for the period during which IPL was restrained by the courts at Chennai from discharging the cargo from the vessel. In addition to its reply, the appellant filed a counter claim before the Arbitral Tribunal claiming a sum of ₹11,53,405/- paid by receiver IPL as ousting priority charges for the purpose of allotment of a berth to the vessel.

14. While the matter was pending adjudication before the Arbitral Tribunal, the owner of the vessel invoked the arbitration contained in charter party agreement between the respondent and owner of the vessel and filed a claim petition before an Arbitral Tribunal in London claiming amongst other sums, a sum of US\$233,368.06 from the respondent as demurrage resulting from delay in discharging the cargo from the vessel. Significantly, save and except contention relating to force majeure clause same contentions, as were raised by the appellant in the reply filed by it before the Arbitral Tribunal in the present matter, were advanced by the respondent before the Arbitral Tribunal in London in order to deny payment of demurrage to the owner of the vessel. In addition thereto, it was contended by the respondent that in view of clause 26 of the charter party agreement which prescribes that the charterer shall not be liable for any loss or damage resulting from the negligence or default of the stevedores and the fact that delay in discharging the cargo from the vessel had occurred due to inefficiency of the Stevedores SSL employed by receiver IPL, it is not liable to pay any demurrage to the owner of the vessel.

15. Vide award dated 15.05.2002 the Arbitral Tribunal in London repelled all the contentions advanced by the respondent and allowed the claim petition filed by the owner of the vessel. The respondent was directed to pay demurrage in sum of US\$216,531.92 together with interest @ 7.5% per annum to the owner of the vessel. The relevant portion of the award passed by the Arbitral Tribunal in London reads as under:-

“

Removal from Berth – 12th to 17th August 1999

20. Following a series of complaints from the port authorities at the slow rate of discharge, on the 12th August at 11:55 the Vessel was ordered to shift from the discharge berth, having discharged 12,980 MT of cargo.....

22. On 13th August the stevedores blamed the slow discharge rate upon the inadequacy of the ship's gear, and they demanded a Llyod's survey. The Charterers then placed the Owners on notice and held them responsible for all claims arising from problems with the gear. The Owners denied the allegations, stating that the Vessel and her cargo gear were fully certified by her Classification Society. We found that the stevedores' complaints were unfounded.

23. Meanwhile, the Chennai Port Trust ordered the Receivers and/or their stevedores to attend the daily berthing meetings to explain the slow rate of discharge, and the Port Authority arranged for the Vessel to be re-berthed on the 17th August on condition that, if the discharge rate did not improve, it would “*take suitable action*”

25. In evidence the Owners relied upon a report from their P&I Club's Correspondent. His evidence suggested that the stevedores first appointed to

discharge the Vessel (Sea-Shore Logistics) had lacked the financial resources to ensure a smooth and speedy progress of the operation. This appeared to us to be the most likely explanation for the clearly unsatisfactory performance of the discharging operations that led to the removal of the Vessel from the berth on 24th August.

26. As we shall see, the replacement of the stevedores initially appointed brought about other problems, but for the time being we will concentrate upon the period 12th to 17th August during which the Vessel was removed from the discharging berth. The Charterers relied upon clauses 4 and 26 of the Charter-party, which, they said, interrupted the running of lay-time during the period in question.

27. So far as clause 4 is concerned, the Charterers relied upon '*...shortage of trucks*', and '*restraints of established authorities*', as well as general wording relating to '*any other causes arising happening without fault of the Charterers...*' It is in our view quite clear that, in respect of all the exceptions to lay-time covered by clause 4, lack of fault attributable to the Charterers is a necessary requirement. Therefore, as we are considering possible exceptions to the running of lay-time, it was for the Charterers to bring themselves within them.

28. The interruption to discharge following the Vessel's removal from the berth on 12th August had as an immediate cause the intervention (or 'restraint') of an established authority, but the question we still had to answer was whether this intervention had come about without fault on the Charterer's part. Ignoring for the moment any possible impact of clause 26 upon this question, our view of evidence favored the Owners.

