

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 212/2015

MMTC LIMITED

..... Petitioner

Through: Mr. Neeraj K. Kaul, ASG with
Mr. Ruchin Midha, Mr. Rohit Puri and
Mr. Bhuvan Mishra, Advocates.

versus

TRANSAMMONIA AG. ZURICH (SWITZERLAND)

..... Respondent

Through: Mr. Ciccu Mukhopadhaya, Senior
Advocate with Mr. Omar Ahmad, Mr. Manu
Krishnan and Ms. Rashmi Gagoi, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
11.03.2015

I.A. 5084 of 2015 (for exemption)

Exemption allowed subject to all just exceptions.

The application is disposed of.

OMP No. 212 of 2015

1. Challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by MMTC is to the Arbitral Award dated 27th November 2014 passed by the three member Arbitral Tribunal ('AT') adjudicating the disputes between MMTC and the Respondent, Transammonia AG. Zurich ('TAG') arising out a contract dated 7th October 2011.

2. In terms of this contract, TAG agreed to supply and sell to MMTC, a net quantity of 2,00,000 metric tonnes ('MTs') (+/- 10% at TAG's option) of Granular/Prilled bulk Urea ('product') on CFR basis, subject

to certain terms and conditions stipulated therein.

3. In terms of the contract, the product was to be loaded in 4/8 lots at the option of TAG. The rate was US Dollars ('USD') 525 per metric tonne ('PMT'). On 9th November 2011, TAG nominated a vessel (MV Kiran Europe) for transportation of a quantity of 48-50,000 MT +/- 10% MTs bulk urea to MMTC in terms of the schedule laid down in the contract. The consignment was to be loaded at Constanza, Romania and delivered at Krishnapatnam in India.

4. MMTC states that the purchase was meant for the Department of Fertilizers ('DoF'), Government of India, and therefore, on that date itself it sent a fax message to the DoF, which then conveyed its acceptance to MMTC by a letter on the same date, i.e., 9th November 2011. In turn, MMTC conveyed its acceptance to TAG on 11th November 2011. A Cargo Plan was forwarded on 22nd November 2011 under the instructions of TAG and endorsed by the Master of the said shipping vessel, MV Kiran Europe.

5. In terms of the contract and in particular Clause IV (8) "the weight (of the consignments loaded on to the ship) should be determined by conducting draft survey before loading of the cargo and after completion of the loading of the cargo through an independent internationally reputed surveyor at Buyer's cost. Bill of lading and invoice will show draft survey weight". The Surveyor who prepared the draft survey report was SGS Romania SA ('SGS') and was chosen by MMTC.

6. The consignment of 50,000 MTs which was to be loaded, was split up into two consignments of 42,000 MTs and 8,000 MTs by TAG.

According to MMTC, apprehending that the loading of the entire shipment would take some more time, TAG sent an email dated 30th November 2011 seeking an extension of the deadline for the entire 50,000 MTs to 5th December 2011. Accordingly, by a separate email on the same day, i.e. 30th November 2011, TAG sought amendments to the terms of the letter of credit ('L/C') opened by it. MMTC then communicated to the DoF the request of TAG.

7. Meanwhile on 5th December 2011, TAG issued a shipping advice stating that the entire quantity of 50,000 MTs was on board the vessel but under two separate bills of lading ('B/L'), i.e., one for 42,000 MTs and another for 8,000 MTs and that the ship had set sail only on 3rd December 2011. Discharge from MV Kiran Europe was completed on 9th January 2012 with 42,000 MTs being off-loaded.

8. Meanwhile, the international price of the contracted goods had fallen from the rate of USD 525 PMT to USD 446 PMT. MMTC was, however, bound to pay TAG the contractual price, provided the shipment of the last lot was made on or before 30th November 2011.

9. MMTC received a letter from the DoF on 30th December 2011 stating that the DoF could not accept MV Kiran Europe at the MMTC contract price, but was prepared to pay at the rate of USD 446 PMT. DoF, in fact, refused to reimburse MMTC as per the value of USD 525 PMT and instead paid MMTC at the rate of 446 USD PMT for the 42,000 MTs. DoF also declined to accept the balance 8,000 MTs which was loaded on MV Kiran Europe, which had its sail on 3rd December 2011.

10. Accordingly, MMTC took the stand that since TAG had failed to

ship the entire 50,000 MTs by 30th November 2011, it was in breach of the contract. MMTC maintained that it stood discharged from its obligation to pay for the goods at the contracted rate of USD 525 PMT. MMTC claimed from TAG USD 3,318,000 as damages at the rate of 79 USD PMT being the differential between the contracted value of USD 525 PMT and USD 446 PMT paid by DoF to MMTC. To the above extent, MMTC encashed the Performance Guarantee Bond ('PGB').

