

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

Decided on: 31.07.2013

+ FAO (OS) 287/2010

MMTC LIMITED (INDIA)

.....Appellant

Through: Sh. J.P. Sengh, Sr. Advocate with Ms.
Padma Priya, Sh. Mukesh Kumar, Sh. Sumit Batra
and Ms. Ankita Gupta, Advocates.

Versus

ALCARI, SA (SWITZERLAND)

.....Respondent

Through: Sh. Dharmendra Rautray with Ms. Ankit
Khushu, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This is an appeal against the order of the learned Single Judge in CS(OS) No. 379A/2002 upholding the arbitral award dated 17.02.2000 and directing it to be made as rule of the Court.

2. The Appellant MMTC Ltd., (hereafter “*MMTC*”) is a public sector undertaking engaged, *inter alia*, in the import of urea. It entered into a contract with the Respondent (Alcari, SA (Switzerland), now Hinduja Bank (Switzerland) Ltd., hereafter “*the Claimant*”) for the supply of 15,000 MT of urea pursuant to a tender issued by it for the import of 4,00,000 MT.

3. MMTC formally accepted the Claimant's offer on 7th July, 1992, with the date of shipment under the contract being 10th July, 1992. Clause 26 of the contract provided as under:

"26. Sellers are to ensure that liberties, victories and other war built vessels are avoided for the shipment of the cargo. They should also not book vessels of more than 15 years age. In case of necessity of booking vessels older than 15 years the Sellers shall take the prior approval of the Buyers."

4. Stating that it was pressed for time, the Claimant selected a vessel aged more than 15 years and approached MMTC for its approval on 10th July, 1992. On the same date, MMTC informed the Claimant that the Department of Fertilizers ("DoF", the consignee) had not agreed to the nomination of the vessel. Claimant responded on the same date that since Mr. Jaiswal of MMTC *"had expressed some difficulties in giving approval as the decision in such matters essentially lies with the Deptt. of Fertilizers"*, the matter had been discussed with Mr. K. Parthsarathy, Deputy Commissioner of the DoF, who had indicated that the vessel would be acceptable if the Claimant could *"give a letter undertaking responsibility for shortfall in discharge rate below 1250 MT per day"* and that *"in any case discharge rate should not fall below 500 MT per day."* The Claimant accordingly gave a written guarantee by a letter dated 10th July, 1992 that it would *"assume any incidental costs that may arise as per our contract and tender conditions if the said discharge rate fell below 1250 MT/WWD."* It also furnished a guarantee on 21st July, 1992

stating that the discharge rate would not fall below 600 MT/WWD per day. MMTC did not respond to either of these communications.

5. Further, on 21st July, the Claimant informed MMTC that the vessel had sailed from the load port with cargo on 18th July, 1992. MMTC responded by fax on the same date, reiterating that the vessel, being over 20 years of age, was not acceptable to the DoF in terms of clause 26 of the contract. The Claimant, by telex message on 21st July, 1992 informed MMTC that the vessel had already sailed on 17th July and it had proceeded in the belief that the vessel would be “*accepted by the Department of Fertilizers if discharge rate guaranteed the basis of minimum 600 MT/WWD*” and that it accepted this condition despite its conviction that the vessel was capable of handling the contractual discharge rate.

6. An inter-departmental telex message dated 24th July, 1992 sent by Mr. Parthasarathy of DoF to Mr. N.K. Kala of MMTC said, on the other hand, that “*as per the guaranteed discharge rate of 600 MT/WWD agreed to by the suppliers*”, the DoF “*has no objection in fixation of this Vessel,*” subject to conditions, of which clause (d) said “*the discharge rate should be 600 MT per day as agreed to by the suppliers.*” This message was not communicated to the Claimant.

7. The vessel achieved a discharge rate of 1168 MT/WWD, which was more than the contractual rate of 1000 MT/WWD, but incurred demurrage on account of rain and congestion at the port. The Claimant consequently made a demurrage claim of US\$ 142,447.90, having calculated the discharge rate at the contractual rate of 1000 MT per day. MMTC disputed this, calculating demurrage at the rate of 600

MT per day, and paid US\$ 75,625 accordingly. This led to a dispute over the balance amount of US\$ 66,822.90.

8. The parties referred the dispute to arbitration under Clause 23 of the contract. The arbitrator decided in favour of the Claimant, holding that it was entitled to the balance demurrage amount of US\$ 66,822.90 with interest at 18% per annum from one month after the date of receipt of the award till the date of payment. MMTC's counter claim of US \$75,625 with interest, made on the ground that it had paid the amount "by mistake" and did not owe the Claimant demurrage in view of alleged breach of clause 26 of the contract made in the use of an overage vessel was dismissed.

