

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

+ CS (OS) 1285/2002

Date of Decision: 13 .03.2013

**ISLAMIC REPUBLIC OF IRAN SHIPPING LINES
.....PLAINTIFF**

Through: Mr.N.Ganpathy, Advocate with
Mr.Vishal Seth, Mr.Kartik
Yadav, Advocates.

Versus

**THE PROJECTS AND EQUIPMENT CORPORATION OF
INDIA LIMITED
.....DEFENDANT**

Through: Mr.Sanjeev Narula, Advocate.

**CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA**

M.L. MEHTA, J.

1. This is a suit for recovery of money. The plaintiff is a foreign company owned by the Republic of Iran. The Government Trading Corporation of Iran (for short the 'GTC') had entered into a contract with the defendant for purchase of rice. The terms and conditions between the GTC and the defendant were recorded in telex dated 10.05.1998. In pursuance thereto, the plaintiff was entrusted the shipment of the goods from India to Tehran. There being delay in shipment of goods at the Kandla port in India, the plaintiff has claimed

from defendant the demurrage amounting to USD 101,000/- along with interest, which liability is disputed by the defendant, and that led the plaintiff to file the instant suit.

2. The defendant, which is also a corporation of Government of India and had supplied the rice to GTC, carried by the vessel provided by the plaintiff, has disputed the claim as set up by the plaintiff. The defendant has raised the preliminary objections: (i) the suit is not maintainable for non-joinder of GTC; (ii) there was no privity of contract between the plaintiff and the defendant; (iii) the suit was not filed by a duly authorized person; (iv) the suit was barred by limitation inasmuch as the cause of action for filing the suit arose within 90 days from 06.10.1998 when the goods were loaded, whereas the suit was filed on 11.07.2002, which is beyond the limitation. On merits, beside the plea of limitation as also privity of contract, it was averred by the defendant that it is not liable to pay any demurrage since the buyer GTC being fully satisfied regarding completion of contract on the part of the defendant, had released the Performance Bank Guarantee and whereafter, the defendant also released the Performance Bank Guarantee of its associate M/s. Gee Gee International. It was averred that had the buyer GTC and/or plaintiff informed the defendant about any liability prior to the release of Performance Guarantee by the GTC, the defendant would not have relieved associate from their liability. The case was tried on the following issues:

“1. Whether the suit is instituted by a duly authorized person? OPP.

2. *Whether the suit is barred by time? OPD.*
3. *Whether there is any privity of contract between the plaintiff and the defendant? OPP.*
4. *Whether the plaintiff is entitled to claim demurrage charges from the defendant? OPP.*
5. *Relief?*

3. The plaintiff has examined its Claims Executive Mr. Mahmoud Mohammad Alosfoury as PW1 and the defendant its Chief Marketing Manager Mr. Rajiv Chaturvedi as DW1. The discussion and the findings on the issues are like this:

Issue No. 1

4. PW1 Mahmoud Mohammad Alosfoury is the Claims Executive of the plaintiff company. He stated that at the time of events also, he was the Claims Executive and he had handled the matter in question. He has been specifically authorized by the plaintiff. He has also been authorized vide Ex.PW1/15 to depose on behalf of the plaintiff. There is no challenge made to his authorization in his cross examination by the defendant. He maintained that he is the permanent personnel of plaintiff company, which has authorized him for this case. Consequently, the issue is decided in favour of the plaintiff holding the suit instituted by a duly authorized person.

Issue Nos. 2, 3 & 4

5. Since the findings on these issues are to be on the interpretation of the documents filed by the parties, these can be dealt with together. It was on the defendant to prove that the suit is barred by time and upon the plaintiff that there was a privity of contract between it and the defendant. The plea of the defendant regarding limitation was that the goods were loaded on the vessel of the plaintiff on 06.10.1998, and thus, as per the proforma invoice (Ex.DW1/5), the claim, if any, of demurrage was to be as per charter party and was to be settled within 90 days from the completion of loading.

