IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.06.2016

DELIVERED ON: 21.06.2016

Coram:

The Hon'ble Mr.Justice A.SELVAM
and
The Hon'ble Mr. Justice T.MATHIVANAN

O.S.A.No.213 of 2008

M/s.Madras Fertilizers Limited
A Govt.of India Undertaking
Rep.by its Executive Director
Personnel & Administration
Manali
Chennai 600 068 .. Appellant/Petitioner

vs.

1. M/s.Prospects Shipping Pvt.Ltd.,
203, Adamji Building
N.Natha Street
Masjid Bunder (W)
Mumbai 400 009

2. Mohd. Yusuf Shah
3. Capt.P R Dattar
4. Mr.P.C.Tilak .. Respondents/Respondent

This Appeal is preferred under Order XXXVI Rule 1 of O.S.Rules r/w Clause 15 of the Letters Patent Act against the order of this Court dated 8.6.2007 in O.P.No.810 of 2002.

For Appellant : Mrs.Rita Srinivasan for M/s.Aiyar & Dolia

For Respondents : Mr.S.Raghunathan for R-1
No appearance for R2 & R3
R4 - dismissed vide order dated 3.12.2009

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED
BY A.SELVAM, J.)

Challenge in this Original Side Appeal is to the order dated 8.6.2007 passed in O.P.No.810 of 2002.

2. The appellant herein, as petitioner, has filed O.P.No.810 of 2002, praying to set aside the Award dated 27.5.2002, wherein, the present respondents have been shown as respondents.

3. The nubble of the averments made in the petition is that the petitioner has engaged in the manufacture and selling of fertilizers. During the course of business, the petitioner has used to import urea from various countries. The petitioner has placed an order with M/s.Indian Potash Limited (IPL), canalizing agent for importing urea, who in turn placed an order with M/s.Petro Chemical Industries (KSC), Kuwait. The petitioner has operated a letter of credit in respect of the said consignment through its Bank, viz., State Bank of India on 14.3.2000. M/s.Transchart, the Government of India Nodal agency has arranged vessels to transport urea and nominated a vessel by name M.V.Prospects and to that effect, an agreement has been entered into on 9.3.2000 with the first respondent. As per the agreement, it shall be the responsibility of the owner to ensure proper delivery of cargo. The said agreement has further provided that in the event of dispute/s, the same shall be settled in India and that too, in accordance with Maritime Arbitration Rules of the Indian Council of Arbitration. The urea (bulk urea) weighing 16,592 MT has been loaded in the vessel - MV Prospects, belongs to the first respondent in the Port Shuaiba, Kuwait. The said vessel has left the said Port on 28.3.2000 with bill of lading, quantified as 16,592 MT. The same has arrived at Chennai Port on April 7, 2000. At the time of loading, as per international practice, a survey has been done and a certificate to that effect has been produced by the Inspectorate Kuwait. The cargo has been loaded in the Hold Nos.1 to 5. After arrival of the vessel, the same has been entrusted to M/s.Express Clearing Agency. The survey work has been entrusted to M/s.Ericson and Richards, Madras. The surveyors in their reports dated 3.5.2000 have certified that cargo discharged is 16,295 MT and the actual shortage is 297 MT. The Master of the vessel has admitted the shortage of 297 MT, but actually a delivery has been made to the petitioner to an extent of 15,217.21 MT and a total shortage is 1374.790 MT. The first respondent has been properly informed that the cargo should not be loaded in inaccessible area, but the first

respondent has failed to take into consideration. The agent of the first respondent by its letter dated 4.5.2000 requested the petitioner to come forward for a joint draft survey. The petitioner has sent reply through fax that the petitioner is not willing to be a party for resurvey. After knowing the fact that there is a shortage of 1374.790 MT, the petitioner has informed to IPL, New Delhi. On 7.6.2000, the petitioner has duly informed the first respondent about its responsibility with regard to shortage. After making several correspondences, respondents 2 to 4 have been appointed as arbitrators and they rejected the claim of the petitioner in toto and partially allowed the counter claim made by the first respondent, by way of passing the impugned award dated 27.5.2002 and in order to set aside the same, present petition has been filed.

