

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

% *Judgment Reserved on : March 18, 2013*
Judgment Pronounced on : March 20, 2013

+ **FAO(OS) 101/2013**

JAGSON AIRLINES LTD. Appellant
Represented by: Mr.Sakal Bhushan, Advocate
with Mr.Rohit Gandhi, Mr.Raghvendra, Advs.

versus

M/S BANNARI AMMAN EXPORTS P.LTD.& ANR. Respondents
Represented by: Ms.Indu Malhotra, Sr.Advocate
instructed by Mr.Vanshdeep Dalmia, Ms.Nistha
Kumar, Advocates.

AND

FAO(OS) 102/2013

JAGSON AIRLINES LTD. Appellant
Represented by: Mr.Sakal Bhushan, Advocate
with Mr.Rohit Gandhi, Mr.Raghvendra, Advs.

versus

BANNARI AMMAN EXPORTS (P) LTD. & ANR. Respondents
Represented by: Ms.Indu Malhotra, Sr.Advocate
instructed by Mr.Vanshdeep Dalmia, Ms.Nistha
Kumar, Advocates.

AND

FAO(OS) 103/2013

INDIAN PORTS WAREHOUSING CO. Appellant
Represented by: Mr.Jayant Nath, Sr.Advocate
instructed by Ms.Subhash Mishra, Mr.Abhishek
Kr.Jha Mr.Sanjay Grovers, Advocates.

versus

BANNARI AMMAN EXPORTS (P) LTD. & ANR.

..... Respondents

Represented by: Ms.Indu Malhotra, Sr.Advocate
instructed by Mr.Vanshdeep Dalmia, Ms.Nistha
Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. FAO(OS) No.101/2013 and FAO(OS) No.103/2013 have been filed by Jagson Airlines Ltd. and Indian Ports Warehousing Company respectively, laying a challenge to the impugned decision dated November 05, 2012 passed by the learned Single Judge dismissing objections under Section 34 of the Arbitration and Conciliation Act 1996 registered as OMP No.478/2006 and OMP No.482/2006 respectively filed by the two companies challenging an award dated July 10, 2006 published by the learned Sole Arbitrator Justice S.Natarajan (Retd.).

2. FAO(OS) No.102/2013 has been filed by Jagson Airlines Ltd. challenging the order dated November 11, 2012, passed by the learned Single Judge disposing of OMP No.238/2012; a petition under Section 9 of the Arbitration and Conciliation Act 1996 restraining Jagson Airlines Ltd. from disposing of its immovable assets pending execution of the award dated July 10, 2006.

3. With respect to a challenge to the award, the learned Single Judge has found no case made out to interfere therewith save and except the cost, in sum of ₹25 lakhs, awarded in favour of Bannari Amman Exports Ltd. which has been reduced to ₹10 lakhs.

4. To appreciate the dispute, and we shall be brief, for the reason we are concerned in the two appeals where an award is the subject matter of

challenge and the law prohibits us from re-appreciating the evidence which was appreciated by the learned Arbitrator; as was the learned Single Judge prohibited from so doing. The issue pertaining to the award could be better understood by highlighting the claim of Bannari Amman Exports Pvt. Ltd. before the learned Arbitrator. It was as under:-

- (a) Refund of/adjustment of ₹17,63,300 /- towards tank hire charges for a period of 20 days from February 25, 1997 to March 15, 1997 together with interest @ 24% per annum for the period from March 15, 1997 to February 03, 1998.
- (b) Refund of/adjustment of ₹3,76,005/- towards tank hire charges for 358.106 MT of Molasses illegally dumped by IPWC and JAL @ ₹150/- per MT per month for the period September 1996 to March 1997 together with interest @ 24% per annum for the period April 01, 1997 to February 03, 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) ₹95,21,820/- towards the refundable security deposit together with interest @ 24% per annum from April 07, 1997 to February 03, 1998 and future interest thereon @ 24% per annum.

5. Jagson Airlines Ltd. and Indian Ports Warehousing Company filed a joint counter-claim in sum of ₹4,78,04,391/- pleading that after adjusting the security deposit, Jagson Airlines Ltd. was entitled to rental in sum of ₹22,52,474/- for the period up to June 15, 1997 and ₹4,55,51,917/- as lease rental for the period July 16, 1997 to April 21, 1998. Interest was prayed for @ 24% per annum on the said amount.