6. For better understanding of the controversy in question, it would be necessary to refer to certain relevant documents and the statements. So far as the plea of there being no charter party, it is not in dispute that no formal charter party was executed. But, according to PW-1, Ex.P-12 dated 17.06.1998 is a Charter Party. I will revert to this a little later. However, it is not in dispute that a contract between GTC and the defendant came into being by way of a telex dated 10.05.1998. This was specifically averred by the plaintiff in para 3 of the plaint stating that the terms and conditions between the defendant and the buyer GTC were recorded in the telex dated 10.05.1998 Ex. DW1/P-X and the same was confirmed by the defendant vide their telex dated 18.05.1998 Ex. P-8. This has not been denied by the defendant. Rather, DW-1 has admitted in his cross examination about the contract between GTC and defendant dated 10.05.1998. A look at this document dated 10.05.1998 Ex. DW1/P-X evidences these facts. The contract between GTC and the defendant was regarding supply of rice

on the terms and conditions stipulated in this document. The terms relating to demurrage and settlement of demurrage/dispatch read like this:

“DEMURRAGE:

AS PER CHARTER PARTY, TO BE DECLARED AT THE TIME OF NOMINATION OF VESSEL(S).

DESPATCH:

HALF DEMURRAGE.

SETTLEMENT OF DEMURRAGE/DESPATCH:

DEMURRAGE/DESPATCH OF THE VESSEL(S) / ANY DETENTION CHARGES SHOULD BE DIRECTLY SETTLED BETWEEN SELLERS AND THE RELEVANT SHIPPING LINE TO BE NOMINATED LATER WITHIN 90 DAYS.”

7. It was also stipulated in Clause 5 thereof that “this contract is made by exchange of telexes/faxes”. This was admitted by DW-1 in his cross examination that as per the clause of settlement of demurrage mentioned in Ex. DW1/P-X, the defendant was to directly settle the demurrage charges with the plaintiff company, though, he had also volunteered that it was to be settled as per the charter party and that there was no charter party. It is noted from the above clauses that as per charter party, the amount of demurrage was to be declared at the time of nomination of vessel, but settlement of demurrage was to be “within 90 days”. Undisputedly, it is not mentioned as to whether the said 90 days was to be from the date of completion of loading at port in

India as alleged by the defendant or some other date. DW-1 in his affidavit of evidence Ex. DW1/A had stated in para 9 thereof that the 90 days was to be from the completion of loading. In answer to a question put to him in this regard, he had stated that the contract was signed in response to defendant's proforma invoice dated 20.05.1998 (Ex. DW1/5) wherein it was mentioned the time as 90 days from the completion of loading. This part of the statement of DW-1 is quite surprising and apparently against the record. It is noted above that the contract came into existence on 10th May 1998 vide Ex. DW1/P-X and not in response to proforma invoice of 20th May 1998. It was put to DW-1 and he admitted that this "period of 90 days from completion of loading" was not stipulated in the contract dated 10.05.1998 Ex. DW1/P-X and also that this proforma invoice was their own document. At one place he stated having sent the proforma invoice to the plaintiff, but then he admitted not having sent it to the plaintiff, but to GTC. A look at this proforma invoice dated 20th May 1998 would evidence that this is nothing but a document of the defendant reproducing the contents of Ex. DW1/P-X, but with addition of certain words in clause relating to demurrage/dispatch as under:

"5. DEMURRAGE/DESPATCH:

AS PER CHARTER PARTY/HALF DEMURRAGE BUT NOT MORE THAN US \$ 6000/3000 AT LOAD PORT TO BE SETTLED BETWEEN SELLERS AND BUYER'S NOMINATED CARRIER DIRECTLY WITHIN 90 DAYS FROM THE DATE OF COMPLETION OF LOADING."

(emphasis supplied)

The words “from the date of completion of loading” have been added by the defendant in the aforesaid clause of the performa invoice (Ex.DW1/5).