11. In its statement of claim before the AT, TAG sought:

- (i) Refund of or damages for the sum of USD 3,465,000 for MMTC's alleged wrongful invocation of the PGB.
- (ii) Damages for the sum of USD 1,655,000 for MMTC's breach of an alleged oral agreement to receive and pay for the additional 8,000 MTs.
- (iii) USD 40,635.42 as demurrage along with interest and costs.

12. MMTC, apart from denying the above claims, preferred the following counter-claims:

- (a) LD for the amount equivalent to 2% of the value of the contract for the undelivered part of the product for each month or part of month's delay, together with interest at 18% from 9th January 2012 till the date of payment, being the sum of USD 525,000.
- (b) to be reimbursed at the rate of USD 79 PMT on 42,000 MTs amounting to USD 3,318,000.
- (c) USD 18,276.04 by way of 'dispatch amount'.

13. Before the learned AT, the three issues that were formulated on TAG's claims were:

- (a) Refund of or damages for the sum of USD 3,465,000 allegedly

wrongfully claimed by MMTC under the PGB.

- (b) Payment of USD 1,655,000 by way of damages from MMTC for wrongful refusal to accept or pay for 8,000 MTs of the product.
- (c) USD 40,635.42 for payment of demurrage by MMTC.

14. These issues apart from the counter-claims of the MMTC already referred to above.

15. On the first issue of refund of USD 3,465,000, the AT referred to the evidence of Mr. Hendrik Van Dalfsen for TAG, who stated that 42,000 MTs was shipped as per the requirement of the contract. The AT rejected the evidence of Mr. Unni Krishnan for MMTC that the entire 50,000 MTs had to be shipped in one go. The AT found that there was no provision in the contract giving the right to MMTC to insist upon any upper limit being satisfied, with the option to satisfy the minimum and maximum limit being given only to TAG as the seller. There was no addendum to the contract incorporating such a requirement. The AT thus concluded that 42,000 MTs was delivered by TAG to MMTC in accordance with the contract.

16. However, as regards the remaining consignment of 8,000 MTs and whether there was an agreement between the parties to extend the latest shipment date for the same beyond the contractual date of 30th November 2011, the AT found that MMTC was not liable to TAG. The evidence of Mr. Subhash Chandra Varghese for TAG was referred to by the AT to hold that there was no written assurance given by MMTC to accept the balance 8,000 MTs of the consignment. It was held that TAG had failed to establish estoppel by convention or promissory estoppel. Accordingly, it was held that MMTC was not liable in respect of 8000 MTs.

17. On the third issue of demurrage, MMTC was held liable to pay USD 8,252.50 to TAG. Here, it was held that the Notice of Readiness ('NoR'), after the vessel arrived at the destination port, was tendered on 30th December 2011. However, the discharge commenced only on 5th January 2012. Thus, the demurrage period was held to be one day and 17.01 hours, since it began to run 24 hours after the arrival of the vessel.

18. The counter-claims of MMTC were held to be untenable since there was no breach of contract by TAG.

19. Mr. Neeraj Kishan Kaul, learned ASG appearing on behalf of MMTC submitted that time was of the essence of the contract. The entire quantity of 50,000 MTs had to be shipped by 30th November 2011. There was nothing to show that there was in fact a draft survey that took place prior to the loading, as required by Clause IV (8) of the contract. MMTC's specific case was that TAG failed to complete the loading of the entire shipment before 30th November 2011. It sought extension of time till 5th December 2011 and therefore committed default in terms of Clause II of the contract. No extension of time had been granted to TAG. There was no amendment in writing in terms of Clause II signed by both parties agreeing to any such extension.

20. Mr. Kaul submitted that the vessel with the said quantity of 50,000 MTs was shipped only on 5th December 2011. He pointed out that the draft survey report submitted was dated 5th December 2011 and this was in itself an admission that the loading of the consignment was not complete on 30th November 2011, by which time the price of the contracted goods had fallen from 525 PMT to 446 PMT. In terms of Clause XXII of the SCC, TAG was bound to reimburse MMTC for the

short payment by DoF, which was entirely attributable to the failure of TAG to send the entire consignment of 50,000 MTs on or before 30th November 2011.

21. Mr. Kaul drew the attention of the Court to the specific questions put by the Chairman of the AT to the witness for TAG, i.e., Pushkar Jamnerkar (CW-3), regarding the loading of the MV Kiran Europe at the port of Constanza, Romania. He referred to the transcript of the cross-examination of CW-3 that took place as under:

“CHAIRMAN: Before you go further, I just would like you to, if you can, point out to us the draft survey that you think should be relevant for the purposes of the bill of lading for the 42,000.

A. Sure, I will. Give me a few seconds to look at the document.

CHAIRMAN: Take your time.

A. I think it is tab 62, page 224, wherein it says - SGS report wherein it says: "Quantity of cargo on board determined by means of draft survey: 42,000 MTS."