6. The admitted position of the parties as per their pleadings before the learned Arbitrator was that Indian Ports Warehousing Company

was the owner of various storage tanks at the New Mangalore Port. M/s.Bannari Amman Exports Pvt. Ltd. was engaged in business which required it to purchase, store and sell molasses, a commodity, purchase, storage and sale whereof was strictly regulated as per the Excise Laws. At each stage, permission had to be obtained from the Excise Department. It was desirous of taking on lease a storage tank from Indian Ports Warehousing Company and the parties negotiated for tank No.6 having storage capacity 5678 MT. A lease deed was executed on April 10, 1996 recording therein that the six months lease period would be commencing from May 07, 1996 ending on November 07, 1996. A sum of ₹42,58,500/- was paid by M/s.Bannari Amman Exports Pvt. Ltd. to Indian Ports Warehousing Company as refundable security deposit.

7. Business of M/s.Bannari Amman Exports Pvt. Ltd. grew all of a sudden, resulting in the company needing additional storage space and thus it opened a dialogue with Indian Ports Warehousing Company to take on lease a larger tank; and the parties started discussing lease of tank No.5 having storage capacity 17,633 MT.

8. During discussions Indian Ports Warehousing Company informed M/s.Bannari Amman Exports Pvt. Ltd. that it had leased the tank to Jagson Airlines Ltd. and that it would be willing to transfer the security deposit to Jagson Airlines Ltd. if M/s.Bannari Amman Exports Pvt. Ltd. and Jagson Airlines Ltd. could agree to the terms pertaining to lease of Tank No.5, and terminate the lease pertaining to Tank No.6.

9. Letters were exchanged between M/s.Bannari Amman Exports Pvt. Ltd., Jagson Airlines Ltd. and Indian Ports Warehousing Company inter-se each other, resulting in the terms on which M/s.Bannari Amman Exports Pvt. Ltd. would take on lease Tank No.5 from Jagson Airlines Ltd. being agreed and the date of the lease commencing from September 27,

1996 till March 27, 1997.

10. It may be highlighted here that the lease-deed pertaining to Tank No.5 was drawn up on September 12, 1996, a date within the six months period of the lease pertaining to Tank No.6 which was to expire by efflux of time on November 07, 1996. Indian Ports Warehousing Company transferred the security deposit to Jagson Airlines Ltd. and terminated the lease of tank No.6.

11. The correspondence between the parties clearly envisaged that lest M/s.Bannari Amman Exports Pvt. Ltd. was saddled with the liability to pay lease for two tanks, (No.6 as well as 5) Indian Ports Warehousing Company would transfer whatever molasses was lying in store in tank No.6 to tank No.5 on or before when the lease commenced on September 27, 1996 for tank No.5.

12. And here the problem surfaced.

13. If we may use the expression used by the learned Sole Arbitrator, a mischievous quantity of 358.106 MT molasses surfaced. It found itself into tank No.6.

14. As noted above, purchase, transportation, storage and sale of molasses was strictly regulated by the Excise Department, noting 358.106 MT molasses in excess lying in tank No.5, the department suspended the license of M/s.Bannari Amman Exports Pvt. Ltd. for a period of 20 days commencing from February 25, 1997 ending March 15, 1997 resulting in M/s.Bannari Amman Exports Pvt. Ltd. not being able to do any business. It was in respect of this fact that M/s.Bannari Amman Exports Pvt. Ltd. raised a claim for damages as also refund of the rental for tank No.6 in sum of ₹17,63,300/- together with interest thereon and additionally for dumping 358.106 MT molasses in the tank which was leased to it i.e. Tank No.6. Refund of the security deposit was also claimed. Whereas Jagson Airlines

Ltd. and Indian Ports Warehousing Company, as per joint pleadings in a common reply cum counter-claim filed, maintained that 358.106 MT molasses was brought firstly into tank No.5 when it was purchased by M/s.Bannari Amman Exports Pvt. Ltd. and later on transferred to tank No.6 as per agreement between the parties; that with the simultaneous termination of the lease of tank No.6 and commencement of lease of tank No.5 molasses belonging to M/s.Bannari Amman Exports Pvt. Ltd. in tank No.6 would be transferred to tank No.5, M/s.Bannari Amman Exports Pvt. Ltd. denied having purchased and brought any liquid to tank No.6.

