vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1165 OF 2010

Seven Islands Shipping Ltd.,
a company incorporated under the
Companies Act, 1956, having its
office at C-702, Mangalya Opp.
Fire Brigade Station, Marol
Andheri (E), Mumbai – 400 059. ...Petitioner

...Versus...

Indian Oil Corporation,
a company incorporated under the
Companies Act, having its registered
office at Indian Oil Bhavan, C-9,
Ali Yavar Jung Marg,
Bandra (E), Mumbai – 400 051. ...Respondent

Mr.D.D. Madon, Senior Counsel i/b Bhatt & Saldanha for the Petitioner.

Mr.Chirag Mody i/b Mr.Ashok Purohit for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 30TH JUNE, 2015
PRONOUNCED ON : 21ST JULY, 2015.

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioner has impugned the arbitral award dated 11th May, 2010 directing the petitioner to pay to the respondent a sum of Rs.6,06,17,108.34. Some of the relevant facts for the purpose of deciding this petition are as

under :

2. On 8th April, 2004, the petitioner and the respondent entered into a charter party with respect to vessel M.T. “Seven Islands” to carry clean and/or dirty petroleum products including condensates for the period up to 30th June, 2004 with effect from the date and time of delivery at the option of the respondent. The said vessel was delivered to the respondent at Haldia on 13th April, 2004. The respondent loaded at Haldia on board the said vessel allegedly in good order and condition according to the respondent.

3. On 14th April, 2004 the said vessel sailed out from the port of Haldia and arrived at Pirpau on 27th April,2004 to discharge the said cargo. The respondent at the time of taking delivery of the cargo alleged that the cargo except H-150 was contaminated. It is the case of the petitioner that during the period the parties were discussing the next course of action, discharging of cargo was suspended. The respondent informed the petitioner that the contaminated oil was not usable for the intended purposes and claimed its full value from the petitioner. The petitioner's P & I Club furnished a letter of indemnity dated 27th May, 2004 in favour of the respondent as security towards the alleged claim of the respondent to ensure the sailing out of the said vessel without an arrest from the said port.

4. The dispute arose between the parties and was referred to the arbitral tribunal consisting of Mr.R.S. Cooper, Capt.V.K. Gupta and Mr.J.C. Sheth.

5. It was the case of the respondent that a joint sampling of the cargo was drawn on 27th April, 2004. During the said period the

contamination of cargo H-70 and H-500 was observed. The vessel went to outer anchorage in order to rid vessels tanks of water and returned on 2nd May, 2004. It was the case of the respondent herein that the contaminated oil was not usable for the intended purposes and claimed its full value from the petitioner. The claim made by the respondent for sea water contamination was Rs.8,63,97,450.41.

6. During the pendency of the arbitral proceedings, pursuant to an order passed by the arbitral tribunal on 11th April, 2005, allegedly contaminated oil was sold and accordingly the claim made by the respondent under the said head was reduced to Rs.4,03,70,523.21. The said claim was subsequently amended to Rs.4,05,88,972.31. The respondent had withheld a sum of Rs.28,51,647.25 from the charter hire due to the petitioner and claimed balance amount of Rs.10,95,881.94 before the arbitral tribunal towards the transit loss / short delivery of the cargo, port stay analysis and poor under performance of the vessel, which was originally claim at Rs.39,47,529.19. The respondent also claimed interest.

7. The petitioner herein filed a counter claim initially for Rs.28,51,647.25. Subsequently the said amount was set off against an agreed amount of Rs.17,21,380.06. The petitioner claimed difference amount of Rs.11,30,267.19 before the arbitral tribunal with interest and costs.. Mr.Madon, learned senior counsel for the petitioner invited my attention to various paragraphs of the impugned award and submits that contamination of cargo was not proved by the respondent. He submits that the finding by the arbitral tribunal that there was possibility of sea water contamination is contrary to the test report considered by the arbitral tribunal. He submits that conclusion

of the arbitral tribunal that most probably the contamination was by sea water was contrary to the evidence and in any event such finding was not conclusive. He submits that the said finding was based on presumption and surmises.

8. Learned senior counsel for the respondent submits that in paragraph 16 of the impugned award, the arbitral tribunal, has cast onus of proof on the petitioner to establish the true cause of contamination though the same was on the respondent. He submits that the finding rendered by the arbitral tribunal in favour of the respondent is contrary to the other findings rendered in favour of the petitioner about the loss, work etc.