9. The arbitrator found that use of the overaged vessel had been approved, subject to a condition, the exact term of which was at the centre of the controversy. The evidence put forth by the Claimant was both consistent and compelling, whereas MMTC's was riddled with internal contradictions. Thus the arbitrator ruled in favour of the Claimant's version that the acceptance was conditional on the guarantee of a *minimum* discharge rate of 600 MT/day. He found that MMTC, being an instrumentality of the state, was bound under Article 14 to impose a condition that was reasonable. Reducing the discharge rate to 600 MT/day could not be considered reasonable, but the condition was severable from approval granted, thus having no effect on its validity. Reduction of the rate for calculation of demurrage would have required an amendment in the contract with the written consent of both the Claimant and MMTC. There had been no such attempt.

10. The Claimant initially moved for execution under the new Arbitration and Conciliation Act, 1996. After notice was issued, the MMTC objected to maintainability of those proceedings, stating that the arbitration proceedings and award were not subject to the new Act, but were conducted and culminated under the Arbitration Act, 1940. The Claimant, therefore, filed an application before the learned Single Judge under Section 17 of the Arbitration Act, 1940 to treat the arbitral award as rule of the Court. MMTC challenged the maintainability of the suit under the Arbitration Act and also filed objections against the award in I.A. 353/2003 in the same suit.

11. The learned Single Judge, by an order dated 16.03.2009, ruled on objections to the maintainability of the application by the claimant, against MMTC. In the impugned order, the learned Single Judge had noticed that an appeal (FAO (OS) 261/2009) was pending on the file of this Court, which had questioned the maintainability of proceedings preferred by the claimant to make the award a rule of Court, and held that the ruling on merits was without prejudice to MMTC's contentions in that appeal.

12. In the impugned judgment, before addressing the objections, the learned Single Judge first addressed the scope of interference by this Court with an arbitral award rendered under the Arbitration Act, 1940. The Court cited *M/s. Arosan Enterprises Ltd. v. Union of India and Anr.*, (1999) 9 SCC 449:

“38. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the Court is not permissible and as a matter of fact exercise of power by the Court

to reappraise the evidence is unknown to proceedings under section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the Court would not arise at all. In the event, however, there are reasons, the interference would still not be available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

39. The common phraseology “error apparent on the face of the record” does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.....”

13. The chief issue was whether MMTC imposed any condition when it was informed that the Claimant was shipping the consignment in a vessel of more than 15 years of age. He found that the only written communication in support of MMTC’s contention that it had granted approval subject to discharge rate being 600 MT per day was the inter-departmental telex message, which had never been communicated to the Claimant. The arbitrator had examined the other available evidence and found favour with the Claimant’s assertion that MMTC seemed anxious to ensure the discharge rate did not fall below a minimum of 600 MT/WWD.

14. In view of the established principle that the arbitrator is the sole judge of quality as well as quantity of evidence and reappraisal of evidence is outside the scope of the Court's powers under Section 30 of the Act, the learned Single Judge accepted the arbitrator's finding. He held further that the discharge rate could not have been reduced from 1000 MT to 600 MT/WWD as clause 16 of the contract read "*no variation or modification of the contract shall be made except by written amendment signed by parties.*" Acceptance of the consignment without demur additionally estopped MMTC from alleging breach of clause 26 of the contract.

15. Lastly, he found that in a commercial contract where the contracting parties are business persons the question of application of Article 14 would not arise. Even so, the award could not be set aside because of erroneous application of the provision as this was one of several reasons given by the arbitrator to decide the matter against MMTC.

16. By the impugned judgment and order, the learned Single Judge allowed the Claimant's application and dismissed objections raised by MMTC. The latter has consequently appealed.

17. It is first contended by MMTC – and urged by its Senior Counsel, Mr. J.P. Sengh – that the maintainability of the proceedings under Section 17 of the Act had been ruled against the Claimant in the previous order of the learned Single Judge. Counsel submitted that though FAO (OS) 261/2009 has since been decided and MMTC's appeal against the order on maintainability decided, nevertheless on 15.05.2013, the jurisdiction of the Court to rule upon an application to

make the award a rule of Court under Section 17 of the Act, in the absence of the original award and the proceedings conducted by the arbitral body, i.e. the International Chamber of Commerce, has not been finally decided. It was submitted that in the absence of the record or the award, which was not filed either by the Arbitrator or anyone authorized by him, the Court could not have proceeded to affirm it and direct a decree to be drawn. Characterizing the impugned judgment as being of questionable legality, since it was premised on a document which could not have been the valid basis for an Indian Court to take cognizance of the award, counsel underlined that the entire proceedings leading to the direction to make the award a rule of Court, was without sanction and jurisdiction. It was repeated here that the judgment of this Court in FAO (OS) 261/2009 did not deal with this aspect at all. Learned senior counsel submitted that even the order impugned in that case had acknowledged that the award had not been filed in accordance with Section 14 of the Act.

