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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 498/2013

Reserved on: April 09, 2015

Decided on: May 12, 2015

SOUTHERN PETROCHEMICAL INDUSTRIES

CORPORATION LTD & ANR

..... Petitioners

Through: Mr. Gagan Gupta, Advocate.

versus

THE GREAT EASTERN SHIPPING CO. LTD .. Respondent

Through: Mr. Sandeep Sethi, Senior
Advocate with Mr. Amitava Majumdar,
Mr. Arvind Kumar Gupta, Mr. Siddharth
Ranka, Mr. Anshul Garg and Mr. Abhishek
Goyal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

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12.05.2015

Introduction

1. The challenge in this petition filed by Southern Petrochemical Industries Corporation Ltd ('SPICL') and the Government of India through the Ministry of Chemicals and Fertilizers ('MoCF') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an award dated 10th January 2013 passed by the Arbitral Tribunal

(‘AT’) in the disputes between the parties arising out of a Charter Party (C/P) Agreement dated 10th June 1992 whereby the Respondent The Great Eastern Shipping Company Ltd. (‘GESCL’) gave their vessel ‘MV Jag Rahul’ to the MoCF for carriage of 35,000 Metric Tons (MT) (5% more or less) of bulk Di-ammonium Phosphate (‘DAP’) from 1/2 safe ports/safe anchorages West or East Coast of India excluding Calcutta.

2. It is not in dispute that the vessel carried DAP from the port of More Head City and arrived at the Kakinada anchor at 07:06 hours on 8th August 1992 and completed the discharge on 23rd November 1992. A dispute arose between the parties on the calculation of discharge port demurrage. The case of the Petitioners was that there was a strike of the stevedores/labourers at Kakinada port between 23rd August and 17th September 1992 and this was an event for which duration, in terms of Clause 33 of the C/P Agreement, demurrage was not payable. The case of GESCL on the other hand was that there was no such strike and in any event the Statement of Facts (SoF) submitted by the captain of the ship did not record any such strike between the said dates. According to GESCL, the failure to allot a discharge turn to the vessel by the port authorities was not due to any strike but possibly due to congestion for which there was no exception under Clause 33 of the C/P for payment of demurrage.

Relevant Clauses of the C/P

3. In order to understand the background to the above dispute, it is necessary to refer to the relevant clauses of the C/P Agreement which read as under:

“24. Discharging port(s) stated in Bills of Lading are not necessarily final discharge ports and actual disc/aring ports to be declared by KRISHKHAD NEW DELHI on vessel’s passing Suez/Cape Town in response to Master’s telegram to KRISHKHAD NEW DELHI, EMTICIFERT NEW DELHI and TRAMSCHART NEW DELHI giving 96 hours notice of ETA Suez/Cape Town. Orders for second discharge port if required, can be given by Charterers while the vessel is discharging at the first port unless given earlier.”

“33. If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lockout of any class of workmen essential to the loading of the cargo, or by reason of constructions or stoppages beyond the control of the Charterers caused by riots, civil commotions or of a strike or lockout, on the railways, or in the Docks or other loading places, or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lockout of any class of workmen essential to the discharge, the time for loading or discharging as the case may be shall not count during the continuance of such causes, provided that a strike or lockout of the Shippers and/or Receivers men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before

the strike or lockout. In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the Charterers, Receivers of the cargo or Owners of the steamer. For the purpose, however, of settling despatch money accounts, any time lost by the steamer through any of the above causes shall be counted as time used in loading and discharging as the case may be.”

“40. Charterers shall not be liable for any delay in loading or discharging including delay due to the unavailability of cargo which delay or unavailability is caused in whole or in part by an Act of God, War, hostilities, political disturbances, rebellion, mobilisation, revolution, insurrection. Acts of public enemy, civil commotions, sabotages. Acts of Government (including but not restricted to any preference, priority allocation or limitation order and any export or import control). Fires, Floods, Force Majeure, Earthquakes, Storms, Land-slides, Frost or Snow, bore tides, explosions or other catastrophes, epidemics; quarantines, restrictions, strikes, embargo, blockade, railways accident or impediments and any other causes beyond the control of Charterers.”

