

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

Decided on: 17.07.2017

+ **FAO (OS) (COMM) 133/2017, C.M. APPL.23390-23391/2017, CAV. 604/2017**

STEEL AUTHORITY OF INDIA LTD. Appellant
Through: Sh. Debal Banerjee, Sr. Advocate with Sh. Shaiwal Srivastava and Sh. Gopal Singh Chauhan, Advocates.

Versus

M/S. GREAT EASTERN SHIPPING COMPANY LIMITED
..... Respondents
Through : Sh. Arvind Kumar Gupta with Ms. Jyotika Jain, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%
CAV.604/2017

Learned counsel for the caveator has entered appearance.

Cav. 604/2017 accordingly stands discharged.

C.M. APPL.23390/2017

Allowed, subject to just exceptions.

FAO (OS) (COMM) 133/2017, C.M. APPL.23391/2017

1. The Steel Authority of India (hereafter "SAIL") appeals the judgment and order of a learned single judge of this court dated 28th February, 2017.

3

dismissing its objections to an arbitral award, under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"). The Award was dated 30th June, 2015 passed by the Arbitral Tribunal ("AT"), constituted to decide disputes between SAIL and the Great Eastern Shipping Company Limited ("GE Shipping").

2. The facts necessary to decide this appeal are that GE Shipping, a shipping line which operates *inter alia*, ocean-going freight vessels, owns the vessel MV Jag Riddhi. It entered into a Charter Party contract with SAIL on 19th December, 2007 in terms of which it undertook to transport 47,000 metric tons ("MTs") (5% more or less at the option of GE Shipping) of coking coal in the said vessel from Haypoint Australia to 1/2 safe Berth(s) Visakhapatnam/Paradip/Haldia in India. MV Jag Riddhi was loaded with a cargo of 47,102 MTs at Haypoint on 18th January, 2008. It arrived at Visakhapatnam and issued a notice of readiness ("NOR") at 0930 hours on 5th February, 2008, for discharge of the cargo at Visakhapatnam. SAIL alleged that all four hooks aboard the vessel were not ready for supply when the NOR was issued. It alleged that cargo in Hatch-I and Hatch-II were not accessible to it at the port of discharge at the relevant time. The NOR, according to it, could only be accepted at 1430 hours on 16th February, 2008. Thereafter the vessel discharged 24,938 MTs of the cargo. It then proceeded to Haldia where the balance cargo was discharged. The discharge was completed on 20th February, 2008.

3. GE Shipping invoked the arbitration clause in the Charter Party which envisioned that disputes arising under it could be settled in accordance with the provisions of the Act and under the Maritime Arbitration Rules of the

4 13

Indian Council for Arbitration ('ICA'). The Arbitrators were to be 'commercial men'. SAIL and GE Shipping nominated one arbitrator each and the two arbitrators nominated a third arbitrator; the three constituted the tribunal. GE Shipping claimed ₹ 1,23,28,252.20 as discharge port demurrage and ₹ 1,04,87,542.91 as balance freight. By Award dated 7th/10th May, 2010, the tribunal held that SAIL should refund to GE Shipping ₹ 13,47,917 being the sum in excess deducted by them from the freight. The tribunal rejected GE Shipping's claim for demurrage and balance freight. The tribunal, *inter alia*, found that:

"(i) The statement of facts (SOF) indicated that "full discharging equipment was not ready when notice was tendered. Nor was it available for use when required on berthing. Therefore, NOR tendered on 5.02.2008 was not a valid notice.

(ii) In the time sheet, GE Shipping had conceded the pro rata deduction even before the berthing of the ship. In fact in the time sheet there was an admission by GE Shipping that all the four hooks were not ready 'in every respect' when the NOR was given. The exception clause came into application only after the commencement of the lay time and not before that. The surveys arranged corroborate the deficiency with regard to Cranes No. 1 and 3.