29. The most specific complaint made by the Charterers related to an alleged shortage of trucks for which, they said, they were not responsible. The Owners took issue with this, stating that the slow rate of discharge (which had caused the authorities to act) had been due to the stevedores' failure to employ sufficient gangs to work the Vessel and sufficient trucks to remove the cargo discharged. The Owners submitted that there was no shortage of trucks at the port, and that the stevedore's poor performance was due to their poor financial status, which, among other things led to their failure to pay the required labour dues. The Receivers, the Owners said, were themselves dissatisfied with the performance of the stevedores, and in their letter of 20th August, to which we have referred, they had spoken of this.

30. Whether or not the underlying problem was financial, we are satisfied that the slow rate of discharge achieved by Sea-Shore Logistics was due to their failure to engage sufficient trucks and labour. There was, we find, no shortage of either at Chennai at the time, which could not have been avoided by proper management, and we note that the replacement stevedoring company successfully increased the rate of discharge. It would be nonsensical to conclude that an avoidable shortage fell within clause 4 of the Charter-party. On the facts, the Charterers' reliance upon the specific exception 'shortage of trucks' was, therefore, misplaced, regardless of whether or not the Charterers were generally responsible for the stevedores' conduct, a matter to which we will refer below.

31. Similarly, while the removal of the Vessel from the berth may be said to have stemmed from the restraint of an established authority, that restraint was imposed only because of the stevedores' shortcomings, and the essence of what we have said in the preceding paragraph applies here also.

32. As we noted previously, the requirement of lack of fault attributable to the Charterers is an essential feature of successful reliance upon clause 4 of the Charter-party. Under the Charter-party, it was Charterers' own responsibility to discharge the Vessel, and to do so within the permitted lay-time, and if it was because of the inadequacies of those who actually did the work on the Charterers' behalf that this target was not met, then at first sight the Charterers' would appear unable to demonstrate a lack of fault attributable to them. However, the Charterers suggested that an escape from such an obvious conclusion lay open to them, which they said was to be found in clause 26 of the Charter-party.

33. Clause 26 was undoubtedly broadly expressed, but we do not think it provides the protection that the Charterers seek. It is a matter of common sense and commercial reality, and, we believe, reasonably plain as a matter of construction. If clause 26 were to be taken as having effect that the Charterers suggest, there would seem to us to be very little point in having a lay-time and demurrage regime in the Charter-party at all. In our view, clause 26 is quite reasonably concerned with the potential vicarious liability for loss or damage caused to third parties (which for the present purposes might include the Owners) by those to whom the clause refers. We do not consider that this provision has any part whatsoever to play in connection with the Charter-party's distinct lay-time and demurrage regime, neither affecting the counting of time, nor the Charterers' obligation for time used beyond that allowed. We do not overlook that a claim to be paid demurrage may be characterized as a claim for liquidated damages for detention, but the code under which demurrage might become payable remained quite distinct from other provisions of the Charter-party, and, of course, contained its own

exceptions which, in appropriate circumstances, might have relieved the Charterers from that liability. Only by the use of very clear language- not present here- would we have been persuaded that an exceptions clause not explicitly directed towards lay-time was to be applied to the lay-time/demurrage code. Time therefore continued to count towards lay-time (in accordance with the provisions of the Charter-party) during the period at which we have been looking in this section.

Interruptions to Discharging – 24th August to 6th
October 1999

34. As we have set out in the introductory part of these Reasons, discharge was again interrupted on 24th August, and the Vessel was removed from the berth, after Sea-Shore Logistics had obtained an injunction for the Court at Chennai preventing dealing with the cargo. At this time only about 3,000 MT of cargo remained on board. The injunction was lifted briefly enabling some work to be carried out on 8th September, but Sea-Shore Logistics then obtained a further injunction, which was not ultimately lifted until 2nd October. The Charterers submitted that the lengthy delays that were result of these injunctions were not for their account, being excepted from lay-time under clause 4. They relied upon specific exception “restraints of established authorities” and upon the general provision as to other causes arising without fault. They also, once more, sought the protection of clause 26.