CHAIRMAN: Where is that?

A. Page 224, tab 62, bottom line. Fourth line from bottom.

CHAIRMAN: Yes, but this is dated 5 December.

A. It could be. It says: "Draft survey on completion of loading on Constanza ... on 30 November ..." That's the heading of the page.

CHAIRMAN: What I'm more interested in is the contemporaneous draft survey as of 30 November or 1 December. Because this is dated 5th. This would not be in the captain's hand when he issued the bill of lading, right, to determine the tonnage?

A. To my knowledge, as per my experience, no captain,

master of the vessel, would sign a bill of lading quantity unless he or his chief mate, chief officer, is satisfied through a valid draft survey that this quantity has been placed on board.

CHAIRMAN: That may be your thinking in your mind. You have said there was a draft survey done, so all I'm asking for is that draft document, that draft survey that was done as of the midnight of 30th. Just the contemporaneous document."

22. Mr. Kaul referred to the further cross-examination of CW-3 on the same topic as under:

"MR PURI: Mr Jamnerkar, it is your evidence that the loading continued until the midnight of 30 November 2011; is it right? Is it correct?

A. Right.

Q. After that, the draft survey would have been done, according to you?

A. I don't know the exact time it was done, but it should have been done.

Q. After that, after the loading was completed?

A. (Witness nodded).

MR JUSTICE GUPTA: Again, you are shaking your head only, so please help us by -

A. Yes, sorry. I apologise.

MR PURI: After the draft survey was done, the bill of lading is drawn, issued by the master; is that right? That's the sequence?

A. That's the sequence."

(Page 51 of Annexure P-6)

"Q. 'What was the basis of coming to a conclusion that 42,000 was loaded at the midnight of November 30, 2011?

A. As I mentioned earlier, a draft survey was conducted, basis which the quantity was written.

Q. The draft survey was conducted after 30 November, after midnight, according to you. Therefore, how would you know the weight of the loaded quantity at the midnight of 30 November?

A. Because there is a BL evidencing the same."

23. Mr. Kaul also referred to the fact that according to CW-3, "Since the BL is issued – a BL is the title of documents to the goods, so since the BI is issued on 30th, a BL will not be issued, no master of the vessel will agree to issue a BL without being sure of a draft survey quantity." Mr. Kaul also referred to the following exchange between the Chairman, AT and the witness:

"CHAIRMAN: Hold on. I just want to clarify with you just this. You said in your answer, it was midnight. How do you know it was midnight, 30 November?

A. I'm assuming it is midnight, because by the midnight of 30 November, we had instructed to the 42,000 tonnes was expected to be on board.

CHAIRMAN: You read the answer you put. You put: "A draft survey was conducted at the midnight of 30 November ..." So it's from your answer, there was a cut-off point, draft survey was conducted at midnight. How did you come to that? What is the basis for you to say that?

A. We had instructed the load port. We had given clear-cut instruction that we are not going to -

CHAIRMAN: You have instructed what?

A. At the load port. I was not directly involved.

CHAIRMAN: What did you instruct?

A. To loading to stop by midnight on the 30th.

CHAIRMAN: According to what you're saying now is you instructed them to stop the loading at midnight. So the draft

survey, according to what you are saying now, could only be conducted at or after midnight?

A. I'm not sure about that.

CHAIRMAN: Based on your instruction, not your personal -- based on what you have just said and your instruction to complete at midnight the loading.

I just want to be very sure. So, you have said you gave instructions: complete loading at midnight?

A. Right, I didn't give it personally, but somebody in the company gave it.

CHAIRMAN: Transammonia?

A. Yeah, Transammonia.

CHAIRMAN: That was on the 30th midnight?

A. Yes, to stop loading at 30th, midnight.

CHAIRMAN: I'll just stop there. Mr Puri, you can continue your questions. I just wanted to clarify that."

24. Mr. Kaul's criticism was that despite the AT having specifically put questions to TAG's witness on whether the draft survey report was prepared prior to the loading or after the loading on 30th November 2011, there was no discussion in the Award of that particular issue. This was a case of evidence on record being entirely overlooked by the AT and no finding rendered on the crucial issue on whether the vessel was indeed loaded after the draft survey report was prepared by the SGS on 30th November 2011.

25. In reply, Mr. Ciccu Mukhopadhaya, learned Senior counsel appearing for TAG, pointed out that in its response to TAG's claims before the AT, MMTC did not raise any issue as regards the

draft survey report. It was only in the written submissions filed before the AT that for the first time, such an issue was raised.

26. Mr. Mukhopadhaya referred to the documents including the draft survey report, which showed that the Inspector had been on the vessel and conducted the inspection both prior to and after the loading of the consignment. The said draft report although dated 5th December 2011, shows that the inspection took place after the loading on 30th November 2011 itself and this clearly shows that 42,000 MTs of the prilled bulk Urea had already been loaded on that date.