9. It is submitted by learned senior counsel that the respondent did not put cargo to sale until the arbitral tribunal directed the respondent to sell the cargo. He submits that the finding of the arbitral tribunal that even after the said cargo would have been sold earlier by the respondent, it would have fetched same price, is based on presumption and surmises. He submits that though the arbitral tribunal found fault with the respondent for not selling the cargo earlier, gave finding in favour of the respondent on the issue of mitigation and allowed the said claim. He submits that the respondent itself had submitted its bid and the said sale was not in accordance with law.

10. Learned senior counsel for the petitioner submits that the conclusion drawn by the arbitral tribunal in paragraph 17.3 of the impugned award that the respondent had failed to prove any breach of respondent's duty to mitigate the loss is contrary to its own finding that the respondent was remiss in not sufficient steps towards

mitigation for almost a year till the arbitral tribunal had ordered the cargo to be sold is inconsistent.

11. It is submitted by learned senior counsel that the arbitral tribunal could not have awarded interest on the claim for damages upto the date of award and the said part of the award is contrary to law and the provisions of Interest Act. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of *State of Rajastan & Anr. vs. Ferro Concrete Construction Pvt. Ltd. (2009) 12 SCC 1*. He submits that on the issue of interest, Justice R.S. Cooper has given dissenting award.

12. The next submission of the learned senior counsel is that the arbitral tribunal has awarded interest on interest insofar as future interest is concerned. Insofar as the arbitration cost is concerned, it is submitted by learned senior counsel that though the arbitral tribunal has rejected one of the major claim of the respondent, the arbitral tribunal has directed the petitioner to pay half share of the respondent towards the arbitration fees, which is illegal.

13. Mr.Mody, learned counsel appearing for the respondent invited my attention to the various finding of fact rendered by the arbitral tribunal and would submit that since the said findings rendered by the arbitral tribunal are based on the appreciation of evidence and the arbitral tribunal has interpreted the terms of the contract which interpretation is a possible interpretation, this court cannot interfere with such finding of fact and cannot substitute such interpretation by another interpretation. He submits that the limited burden of the respondent was to prove that the respondent had supplied goods in good condition and received the goods in damaged

condition. He submits that the respondent had led oral evidence to prove its case before the arbitral tribunal. He submits that the respondent has discharged the burden before the arbitral tribunal. The arbitral tribunal has rendered a finding of fact on the said issue, which is not perverse.

14. Learned counsel submits that since the respondent had discharged its burden of proof, the burden of proof did not shift on the petitioner. The goods were being in the custody of the petitioner. Learned counsel placed reliance on the finding rendered by the arbitral tribunal in paragraphs 7 and 12 of the arbitral award and submits that the arbitral tribunal has rightly held that the respondent herein had initial burden of proving that loss or damage took place when the goods were in the hands of carrier, the physical extent of the damage or the loss and the monetary value of the loss or damage. There was no dispute between the parties on this aspect.

15. It is held by the arbitral tribunal that the carrier must thereafter prove the cause of the loss, that he exercised due diligence to make the vessel seaworthy at the beginning of the voyage, in respect of the loss and that he properly and carefully loaded, handled, stowed, carried, kept, cared for, discharged the goods carried and that the loss / damage was caused by one or more of the exculpatory clauses in (a) to (q) of Art 4(2). He submits that the petitioner did not lead any evidence.

16. The arbitral tribunal has referred to the various documentary evidence in paragraph 14 and also considered the oral evidence led by the respondent of one Mr.Rakesh Kumar, who testified about loading and sampling procedures and the instructions

given to the vessel regarding heating of the cargo.

17. Learned counsel for the respondent submits that the report with the quantitative and analysis report submitted by the petitioner before the arbitral award was not carried out in the presence of the respondent and was not proved. The arbitral award therefore, rightly discarded the said report relied by the petitioner.

18. Learned counsel for the respondent submits that the arbitral award has also considered various provisions of the Hague Rules and have rightly held that it was for the petitioner to establish the true cause of contamination and if they did not do so, then they cannot escape liability on the ground that they were not negligent in respect of their duty of due diligence in accordance with contemporary standards.

19. Insofar as the issue of mitigation raised by the petitioner is concerned, he submits that the arbitral tribunal has rendered a finding of fact on that issue also in paragraph 17.3 of the impugned award and has rightly held that the respondent herein had nothing to gain by not mitigating the loss. The respondent had asked their R & D department to investigate what could be done to mitigate the losses but the solution suggested by the R & D department would have meant commercially unacceptable interruptions to their normal production.