35. So far as clause 26 is concerned, we do not think it is necessary to do more than repeat what we have already said in paragraph 33, above. Although technical in nature, and possibly for this reason less appealing, one additional argument can be made in the Owners’ favor in connection with the matter with which we are now dealing. So it could be said that, as they had previously been

replaced as stevedores when they obtained the injunction that they did obtain, Sea-Shore Logistics were not then within the scope of clause 26 at all.

36. In the context of interruptions with which we are immediately concerned, we found the question of the applicability of clause 4 a less easy one to answer. Although it is, we accept, a matter of impression, we have nonetheless reached the conclusion that the specific exception “restraints of established authorities” is not intended to embrace the assistance that may be given (and was given in the present case) by a court merely by way of injunction in civil proceedings relating to the sort of commercial dispute in which Sea-Shore Logistics had taken action. On the other hand we can imagine circumstances in which an injunction imposed by an competent court in such proceedings fell within the general exception, provided, of course, that its imposition, and its consequences had arisen without fault attributable to the Charterers.

37. In the present case, Sea-Shore Logistics’ objective in bringing proceedings against the Receivers and others was to ensure payment to them of what they said they were entitled to for the operations taken by them prior to their replacement as stevedores. The immediate aim of the injunction appears to have been to prevent any movement of the cargo either remaining on the Vessel or removed to the godowns so that the quantity in respect of which they claimed entitlement to payment could be ascertained. So far as the Owners were concerned, the cargo was being dealt with on free in and out terms, and the question of what was due to the former stevedores should have been of no concern to them. They and the vessel were, as they said, innocent pawns in the contractual disputes of the others. Although Sea-Shore Logistics’ actions seem to have been principally directed against the Receivers, under

the Charter-party it was Charterers' responsibility to ensure the discharge of the Vessel, and the essence of the Owners' case was that it was for the Charterers to do whatever appeared necessary to ensure that the Vessel was discharged. The Charterers could not, as it were, hide behind the Receivers in order to escape from their own obligations. We agree with this analysis. In practical terms, we consider that it was incumbent upon the Charterers to deal with the situation to which the grant of an injunction had given rise, seeking to have it lifted either by making a payment to the former stevedores, or by the provision of security of their claim. Instead, it appeared to us, the Charterers were more concerned to pursue their own arguments with the Receivers rather than taking steps to ensure the removal from the Vessel of the small quantity of cargo remaining on board at the material time. Although it is not for us to say, it may be that the Receivers should have done more than what they did, but that was no concern to the Owners. As we have previously held, it was for the Charterers to bring themselves within the protection of clause 4 of the Charter-party. On the evidence before us we are not satisfied that any of the loss of time suffered after 6:00 hours on 24th August as a result of the injunctions obtained by Sea-Shore Logistics happened without the fault on the Charterers' part. *(Emphasis Supplied)*

16. Vide award dated 23.05.2005 the learned Arbitral Tribunal dismissed the claim petition and counter claim raised by the respondent and appellant respectively. It was held by the Arbitral Tribunal that the appellant is not liable to pay any demurrage to the respondent for the reasons:- (i) during the course of the arbitration proceedings the respondent revised the sum claimed in the claim petition filed by it on various occasions; (ii) the respondent did not disclose the factum of

