

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

% **Judgment reserved on: 29<sup>th</sup> March, 2016**  
**Judgment pronounced on: 13<sup>th</sup> July, 2016**

+ **O.M.P. No.1102/2014**

PEC LIMITED ..... Petitioner  
Through Mr.Alok Krishna Agarwal, Adv.with  
Mr.Mayank Bughani, Adv.  
  
versus

ADM ASIA PACIFIC TRADING PTE LTD. .... Respondent  
Through Mr.Sandeep Sethi, Sr. Adv. with  
Mr.Amitava Majumdar, Mr.Arvind  
Gupta & Mr.Arjun Mital, Advs.

**CORAM:**  
**HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. The petitioner has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging an unanimous Award passed on 28<sup>th</sup> May, 2014 by the Arbitral Tribunal comprising of Justice (Retd.) Rekha Sharma, Justice (Retd.) Usha Mehra and Mr.G.P. Khot.

2. The Tribunal after detailed consideration of pleadings, oral arguments and written submissions filed by both the parties passed an unanimous Award awarding demurrage to the respondent a sum of USD391,823 under two contracts of sale being Contract No.PEC/YPEAS/2008/IX-A/TOEPFER and Contract No.PEC/YPEAS/2008/IX-B/TOEPFER both dated 30<sup>th</sup> July, 2008. The Tribunal also awarded interest at 5% on the sum awarded from 15<sup>th</sup> November,

2011 upto the date of final payment. The Tribunal rejected the counter-claim of the petitioner for despatch in the sum of USD30,712.

3. The undisputed facts already recorded by the Arbitral Tribunal in the award are that the petitioner M/s PEC Limited (respondent before the Tribunal) had floated a tender for import of 100,000 mts of Canadian Yellow Peas on 18<sup>th</sup> July, 2008. The respondent M/s. Toepfer International Asia Pte Ltd. (claimant therein) offered to supply 40,000 mts (+/- 10%) of Canadian Yellow Peas. After some rounds of negotiations on terms, the petitioner awarded the contract to the respondent for supply of 40,000 mts (+/- 10%) on C&F Free out basis on 30<sup>th</sup> July, 2008. The petitioner split the contract quantity in 2 parts of 20,000 mts (+/- 10%) of cargo under the understanding that both parts of the contract would be treated as composite contract in relation to the performance of the terms and conditions and the respondent would discharge its obligation under both parts of the contract simultaneously by shipping a total of 40,000 mts of cargo on C&F Free out basis with discharge ports at Vishakhapatnam (Vizag) and Kolkata on one vessel. The shipment period of the contracts was September to 15<sup>th</sup> October, 2008. The respondent loaded a quantity of 42,000 mts. of the cargo on vessel MV Tu Qiang (the said "vessel") in Vancouver, Canada and the vessel arrived in Vishakhapatnam on 14<sup>th</sup> October, 2008. The vessel discharged 21,000 mts. of cargo at Vizag and sailed for Kolkata on 21<sup>st</sup> October, 2008. The vessel arrived at Kolkata on 22<sup>nd</sup> October, 2008 and completed discharge of the balance quantity of 21,000 mts. of the cargo on 22<sup>nd</sup> November, 2008.

4. As the disputes between the parties arose with regard to the calculation of lay time and demurrage, the respondent invoked arbitration on 15<sup>th</sup> November, 2011 under clause 20 of the composite

contract and nominated Mr.G.P.Khot as its Arbitrator. The petitioner nominated Ms. Justice Usha Mehra (Retd. Judge of this Court) as its Arbitrator and the Arbitration Committee of the ICA appointed Ms. Justice Rekha Sharma (Retd. Judge of this Court) as the Presiding Arbitrator of the Tribunal under Rule 23(b) of the Council.

5. After completion of pleadings, the Tribunal framed the following issues:-

- (1) Whether the claim of the Claimant is barred by limitation?
- (2) Whether the Claimant is entitled to the claim amount as per the Statement of Claim?
- (3) Whether the Respondent is entitled to the counter claim?
- (4) Whether the parties are entitled to interest, if so, at what rate and from what date?

