

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

% Reserved on : 20.02.2013
Date of decision: 28.02.2013

+ **FAO (OS) No.523/2012**

MMTC LIMITED Appellant

Through: Mr.Sanat Kumar, Advocate.

versus

INTERNATIONAL COMMODITIES EXPORT CORPORATION
OF NEW YORK Respondent

Through: Mr.Prashant P.Pratap, Sr.Adv. with
Mr.O.P.Gaggar, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

SANJAY KISHAN KAUL, J.

1. The MMTC, the appellant, entered into an agreement dated 23.06.1992 with the International Commodities Export Corporation (respondent) for purchase of 80,000 MT of sulphur on C&F basis. The shipping arrangements had to be made by the respondent. This agreement contained an arbitration clause 16 providing for resolution of disputes through arbitration in India.
2. The respondent entered into a Charter Party agreement on 19.09.1992 with M/s Lane Shipping Company Limited (as the vessel owner). In pursuance to the said arrangement, the shipment arrived through a vessel M.V.Alexander at Visakhapatnam (one of

the discharge ports) at 0800 hours on 16.10.1992. However, the vessel could not get the allotment of a berth by the Visakhapatnam port trust for want of delivery order.

3. The said order was to be issued by the master of the vessel/agent on the original Bill of Lading and other set of documents being handed over to them by the representative of the appellant. These documents were, however, not received by the representative of the appellant from the corporate office of the appellant at New Delhi.
4. It is the case of the appellant that the master of the vessel/agent ought to have issued delivery order without insisting on the production of the original Bill of Lading as a copy of the set of shipping documents had been provided to the Master to deal with such exigencies. The needful is stated to have been done only on 30.10.1992. The discharge at the Visakhapatnam was completed on 20.11.1992. The notice of readiness was tendered at 1200 hours on 02.12.1992.
5. It is the case of the appellant that the time for counting lay time did not start till 24 hours after service of notice of readiness while on the other hand, the respondent took the stand that as the vessel had arrived at Calcutta already on demurrage from Visakhapatnam, 24 hours postponement of time did not apply. The discharge of the cargo at Calcutta was complete at 1500 hours on 18.12.1992. The aforesaid aspects of delay gave rise to disputes inter se the parties as to the amount to be paid by the appellant to the respondent as compensation towards demurrage and a claim was laid by the respondent of US dollars 1,25,541.67, interest thereon as also costs.

6. These disputes were referred to arbitration of an arbitral tribunal which was re-constituted. The issue of appointment of arbitrator also went to court, but it is not necessary to delve into this issue and suffice to say that the arbitration proceedings ultimately were held before an arbitral tribunal of two arbitrators Justice B.J.Diwan (Retired) and Tapas Icot, a technical expert.
7. The parties agreed that no oral evidence would be required and the final hearing was held by the arbitral tribunal on 26.08.2005. The arbitrators made and published their award on 14.06.2008 awarding a sum of US dollars 1,27,019.20 less payment made of US dollars 5686.11 i.e. the net amount of US dollars 1,21,333.09 to the respondent as demurrage both for Visakhapatnam and Calcutta of 31 days, 18 hours and 07 months at US dollars 4,000 per hour. The respondent was also held entitled to interest at 6.5 per annum from 22.03.1994 to the date of award and future interest at the same rate till actual payment.
8. The appellant aggrieved by the award filed objections under Section 30 & 33 of the Arbitration Act, 1940 ('the said Act' for short). The objections were, however, dismissed by the learned single Judge in terms of the impugned order dated 26.04.2012.
9. The appellant raised the first objection arising from inordinate delay in pronouncing the award, but that aspect was held against the appellant as extension of time was granted from time to time by both the parties for making and publishing the award especially keeping in mind the serious health problems of one of the learned arbitrators. Be that as it may, that is not an aspect pressed before us.

10. The second plea raised was *qua non* production of a copy of the Charter Party agreement till the end of arbitral proceedings by the respondent, but even *qua* that aspect, which was decided against the appellant, on the ground that the appellant never sought a copy of the same, nothing was urged before us.

