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

% Judgment delivered on: 30.04.2015

+ **FAO (OS) 325/2014 & CM No.11483/2014 (stay)**

STEEL AUTHORITY OF INDIA LTD. (SAIL) Appellants

versus

M/S DAMPSKIBSSELSKABET NORDEN A/S Respondent

+ **FAO (OS) 334/2014**

M/S DAMPSKIBSSELSKABET "NORDEN" A/S Appellants

versus

STEEL AUTHORITY OF INDIA LTD. (SAIL) Respondent

Advocates who appeared in this case:

For the Appellants : Mr A.K. Ganguli, Sr Advocate with Ms Monika Garg,
Advocates and for the respondents in FAO (OS) in
334/2014

For the Respondents : Mr Prashant S. Pratap, Sr Advocate with Mr O.P.
Gaggar, Advocates and for the appellants in FAO(OS)
325/2014

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These cross appeals arise from the judgement dated 30.04.2014 delivered by a learned Single Judge of this Court in OMP No.773/2013 which was a petition under Section 34 of the Arbitration & Conciliation

Act, 1996 (hereinafter referred to as 'the said Act') filed by Steel Authority of India Ltd. (SAIL). The said petition was for setting aside the Award dated 26/27.02.2013 made by a three member Arbitral Tribunal. Under the Award, a sum of US \$ 417,979.16 alongwith interest amounting to US Dollar 70,556.34 has been awarded in favour of Dampskibsselskabet (NORDEN).

2. We need not set out the facts in detail inasmuch as they have been elaborated in the impugned judgment. For our purpose, it would be sufficient to note that a Contract of Affreightment (COA) was executed between NORDEN and SAIL on 03.03.2008 whereby a cargo of 3 x 50,000 MT $\pm$ 5%, coking coal in bulk was to be loaded from Newport News or Norfolk, Virginia, USA for discharge at Vishakhapatnam, Paradip and Haldia. As per the COA, NORDEN was required to nominate vessels for three shipments. Two of such nominated vessels were MV Nord Fighter and MV Navios Kypros. The whole dispute, without getting into details, is that these two vessels arrived at Vishakhapatnam and Haldia and Notices of Readiness (NOR) were given on a particular dates and at particular times. The berthing of these vessels which was to be arranged by SAIL took time. Furthermore, each of these

vessels was to be fitted with 4 x 25 ton cranes having a minimum capacity of 4 x 10 CBM grabs. The vessels were fitted with these 4 x 25 ton cranes and 4 x 10 CBM grabs but, at the point of time when the Notices of Readiness were given in respect of each of the vessels, only three cranes/grabs were functional. One of them, in each case, was under repair. Subsequently, the cranes/grabs were repaired. According to SAIL, the Notice of Readiness would take effect only from the time when all the four cranes/grabs were functional. On the other hand, on the part of NORDEN, the submission was that the Notice of Readiness was valid at the point of time it was given because they were ready to discharge the cargo and the fact that one of the cranes was not functional would not have any effect on their readiness to discharge cargo but could have had effect in respect of other clauses such as Clause 44 of the COA whereby the minimum capacity of discharge of 12,000 tons per day of 24 consecutive hours had been guaranteed by NORDEN. Another issue has also been raised before us and was also raised before the learned Single Judge, and that is whether there should be a pro-rata reduction on account of one non-functional crane in respect of the demurrage for the delay in the period of berthing?

3. In so far as the first issue is concerned, as to whether the NORs issued by the NORDEN in respect of the two vessels were to start from the point of time they were issued or from the point of time when the four cranes were made functional. The Tribunal held that the NOR would be valid from the point of time it was issued. It so held on an interpretation of Clause 35 of the COA. Its findings and interpretations have been confirmed by the learned Single Judge. However on the issue of pro-rata reduction in the demurrage liability, the learned Single Judge has remitted the matter to the Tribunal to consider the question of reduction in demurrage liability of SAIL on account of the fact that only three out of four cranes were functional when the ship had arrived at the ports.

4. We have heard the learned counsel for the parties on these two issues. The learned counsel for NORDEN drew our attention to paragraphs 14 and 15 of the Award which read as under:-

“14) In this matter, both Counsel confirmed that there are no disputes in regard to facts, and that the dispute is only in regard to the interpretation of the clauses of the Contract of Affreightment (COA). Counsel further agreed that if the interpretation of the Claimants is accepted, then the calculations and quantum of payment as calculated by the Claimants are correct; and if the interpretation of the Respondents is accepted, the amounts calculated by the Respondents are correct.