20. Insofar as the issue of interest on damages and interest on interest raised by the petitioner is concerned, he submits that the arbitral tribunal has ample powers to award interest on damages as well as further interest on interest under section 31(7)(a) and also

under the Interest Act. He submits that the judgment relied upon by the learned senior counsel for the petitioner on this issue was delivered under the provisions of the Arbitration Act, 1940 and was not applicable to the facts of this case. He submits that in view of section 31(7)(a) of the Arbitration Act, 1996, the arbitral tribunal has ample power to award interest for all three periods at the reasonable rate. He relied upon the judgment of the Supreme Court in the case of *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa*, in Civil Appeal No.3147 of 2012 decided on 25th November, 2014 and also the judgment of this Court delivered on 24th April, 2015 in the case of *Haresh Advani vs. Suraj Jagtiani* in Arbitration Petition No.846 of 2014.

21. Insofar as the arbitration cost is concerned, learned counsel submits that the arbitral tribunal has allowed substantial part of the claim made by the respondent and has rejected the counter claim made by the petitioner and has therefore, rightly directed the petitioner to share 50% of the arbitration cost in favour of the respondent. No interference is warranted even in respect of the said part of the claim.

22. A perusal of the award indicates that the arbitral tribunal has held that although the Hague Rules were designed to apply to the bills of lading only and not to the charter parties, it became the practice to incorporate them wholly or partially into charter party contracts and it was often desirable to do so indeed from the commercial view point. It is held by the arbitral tribunal that the carrier is also required to properly and carefully keep, carry and care for the goods during the time the goods were in his hands. The arbitral tribunal has held that the petitioner had not led any evidence

to prove the burden cast on the petitioner i.e. the cause of loss, that he exercised due diligence to make the vessel seaworthy at the beginning of the voyage, in respect of the loss and that he properly and carefully loaded, handled, stowed, carried, kept cared for, and discharged the goods carried.

23. Insofar as the issue whether the respondent herein had proved that they have shipped the cargo in good condition, the arbitral tribunal considered the oral evidence led by the witness examined by the respondent, who testified about loading and sampling procedures and the instructions given to the vessel regarding heating of the cargo. The witness deposed that after loading was completed, the test for detecting free water in the oil was carried out in his presence and in the presence of the ship's chief officer and a representative of Geo Chem Laboratories using the water finding paste supplied by the Chief Officer of the ship and that the test was negative indicating that there was no trace of water in the cargo. The arbitral tribunal also considered the oral evidence of another witness Mr.S.K. Das, examined by the respondent on this issue. After considering the oral evidence led by the parties, the arbitral tribunal came to the conclusion that the respondent had proved that they had shipped the lube oils in good condition free of water as claimed and accordingly decided the said issue in favour of the respondent and against the petitioner herein.

24. On the issue as to whether the respondent had proved that it received the cargo in damaged / contaminated state and if so, that the contamination was by sea water is concerned, the arbitral tribunal recorded that the petitioner had conceded that the samples tested in the presence of their representative indicated possible sea water

contamination of H-70 and H-500. The arbitral tribunal also considered the quantitative and analysis report presented by the petitioner which was not prepared in the presence of the respondent herein. The arbitral tribunal recorded the fact that the respondent herein was not invited to remain present for quantitative analysis nor was informed of the petitioner's intention to do such an analysis as admitted by the witness examined by the petitioner.

25. The arbitral tribunal accordingly concluded that RCA test report was unilateral and was admitted to have been commissioned for internal verification of the petitioner and was not witnessed by the respondent herein. The arbitral tribunal recorded the finding of fact that the respondent had proved that they had received lube oil in contaminated condition and most probably the contamination was by sea water. It is held that the contamination was such as to render the oils unfit for their intended purpose as high grade specialized lube oils. After rendering such finding, the arbitral tribunal allowed the claims made by the respondent and against the petitioner. The arbitral tribunal after rendering the finding of fact held that it was for the petitioner to establish true cause of contamination and if they did not do so, then they could not escape the liability on the ground they were not negligent.

26. The arbitral tribunal also has rendered a finding of fact that the cargo was in the custody of the petitioner and they ought to have presented all the facts and evidence with them. The petitioner however, did not produce any of the officers / crews who were on board the vessel during the relevant time. It is also held by the arbitral tribunal that the petitioner had failed to prove the casual connection between whether condition as reflected in the unproved copy of the

ship's log books submitted by them before the arbitral tribunal. The petitioner did not plead peril of the sea before the arbitral tribunal.