6. After hearing both the parties and having gone through their written submissions, the Tribunal had passed the award while holding that the respondent is entitled to demurrage of 15 days 16 hours and 9 minutes amounting to a sum of USD391,823 along with interest @ 5% to be payable by the petitioner.

7. The petitioner has challenged the findings of the Tribunal by filing of objections under Section 34 of the Act. Learned counsel for both the parties has made their rival submissions. Both the parties have also filed their short submissions.

8. It is necessary to refer the relevant clause of the Tender Document and the Contract between the parties in view of the nature of controversy in the matter. The relevant Clause 16 is reproduced here as under:

"16. FUMIGATION

- a. The consignment must be treated by appropriate fumigant in the holds of the vessel, prior to sailing strictly in accordance with the instructions as given in Order 'Plant Quarantine (Regulation of Import into India) Order 2003' with schedules and subsequent amendments.
- b. Seller must ensure conformity to quality requirements pertaining to poisonous weed seeds, Mycotoxins, Argemone Mexicana and Lathyrus Sativa, Uric Acid, Rodent Hair and excreta etc."

"16. FORCE MAJEURE

Should any of the force majeure circumstances, namely act of god, natural calamity, fire, Government of India Policy, restrictions, any act of Govt., strikes or lockouts by workmen, war, military operations of any nature and blockades preventing the Seller/Buyer from wholly or partially carrying out his contractual obligations, the period stipulated for the performance of the Contract shall be extended for as long as these circumstances continuing for more than three months, either party shall have the right to refuse to fulfil its contractual obligations without title to indemnification of any losses it may thereby sustain. The party unable to carry out its contractual obligations shall immediately advise the other party of the commencement and the termination of the circumstances preventing the performance of the Contract. A certificate issued by the respective Chamber of Commerce in the Seller or the Buyer country shall be sufficient proof of the existence and duration of such circumstances."

TERMS OF SHIPMENT SUB CLAUSE 16

"16. The cargo to be discharged at an average rate of 4000 MT for Vishakapatnam and/or Kolkata Port Per Weather Working Day (PWWD) of 24 consecutive hours based on minimum number of four hatches or prorata. Each hatch must have one gear/crane. Sundays and Holidays excepted, even if used. If detained longer, receiver to pay demurrage as per charter party, maximum upto USD 25,000/- per Weather working Day and on prorata for any part of the day. Despatch money, if any,

shall be paid by the Seller to the Receiver at half the demurrage rate for all the time saved. Laytime at discharge port shall commence 24 hours after the notice of readiness has been received in writing by Fax or cable by the Receiver on all working days from Monday to Friday between 1000 hours to 1700 hours, provided Fax message was not garbled."

9. The Arbitral Tribunal in para 2.A to 2.C has recorded the submissions of both the parties and mentioned the facts and documents as well as applied law on the subject. In the said paras, the Arbitral Tribunal has framed three main points which were relevant for the purpose of deciding the claims and counter-claims by the parties. Those were – (a) Lay time commencement at Vizag, (b) What is the correct rate of discharge at Vizag and Kolkata, and (c) When does the lay time commence at Kolkata. The findings arrived by the Tribunal have been reproduced herein below:-

"2.A Lay time commencement at Vizag

The Respondent argued that the vessel was not a 'ready ship' at the time when NOR was tendered on 14/10/2008. The Respondent cited tender clauses to support his case and claimed that the vessel did not have plant quarantine inspection and phyto-sanitary certificate at the time of tendering the NOR.

The Claimant contended that there is no provision in the contract that the NOR is to be issued after the plant quarantine order and phyto-sanitary certificate. In fact the contract states that the NOR can be tendered WIBON WIPON and WIFPON. The Claimant further contended that the discharge actually commenced even before the required certificate was received thereby confirming that unavailability of the certificate was no impediment to commencing the discharge. The Claimant further argued that the quarantine order and sample analysis relate to the cargo and was the responsibility of the Respondent and had nothing to do with the readiness or the state of the vessel to discharge cargo.