- 15) The question that is posed before us is, whether the charterers / receivers' would be correct in not accepting the Notice of Readiness (NOR), on the ground that one of the cranes of the vessel had broken down at the time of presenting the NOR."
(underlining added)

5. On going through the paragraphs 14 and 15, extracted above, it is evident that the disputes between the parties did not relate to the factual matrix and that the dispute was only with regard to the interpretation of the Clauses of the Contract. In fact, the dispute primarily related to interpretation of Clause 35 of the COA, which we shall refer to a little later. For the present we may note that it has been recorded in paragraph 14 that the counsel agreed that if the interpretation of NORDEN was to be accepted, then the calculations and quantum of payment as calculated by NORDEN would be taken as correct and that if the interpretation of SAIL was to be accepted, the amounts calculated by SAIL would be taken as correct. Subsequent to the noting of this agreement between the counsel for the parties with regard to the manner in which the arbitration was to be proceeded with, the Arbitral Tribunal, in paragraph 15 (which is also extracted above) noted that the question which arose for consideration was: "Whether the charterers/receivers would be correct in not accepting the notice of readiness (NOR) on the ground that one of the

cranes of vessel had broken down at the time of presenting the NOR?" It is evident from the above that the primary and main focus of the Arbitral Tribunal was on this question i.e. the point of time at which the Notice of Readiness was to take effect. Was it at the point of time when the Notice of Readiness was served by NORDEN on SAIL or was it at the point of time when all the four cranes were fully functional? The latter, according to SAIL, was the time at which they had accepted the NOR.

6. At this point, it would be relevant to set out Clause 35:-

"Clause 35 : Time Counting Provision

At each discharging port, even if at second discharge port vessel arrives on demurrage, time to count 24 hours after Notice of Readiness is served on arrival of the vessel within port limits at each port of discharge and whether in berth or not and in free pratique and ready in all respects to discharge the cargo. If turn time of 24 hours expires on Saturday afternoon, laytime will commence at 08:00 hours on first working day.

If the vessel is ordered to Haldia and is unable to give Notice of Readiness by reason of congestion at Haldia, time shall commence to count 24 hours after Notice of vessel's arrival off Sandheads has been given by radio to Charterers or their Agents and received by them during ordinary office hours: Whilst- waiting off Sandheads Sundays and Holidays to count. Time used in proceeding from Sandheads to Haldia not to count."

(underlining added)

7. Counsel for the parties submitted that the only expression which requires consideration is - “ready in all respects to discharge the cargo”. According to Mr Ganguly, the learned senior counsel appearing on behalf of SAIL, the said expression would mean that the vessels were fully ready in that all the four cranes and grabs were fully functional. This, he said, could be gathered from a reading of Clauses 1, 3, 40, 43 & 44 of the COA.

8. The Tribunal had considered all these clauses as also Clause 35 in detail and had arrived at the conclusion that the expression “ready in all respects to discharge the cargo” would not entail that all the four cranes/grabs were fully functional at the point of time when the NOR was issued. As long as NORDEN was ready to discharge the cargo, the condition was satisfied and the fact that the cargo could not be discharged and would not be discharged at a particular rate would be taken care of by other conditions and clauses of the contract for example Clause 44 of the COA where NORDEN had guaranteed a minimum capacity of discharge of 12,000 tons per day of 24 consecutive hours. That clause itself provides that in case of any deficiency, the Surveyors report shall be binding on owners and charterers and the rate of discharge shall be

reduced proportionately. The observations of the Tribunal on the interpretation of Clause 35 and the interplay between the said clauses and the other clauses, on which SAIL relied upon, have been dealt with in detail and, it would be appropriate, if we simply reproduce them.

“36) Clause 35 provides that at each discharge port, including the 2nd discharge port, the time to count 24 hours after the NOR is served on arrival of the vessel within the Port limits, and whether in berth or not and in free pratique and ready in all respects to discharge cargo. [Emphasis supplied].

37) Now, let us see what are the conditions required for tendering the NOR. First, the vessel has to arrive within the Port limits and must be in free pratique; and secondly, it must be ready in all respects to discharge the cargo. The Respondents' contention is that the said condition, that the vessel in all respects should be ready to discharge the cargo, will not be satisfied if the vessel had come with a crane breakdown. It must be noted that the clause nowhere says that the vessel should be ready to discharge cargo at the discharge rate provided in the charter party. Even if the vessel arrived with a defective crane, it would be ready to discharge cargo, but it may not be ready to discharge cargo at the same rate as provided in the charterparty; and clause 35 does not say that the vessel has to be ready to discharge cargo at that rate. The Respondents' contention is that the vessel was not ready to discharge because, when, the vessel came with one crane less. Clause 35 does not say that all the cranes should be available for discharge nor does it say, as said in clause 1, that if any crane is not working the NOR is not valid.