18. On the merits, it was argued that there was no prior approval, and if any, it was given by the DoF which was not a party to the suit. Thus the claimant had breached Clause 26, absolving MMTC of the liability to pay demurrage. It was submitted that the MMTC had clearly expressed its reservations and communicated it to the claimant, which nevertheless proceeded to charter an overaged vessel. The consequent demurrage liability, therefore, could not be fastened upon the MMTC. It was emphasized that the DoF could not have any say in the matter and the claimant was not privy to the contract with it in order to claim that its approval or say in the matter had any bearing on

the issue. The liability visualized was that of MMTC, and the conditions governing it were clearly spelt-out in the contract, to which the DoF was not a party. Consequently, the claimant could not have relied on the correspondence between MMTC and DoF, and the award, to that extent, was unsustainable. Thus, the learned Single Judge fell into error in rendering the finding that there was nothing wrong in the Claimant proceeding ahead without the approval, despite its being an integral condition of the contract. In so holding, the arbitrator fell into error, and acted contrary to the terms of the contract. Learned senior counsel further argued that the arbitrator failed to see that the question of capacity of the vessel and the tonnage it could discharge had a very material bearing on the terms of the contract, because had the claimant adhered to the quantum, the time for discharge would have been more and consequently there could have been no liability.

19. On behalf of the claimant, it was argued that the decision in the other appeal concluded the question of maintainability. Stressing that the MMTC could not urge the ground once over, it was argued that the mistake in first filing the petition under the new Act resulted in loss of considerable time. Consequently, when the claimant approached the ICC arbitral chamber, under whose aegis the arbitration proceedings took place, the records were unavailable. It was further argued that there was no dispute with respect to the matters considered by the arbitrator, or the facts and documents. Nor did MMTC demonstrate what prejudice was caused to it, by the claimant relying on the copy of the award and the proceedings. In these circumstances, the justice of

the case would suffer, on an over-insistence of the original documents and award.

20. It was argued that the MMTC cannot submit that the permission under clause 26 was not forthcoming. Here, counsel relied on the findings of the arbitrator and submitted that there was no question of approval not having been obtained, in the facts of this case. It was argued that when the claimant approached the MMTC for approval, prior to the sailing of the vessel, the indication given to it was that the DoF had final say in the matter. Now, the MMTC cannot contend that its approval was necessary, regardless of whether DoF approval had been granted. It was also argued that the question of discharge rate of the vessel had to be seen from the perspective of the MMTC's requirement that it should not be below 600 TPD.

21. The first question at the threshold of this dispute, which this Court has to address, is whether the MMTC is correct in contending that the Single Judge should not have entertained the matter, given that the original records were not filed by the arbitrator. As far as the other aspect, i.e. the question of limitation goes, this Court finds that the matter stands concluded against the MMTC in FAO (OS) 261/2009 and MMTC's appeal against the order on maintainability decided against it on 15.05.2013.

22. MMTC's argument regarding lack of jurisdiction because the Court did not have the benefit of the original arbitral record, in our opinion, is without merit. Whilst ordinarily the objections to awards have to be adjudicated in the context of notices issued under Section 14 in the course of which the Court is expected to receive the original

arbitration records, we notice here that there is in fact no dispute about what transpired during the arbitration proceedings or its outcome. As observed in the judgment in FAO(OS) 261/2009, the successful claimant had filed the award mistakenly under the Arbitration and Conciliation Act. Long after it was entertained, MMTC objected, stating that the proceedings ought to be under the old Act, necessitating withdrawal of those proceedings. The Claimant submits that its attempts to secure the original record from the arbitral institution, i.e. the ICC were unsuccessful, since records are kept only for a limited period of time. MMTC does not dispute the accuracy of contents of the award, a copy of which was produced by the claimant before the Single Judge. MMTC had been heard on the question of limitation (in approaching the Court, for a rule on the basis of the award) and its contentions overruled, and the matter concluded in FAO(OS) 261/2009. In these circumstances, the attempt at having the issue resuscitated through a 'side-wind', as it were, cannot be countenanced. The objection thus articulated is, therefore, rejected.