15. Suffice would it be to state that the dispute which arose on the pleadings of the parties was on a matter of fact. The fact being, whether M/s.Bannari Amman Exports Pvt. Ltd. had purchased 358.106 MT of molasses and transported the same at the Port Complex and stored the same in tank No.6 and had thereafter consented to the same being transferred to tank No.5 or whether Indian Ports Warehousing Company and Jagson Airlines Ltd. had surreptitiously brought said quantity of molasses and illegally stored the same firstly in tank No.6 and thereafter transferred the same to tank No.5 with same surreptitiousness, till when Excise Department detected 358.106 MT of molasses in tank No.5 taken on lease by M/s.Bannari Amman Exports Pvt. Ltd. and took penal action against M/s.Bannari Amman Exports Pvt. Ltd. by suspending its license.

16. On this aspect of the matter, as per the common stand taken by Indian Ports Warehousing Company and Jagson Airlines Ltd., M/s.Bannari Amman Exports Pvt. Ltd. had purchased the molasses after taking permission from the Excise Department and in support of the said stand the two relied upon Ex.C-4, a letter addressed by Indian Ports Warehousing Company to M/s.Bannari Amman Exports Pvt. Ltd. on September 06, 1996 undertaking to transfer residual molasses in tank No.6 to tank No.5 on or

before September 27, 1996 and invoice dated November 11, 1996 raised by Jagson International Ltd., a sister concern of Jagson Airlines Ltd. on M/s.Bannari Amman Exports Pvt. Ltd. for sale of 306 MT molasses to M/s.Bannari Amman Exports Pvt. Ltd., Ex.C-31, a letter dated April 25, 1997 addressed by the Excise Commissioner pertaining to permission granted to M/s.Bannari Amman Exports Pvt. Ltd. to purchase 358.106 MT molasses from Karnataka Agro Industries, Ex.C-21, a bill dated April 28, 1997 raised by Jagson International Ltd. on M/s.Bannari Amman Exports Pvt. Ltd. for sale of 358.106 MT molasses, Ex.R-1, a letter dated March 25, 1997 addressed by M/s.Bannari Amman Exports Pvt. Ltd. to the Deputy Excise Commissioner to purchase 358.106 MT molasses from Jagson International Ltd., Ex.C-34, a letter dated July 02, 1997 addressed by M/s.Bannari Amman Exports Pvt. Ltd. to the Excise Commissioner seeking permission to purchase 358.106 MT molasses from M/s.Karnataka Agro Industries Corporation Ltd. Ex.RW-1/4 (date not known) being a letter from Bakelite Hylam Ltd. addressed to M/s.Bannari Amman Exports Pvt. Ltd. regarding residual stock being measured by the Surveyor.

17. With reference to Ex.C-31 and Ex.C-34 as also Ex.RW-1/4 it was sought to be urged before the learned Arbitrator that these documents clearly established that M/s.Bannari Amman Exports Pvt. Ltd. had purchased 358.106 MT molasses.

18. With reference to the said letters the learned Arbitrator took into account Ex.C-5, a letter dated September 09, 1996 addressed by M/s.Bannari Amman Exports Pvt. Ltd. to Indian Ports Warehousing Company protesting against molasses belonging to it being transferred from Tank No.6 to Tank No.5; Ex.C-15, a letter of protest written by M/s.Bannari Amman Exports Pvt. Ltd. to Jagson International Ltd. pertaining to the bill dated November 11, 1996 (Ex.C-14), and a few other documents to hold that

Jagson Airlines Ltd. and Indian Ports Warehousing Company could not bring home the point that 358.106 MT molasses was purchased by M/s.Bannari Amman Exports Pvt. Ltd.

19. The learned Arbitrator has noted a cacophony emerging from the documents relied upon by Indian Ports Warehousing Company and Jagson Airlines Ltd.; being that the two were filing documents containing different versions about the ownership of the molasses. As noted above, Ex.R-1 was making a reference to purchase of said quantity of molasses from Jagson International Ltd., Ex.RW-1/4 made a reference to the said quantity of molasses being purchased from Bakelite Hylam Ltd. and Ex.C-34 making a reference to the said quantity being purchased from M/s.Karnataka Agro Industries Corporation Ltd.