38) Therefore, on a mere reading of clause 35 itself, it is clear that 24 hours after service of NOR the time starts, whether the vessel is in berth or not — as long as the vessel can discharge, but not necessarily that it can discharge at the same rate as provided in the charterparty. If a vessel were to arrive with all cranes defective so that it is not totally able to discharge cargo, certainly different consequences may follow.

39) The Respondents rely heavily on clause 40 that, if there is a breakdown of gears crane by reason of displacement or insufficient power, etc., the period of such insufficiency shall not count as laytime. One must see the expression carefully used by the authors of the standard charterparty. In clause 40, the expression used is "such insufficiency shall not count as laytime",-which means that what is not to be counted as laytime is only to the extent of insufficiency, but certainly not as the whole.

40) Clause 44 provides that a joint survey shall be conducted to determine the deficiency, and further says that in case of deficiency the rate of discharge shall be reduced proportionately [Emphasis supplied]. In clause 43, the expression used is "pro-rata". According to Counsel, Webster's International Dictionary defines "pro-rata." as "proportionally, according to some exactly calculable factor". According to him, therefore, there is a specific difference between the two.

41) The vessel is supposed to have 5 hatches and if it comes only with 4 hatches, there would be a pro-rata 20% deduction. Therefore, deduction is pro-rata, viz. something which can be calculated

exactly on a calculable factor. This is why, in clause 43, the expression used is "pro-rata", because, if one hatch is not available, the discharge rate is reduced straightaway. As against which, in the case of any deficiency in the crane, the discharge rate is not reduced straightaway but to the extent of time during which there was a breakdown, and not that the discharge rate is wholly reduced. That is why a different expression is used. In a contract of affreightment, which is free in and free out, a charterer or receiver cannot expect a vessel to be laid at their disposal, for loading or discharge, for an indefinite period. Therefore, at the time of entering into the contract, a time called "laytime" is made available to the charterer / receiver, to load or discharge the cargo. This is by providing a discharge rate. A discharge rate cannot be fixed in isolation and, in order to maintain that discharge rate, the shipowner has to make certain conditions available to the charterer — and one such condition is the provision of cranes. Therefore, if the owners are unable to provide those requirements, the discharge rate is reduced proportionately, viz. proportional to the time during which the owners do not provide the agreed facility. Commencement of laytime is an entirely different matter altogether; and that is why the clause relating to commencement of laytime is different from the clause relating to reduction or adjustment of the rate of discharge.”

9. These observations and interpretation of the Tribunal have been endorsed by the learned Single Judge. It is well settled that interpretation of the provisions of a contract are within the domain of the Arbitral Tribunal. The Courts would not interfere with the interpretation given by

an Arbitral Tribunal to the terms of a contract unless and until the interpretation is such as it shocks the conscience of the Courts or, in other words, is a perverse interpretation.

10. In the present case, after having examined the rival contention, we cannot agree with Mr Ganguly that the interpretation amounts to re-writing the contract or to be of such a nature as would shock our conscience. We feel that the interpretation given by the Tribunal and accepted by the learned Single Judge is certainly a plausible interpretation. This is so because Clause 35 relates to the commencement of laytime where as Clause 44 relates to the reduction or adjustment of the rate of discharge. The two are different and we agree with the Tribunal on this aspect. As long as NORDEN was ready to start discharging the cargo, the conditions stipulated in clause 35 were met. Clause 35 does not imply that all the four cranes and grabs should have been functional at the point of time at which the NOR was issued. The fact that NORDEN would not be able to match its guarantee under Clause 34 was dealt with separately under different terms of the contract including Clause 44 and had nothing to do with Clause 35 which simply meant that the vessels should be ready in all respects to discharge the

cargo. The rate of discharge was not specified in the said clause.

11. In our view, this is a plausible interpretation and even if we were to arrive at a different interpretation, we still would not be able to substitute our interpretation in place of that of the Arbitral Tribunal.