23. On the merits, the arbitrator found in that there was no question that approval had been granted by the DoF. He did not directly address the issue of approval being invalid because DoF was not a party to the proceedings. As to whether or not approval was granted, and by whom, these are questions of fact that this Court cannot re-examine. We can only note that in terms of the arbitrator's assessment of the facts, MMTC itself indicated inability to grant approval to the overaged vessel, thus necessitating direct interaction between DoF and the Claimant. MMTC could not deny ability to give final approval to

the vessel on the one hand, and try to avoid liability to pay demurrage on account of approval having come from DoF on the other.

24. The next question relates to the discharge rate. Here, the findings of the arbitrator and the learned Single Judge were that there was no breach of contract by the Claimant in using a vessel with a draft that was more than 600 TPD. Apart from the fact that these findings were within the exclusive domain of the arbitrator and given the limited jurisdiction under Sections 30 and 34 of the Act, the Court is also unable to appreciate how the condition regarding draft was violated. The inter-departmental telex message dated 24th July, 1992 sent by Mr. Parthasarathy of DoF to Mr. N.K. Kala of MMTC stated that “*as per the guaranteed discharge rate of 600 MT/WWD agreed to by the suppliers*”, the DoF “*has no objection in fixation of this Vessel,*” subject to conditions, of which clause (d) said “*the discharge rate should be 600 MT per day as agreed to by the suppliers.*” As a matter of fact, the draft achieved after the vessel berthed at the port was over 1168 TCD. Demurrage became payable, however, on account of port congestion. The liability was thus attributable to other reasons. The findings of the arbitrator cannot be termed as so unreasonable or unsupported by the facts as to warrant interference by the Court under the old Act. The judgment of the Single Judge, therefore, is sound and consequently is affirmed.

25. The third issue concerns the question of severability. The doctrine of severability could not have been applied to save the award, which deserved to be set aside in entirety, because Art. 14 had no application to commercial transactions. In *R.S. Jiwani v. Ircon*

International Ltd. A Govt. of India, 2010 (1) Bom CR 529, the Division bench found that the doctrine of severability did indeed apply to arbitral awards. The test for its application was, simply enough, whether the relevant part of the award was severable. The Court noted:

“20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good part of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable.....”

26. In relation to Section 30 of the 1940 Act, the law has clearly been stated by the Supreme Court in the case of *J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.*, (2008) 2 SCC 444, where while dealing with the award, when the Court found that part of the arbitral award was vitiated while the other could be upheld, it held as under:

“26. Does it mean that the entire award should be set aside? The answer is no. That part of the award which is valid and separable can be upheld.”

27. Thus, the doctrine of severability is applicable in the case of arbitral awards. The question is whether the part of the award applying the reasonability test under Art. 14 to the condition urged by MMTC is inextricable from the rest of the award or whether it can be separated and set aside. As the learned Single Judge pointed out, this

was only one of the reasons given by the arbitrator for deciding in favour of the Claimant's version. The setting aside of this part of the award *arguendo* would have no effect on the arbitrator's finding that the evidence in favour of the condition being a minimum of 600 MT/day was more compelling. The doctrine of severability was, therefore, correctly applied by the learned Single Judge to the arbitral award.

28. *The rate of interest prescribed by the arbitrator was exorbitant.*

Unlike Section 31(7)(b) of the 1996 Act which prescribes a future interest rate of 18% in the absence of a direction in the award, Section 29 of the 1940 Act says only that interest prescribed must be at a reasonable rate. The power of the arbitrator to award future interest under the 1940 Act is not in question, as held by the Supreme Court in *Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir*, AIR 1992 SC 2192. As to what interest rate is reasonable, a cue can be taken from rates prevalent in the market, as done by the learned Single Judge in *State Trading Corporation v. Irano Hind Shipping Company*, OMP 396/2003, (decision dated 27.4.2010):

“that the rate of interest awarded by the Arbitral Tribunal is excessive especially keeping in view the fact that the Award is in foreign currency and the rate of interest prevalent in the international markets is extremely low. Even, the Supreme Court in recent judgments has reduced the rate of interest awarded by the Arbitrators on the ground that after economic reforms the interest regime in the country has changed and that rates have substantially reduced.

14. Consequently, keeping in view the rates of the interest which have been prevalent in the international market for the last few years, I reduce the rate of interest on the awarded sum to a uniform rate of 6% per annum simple interest from the date of Award i.e. 15th January, 2003 till the date of payment.”

29. Having addressed the relevant grounds of appeal and thoroughly perused the record, this Court is satisfied that the reasoning and consequent findings of the arbitrator are sound and do not disclose any fundamental or manifest error of the magnitude warranting interference under Section 39 of the Arbitration Act, 1940.

30. For the foregoing reasons, the appeal must fail. The impugned judgment and order of the learned Single Judge is hereby upheld, thus upholding the arbitrator's award. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

JULY 31, 2013