(iii) As far as Vizag was concerned, lay time would count from 0245 hours to 1430 hours on 12th February 2008. After accounting for the breakdowns and for the pro rata deductions, the charterers on 12th February 2008 used an additionally time of about 5 hours 36 minutes after commencement of discharge. The lay time used at Vizag was, therefore, 2 days 11 hours and 43 minutes.

(iv) The calculation of the GE Shipping for the lay time used at Haldia as 1 day 2 hours and 45 minutes was correct.

5

(v) *The claim of the GE Shipping for demurrage and balance freight did not survive. In terms of the lay time allowed and used and the dispatch amount deducted in excess, it was held that SAIL required to refund to the GE Shipping Rs. 13,47,917 together with interest @ 8% per annum from 19th June 2008 till the date of the Award. SAIL was also directed to pay interest at 8% per annum on the balance of the 10% freight amounting to Rs. 72,22,959 that was withheld from 20th May 2008 to 4th March 2009."*

4. GE Shipping challenged the above award before this Court under Section 34 (in OMP No. 582 of 2010). By judgment dated 9th May 2012 (*Great Eastern Shipping Company Limited v. Steel Authority of India Limited* 2012 IV AD (Del) 655), the Court set aside the Award holding, *inter alia*, that between the dates of issue of NOR and the date of berthing of the vessel, there was no inspection to show that vessel was not ready to discharge cargo when NOR was issued; in terms of the Statement of Facts (SOF), at the time of commencement of discharge, Grabs-I and II were under repair as a result of which Hatch-I could not be opened. Therefore, 50% of the cargo could be discharged and a *pro rata* discount was given as regards lay time. The court also ruled that:

"The expression 'ready in all respects' in Clause 33 had to be interpreted in the context of readiness to 'discharge' and not to 'load'. It also had to be interpreted in the context of the fact that the CP was a port charter and not a berth charter and that Clause 38 of the CP provided for pro rata discount in lay time to the extent any of the equipments were non-functional..... Factually, there was a pro rata reduction given in the lay time in the present case as was evident from the time statement itself.

(vi) *'The conclusion of the AT that when the NOR was issued, the ship was not ready in all respects was not based on evidence but on conjecture. The Award suffered from a patent*

illegality. It was on the basis of a misreading of the documents placed on record. Therefore, the AT's rejection of the claim of GE Shipping for demurrage and balance freight cannot be sustained on law. That portion of the impugned Award was accordingly set aside."

5. GE Shipping sent a letter dated 20th July 2012 to the Secretary of ICA invoking the arbitration clause and stating that the disputes had arisen between it and SAIL. In terms of the Maritime Arbitration Rules of the ICA ('MAR'), GE Shipping enclosed a statement of claims. It also nominated its Arbitrator. ICA wrote to SAIL on 16th August 2012 asking it to nominate an Arbitrator from its Maritime Panel of Arbitrators within 30 days failing which SAIL's nominated Arbitrator would be appointed by the Maritime Arbitration Committee under its rules. SAIL sought extension of time till 29th September 2012, by its response, for submitting the defence statement, the name of the Arbitrator and the arbitration fees. Later, by its letter dated 20th September 2012 to the ICA (by email) SAIL contended that a *de novo* arbitration was not permissible because GE Shipping had exhausted the provision for reference of disputes to arbitration which had culminated in the award, though it was set aside.

6. SAIL was granted a final opportunity to nominate its arbitrator, which it failed to avail. ICA wrote a letter dated 9th April 2013 informing SAIL about the constitution of the tribunal. It appointed Shri Gajendra Singh Sahni as an Arbitrator on behalf of SAIL. The two Arbitrators then appointed a Presiding Arbitrator of the tribunal. SAIL then filed Writ Petition (C) No. 3013/ 2013 against ICA and GE Shipping before this Court under Article 226 of the Constitution challenging the appointment of an Arbitrator on its behalf by ICA. GE Shipping questioned the maintainability of the writ