In the absence of any provisions in the contract that the NOR is to be issued after the plant quantitative order and phyto-sanitary certificate and in view of the self destructive act of the respondent in actually commencing the discharge before the discharge certificate, the Tribunal finds merit in the Claimant's argument and adjudicates that the vessel tendered a valid NOR 14/10/2008 and therefore the lay time correctly commenced at 1000 hrs on the 16/10/2008.

2B What is the correct rate of discharge at Vizag and Kolkata

The relevant clause 16 annexure II of the contract reads as "The cargo to be discharged at an average rate of 4000 mts for Vishakhapatnam and/or Kolkata port per weather working day (PWWD) of 24 consecutive hours based on minimum number of four hatches or pro rata. Each hatch must have one gear/crane....."

The Respondent in his defense cited the tender conditions and correspondence exchanged leading to the signing of the contract and the above mentioned clause to argue that in denying the applicability of pro rata discharge at the negotiating stage, the Claimant clearly demonstrated its awareness of the intention of the Respondent to prorate the discharge rate and since the provision of "pro rata" was maintained in the clause the Respondent was entitled to it. The Respondent also cited an English case "The Tropwave (1981) 2 Lloyds Reports 159" to support his contention that if at the time of unloading, the number of hatches were less than stipulated, rate was to be reduced pro rata. The Respondent claimed that since only 3 hatches were made 'available' for discharge at Vizag the pro rata clause should be made applicable in adjusting the rate of discharge as per clause 16 of Annexure II of the contract.

The claimant, on the other hand, contended that the requirement of minimum number of 4 hatches in clause 16 was "vessel specific" and the pro-rata provision was to apply only in case where the vessel nominated had less than 4 hatches. In any case, the claimant further contended that the respondent had not even shown that it was denied access to all the five hatches which had cargo underneath them. It was also argued that the discharge was the responsibility of the respondent and if the respondent for its

own reasons had used only 3 hatches for discharge at Vizag and the balance 2 hatches/holds for discharge at Kolkata it is assumed that it was done only to suit its own plan and convenience.

In support of its contention of the inapplicability of the pro rata provision of the discharge clause 16 of annexure II of the Contract, the Claimant cited the case of "General Capinpin" where the principle of construction of this international maritime clause has been given and approved by the Court of Appeal and the House of Lords. In that case, the subject discharge clause provided inter alia:

"cargo to be discharged by consignee's stevedores free of risk and expense to vessel at the average rate of 1000 mts 5 or more available workable hatches, pro rata if less number of hatches per weather working day of 24 consecutive hours....."

In the case of "General Capinpin" the charterers claimed that even where the vessel fulfilled the condition of 5 hatches, the lay time allowed should be calculated by dividing the average rate of discharge (1000 mts) by the number of hatches (5) and then dividing the largest quantity of cargo in any hold by the number so obtained (i.e. 200).

The claim of the charterers was disallowed by the Arbitrators. The charterers went to the Court of Appeal where also they met similar fate. The Court of Appeal in its judgment reported as *President of India V. JEBSENS (UK) Ltd and others (The "General Capinpin," PROTEUS FREEWAVE and "DINARA" 1989 Vol. (I) Lloyds's Law Reports 232* held that by so claiming the charterers are in effect claiming that the wording of the clause is the same as if to read " cargo to be discharged ... at a rate of 200 mts per available workable hatch, prorata with a maximum of 1000 mts PWWD....." The judgment further held that "we see the force of the argument that a daily rate which is expressed to be based on "available workable hatches" is only apt to describe a daily rate which reduces as the holds beneath the hatches are filled or emptied and the available workable hatches become fewer in number. In our view however the argument fails to give proper weight to the fact that the obligation to discharge is expressed to be the average rate of 1000 mts PWWD. The obligation to discharge is qualified,

it is true, but the obligation is imposed by reference to a rate for the vessel and not to a rate per hatch. In the opinion of this Court this is the fundamental distinction".