arbitration proceedings instituted by the owner of the vessel against it before an Arbitral Tribunal in London and the passing of an award by the said Tribunal in the claim petition filed by it in the present matter; (iii) there is no evidence on record to show that the respondent made any payment to the owner of the vessel in respect of the award dated 15.05.2002 passed by the Arbitral Tribunal in London; (iv) the period during which IPL was restrained by the Courts at Chennai from discharging the cargo from the vessel could not be counted towards lay time in view of clear stipulation contained in clause 4 of the charter party agreement entered between the respondent and the owner of the vessel that the period during which restraints are imposed by the established authorities upon discharging of cargo is not to be counted towards lay time, particularly when receiver IPL had vigilantly opposed the various petitions/applications filed by SSL in various courts at Chennai and got vacated the orders of injunction granted by the courts in favor of SSL on various occasions. When such period is excluded from the lay time calculated by the respondent the demurrage caused is negligible and can be set off against the amount claimed by the appellant on account of delay caused in berthing the vessel and (v) the period during which receiver IPL was restrained from discharging the cargo from the vessel could not be counted towards lay time for the said period falls under 'Force Majeure' clause in the contract between the parties inasmuch as restraint imposed upon IPL by the courts

at Chennai from discharging the cargo from the vessel tantamount to 'acts of Government'.

17. Aggrieved by the award dated 23.05.2005 passed by the Arbitral Tribunal the respondent filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 before a learned Single Judge of this Court.

18. Vide impugned judgment dated 10.10.2007 the learned Single Judge allowed the objections filed by the respondent and set aside the award dated 23.05.2005 passed by the Arbitral Tribunal. The learned Single Judge directed the appellant to pay a sum of US\$216,531.92 to the respondent along with interest @7.5% per annum compounded at 3 monthly rests with effect from 08.09.1999 until payment along with costs in the sum of 9850 pounds along with interest thereon @7% per annum compounded at 3 monthly rests calculated from the date of publication of award dated 15.05.2002 passed by the Arbitral Tribunal in London until payment. It was further directed that aforesaid payment shall be made by the appellant by means of a banking escrow account whereby the payment made by the appellant shall be forwarded directly towards the fulfillment of the award passed by the Arbitral Tribunal in London. In coming to the said conclusion, it was held by the learned Single Judge that: - (i) the Tribunal erred in holding that the restraint imposed upon IPL by the courts at Chennai from discharging the cargo from the vessel tantamount to act of Government inasmuch as restraint passed by a court at the instance of a party to the contract does not tantamount to the act of the Government;

(ii) the Tribunal erred in holding that the period during which IPL was restrained by the courts at Chennai from discharging the cargo from the vessel cannot be counted towards lay time in view of Force Majeure clause contained in the contract between the parties when there was no reference to the 'acts of Courts' in the said clause; (iii) in view of the terms of the contract prescribing that the buyer was liable to pay demurrage resulting from the negligence or default on party of the buyer the appellant buyer was liable to pay demurrage to the respondent for the action of receiver IPL of terminating the services of SSL without settling its accounts led SSL to take recourse to the court(s) and obtain injunction(s) restraining IPL from discharging the cargo from the vessel which resulted in demurrage and (iv) while holding that period during which IPL was restrained by the Courts at Chennai from discharging the cargo from the vessel cannot be counted towards lay time in view of clause 4 of the Charter Party agreement the learned Tribunal failed to take note of the fact that happening of only such events is excepted under clause 4 which had happened without any fault on part of the Charterers of the vessel, which was not the position in the present case inasmuch as the restraints were imposed upon IPL by the Courts at Chennai due to the faults of receiver IPL of appointing inexperienced and inefficient stevedores and terminating the services of stevedores SSL without settling its accounts.

16. Aggrieved by the impugned judgment dated 10.10.2007 passed by the learned Single Judge the appellant has filed the

present appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

17. In support of the present appeal, learned counsel for the appellant advanced following 2 submissions:-

A) It is settled law that an arbitrator is the final authority to interpret a contract between the parties and save and except the view being perverse it is impermissible for a court to re-read the contract for purposes of interpretation. As long as arbitrator has considered all relevant terms of the contract and view taken by the arbitrator is a plausible view, the Court cannot interdict the award under Section 34 of the Arbitration and Conciliation Act, 1996. In the instant case, after interpreting clause XIX of the contract between the parties and Clause 4 of the Charter Party agreement the view taken by the Arbitral Tribunal to that period during which IPL was restrained by the Courts at Chennai from discharging the cargo from the vessel is a correct view when seen in the backdrop of the fundamental principle of law that an injunction granted by the Court should not cause any injury to any person.