4. In the counter filed on behalf of the first respondent, it has been specifically stated that the averments made in the petition with regard to transport of cargo are true, but with regard to liability, it has been specifically denied. Further it is averred in the counter that there is no valid ground to make interference with the Award dated 27.5.2002 and altogether it is prayed to dismiss the petition.

5. On the basis of the divergent contentions put forth on either side, the learned single Judge has dismissed the Original Petition by way of passing the impugned order dated 8.6.2007. Against the impugned order, the present Original Side Appeal has been preferred at the instance of the petitioner, as appellant.

6. The learned counsel appearing for the appellant has sparingly contended that as per agreement dated 9.3.2000, the first respondent is solely responsible for shortage of urea and in fact, surveyors have conducted proper survey and filed their reports, wherein it has been clearly stated about the alleged shortage, but the arbitrators have not at all considered the same. Under the said circumstances, O.P.No.810 of 2002 has been filed, but the learned Single Judge, without considering the contentions put forth on the side of the appellant/petitioner has erroneously dismissed the same and therefore, the order passed in O.P.No.810 of 2002 is liable to be set aside and consequently the award dated 27.5.2002 passed by the arbitrators is also liable to be set aside.

7. The learned counsel appearing for the first respondent has also equally contended that in the agreement dated 9.3.2000, no specific responsibility has been fixed upon the first respondent and the first respondent is not at all responsible for the alleged shortage and the arbitrators, after considering the rival contentions put forth on either side coupled with

relevant documents, has rightly passed the award and there is no patent illegality in the award passed by the arbitrators and the learned single Judge, after considering the rival contentions put forth on either side, has rightly dismissed the original petition and therefore, the order passed in O.P.No.810 of 2002 is not liable to be set aside.

8. The sum and substance of the contentions put forth on the side of the appellant/petitioner is that after arrival of the ship mentioned in the petition, the shortage of urea is found out and subsequently, surveyors have been appointed and they filed their reports and the arbitrators, viz., respondents 2 to 4 have failed to consider shortage of urea. Under such circumstances, the award passed by the arbitrators is liable to be set aside.

9. Before pondering the circumstances under which the award in question is liable to be set aside, it has become shunless to look into the alleged liability fixed on the side of the appellant/petitioner upon the first respondent.

10. The learned counsel appearing for the first respondent has relied upon Clause 24 of the agreement dated 9.3.2000 and the same reads as follows:

> "24. Owners to exercise due diligence to ensure full protection of cargo at their cost and seal all hatches completely after loading to avoid contamination of cargo and contact of material with atmosphere during currency of the voyage. Suppliers/Charterers agents reserving the right to supervise loading."

11. From a mere reading of Clause 24 of the Agreement dated 9.3.2000, it is easily discernible that no specific responsibility has been fixed upon the first respondent with regard to alleged shortage.

12. In order to repudiate the contentions put forth on the side of the appellant/petitioner, the learned counsel appearing for the first respondent has relied upon Section 6 of the Indian Carriage of Goods by Sea Act, 1925 (26 of 1925) and the same reads as follows:

> "6. Modification of rules 4 and 5 of Article III in relation to bulk cargoes:-
>
> Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight

> ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then notwithstanding anything in the rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper."

13. A cursory look of the said provision would clearly go to show that shipper is not guaranteed the quantum mentioned in the bill of lading.