2

petition and also submitted that the principles of *res judicata* were not applicable. Taking cue from *McDermott International v. Burn Standard Corporation Ltd.* (2006) 11 SCC 181 it was argued that while the Award dated 7th May, 2010 passed by the tribunal was set aside by this Court by the judgment dated 19th May 2012, the disputes were not finally adjudicated and that once the Court set aside an Award under Section 34 of the Act it had no power to pass further directions to remand the matter to the tribunal. A learned Single Judge decided the writ petition against SAIL, holding it not to be maintainable; he also ruled that *res judicata* did not operate in the circumstances of the case. SAIL's appeal (LPA No. 103 of 2016) before the Division Bench of this Court was dismissed. The Division Bench followed *Indian Oil Corporation Limited v. SPS Engineering Limited* (2011) 3 SCC 507 where it was held that a question whether some claim is barred by the principles of *res judicata* has to be examined by the Arbitral Tribunal since a decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration.

7. There was no stay of arbitration proceedings during pendency of writ petition and later, the appeal against the judgment of the single judge (in the writ petition). The impugned Award was passed by the tribunal, after considering the pleas of the parties and the evidence led, unanimously on 30th June, 2015. The tribunal held that Clause 33 of the CP (the Time Counting Provision) meant that time started to count 24 hours after service of NOR, whether the vessel was in berth or not-as long as the vessel could

discharge, but not necessarily that it can discharge at the same rate as provided in the Charter Party. Clause 38 (which deals with the consequence of breakdown of cranes) comes into operation only after the lay time commenced after the tender of NOR-it did not come into operation at the stage of tendering the NOR. No provision in the Charter Party contemplated availability of minimum four functional cranes/grabs as a condition precedent to the tender or acceptance of a NOR. The contingency envisaged in Clause 38 and the guarantees in Clauses 41 and 42 did not invalidate the NOR nor did they stop the commencement of lay time. The consequence provided under the Charter Party is limited to *pro rata* exclusion of the breakdown period for lay time. If the owners are unable to provide the equipments in working order as envisaged in the contract, the discharge rate is reduced proportionately. However, commencement of lay time was entirely a different matter altogether. The question relating to commencement of lay time was different from the time relating to reduction of rate of discharge. SAIL's contention, i.e. that for the NOR to be valid, not only must all her cranes and grabs be ready when the NOR was tendered, they should also be ready to discharge cargo at the rate provided in the CP, was rejected.

8. On examination of the evidence on record, it was concluded that the joint survey undertaken was in the context of the vessel efficiency which was discharged and not linked to the tender of NOR and/or to the commencement of lay time. The report which was signed only by the surveyors appointed by SAIL could not be accepted as a joint survey report. There was no evidence to show that GE Shipping was invited to attend the survey. SAIL also made

9

no attempt to prove the report by examining its officers. It was held that the report could not have assessed the condition of the equipments at the time the NOR was served. The possibility of the malfunctioning of the cranes and grabs beyond the tender of the NOR on 5th February, 2008 and at the time of survey on 14th February, 2008 could not be ruled out. The tribunal ruled that the burden of proof was primarily on SAIL; it never called upon GE Shipping to produce its test certificates and other records pertaining to the maintenance and efficiency of the equipments. Consequently, SAIL failed to prove that the vessel cranes/grabs were malfunctioning or defective. Based on the joint SOF presented by the parties, the tribunal drew up a tabulated lay time statement and found that the vessel was on demurrage for 5 days 14 hours and 26 minutes and the agreed daily rate was of ₹ 20 lakhs per day and pro rated for part of a day, the GE Shipping was entitled to receive the sum of ₹ 1,12,02,780 towards demurrage before deducting 1% Chartering Service Fee, as is provided in Clause 46. GE Shipping was also held entitled to interest on the balance freight and demurrage from 17th July 2008 till 2nd March 2009 (both days included) and, therefore, the amount on which interest was due at 11% per annum stood reduced by ₹ 72,22,959. SAIL was liable to pay GE Shipping ₹ 3,59,552 towards costs of arbitration. It was also held entitled to get interest @ 10% per annum from the date of Award till the date of payment if the sums due were not paid within 30 days.