B) While rejecting the interpretation given by the Arbitral Tribunal to Force Majeure clause (clause XIX) contained in the contract between the parties the learned Single Judge failed to appreciate that 'Force Majeure' is a term of wide import. Where reference is made to 'Force Majeure', the intention is to save the performing party from the consequences of anything over which he has no control. In the instant case, the appellant had no control over the injunction(s) granted by

the Courts at Chennai restraining receiver IPL from discharging the cargo from the vessel and in this view of the matter it was rightly held by the Arbitral Tribunal that period during which IPL was restrained by the Courts at Chennai from discharging the cargo from the vessel should not be counted towards lay time, particularly when receiver IPL had vigilantly opposed the various petitions/applications filed by SSL in various courts at Chennai and got vacated the orders of injunction granted by the courts in favor of SSL on various occasions.

18. The basic facts of the matter are not in dispute. It is not in dispute that the vessel remained in the anchorage for a considerable period after arriving at the discharging port. The vessel firstly remained in the anchorage for a period from 12.08.1999 to 17.08.1999 when port authorities ordered the shifting of the vessel to the anchorage on account of failure of stevedores SSL to maintain the minimum discharge rate prescribed by the port authorities. The vessel has thereafter remained at the anchorage for the period from 24.08.1999 to 06.10.1999 due to the orders passed by the courts at Chennai restraining receiver IPL from discharging the cargo from the vessel. The appellant has denied its liability to pay demurrage to the respondent when the vessel remained in the anchorage from 24.08.1999 to 06.10.1999.

19. The first question which has arisen in the present appeal is that whether the restraint imposed upon receiver IPL by the courts at Chennai from discharging the cargo from the vessel

falls under the Force Majeure clause (clause XIX) contained in the contract between the parties.

20. We have already reproduced the Force Majeure clause (clause XIX) contained in the contract between the parties in para 1 above. Be it noted here that there is no reference to the 'acts of Courts' in the said clause.

21. The term 'Force Majeure' was considered in great detail by the Supreme Court in the decision reported as *Dhanrajamal Gobindram v Shamji Kalidas & Co* AIR 1961 SC 1285 wherein it was stated as under:-

"McCardie J. in Lebeaupin v. Crispin [1920] 2 K.B. 714, has given an account of what is meant by 'force majeure' with reference to its history. The expression 'force majeure' is not a mere French version of the Latin expression 'vis major'. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in 'force majeure'. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in 'vis major' are included in 'force majeure'. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to 'force majeure', the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to 'force majeure', and even if this be the meaning, it is obvious that the condition about 'force majeure' in the agreement was not vague...."

(Emphasis Supplied)

22. From the aforesaid, it is clear that the appellant can take recourse to Force Majeure clause contained in the contract between the parties only if is able to show that the happening of events of restraints imposed upon IPL by the

courts at Chennai from discharging the cargo from the vessel was beyond the control of the appellant.

23. In the instant case, the appellant had appointed IPL as receivers for the purposes of handling of cargo which in turn engaged the services of SSL as stevedores. It is not in dispute that the performance of SSL was poor inasmuch as it was not able to maintain the minimum discharge rate prescribed by the port authorities due to which reason the port authorities ordered the shifting of the vessel to the anchorage on 12.08.1999. The vessel returned to the discharge berth on 17.08.1999. However the performance of SSL did not improve and it was still not able to maintain the minimum discharge rate prescribed by the port authorities due to which reason IPL terminated the services of IPL on 20.08.1999 and appointed another stevedores M/s.Express Clearing Agency in its place. Before terminating the services of SSL IPL neither ascertained the quantity of cargo unloaded by SSL nor settled the accounts of SSL which constrained SSL to take recourse to the court(s) and obtain injunction(s) restraining IPL from discharging the cargo from the vessel. The appellant and receiver IPL could have avoided the situation of restraints being imposed upon by IPL by the courts at Chennai by ascertaining the quantity of cargo unloaded by SSL and settling the accounts of SSL before terminating the services of SSL. Such being the position, the happening of events of restraints imposed upon IPL by the courts at Chennai from discharging the cargo from the vessel was not beyond the control of the appellant and consequently the appellant take