11. There were only twin submissions advanced before us by learned counsel for the appellant. The first of these arose from what is alleged to be a wrong interpretation of clause 11(c) of the agreement. It was the say of the learned counsel for the appellant that the demurrage could not have commenced during the period when the master of the ship did not hand over the original Bill of Lading to the appellant which could have facilitated earlier discharge of cargo. In order to appreciate the plea, it is necessary to reproduce the relevant clause. We may notice that clause 11 of the agreement *inter se* the parties deals with payments. It provides in sub-clause (a) that the payment to be made on CAD basis at sight against presentation of the documents enlisted therein. Sub-clause (ii) reads as under:

“ii) One set of clean, signed, “On Board” Charter party Bills of Lading with one negotiable and four non-negotiable copies made to order and blank endorsed, evidencing that the goods have been shipped.”

Sub-clause (c) of clause 11 reads as under:

“Sellers will ensure that one original set of Bill of Lading duly endorsed in favour of the Buyers air-freighted/airmailed to the Buyers or its concerned Regional Office immediately on sailing of the vessel. Another original set of Bill of Lading will be sent to the buyers through the Master of the Vessel.”

12. It was canvassed by learned counsel for the appellant before the learned single Judge, an aspect reiterated before us, that the master of the vessel acted in breach of clause 11(c) of the contract by non-delivery/handing over the shipping documents carried on board which in turn led to delay on the part of the appellant in obtaining delivery order/completing the documentations required for allotment of berth by the port authorities. This argument was rightly repelled by the learned single Judge based on the submission of the learned counsel for the respondent that there was only one endorsed original Bill of Lading which was sent to the bankers of the appellant in terms of clause 11(a) (ii). What the appellant desired was that on the basis of non-negotiable copies of the Bill of Lading, which were on board, the cargo should be delivered, which was impermissible. The cargo could be delivered only against 'original set of Bill of Lading' as set out in clause 11 (c).

13. It was not as if the original Bill of Lading was not available with the appellant's bank which in turn had been presented by them to the appellant with a letter dated 12.10.1992. The fault lay with the appellant in not ensuring the endorsed Bill of Lading was available with their agent at Visakhapatnam, which is what caused the delay in berthing of the vessel and consequent demurrage. It is abundantly clear from clause 14 r/w clause 16 & 26 that any warfage or demurrage at port of loading was to be to the account of the seller/respondent. If the warfage or demurrage was at the port of discharge due to negligence of the seller or their nominee by

reason of failure to send correct documents in time, connected with shipment of goods under the contract, resulting in delay of delivery of goods, the same was once again to the account of the seller/respondent. However the warfage or demurrage for any other reason at the port of discharge was to be at the buyer/appellant's account. Clause 16 sets out the average rate of discharge of the goods and as per clause 26, the demurrage had to be paid at the rate and in the currency mentioned in the Charter Party Agreement, per day and on pro rate basis. The blame in the facts of the present case thus lay squarely with the appellant on account of their failure to produce the original Bill of Lading and thus the warfage has to be to the account of the appellant.

14. There is also another aspect to the matter arising from the powers vested with the arbitral tribunal to interpret clauses of the contract. The opinion of the arbitral tribunal must prevail unless it borders on absurdity and perversity. In the present case, the arbitral tribunal further consists of an expert in the field. These are aspects not to be interfered with by the court while examining the awards. The award unanimously made by the two arbitrators, gets a greater weightage as experts having knowledge of trade practice have interpreted the relevant clauses of the contract. This view finds support from the observations of the learned single Judge of this court in Sunder Lal Khatri v. Delhi Development Authority; 1994 (2) Arb.Law Reporter 479 (Del) which in turn drew strength from the observations in M/s Hind Builders v. Union of India; (1990) 2 SCR 638. In the present case, the view taken by the arbitral tribunal is not only a plausible view but possibly the only correct

view and thus there can be no ground to interfere with the arbitral award on this account.

15. The second limb of the submission of the learned counsel for the appellant flowed from the manner of computation of the demurrage. The arbitral tribunal calculated demurrage taking into consideration clause (26), which reads as under:

“26. The sellers shall pay to the Buyers despatch money and Buyers to pay to the Sellers’ demurrage money at the rate and in the currency as mentioned in the Charter Party per day and pro-rata the part of day for all time saved in discharging. Demurrage/despatch rate will be as per Charter Party but not exceeding US\$ 4000/- 2000 A.T.S. per day. In case such rates are higher, prior approval of the Buyers should be obtained.”