14. The learned counsel appearing for the first respondent has also relied upon the decision reported in AIR 1983 Madras 105 (M/s.Thakur Shipping Co.Ltd., Bombay and another Vs. Food Corporation of India), wherein the Division Bench of this Court at paragraph No.33 has stated like thus:

> "33. Thus, a review of the reported case and the ratio laid down therein clearly goes to show that the statements in the bills of lading regarding the number of bags, tins or containers that are shipped would constitute sufficient evidence against the shipowner about the exact number of bags, tins or containers being shipped. But insofar as the weight, contents and value are concerned, if there is an endorsement that they are not known or if there is a qualifying remark indicating that the master of the vessel has entered those particulars in the bills of lading in accordance with the figures given to him by the shipper or consignor, then the statements in the bills of lading in accordance with the figures given to him by the shipper or consignor, then the statements in the bills of lading regarding those particulars would not be binding on the ship owner and it will be for the shipper or consignor to prove that the consignments loaded on board the ship were of the same weight and the contents were of the same nature and the value was of the same figure as those noted in the bills of lading. The hypothesis on which such a dictum has been laid is not far off to see. Insofar as the number of bags, tins or containers is concerned, they can be easily verified by a visual check and the checking process will not involved any complicated procedure. On the other hand, checking the weight or nature or the value of the contents in the consignment, that is shipped will

involve specialised tests and will also prove to be a time consuming exercise, which the ships cannot afford to do for various reasons, such as, the cost factor, the adherence to departure, and arrival, schedules, the lack of facilities for conducting such checks etc. Therefore, it is that if a bill of lading contained a disclaimer clause, it will not have effect insofar as the number of bags, tins, etc. are consigned, as no mistake can be made by the master of a vessel about those particulars. But, insofar as the weight, contents and quality are concerned, the disclaimer clause will certainly operate and in such a situation, it will be for the shipper or consignor to prove by adequate evidence that the particulars regarding weight contents etc., entered in the bill of lading represent the correct weight and the exact quantity of the goods which are loaded on board the ship."

15. From a close reading of the above observation, it is made clear that shipper or consignor has to adduce adequate evidence with regard to the weight mentioned in the bill of lading.

16. As stated earlier, the main contention put forth on the side of the appellant/petitioner is that arbitrators, viz., respondents 2 to 4 have failed to look into surveyors' reports as well as the shortage of urea. At this juncture, a nice legal question would arise as to whether the reasons mentioned in the petition would be sufficient to set aside the award passed by the arbitrators.

17. The learned single Judge, after contemplating the various contentions put forth on either side, has observed that there is no valid ground to make interference with the award passed by the arbitrators and ultimately dismissed the petition.

18. At this juncture, the learned counsel appearing for the first respondent has befittingly relied upon the following decisions:

(A) In (2006) 11 SCC 181 (McDermott Internation Inc. vs. Burn Standard Co. Ltd., and others), the Hon'ble Supreme Court has specifically held that the power of the Court with regard to arbitration award is nothing but a supervisory and this role has to be kept at a minimum level and interference is envisaged only in cases of fraud or bias, violation of natural justice, etc. Further, interference is permissible on the ground of patent illegality only if the same goes to the root of the matter.

(B) In (2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority), it is held by the Supreme Court that only when arbitral award is in conflict with public policy of India as per Section 34 (2)(b)(ii) of Arbitration and Conciliation Act, 1996, that merits of an arbitral award are to be looked into under certain specified circumstances.

19. In the instant case, the arbitrators after considering the overall contentions raised on either side have rejected the claim put forth on the side of the appellant/petitioner and partly allowed the counter claim raised on the side of the first respondent. Therefore, the Court cannot come to the conclusion that arbitral award is vitiated either by fraud or bias. Since these aspects are not at all in existence in the present case, it is highly impossible or improbable on the part of the court to set aside the same.

20. The learned single Judge, after considering the overall circumstances and also the rival contentions put forth on either side, has rightly dismissed the petition. In view of the foregoing elucidation of both factual and legal aspects, this Court is of the view that there is no valid ground to make interference with the well merited order passed by the learned single Judge and altogether the present Original Side Appeal is liable to be dismissed.

21. In fine, this Original Side Appeal is dismissed without cost.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

ajr
To
The Sub-Assitant Registrar,
Original Side,
High Court, Madras.

1 cc to Mr.Aiyar & Dolia, Advocate, sr.35390
1 cc to Mr.S.Raghunathan, Advocate, sr.34837

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pvr co
kra 01.08.2016