The matter was further taken in appeal to the House of Lords. By a majority judgment reported in (1991) (1) Lloyd's Law Reports the House of Lord upheld the judgment of Court of Appeal. The following extract from the judgment are reproduced as under:-

"Another point which I wish to stress is this. Some of the arguments before your Lordships appeared to invoke the reasons why this particular form of clause had been chosen by the charterer. We can see, from cl.14(a) of the General Capinpin charter, that the charterer took a laytime clause which provided for an overall rate of discharge per ship, and inserted in it the words" basis five or more available workable hatches pro rata, if less number of hatches". On its face, however, the clause still provided for a rate of discharge for the whole vessel; and Mr.Young for the charterers was able to say that the charterer, in amending the clause, had deliberately chosen not to adopt a clause which provided for a rate per hatch, despite the authorities in which such a clause was considered. On the other hand, the charterer was able to say that it was he who made the insertion in his own form of clause, and that it was improbable that he would have done so if it did not achieve the beneficial effect for him of a discharging rate per hatch. I must confess however that I am reluctant to speculate on the motives of a party for adopting a clause in any particular form. For once a clause is embodied in a commercial contract, it has simply to be construed in its context, from the objective point of view of reasonable persons in the shoes of the contracting parties. Of course it has to be construed sensibly, and regard has to be had to its practical effect. But the objective interpretation is of paramount importance in commercial affairs; commercial men have frequently to take important decisions with some speed, and it is of great importance that they all know that they can rely on Courts and arbitrators, if any dispute should later arise, to adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts.



It is with these considerations in mind that I turn to the construction of the clause, and to the resolution of the problem in these cases, which is essentially whether the clause should be given effect to as expressly providing for an overall rate of discharge for the whole ship, the reference to "basis five or more available workable hatches" being treated only as qualifying that provision in the respects proposed by the owners, or whether that reference should be treated as overriding the provision for an over all rate of discharge, substituting for it a rate per available workable hatch. In truth the point is a short one, and it derives from the fact that the clause, which retains from its original form an overall rate of discharge which is then qualified by the words "basis five or more available workable hatches", has built into a tension between two different kinds of discharging rate. This gives rise to a problem which has to be solved as a matter of construction, but the meaning of the clause must also be to some extent a matter of impression. In this connection it is of some interest that, in all three cases, the construction favoured by the owners appears to have been unanimously adopted by the arbitrators. In the case of General Capinpin the arbitrator appointed by the charterer was Mr. Clifford Clark, and in the cases of Free Wave and Proteus the arbitrator so appointed was Mr. Cedric Barclay, both to hem commercial men and arbitrators of exceptional distinction and experience. Although there was disagreement between the arbitrators in the case of the Proteus, it is legitimate to infer (Since Mr. Cedric Barclay was also the charterer's arbitrator in the case of Free Wave, where there was an agreed award) that the disagreement in the case of the Proteus must have been on another point. It is plain that what really struck the arbitrators was that the clause did indeed provide for an overall rate of discharge, and did not expressly provide for a rate per hatch, despite the existence of well-known authorities dealing with clauses which so provided. They were simply not prepared to ignore the express provision for the overall rate; they preferred to treat the reference to "available workable hatches" not as substituting a rate per hatch for the expressly provided overall rate for the ship, but rather as imposing a qualification upon it. This was the reaction of commercial men, who must have

been well aware of the practical consequences of their decision, and who must also have been well aware how charter-parties are negotiated and how they are likely to be understood by practical men in the trade. No great issue of principle arises in this case, which is concerned with the constructions of an amended clause; though doubtless the clause in the present form has been employed by the charterer in a considerable number of cases, with the result that the present appeals are of importance to him. I can see no good reason for departing from the conclusion of the arbitrators in these three cases; indeed, like the Court of Appeal, I for my part have reached the same conclusion, for basically the same reasons as the arbitrators. I am however also influenced by the shape of the clause, which appears to me to be so drawn as to give primacy to the overall rate for the vessel. I am also fortified by the fact that this conclusion is consistent with the reasoning of Mr. Justice Parker in *The Tropwave*, (1981) 2 Lloyd's Rep.159, though it is fair to observe that the form of the clause in that case was somewhat different, and that the point was there a subsidiary one.