Relevant facts

4. Notice of readiness (‘NOR’) was tendered on 8th August 1992 when the vessel arrived at the Kakinada anchorage and lay time commenced on 9th August 1992. The lay dates statement [which was appended as

Exhibit C to the Statement of Claims (SOC)] recorded that the discharge turn was allotted to the vessel on 29th September 1992 and the time of commencement of discharge was 10:45 hours on 1st October 1992. The discharge was completed at 08:00 hours on 23rd November 1992. Exhibit C showed the total period of demurrage to be 62 days 2 hours and 5 minutes. However, the lay time calculation furnished by the MoCF under cover of their letter dated 7th April 1993 (Exhibit D) indicated that from 24th to 30th August 1992 there was a strike; from 31st August to 16th September there was a "labour problem" and again there was a strike on 17th September 1992. After accounting for rain days and public holidays, the MoCF calculated the demurrage period as 27 days 17 hours and 22 minutes and paid GESCL the corresponding demurrage charges. GESCL's remaining claim was for the demurrage for the balance period of 31 days 13 hours and 38 minutes.

5. On 24th December 1993, Ministry of Surface Transport ('MoST') wrote to the GESCL drawing their attention to the fact that there was a strike or labour trouble in the port of Kakinada from 24th August to 17th September 1992. MoST made a reference to the Statement of Facts (SoF) of M.V. Betanavis which happened to be in Kakinada port at the same time when M.V. Jag Rahul was there awaiting the discharge of cargo.

6. However, by letter dated 16th May 1994 MoST informed GESCL that the Charterers i.e. SPICL were “agreeable to counting of strike/labour problem period as laytime used at discharge port on the basis of the additional information furnished by GESCL”. The letter enclosed the Charterers' Revised Timesheet showing the demurrage as 59 days and 7 hours. In response, by letter dated 18th May 1994 GESCL conveyed to MoST its acceptance of the aforesaid revised calculation and requested MoST to authorise the Department of Fertilisers (DoF) to release the payment of the additional demurrage of 31 days 13 hours and 38 minutes at the earliest. On the basis of the above correspondence, on 2nd June 1994 MoST wrote to the Director of Accounts (DoA) of the DoF requesting it to make payment of the additional demurrage.

7. It was at this stage that the DoF conveyed to MoST that it was not agreeable to the aforementioned calculation. The DoF furnished additional information in the form of a certificate dated 3rd September 1994 of the Kakinada Steamer Agents Association (KSAA) and a communication dated 1st October 1994 of the Commissioner of Labour, Government of Andhra Pradesh stating that the Stevedores and labourers at Kakinada Port were on strike from 23rd August 1992 to 24th September 1992. Consequently, MoST wrote to GESCL on 27th October 1994 asking it to convey its agreement to the earlier calculation of demurrage i.e. 27 days 17 hours and 22 minutes to “enable us to close the case.”

The first round of arbitration and challenge

8. The C/P Agreement contained an arbitration clause. The above dispute came to be referred to a three-Member AT comprising of persons in the maritime industry. Initially, by an Award passed on 17th February 2010, the AT allowed the claim of GESPL to the tune of Rs.44,19,527.78 together with interest @ 6.5% per annum from 18th May 1994 till the date of payment. The AT essentially went by the fact that in the SoF for the vessel in question, which was signed by the Master of the ship and the Charterers there was no mention of any strike in the Kakinada port at the relevant time submitted.

9. The said Award was challenged in this Court by the Petitioners by filing OMP No. 482 of 2010. The Court, in its judgment dated 20th July 2011 set aside the said Award and remanded the matter to the AT for a fresh consideration.

10. The Court first held that the AT erred in considering the SoF as the “be all and end all” as regards the occurrence of strike. The Court also held that the AT had failed to appreciate the letters dated 30th April 1993 of the MoCF stating that the vessel had incurred demurrage of 27 days 17 hours and 22 minutes at the discharge port and the letter dated 24th December 1993 of the Ministry of Surface Transport (‘MoST’) to GESCL to the same effect stating that the payment already made on