8. Undisputedly, the defendant confirmed the telex created contract of 10th May 1998 (Ex. DW1/P-X), through its acceptance communication dated 18.05.98 Ex. P-8 stipulating as “accordingly we accept the terms of the contract finalized between PEC (defendant) and GTC”. Relevant part of another important term in the contract dated 10th May 1998 Ex. DW1/P-X relating to loading terms was like this:

“ON ARRIVAL AT LOADING PORT, VESSEL TO TENDER NOTICE OF READINESS BY CABLE OR THROUGH SHIPPING AGENTS TO THE SELLERS WIBON/WIPON/WPPGON/WCCON. SUCH NOTICE OF READINESS WILL BE TENDERED DURING ORDINARY OFFICE HOURS ON A WORKING DAY. IF NOTICE OF READINESS IS TENDERED BY VESSEL OR HER AGENTS BEFORE 12:00 LOCAL TIME, LAYTIME SHALL COMMENCE TO COUNT FROM 13:00 HOURS (ONE P.M.) LOCAL TIME SAME DAY. IF NOTICE OF READINESS IS TENDERED BY VESSLE OR HER AGENTS AFTER 12:00 HOURS LOCALTIME, THEN LAYTIME SHALL COMMENCE TO COUNT FROM 07:00 HOURS THE NEXT WORKING DAY. ALWAYS WIBON/WIPON/WPPGON/WCCON.”

9. The GTC vide letter dated 10.06.1998 Ex.P-9 sought confirmation of plaintiff as regards the terms for shipment of Cargo. The terms included demurrage at L/P (Loading Port) as per charter party, to be declared at the time of nomination of vessel and settlement of demurrage between the plaintiff and defendant directly. In pursuance of the terms relating to demurrage and loading, the GTC entrusted the shipment to the plaintiff vide communication dated CS(OS) No.1285/2002

11.06.1998 (Ex.P-10). This was further confirmed by GTC with the plaintiff vide communication of 17th June, 1998 (Ex.P-12), which also substantially contained the terms of contract dated 10th May 1998 and 10th June 1998. While stating the maximum demurrage to be USD (US \$) 7000 per day on prorata basis, it was stated that the demurrage was to be directly settled between the plaintiff as a carrier and the defendant as a seller. It is noted that in Ex. P-12 there was no mention of settlement of demurrage within 90 days, as was so stipulated in the Ex. DW1/PX dated 10th May 1998. Relying upon this, it was sought to be contended by the plaintiff that not only that, it was nowhere stipulated in DW1/PX that 90 days was to be from the date of loading, even that limitation of 90 days was not stipulated in Ex. P-9 and Ex. P-12. Since Ex. P-9 and Ex.P-12 were between the plaintiff and the GTC, the defendant stated to be not bound by the terms stipulated therein. Though these exhibits P-9 and P-12 are the communications between the plaintiff and the GTC, but these substantially reproduce the terms which are contained in telex contract dated 10.05.1998 (PW1/PX), which was admittedly, confirmed and accepted by the defendant vide its communication dated 18.05.1998 (Ex.P-8). This being the factual situation, I would interpret this document Ex. DW1/PX stating that the amount of demurrage was to be declared at the time of nomination of vessel, as per standard term of charter party and further that the settlement of demurrage was to be done directly between the seller i.e. the defendant and the shipping line i.e. the

plaintiff within 90 days. This was all accepted by the defendant vide letter dated 18.05.1998 Ex.P-8.

10. The GTC vide its letter dated 13th August 1998 (Ex.DW1/1), giving reference to the agreement, confirmed the terms with the defendant. It was mentioned therein that as per the defendant's proposal laytime was to commence to count after and not when the vessel is tendered and that L/C will be made operative ASAP. It was also stated therein that acceptance of the vessel by the defendant should be clear and unconditional and cannot be mangled subject to the operativity of TFOLL/C or any other excuses. It was also stated therein that defendant undertakes that the complete loading of the vessel will be made within laytime permitted in the contract. Vide communication dated 18th August 1998 GTC informed the defendant about the nomination of vessel of the plaintiff for shipment. The vessel of the plaintiff arrived at Kanda Port on 27th August 1998 and it gave a notice of readiness to the defendant on 28th August 1998 at 10 am. As per Ex.DW1/PX dated 10th May 1998 as also Ex. P-9 and Ex. P-12, the laytime was to commence to count from 1300 hours local time. The receipt of notice of readiness by the defendant is not disputed. However, the loading of the goods was not commenced till 24.09.1998. According to the defendant, the vessel was not ready for shipment as the buyer's (GTC) surveyor on inspection rejected the vessel on 12th September 1998 at 1200 hours. The vessel was passed on subsequent inspection on 16.09.1998 at 1300 hours.