9. Several grounds were urged by SAIL in this round of litigation, in its objections to the award, under Section 34. This included the submission that the impugned Award suffered from patent illegality and from an erroneous and contradictory construction of the clauses of the Charter Party which

10

vitiated the Award entirely. It was further argued that GE Shipping ought to have led evidence to prove that on the day of service of NOR, the vessel was 'ready in all respects'. SAIL argued that the SOF was plain in that cranes/grabs were not working when the vessel berthed on 12th February, 2008. The status of the vessel between 5th and 12th February, 2008 being within the exclusive knowledge of the GE Shipping, it ought to have been proved by it by leading evidence. SAIL relied on *State of Rajasthan v. Kashi Ram* 2006 (12) SCC 254, *Sushil Kumar v. Rakesh Kumar* 2003 (8) SCC 673 and *Sarbananda Sonowal v. Union of India* (2007) 1 SCC 174. Reliance was placed on GE Shipping's admission about the defective/damaged cranes/grabs documented by the parties, which was binding on it. The burden was wrongly shifted by the tribunal on to SAIL to prove that there was anything amiss in the NOR. *Thiru John v. Returning Officer* (1977) 3 SCC 540, *Sushil Kumar v. Rakesh Kumar* (2003) 8 SCC 673 and *Divisional Manager, United India Insurance Company Ltd. v. Samir Chandra Chaudhary* 2005 (5) SCC 784 were placed. The Tribunal's findings that there was no provision in the Charter Party which envisioned availability of minimum four functional cranes/grabs as a condition precedent to the tender or acceptance of a NOR were challenged as perverse and contrary to Clauses 10 and 42 of the Charter Party. SAIL submitted that the whole purpose of having minimum 4 grabs/4 cranes was that they were to be functional and should have had the minimum prescribed capacity to discharge the cargo.

10. GE Shipping argued- besides objecting to SAIL's petition as not disclosing any tenable ground for interference with the award- that the

survey report relied upon by SAIL was not in conformity with Clause 41 of the Charter party. Firstly it was not a joint survey; and was conducted two days after the discharge operations commenced; it did not bear the signature of GE Shipping's surveyor. SAIL did not call upon GE Shipping to conduct any joint survey. It was also argued that Clause 33 was a standard clause dealing with commencement of lay time, which did not state that all the vessel cranes and grabs had to be ready in all respects when the NOR was tendered. It did insist that the vessel must be ready to discharge cargo at the rate provided in the Charter party. The partial unavailability of all equipments to discharge cargo did not disqualify readiness in all respects since the vessel was still capable of discharging cargo. Further when the parties had agreed to a clause that provided how time had to be proportionately adjusted in the event of partial non-availability in discharging cargo (i.e the rider Clause 43 of the Charter Party), SAIL's contention was untenable. Clause 38 read with Clause 42 of the charter party had the effect of excluding lay time (proportionately if at all) only where the breakdown of cranes and grabs actually affected the cargo or discharge. In the event of such breakdown only the actual discharge time would be proportionately reduced.

Impugned judgment

11. The learned single judge held that the expression 'ready in all respects' in Clause 33

“had to be interpreted in the context of readiness to 'discharge' and not to load. It also had to be interpreted in the context of the fact that the CP was a port charter and not a berth charger and that Clause 38 of the CP provided for pro rata discount in

lay time to the extent any of the equipments were non-functional. Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time the NOR was served. This was a question of fact that had to be established by the party alleging it. It was not a matter for surmise or conjecture. There is nothing placed on record before the Tribunal by the charterer to show that on the date of the issuance of the NOR by the master of the vessel, none of the equipments on board were working. Consequently it was erroneous on the part of the Tribunal to conclude that the NOR issued in the present case was not valid. In a port charter when such NOR is issued it is normally some days before the actual berthing. If some of the equipments were temporarily non-functional at the commencement of discharge, it did not mean they were in that position even when the NOR was issued. The portion of the passage in *Scrutton on Charter parties and Bills of Lading*, 17th ed. (1964) highlighted in the extract from *Tres Flores* supports the conclusion that the ship's gears did not have to be shown to be functional at a time when it was not physically possible for her to commence discharge. This view would be consistent with a harmonious interpretation of Clause 33 and Clause 38 which envisages pro rata reduction in the lay time. Factually, in the present case, there has been a pro rata reduction given in the lay time, as can be seen from the time statement itself.