16. It was once again urged before us, as urged before the learned single Judge, that clause 26 only provided an upper ceiling limit of US dollars 4,000 and that the actual value of the loss was never calculated and proved as was required to be done by the respondent. Learned counsel referred to Maula Bux v. Union of India; 1969 (2) SCC 554 to advance the submission that actual loss or damage has to be proved. Such pre-estimates could only apply if there was inability to assess compensation which was not so in the present case. He has also referred to the judgment in Oil and Natural Gas Corporation Limited v. SAW Pipes Limited; (2003) 5 SCC 705 to contend that the intention of the parties is to be gathered from the words used in the agreement and if they are unambiguous it would be difficult to gather their intention different from the language used in the agreement. Further compensation under Sections 73 & 74 of the Indian Contract Act, 1872 has to be

reasonable except as to the maximum ceiling stipulated. Thus, if the compensation named in the award is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for loss suffered. On the other hand, if the compensation named in the contract is a genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence and prove actual loss suffered by him.

17. On the other hand, learned senior counsel for the respondent drew attention of the court to the Charter Party Agreement of the respondent which itself provided for a demurrage of US dollars 4,500. However, under the agreement the amount of demurrage payable by the appellant to the respondent was less than that at US dollars 4,000 per day. Not only that, the question of proving the demurrage would have arisen if it was to exceed US dollars 4,000 for which in fact prior approval of the buyer/appellant was to be obtained. It was also emphasized that this aspect was not even urged before the tribunal by the appellant and the liquidated damages provided in clause 26 were a genuine pre-estimate of losses to be suffered by the respondent (an aspect noticed in para 8 of the impugned order). Learned counsel for the appellant could not dispute this position before us though he stated that it formed a part of the written submission filed before the learned single Judge.
18. Another significant aspect discussed in the impugned order and to which our attention has been drawn is lay time statement of the appellant where the demurrage amount has been calculated at US

dollars 5686.11. The said statement specifies the lay time allowed in days, hours and months and finds that demurrage is payable for 1 day, 10 hours and 7 months calculated at US dollars 4,000 per day. Thus, there was never any controversy over the rate but only of the number of days. Similarly, the time sheet calculations of the respondent calculated the demurrage once against US dollars 4,000 per day but for 32 days, 19 hours and 22 months.

19. We are in complete agreement with the submission of the learned counsel for the respondent on all the aspects, the findings in the impugned order being also to the similar effect. It is obvious from the reading of clause 26 that the same provides for pre-estimate of damages of US dollars 4,000 per day. The provision which would come into play if a claim for a higher amount was laid by the respondent is also incorporated in that clause, which would require prior approval of the appellant. It is in that context that the clause reads as the demurrage not to exceed US dollars 4,000 per day. This is certainly a plausible view of the clause if not the only view and the two learned arbitrators have come to a unanimous conclusion including the expert.
20. We are also of the view that this is how the parties have understood the contract as would be apparent from the lay day statement of the appellant itself calculated at the same rate, but for a lesser period. Learned senior counsel for the respondent was, thus, right in contending that the only issue was the quantum and not the liability or the rate of calculation.
21. We are unable to accept the contention of the learned counsel for the appellant that because the time period of demurrage was small,

the appellant agreed to the rate. This is so as the lay day statement of the appellant is quite clear in its terms. This is of course apart from the fact that this aspect has not even been urged before the arbitral tribunal.

22. The learned single Judge has elaborately discussed the principle along with supporting judgments of the Supreme Court in para Nos.15 to 17 with which we are in complete agreement. The aforesaid being the only two pleas advanced before us, we find no merit in the appeal. The matter has, in fact, dragged on for two decades arising from a commercial contract which itself is quite unfortunate.
23. The appeal is accordingly dismissed with costs quantified at Rs.20,000/-.

SANJAY KISHAN KAUL, J

INDERMEET KAUR, J

FEBRUARY 28, 2013/dm