27. In my view, various findings recorded by the arbitral tribunal referred to aforesaid and forming part of the arbitral award are rendered after appreciating the evidence led by both the parties and the same being not perverse, no interference with such finding of fact is permissible under section 34 of the Arbitration Act.

28. Insofar as the issue of mitigation of loss raised by the petitioner is concerned, a perusal of the award indicates that the arbitral tribunal held that there was only one bidder whose bid was too low. In order to induce him to offer a higher price, the respondent matched the price of the lone bidder. It is held by the arbitral tribunal that in order to mitigate the loss, the respondent herein was not required to go to unusual or extraordinary lengths. It is held that the reasonableness of efforts made to mitigate loss is a question of fact which borders on common sense and depends on the circumstances of each other. The arbitral tribunal also has rendered a finding that the petitioner had failed to prove any breach of the respondent in respect of mitigation of loss. The arbitral tribunal held that though the respondent was remiss in not sufficient steps towards the mitigation for almost a year till the arbitral tribunal ordered the cargo to be sold, however, the said delay did not in any way affect the extent of mitigation finally achieved. It is held that the loss would have been none the lesser had the cargo been sold earlier, except that the respondent would have received the proceeds of sale at an earlier date and would not have been deprived of the use of that money for the period by which the sale was delayed. In my view, there is no inconsistency in the award as canvassed by the learned senior

counsel for the petitioner.

29. In my view, the arbitral tribunal has considered the evidence on record and has rightly come to the conclusion that the respondent had taken sufficient steps to mitigate loss and in any event the petitioner could not prove any breach of the respondent's duty to mitigate loss. The petitioner before the arbitral tribunal could not prove as what amount could have been fetched on sale of the said goods, if it would have been sold earlier. In my view, the findings of fact rendered by the arbitral tribunal are not perverse and thus no interference with such finding of fact is permissible under section 34 of the Arbitration Act.

30. The next submission of learned senior counsel for the petitioner is that the arbitral tribunal has awarded interest on damages for the period prior to the date of declaration of the award, which is not permissible. To controvert this submission, learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa* (supra) and the judgment of this Court in the case of *Haresh Advani vs. Suraj Jagtiani* (supra). This Court after adverting to the judgment of the Supreme Court in the case of *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa* (supra) has held that under section 31(7)(a), the arbitrator has power to award interest on damages prior to the date of award even if no notice under section 3(b) of the Interest Act, 1978 is issued by the claimant. In my view, there is thus no substance in the submission made by learned senior counsel for the petitioner that the arbitral tribunal could not have awarded interest on damages for the period prior to the date of award. I am bound by the judgment delivered by this Court in the case of *Haresh Advani vs.*

Suraj Jagtiani (supra), which was delivered after adverting to the judgment of the Supreme Court in the case of *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa* (supra) and the other judgments of this Court.

31. A perusal of the award indicates that the arbitral tribunal has awarded interest at the rate of 11.25% p.a. after considering the commercial lending rates by the Indian banks during the relevant period to the customers with good credit ratings which had varied between 10.75% to about 12.25% p.a. Under section 31(7)(a), the arbitral tribunal has power to award interest at the reasonable rate unless otherwise agreed by the parties on whole or any part of the money, for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made. In my view, simple interest awarded by the arbitral tribunal in favour of the respondent at the rate of 11.25% p.a. is reasonable rate of interest and is within the powers prescribed under section 31(7)(a) by the Arbitration Act and thus no interference is warranted with this part of award.

32. Insofar as the arbitration cost awarded by the arbitral tribunal is concerned, a perusal of the award indicates that the arbitral tribunal has allowed substantial part of the claims made by the respondent and had also rejected the entire counter claim of the petitioner and in view thereof, has directed the petitioner to pay only 20,70,000/- being the arbitrator's fees paid by the respondent though the respondent had demanded much higher amount and had claimed the arbitration cost towards the venue booking, counsel fees and solicitors fees. In my view, the award of cost by the arbitral tribunal only in the sum of Rs.20,70,000/- which was paid to the arbitral

tribunal by the respondent as their contribution has been rightly awarded and is in accordance with section 31(8) of the Arbitration Act and no interference with that part of the award is warranted.

33. In my view, the petition is devoid of any merits. I therefore pass the following order :-

Arbitration Petition No.1165 of 2010 is dismissed. No order as to costs.

(R.D. DHANUKA, J.)