11. Undisputedly, the defendant and GTC did not give the required documents to the Master of the vessel on arrival at the port for submission to the authorities for getting berth at the port, but gave the documents on 19.09.98 for transmission to the port authorities for berth allotment. The berth could only be made available on 24th September 1998 when the loading commenced. The loading of the cargo was completed on 06.10.1998. According to the defendant, the laytime period was to commence from this day i.e. 06.10.1998, whereas according to the plaintiff, the period was to commence from 13 hours on 28.08.1998. It is also noted above that the defendant was claiming that the settlement of demurrage was to be within 90 days from date of loading of cargo, primarily based on the proforma invoice. It has been discussed above that this was the defendant's own document and the words 'from the date of completion of loading', appearing after the words 'within 90 days', did not form part of the contract of 10.05.1998 (Ex.DW1/PX) or that of 17.06.1998 (Ex.P12). Time and again it was asserted by the learned counsel for the defendant that there being no charter party, it could not be ascertained as to what was the amount of demurrage as also the time of commencement of laytime count. Though at one place PW-1 had stated that according to him Ex.P-12 was a charter party, but from the documents, particularly, Ex. DW1/3 (also Ex.D-2) it would be seen that this was communicated by GTC to the defendant that it did not have any charter party with the Iranian vessel i.e. the plaintiff. It is also seen from Ex. DW1/2 that the defendant also confirmed with the plaintiff about there being no charter

party for Iranian vessel. But that would not mean that there was no contract between the parties regarding the terms stipulating demurrage as also calculations of laytime period.

12. From all above, it would be seen that the contract between the GTC and the defendant came into being vide telex dated 10.05.1998 (Ex.DW1/PX). The defendant had agreed to accept the vessel that may be nominated by the GTC and also the demurrage charges which were as per the standard charter party terms. PW-1 specifically stated they had sent specifications and nominated vessel to the defendant and informed the defendant that if within 48 hours they did not receive any reply from the defendant it would mean confirmation by them of the proposal. The demurrage charges USD 7000 maximum were stated to be as per charter party.

13. From all this discussion, it also stands established that the defendant having accepted the terms of the contract and also the vessel of the plaintiff nominated by the GTC, and also having loaded the goods therein, there came into being a contract between the plaintiff and the defendant in that the dispute between the two of them regarding demurrage was to be settled directly. Thus, it could not be said that there was no privity of contract between the plaintiff and the defendant.

14. In the case of **Shakti Bhog Foods Limited Vs. Kola Shipping Limited, (2009) 2 SCC 134**, the Supreme Court though in different context of the facts, held that if there was no formal charter party, the

same can be inferred from the communication and the contract of the parties. It was held thus:

“29. Fixtures are frequently recorded in a telex or fax recapitulating the terms finally agreed (a “recap”). Thus a recap telex or fax may constitute the “charter party” referred to in another contract. In Welex AG v. Rosa Maritime Ltd. (Elipson Rosa case), it was decided by the Queen’s Bench Division (Commercial Court) that a voyage charter party or Elipson Rosa was concluded on the basis of a recap telex which incorporated by reference a standard form charter. Before any formal charter was signed, bills of lading were issued referring to the “charter party”, without identifying it by date. It was held that the charter party referred to was the contract contained in or evidenced by the recap telex.

30. In the present case therefore, we conclude that there existed a charter party between the parties to the suit which can be identified from the correspondence between the parties to that effect as also from the fixture note and the bill of lading signed by the parties”

15. From the above, it is noted that it was nowhere agreed to by any party that the period for settlement of the claim of demurrage by the plaintiff was limited to 90 days from the date of shipment. Otherwise also, this appears to be highly impractical and improbable that the plaintiff would be in a position to ascertain the amount of demurrage at that point of time. The ship was in the charge of the Master, who was only responsible for cargo and the affairs related to vessel. It was only

after the return of the vessel at the destination and submission of the report and the documents by the Master of the vessel with the plaintiff that the later would be in a position to ascertain demurrage, if any. In answer to a question PW-1 stated that the plaintiff would not know exactly about the claim as soon as the discharge of cargo is finished, because relevant documents are collected later and thereafter time sheet is calculated and all this takes time. He stated that the relevant documents are provided by the concerned agent and not by the Master of vessel and so the calculation of time sheet is not related to the arrival of the vessel at the discharge port. He maintained that the laytime is based on the statement of facts (Ex.P-6), which is signed by the Master of Vessel, Shipper Agent and Carrier Agent.