37. Further the AT also has in the impugned Award on interpretation of the clauses come to the conclusion that there was no requirement under Clause 33 that all the cranes and equipments on board of the vessel must be ready at all times.

38. GE Shipping is right in its contention that the requirement of all four cranes working is not a condition precedent under Clause 42 for issuance of a valid NOR. In any event, the parties had agreed that rate of discharge shall be reduced proportionately in case of any breakdown or deficiency. The key aspect as far as Clause 33 is concerned is that it deals with commencement of lay time and requires that the vessel must be

in a position to discharge cargo and not that it must be ready to discharge at a particular time and at a particular rate. The Court, therefore, rejects the interpretation sought to be placed by the SAIL on expression 'ready in all respects' occurring in Clause 33 of the CP. The conclusion reached by the AT on the basis of the above interpretation of the clauses suffers from no illegality. Re: shifting the burden of proof

39. As regards the observation of the AT that SAIL had failed to discharge the burden of making good its case that the vessel was not ready in all respects, it must be remembered that this was in the context of SAIL putting forth the Surveyor's report in support of the above submission. As rightly pointed out by the AT, SAIL failed to examine the Surveyor who prepared the report. SAIL was unable to counter the submission of GE Shipping that the report was in fact not a 'joint survey' report.

40. The reliance placed on the aforementioned decisions under the IEA by SAIL is misplaced for more than one reason. Under Section 19 (1) of the Act, the AT is not bound by the CPC or the IEA. Section 19(3) of the Act states that where the parties fail to agree on the procedure to be followed by the AT, the proceedings would be conducted by the AT "in the manner it considers appropriate." None of the decisions cited by SAIL before this Court pertain to applicability of IEA in arbitration proceedings. In any event, it was SAIL which was seeking to rely on the Surveyor report in order to show that the NOR was not valid. It was, therefore, incumbent on SAIL to prove such Surveyor report to the satisfaction of the AT.

41. The Court finds nothing erroneous in the observation of the AT as regards the failure of SAIL to prove the Survey report. The fact that some of the cranes/grabs may not have been functional at the time of discharge cannot be construed to be an admission by GE Shipping that all the cranes and grabs were non-functional. The earlier judgment dated 9th May 2012, of this Court reaching the same conclusion has attained finality, are is binding on SAIL. No ground made out under Section 34 42. None of the grounds of patent illegality as explained by the Supreme Court in ONGC v. Western Geco International (supra)

or Associate Builders (supra) are attracted in the present case. On the other hand as held in National Highways Authority of India v. ITD Cementation India Ltd. (supra), the interpretation of the clauses of the contract by the AT should be taken to be final unless it is so perverse so as to shock the judicial conscience. Nothing in the impugned Award goes to attract any of the grounds under Section 34 of the Act as explained in the above decisions. In other words, SAIL has failed to show that the impugned Award is opposed to the fundamental policy of Indian law within the meaning of Section 34(2)(b)(ii) of the Act."

12. Mr. Debal Kumar Banerjee, learned senior counsel appearing for SAIL, argued one ground, in support of SAIL's appeal, i.e. that the single judge fell into error in not appreciating that Section 106 of the Evidence Act, or the principle underlying that provision, applied squarely to the facts of this case. Learned counsel submitted that in this case, SAIL did all that it could to establish that the vessel was in fact not in readiness when the NOR was issued by GE Shipping. Referring to the SOF, Mr. Banerjee pointed out that the representatives of the Charterer as well as SAIL were present. The document clearly recorded that in two instances, on 12 February, 2008, the vessel's grabs and cranes were inoperational. This automatically reversed the onus of proving that the equipment was capable of use, in accordance with the Charter Party, when NOR was issued (05.02.2008). GE Shipping, as the vessel owner had peculiar knowledge about its vessel and the equipment on board. It could have shown that the cranes and grabs were in order and not defective. Its failure to place any material on record or lead any evidence in this regard ought to have led the tribunal to conclude that what prevailed on 12th February, 2008 was what existed on 5th February, 2008.