12. The learned Single Judge also examined the alternative plea raised on behalf of SAIL that if the vessels had arrived with three working cranes and one non-working crane, the Charterers (SAIL) should pay demurrage only for 75% of the time spent for waiting for the berth because even if the vessel had berthed, the discharge rate would only be 75%. This aspect had also been taken note of by the Arbitral Tribunal and the same is recorded in paragraphs 43 & 44 of the Award which read as under:-

“43) In our opinion, none of these clauses can be interpreted to mean that, if there is a breakdown of crane, the NOR is not valid and that the time will not commence till the crane is set right; and all that it would happen is that the laytime would be proportionately reduced during the breakdown period. In the alternative, Counsel for the Respondents argued that, if the vessel had arrived with 3 working cranes and one non-working crane, even during the time when the vessel was waiting for berth, the charterers should pay demurrage only for 75% of the time because, even if the vessel had berthed, the discharge rate would be only 75%. In

short, why should the charterers / receivers pay full demurrage for a vessel which is not fully ready?

44) The obligation to berth a vessel is that of the charterers. If they demur and do not obtain a berth for a couple of days, the time must count and the reduction of time is only permitted for the time lost in actually discharging the cargo.”

13. As noted above, the Tribunal held that the obligation to berth a vessel was that of the Charterer (SAIL). If they have demurred, and did not obtain a berth for a few days, the time would count to the detriment of SAIL. The learned counsel for the respondents/NORDEN once again drew our attention to paragraph 14 of the Award which we have extracted in the earlier part of this judgment. He pointed out that counsel had agreed that it is only the question of interpretation which requires determination and that the calculations and quantum of payment were not in dispute. Consequently, he submitted that the only issue that was actually there before the Tribunal was with regard to the interpretation to be placed on Clause 35 of COA and this ancillary issue did not at all arise. In any event, we find that the Tribunal has considered the same and decided in favour of NORDEN. The learned Single Judge, however, did not agree with this aspect and directed as under:-

“63. Therefore, applying the principle expounded in *the Darrah*, pre-berthing period shall be treated at par with the post-berthing period as far as proportional reduction in laytime on account of breakdown of crane under clause 40, read with clause 44, is concerned. The respondent cannot gain a greater advantage from its vessel being kept waiting for a berth, than it would get from her being kept at her berth, and so, even when the vessel was not alongside berth, the petitioner should have been entitled to a similar reduction on account of breakdown, treating the vessel as if it were in berth.

64. The Tribunal has dealt with the alternate submission of the petitioner in a rather cursory manner. This submission is recorded in para 43 of the impugned Award. The same has been answered by the Tribunal by observing: *"The obligation to berth a vessel is that of the charterers. If they demur and do not obtain a berth for a couple of days, the time must count and the reduction of time is only permitted for the time lost in actually discharges the cargo."* In my view, this reasoning does not answer the petitioner's alternate submission and cannot be said to be even a plausible view. It is an-erroneous view.

65 Therefore, the award is set aside to this limited extent, and remitted back to the tribunal for reconsideration of this aspect in light of the principle enunciated by the House of Lords in *the Darrah*.”

14. The learned counsel for respondents/NORDEN drew our attention to paragraph 49 of the impugned judgment which reads as under:-

49. Coming to the alternate submission of the petitioner on pro-rata reduction of demurrage to the extent of breakdown of a crane for the corresponding pre-berthing period, I may note that there is no express clause in the contract providing for such a pro-rata reduction of demurrage. The demurrage clause in the COA is unqualified. However, the objection in substance turns on the interpretation of clause 40, i.e. whether the effect of clause 40 (excluding the period of breakdown from laytime) operates for the pre-berthing period as well, or is confined to the post-berthing period only.”

(underlining added)

15. He submitted that although the learned Single Judge recognised the fact that there was no express clause in the contract providing for such a pro-rata reduction of demurrage, yet, the learned Single Judge gave a direction for the same. According to him, this was beyond the terms of the contract. On the other hand, the learned counsel for the appellant submitted that the learned Single Judge had interpreted Clause 40 and, while doing so, gave benefit to the appellant on a pro-rata basis for the pre-berthing period in respect of the non-functional crane.

16. There are two difficulties with the approach of the learned Single Judge. First of all, none of the parties had raised any objection with regard to the recording of the agreement of the parties in paragraph 14 of the Award. Secondly, the demurrage for the pre-berthing period was

independent of the requirement of NORDEN to have all the four cranes functional. As long as we have recognised the fact that the NOR as issued by NORDEN was valid at the time and the date of issue, the question of any relief being given to SAIL for the period, pre-berthing would not arise at all. The deficiency in the rate of discharge is already factored into in Clause 44 and other clauses of the contract and, therefore, cannot be reintroduced in the manner in which the learned Single Judge has done. For these reasons, we do not agree with the view taken by the learned Single Judge in respect of the pro-rata reduction of demurrage for the pre-berthing period.

17. Consequently, the appeal of NORDEN is allowed and the appeal of SAIL is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

APRIL 30, 2015
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