that basis “was in full and final settlement of the subjected fixture”. The Court also found that the AT had erred in rejecting the "weighty evidence" produced by the Petitioners in the form of certificate dated 23rd September 1994 of the KSAA and the communication dated 1st October 1994 of the Commissioner of Labour. The inconsistency, if any, in the dates mentioned in the said documents could not have led conclusion that there was no strike at all. Thirdly, the Court held that the plea of GESCL that the Petitioners ought to have nominated a second port as mandated by Clause 24 of the C/P, was not supported by the pleadings of GESCL in its statement of claims. Fourthly, even if the communication dated 16th May 1994 of the MoST could be attributed to the Petitioners, they were entitled under Section 31 of the Evidence Act to explain the so-called admission, “which could not be taken to be a conclusive proof of the fact that there was no strike/labour unrest during the relevant period.” Lastly, the Court while remitting the matter back to the AT for reconsideration of the claim of GESCL on merits, after taking into consideration the observations made by the Court, also observed that the AT had not considered “the relevant and pertinent evidence led before it by the Petitioners while concluding that there was no strike/labour unrest at the relevant time.”

The second Award

11. Pursuant to the said remand, GESCL again filed an SOC before the AT with documents under cover of letter dated 16th January 2012.

This was replied to by the Petitioners on 10th April 2012 along with documents. A rejoinder was filed by GESCL on 16th June 2012. By a letter dated 8th August 2012, the AT informed that since till that date the parties had not indicated that they wished to examine witnesses, the AT would proceed on the basis of the documents, pleadings and relevant judgments placed on record.

12. By a unanimous Award dated 10th January 2013, the AT held that GESCL was entitled to be paid Rs.44,19,527.78 towards additional demurrage. Interest @ 6.5% per annum on the said sum from 2nd June 1994 till the date of the Award was quantified as Rs.53,13,367. The fees and costs of arbitration were quantified as Rs.2,60,000 to be paid by both parties in equal proportion. In the impugned Award, the AT concluded that the Petitioners were unable to satisfactorily explain their defence to the claim that during the relevant period there was a labour strike at the Kakinada Port.

13. In the impugned Award, the AT found it intriguing that the strike which started on 23rd August 1992 and lasted till the third or fourth week of September 1992 could go completely un-noticed not only by the Master of the Vessel i.e. M.V. Jag Rahul but also by the Port Officials, Charterers and company representatives. The AT noticed that since the SoF did not refer to the said strike, there was a need for the AT to look for the possible other evidence.

14. The AT examined the certificate dated 23rd September 1994 of the KSAA and the communication dated 1st October 1994 of the Labour Commissioner and concluded that these were issued at the instance of the Petitioners and long after actual discharge of cargo and in any event later than the letter dated 16th May 1994 by which the MoST had conveyed the Charterer's acceptance of the laytime calculations.

15. The AT noted that the SoF of M.V. Betanavis was produced. What was produced was a copy of the said Award which gave no details normally given in a SoF. As regards the Award relating to M.V. Prabhu Daya, it showed that no oral evidence had been tendered and even the written evidence produced was not before the AT. The Award was between two parties whose names were not mentioned and, therefore, it was of no use in considering the issues before the AT. The AT noted that even after almost a year since the completion of discharge of M.V. Jag Rahul, the Petitioners had not made any effort to get any certificate from the Port Officer of Kakinada or other contemporaneous evidence about the alleged strike and labour problem at Kakinada port. There was no consistency in the stand of the Petitioners on when the strike actually ceased and in particular, whether the strike period should be excluded for the purpose of calculation of laytime.

Submissions of counsel

16. Mr. Gagan Gupta, learned counsel for the Petitioners, submitted that there was no occasion in the first place for the AT to permit the Respondent to file a fresh SOC. Referring to the decision in *ASCU Arch Timber Protection Ltd. v. Commissioner of Central Excise, Calcutta (2004) 10 SCC 653* he submitted that the AT was bound to restrict itself to the material already on record. Secondly, he submitted that the AT failed to take into account the findings of the Court in the order dated 20th July 2011 which were binding on it. Thirdly, it was submitted that the veracity of the documents filed by the Petitioners had already been considered by this Court and, therefore, could not be doubted. Fourthly, the AT erred in holding the letter dated 16th May 1994 sent by the MoST to be an admission on the part of the Petitioners when this Court had already discussed the said letter and held that it had been issued without the approval of the Petitioners. The Award was contrary to Clauses 33 and 40 which permitted the days of strike to be excluded while calculating the laytime. Fifthly, GESCL could not have been permitted to raise a plea on the basis of Clause 24 of the C/P when no such plea had been urged in the pleadings in the first round of litigation.