27. The Court finds that indeed the MMTC did not specifically raise the issue regarding the absence of draft survey report in the pleadings before the AT. That issue was raised for the first time in the written submissions filed by MMTC before the AT.

28. Having carefully perused the draft survey report, the Court is unable to agree that it was in fact prepared only on 5th December 2011. It appears that SGS did prepare the draft survey report, a copy of which is at pages 184-186 at Annexure P-5 in the documents file. Right on top, it gives a certificate number, 11MINCH/0288-D/S-01 with the date of 5th December 2011. However, in the main body of the report, it is stated that it in accordance with the inspection order received from TAG, the Inspector of SGS, i.e., the signatory to the report, attended the ship MV Kiran Europe at the port of loading, i.e., Constanza Romania “for the purposes of the determination of weight/quantity by Draft Survey method (Initial and Final readings) on the undermentioned shipment” of 42,000 MTS of product.

29. The first part of the report states that the date of inspection was from 19th till 30th November 2011. It further states that “we hereby confirm that the inspector has attended the vessel loading and that the inspection has been performed by the inspector in strict compliance with Transammonia AG’s inspection order dated November 14, 2011”.

30. The next part of the report states that “Draft survey prior to loading at Constanza, Romania on 19 November 2011. Draft and displacements are as follows” and proceeds to give the relevant readings. The third part of the report gives the readings taken on 30th November 2011. It clearly states “quantity of cargo on board determined by means of Draft Survey: 42,000 MTS”.

31. The draft survey report therefore, reflects that the readings on the ship were noted down by the Inspector from the beginning of inspection till its conclusion, i.e., from 19th to 30th November 2011. The report clearly shows that at the time of the loading, 42,000 MTs was complete; the Inspector of SGS was very much present and confirmed the reading on 30th November 2011.

32. The above aspects in minute detail were not put to CW-3 and in any event he was not the author of the draft survey report. There was a limit to the extent he could have spoken for the document. On its part, by producing the draft survey report, TAG has discharged its burden of showing compliance with the requirement of Clause IV (8) of the contract. If MMTC wanted to doubt the correctness of the report or to further show that it was in fact prepared only on 5th December 2011, it should have asked to summon and examine the agency which prepared it, i.e. SGS. That obviously was not done by MMTC.

33. In the circumstances, the view taken by the AT was a plausible view to take. Although the AT has not rendered any specific finding in regard the draft survey report, it is plain that TAG had been able to demonstrate before the AT that the consignment of 42,000 MTs had in fact been loaded by 30th November 2011. That is what was relevant for calculating the liability of MMTC under the contract.

34. As pointed out by Mr. Mukhopadhaya, Section 37(1) of the Sale of Goods Act, 1930 ('SGA') enables MMTC to claim for the quantity delivered, even if it was not the entire quantity of 50,000 MTs. Section 37 of the SGA reads as under:

“37. Delivery of wrong quantity – (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall he shall pay for them at the contract rate”.

.....

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.”

35. The plea of MMTC is that the term 'special agreement' used in Section 37(4) must include Clause XXII of the contract, whereby TAG had agreed to reimburse MMTC for any deductions made in the invoices with DoF. Clause XXII reads as under:

“XXII SPECIAL CONDITION

It is expressly understood and agreed by and between the Buyer and Seller that MMTC is making the purchase on behalf of the Department of Fertilisers (DOF). In case of any deductions made from the bills of MMTC by Department of Fertilizers (DOF) on account of deviation in the specifications or due to short-landing at discharge port vis-à-vis Bill of Lading quantity, the amount will be reimbursed to MMTC by the seller. Load port/discharge port despatch/demurrage, as determined by MMTC, New Delhi shall be binding on both sellers, and buyers

depending upon FOBT or C&F purchases.”

36. It is seen that as far as the consignment of 42,000 MTs was concerned, there was no short-landing at the discharge port vis-à-vis the separate B/L for that quantity. There was no rejection of the consignment of 42,000 MTs. The said quantity was accepted and was in fact offloaded. There was also no deviation of the specifications as far as the 42,000 MTs was concerned. The twin conditions - short landing and deviations in specifications - to enable DoF to make deductions were not shown to exist. MMTC could not therefore bring the case within the ambit of Section 37(4) SGA. Consequently, the decision of the AT requiring MMTC to reimburse the amount recovered by encashing the PGB cannot be faulted. It is consistent with Section 37(1) SGA.

37. As regards the demurrage claimed, the finding of the AT was based on a finding of fact regarding the NoR and the date on which the delivery was actually taken.

38. The Court is, therefore, satisfied that no grounds have been made out, within the limited scope of Section 34 of the Act, for interference with the impugned Award of the AT.

39. The petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

MARCH 11, 2015
akg