13. As may be seen from the above factual discussion, that the controversy in this case relates to laytime¹ calculation: a feature peculiar to maritime law. Charter-parties (shipping agreement between the hirer and the vessel owner) involved in vessel hiring transactions contain typical (and standard, time tested) conditions with respect to lay time calculation; they define when lay time commences; what supervening conditions can be taken into account to stop (or put on hold) laytime calculation, once laytime commences, what kind of delays are attributable to either party, etc. In the present case, concededly the vessel arrived after completing her journey from Hayport at Visakhapatnam and issued a notice of readiness ('NOR') at 0930 hours on 5th February, 2008, for discharge of the cargo at port. Due to certain port conditions, she could not berth; discharge operations started on 16th February, 2008. SAIL alleged, on the basis of a document, that the vessel's NOR was not binding, because all her hooks and grabs² (i.e equipments used to scoop cargo, to be offloaded) were not functioning which impaired her capacity to fulfil a charter-party condition that required discharge of cargo at a 10,000 MT per hour. The tribunal, by a unanimous award, overruled this contention; it held that the NOR was effective; that the proportionate discount, for the recorded period (on 12 July 2008) when a crane and one grab were under repair, had been given; furthermore, on an interpretation of the charter party, that the NOR was not ineffective because there was no condition that all cranes and equipment had to be ready for that notice to be issued by GE Shipping, the single judge upheld this award.

¹ laytime is the amount of time allowed (in hours or days) in a voyage charter for loading and unloading cargo. If the laytime is exceeded, is incurred and payable by the charterer (i.e.) hirer of the vessel.

² A 'grab' is a set of mechanical jaws attached to the end of a crane cable. It is used to load or offload bulk cargo such as coal or wood.

11

14. In this court's opinion, the appeal has to fail. The argument made, which is that the onus of proof shifted the moment it became evident that not all equipment were operational, based on an application of Section 106 of the Evidence Act, is inconsequential. The single judge noted that the Surveyor's report was not conclusive and that the provisions of the Evidence Act were not applicable *per se* to arbitration. Such being the case, to extend their application, by an argument that their underlying principles are binding, too remote a contention and unpersuasive. More substantially, once the tribunal held that no condition in the charter party dictated that all equipment on board had to be functional for NOR to be issued, the inference that the charterer is insisting courts to draw, i.e., that the vessel was not ready *at all*, to discharge the cargo for about 8 days, based on a document prepared on 12 February, 2008, cannot be accepted. Charter parties and their conditions in this case, were within the exclusive ken of the arbitrators. The arbitrators here were specialists in maritime trade and practice. They unanimously ruled that the NOR issued was in order. Lay time therefore commenced from the expiry of designated time, under the Charter Party.

15. This court is mindful of its limitations while dealing with challenges to judgments that reject objections under Section 34 of the Act. *Sans* proven patent and manifest illegality, findings contrary to contract, or contractual terms and in the absence of findings that are so unreasonable that no reasonable man placed in like situation would render, courts would refrain from interdicting awards rendered by tribunals set up for dispute resolution through a consensual, or agreed procedure. In this case, even if there was an error, the interpretation of contract being within the exclusive jurisdiction of

12

the tribunal, it could not be termed as a patent illegality (Ref. *Kwality Mfg. Corporation v Central Warehousing Corporation* (2009) 5 SCC 142, *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63 and *Sumitomo Heavy Industries Ltd. v ONGC Ltd.* (2010) 11 SCC 296). There was no cause, therefore, for the single judge to interfere with the award in this case.

16. The appeal, for the foregoing reasons, fails as unmerited; it is, therefore, dismissed without any order on costs.


S. RAVINDRA BHAT
(JUDGE)


S.P. GARG
(JUDGE)

JULY 17, 2017