shelter of Force Majeure clause contained in the contract between the parties to avoid payment of demurrage to the respondent caused by happening of the said events.

24. It has next been contended by the appellant that the period during which IPL was restrained by the courts at Chennai from discharging the cargo from the vessel cannot be counted towards lay time in view of clause 4 of the Charter Party which prescribe that periods during which restraints are imposed by the established authorities upon discharging of the cargo are not to be counted towards lay time.

25. For the sake of convenience, we again reproduce Clause 4 of the Charter Party agreement:-

“4. Any of the following causes are excepted, regardless of where they occur: strikes or lockouts at Shippers’ or Suppliers’ mines or factory, on railways, trucks or barges, or at the ports of loading or discharging; war or effects of war; revolution; civil commotion; breakdown or on stoppage or shortage of railways, trucks or barges; interruptions, stoppage or breakdowns at the factor of the Shippers’ or the Suppliers’ or the Suppliers’ now or hereafter under contract; stoppage or destruction of goods in transit; epidemic; fire; frost, cyclones, storms, floods, earthquakes, unavoidable accidents to machinery or equipment, or other unavoidable hindrances or delay in mining, manufacturing, transporting, loading, discharging or receiving the material or goods; restraints of established authorities; any delay caused by the Vessel, Master or crew; and any other causes whatsoever or howsoever arising happening without the fault of the Charterers preventing or delaying the mining or manufacturing, supplying, transporting, loading or discharging or receiving of the cargo. Charterers shall not be liable for any loss or damage resulting from any such excepted

causes and time lost by reason thereof shall not count as used laytime or time on demurrage, unless vessel already on demurrage.” (Emphasis Supplied)

26. A bare reading of clause 4 brings out that charterer is not liable to pay for any loss or damage caused by the events which occurred without the fault of the charterer and that the time lost due to occurrence of such events is not to be counted towards lay time. We have already held in preceding paragraphs that situation of restraints being imposed upon IPL by the courts at Chennai from discharging the cargo from the vessel was brought about by the fault of the appellant and IPL of not ascertaining the cargo unloaded by the SSL and settling the accounts of SSL before terminating the services of SSL. In such circumstances, it cannot be said that the events of restraints being imposed upon IPL by the courts at Chennai had happened without any fault of the charterer i.e. the respondent inasmuch as the respondent was liable to make payment to the owner of the vessel for any demurrage caused due to the actions of the buyer i.e. the appellant and its nominees. It is also worth mentioning here that the Arbitral Tribunal in London had repelled the contention predicated upon Clause 4 of the Charter Party agreement raised before it by the respondent. We thus concur with the view taken by the learned Single Judge that clause 4 of the Charter Party agreement has no application in the present case.

27. The matter can also be looked at from another angle. The Arbitral Tribunal in London had directed the respondent to pay demurrage to the owner of the vessel caused during the period when IPL was restrained by the courts at Chennai

from discharging the cargo from the vessel. The fault for said restraint being imposed upon IPL lies with the appellant and IPL. The respondent which is an innocent party cannot be made to suffer for the faults of the appellant. Thus, the appellant is bound to make payment of demurrage to the respondent which is payable by the respondent to the owner of the vessel in terms of the award passed by the Arbitral Tribunal in London.

28. In view of the above discussion, the appeal is dismissed and the impugned judgment dated 10.10.2007 passed by the learned Single Judge is upheld.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 01, 2012
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