20. Now, commonsense tells us that the same quantity of molasses i.e. 358.106 MT could not be purchased from three sources.

21. We need to discuss no further for the reason the issue before the learned Arbitrator was one of fact. The various letters relied upon by Indian Ports Warehousing Company and Jagson Airlines Ltd. pertaining to the purchase by M/s.Bannari Amman Exports Pvt. Ltd. would at best show that M/s.Bannari Amman Exports Pvt. Ltd. was seeking permission from the Excise Department to purchase 358.106 MT molasses. But there is no evidence to show that M/s.Bannari Amman Exports Pvt. Ltd. finalized the deal with either Bakelite Hylam Ltd., Karnataka Agro Industries Corporation Ltd. or Jagson India Ltd. That apart, it fell within the exclusive domain of the learned Arbitrator to sift through the evidence and return a finding of fact.

22. It cannot be said that the finding of fact returned by the learned Arbitrator is without any evidence or is a perverse finding. Ex.C-5, to which we have referred to above is a letter dated September 06, 1996 addressed by

M/s.Bannari Amman Exports Pvt. Ltd. to Indian Ports Warehousing Company protesting against surreptitious transfer of molasses by employees of Indian Ports Warehousing Company into the tank taken on lease by M/s.Bannari Amman Exports Pvt. Ltd. i.e. tank No.6, the letter clearly indicates that the transfer was overnight without any information to M/s.Bannari Amman Exports Pvt. Ltd. We are referring to the said letter just to bring home the point that the learned Arbitrator had before him a plethora of letters making a reference to the contemporaneous facts.

23. We refuse to discuss any further and dissect the various letters exchanged between the parties because this would mean a virtual re-hearing of the evidence. The record of the Arbitrator would reveal that extensive arguments were addressed spread over days together. Law does not permit same set of exhaustive arguments to be made stage after stage in arbitration proceedings. Pithily stated, on matters of fact, no argument should be entertained while considering a challenge to an award if it requires re-appreciation of evidence. Of course, a case of a finding of fact being based on no evidence would stand on an entirely different footing. On issues of fact pertaining to an award, the correct approach by a Court should be to identify if there is any evidence. Finding the same, the enquiry should stop; analysis by way of dissecting evidence with reference to whether the onus has been discharged or not, is the job of the Arbitrator and not the Court.

24. We note that the learned Arbitrator had rejected claim for damages by M/s.Bannari Amman Exports Pvt. Ltd. for want of evidence with respect to export commitments, and the discussion is to be found in paragraphs 94 to 96 of the award. As regards the rest, the learned Arbitrator has directed refund of security deposit, and remission of rent for 20 days. Both sums being payable; being the inevitable conclusion of the finding of fact determined by the Arbitrator. Of necessity, the counter-claim raised had

to be rejected for the reason the basis of the counter-claim was 358.106 MT molasses continuing to lie in tank No.5 after the lease period was over and for which stand taken by Jagson Airlines Ltd. and Indian Ports Warehousing Company was that said quantity of molasses belonging to M/s.Bannari Amman Exports Pvt. Ltd. was lying in tank No.5 till it was decanted.

25. An argument was advanced before us with respect to the learned Arbitrator awarding interest @ 18% per annum from the date the amount fell due till date of payment. It was urged that the interest awarded was excessive.

26. We note that the lease agreement between the parties stipulated interest to be paid @ 24% per annum on delayed payment of the security deposit. Thus, the reduced rate at which learned Arbitrator has awarded interest cannot be faulted.

27. Accordingly, FAO(OS) No.101/2013 and FAO(OS) No.103/2013 are dismissed.

28. As regards FAO(OS) No.102/2013, it must suffer a dismissal as a consequence of dismissal of FAO(OS) No.101/2013 and FAO(OS) No.103/2013 because the amount outstanding and payable under the award to M/s.Bannari Amman Exports Pvt. Ltd. needs to be secured pending execution and thus to restrain the judgment debtor to dispose of its assets would be fair, just and proper. The said appeal is also dismissed.

29. Parties shall bear their own costs in the appeals.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 20, 2013

dk

FAO(OS) 101, 102 & 103/2013

Page 10 of 10