16. From the terms of the contract, it would be seen that there was no limit of 90 days for raising claim. What was limited was the settlement of the demurrage claim in 90 days between the plaintiff and the defendant. It is noted from the statement of PW-1 that the statement of facts Ex. P-6 was signed by all the three parties, namely, the plaintiff, the defendant and the GTC. As per this, the hatches passed at 1130 hours on 16.09.1998. The Pilot boarded the vessel at 1245 hrs. on 24.09.1998 and the vessel got the berth at the port at 1445 hrs. on 24.09.1998. The loading commenced on 24.09.1998 at 1830 hours and was completed on 06.10.1998 at 21.10 hours. As per the plaintiff, the laytime was 34 days 15 hours and 30 minutes as against the allowed laytime of 14 days 10 hours and 42 minutes. In this way, according to the plaintiff, there was delay in laytime of 20 days 4 hours and 48

minutes. Based on this view, the plaintiff has raised demurrage totalling to USD 101,000 vide invoice dated 10.04.99 Ex. P-14 communicated to the defendant vide Ex.P-7 dated 14.04.1999, @ USD 5000 per day and pro-rata for a part of a day, on total period of 20 days, 4 hours and 48 minutes alleging of extra time used as against the laytime that was allowed. From Ex.P-6, it could be seen that the vessel was ready for loading only at 1130 hours on 16.09.98. It is not understandable as to why pilot boarded the vessel only at 1245 hours on 24.09.98 and got berth at the port only at 1445 hrs. on 24.09.98. Though, it was asserted by the plaintiff, as was so mentioned in the Master's remarks on the statement of facts Ex.P-6, that the cargo documents were tendered by the shippers only on 19.09.98 for onward submission to the port authorities for the berth allotment, but it is not understandable as to how delay of so many days occurred for the vessel in getting the berth at the port. Taking that the documents were obtained by the Master of Vessel only on 19.09.98, there is no evidence as to when these were submitted to the port authorities by him. The defendant cannot be faulted for the delay on this count. Thus, for all practical purposes, the vessel could be said to be ready for loading when it got the berth at the port at 1445 hrs. on 24.09.98. The loading having commenced on the same day at 1830 hours and completed at 2110 hours on 06.10.1998, the total time taken in loading could be said to be 12 days 2 hours 40 minutes. If the time allowed as per the plaintiff's showing was 14 days 10 hours and 42 minutes, then in view of my above discussion, there does not appear to be any delay

on the part of the defendant in loading the cargo. Even taking that there was delay of three days in giving the documents by the defendant to the plaintiff, then also that would not make any difference. According to the plaintiff the vessel was passed for loading at 1130 hours on 16.09.1998 and the documents were given on 19.09.1998. Since the time of giving documents is not given by the plaintiff, I can only take there to be a delay of clear 3 days on the part of the defendant in giving the documents to the Master of the Vessel. Adding these three days, the total time taken for laytime comes out to be 15 days 2 hours 40 minutes. Allowing the permissible laytime of 14 days 10 hours and 42 minutes, the delay on the part of the defendant, in view of above discussion, comes out to be 16 hours. Thus, the plaintiff would be entitled to demurrage of 16 hours @ USD 5000 per day pro-rata basis, which comes to USD 3333, which is equivalent to Rs.1,66,650/-. Thus, the plaintiff is found to be entitled to the demurrage of USD 3333 or Rs.1,66,650/- from the defendant.

17. In view of above discussion, the issues No. 2, 3 and 4 are decided in favour of the plaintiff, as indicated above.

Issue No. 5

18. The plaintiff is entitled to a decree of USD 3333 or its equivalent of INR 1,66,650.00 from the defendant. The suit of the plaintiff stands decreed for the same. The decree may be drawn accordingly.

M.L. MEHTA, J.

MARCH 13, 2013/akb/awanish

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