17. Countering the above submissions, it was submitted by Mr. Sandeep Sethi, learned Senior counsel appearing for GESCL, that the scope of interference by this Court under Section 34 of the Act is extremely limited. Reliance was placed on the decision in *State*

Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd. 2014 (5) R.A.J. 301 (Del) to urge that “an error by the Arbitrator relatable to the interpretation of contract was an error within his jurisdiction and not an error on the face of the Award and was not amenable to correction by the Courts.” It was pointed out that in the instant case, the three Arbitrators comprising the AT were persons of the same industry and after a detailed analysis of the evidence, had returned findings on facts. Therefore, the Award was not amenable to interference. Reference was also made to the recent decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority 2014 (13) SCALE 226*** and in particular to the observation that “a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award.” Mr. Sethi also took the Court through the relevant evidence to show that the view taken thereon by the AT could not be held to be perverse or irrational.

Decision of the Court

18. At the outset the Court would preface its discussion of the submissions with the remark that in this second round of litigation the scope of judicial review would be even narrower than the first round, since the remand of the case to the AT for it to reconsider GESCL's claims in light of the observations in the judgment dated 20th July 2011 of the Court.

19. The central issue that had to be considered by the AT was whether the evidence on record was sufficient to show that there was a strike at the Kakinada Port between 23rd August and 17th September 1992? In terms of the remand order the AT was bound to consider the evidence produced by the Petitioner and not go by either the SoF alone or the letter dated 16th May 1994 of the MoST.

20. The two pieces of evidence that were required to be considered were the certificate dated 23rd September 1994 issued by the KSAA and the letter dated 1st October 1994 from the office of the Labour Commissioner, Andhra Pradesh. The Court in its previous order felt that the AT had not considered the probative value of the above documents. The AT was obliged in terms of the law explained in *ASCU Arch Timber Protection Ltd.*(supra) to examine the above. Also in terms of the decision in *Chairman, Life Insurance Corporation of India v. A. Masilamani (2013) 6 SCC 530*, the AT was required to form an opinion by the active application of the mind.

21. The Court finds that the AT has indeed discussed both pieces of evidence. The task before the AT was to examine whether these documents satisfactorily proved the fact of there having been a strike. The AT answered the question in the negative. Among the reasons given by the AT are that both documents were issued at the request of the Petitioners nearly two years after the discharge of the cargo. In that

sense, they were not contemporaneous documents. Another reason was that the letter dated 1st October 1994 of the Labour Commissioner was derived from the report of the Assistant Labour Commissioner and that report had not been placed before the AT. Therefore the information was in the nature of hearsay evidence whose reliability would be seriously open to doubt.

22. When there were periodic certificates regarding the weather issued by the Kakinada port authority, there is no reason why a certificate issued by that authority regarding the strike was not produced by the Petitioners. Better still, the record of discharge of ships generally as maintained by the port authority for the relevant period could have been produced. The members of the AT, who belonged to the maritime trade, have appreciated the above evidence in light of their own experience of the industry practices. It could well be argued that another view on the same evidence is possible. But then that by itself does not attract any of the grounds under Section 34 of the Act to enable the Court to interfere. As has been reiterated in several decisions of the Supreme Court including *Associate Builders v. Delhi Development Authority* (supra) to warrant interference, the conclusions of the AT should be found to be perverse, irrational or contrary to the evidence on record or arrived at by overlooking the evidence. In the present case, it cannot be said that in allowing the claim of GESCL by the second impugned Award the AT ignored any relevant evidence, or failed to analyse the evidence on record or given

reasons for the conclusions on such analysis. While the AT need not have again discussed the effect of the letter dated 16th May 1994 of the MoST, or the failure of the Petitioners to name an alternate port under Clause 24 of the C/P Agreement, since both those issues were already decided by the Court in its judgment dated 20th July 2011, the overall conclusion of the AT on whether the Petitioners were able to show that there was a strike between 23rd August and 17th September 1992 remains unaffected.

23. For the aforementioned reasons, no grounds have been made out for interference with the impugned Award of the AT. The petition is dismissed.

S. MURALIDHAR, J

MAY 12, 2015

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