For these reasons, I would dismiss the appeals with costs."

The Tribunal finds that this principle as laid down in the judgment by the House of Lords in the case of "*General Capinpin*" is quite applicable to the present case. We find that the present case is on a better footing than '*General Capinpin's*' case for in the present case even the qualifying words "available workable hatch" are missing from the discharge clause 16 of annexure II of the Contract thereby giving further emphasis or weight to the average rate of discharge of 4000 mts PWWD.

Curiously even the Respondent in calculating time used, maintained the lay time allowed as 10 days 12 hours thereby implicitly agreeing that the average rate of discharge as 4000 mts PWWD. In calculating the time used, the Respondent has prorated the allowed time and not the discharge rate. The clause 16 annexure II of the contract clearly mentions the average rate of discharge to be prorated basis minimum number of four hatches and

not the time. Thus the very method used by the Respondent appears questionable.

The fact that the Respondent agrees to the Lay time allowed on the basis of a discharge rate of 4000 mts PWWD but pro-rates the time allowed further strengthens the Claimant's case since nowhere in the discharge clause 16 of annexure II of the contract is there a mention of pro-rating the time allowed for discharge.

Even the case of "The Tropwave" cited by the Respondent is different to the present case since there the vessel had stowed the charterer's cargo in lesser number of hatches than stipulated and therefore the pro rata discharge rate became applicable. Such is not the case here since all the five hatches have the Respondent's cargo underneath.

The Tribunal is therefore of the opinion that the correct rate of discharge applicable is 4000 mts PWWD and there is no scope for any pro-rating the discharge rate at either of the discharge ports.

#### 2.C When does the lay time commence at KOLKATA

The Respondent contended that a notice of readiness was necessary to be given at Kolkata and lay time begins to count only 24 hours after the tendering of the NOR. The Respondent claimed that it needed time to have its discharging arrangements organized such as plot of land to keep the cargo, arrange for barges, engage stevedores once vessel arrived at Kolkata. It had no way to know when the vessel will exactly arrive Kolkata port. The Respondent also cited the conduct of the Claimant in tendering a NOR at Kolkata and to that extent referred to the clause 19 of the tender document.

The claimant contended that as per the Contract it was always the understanding of the parties that Vizag/Kolkata were to be considered as one discharge port and therefore, it was never the intention of the parties that NOR was to be tendered at each port. As per the claimant tendering of the NOR by the vessel at Kolkata was merely an intimation and could not be considered to vary the terms of the Contract. Therefore the lay time could not be postponed by 24 hours but should have commenced upon serving the NOR at 1700 hrs on 22/10/2008.

The Claimant cited the case of Burnett Steamship Company wherein it was held that in the absence of an express term for NOR to be tendered at each port of discharge, there was no obligation to tender 2<sup>nd</sup> NOR.

The Tribunal finds it important to refer to the initial negotiations and conclusion of the contract wherein the present shipment is a composite of 2 contracts namely PEC/YPEAS/2008/IX-A/TOEPFER AND PEC/YPEAS/2008/IX-B/TOEFER for shipment of 20000 mts (+/- 10%) each. Each of the contract provides for a NOR to be tendered at a discharge port. It is only logical to infer that the Respondent intended to take each of the contract to a discharge port namely one to Vizag and another to Kolkata. The Tribunal, therefore, finds merit in the Respondent's claim that a NOR is required to be served under the contract and lay time will commence 24 hours after the serving of the NOR as provided in the contract."

10. In view of the aforesaid findings, the Arbitral Tribunal had come to the following conclusion:-

"Neither the claimant's nor the respondent's lay time calculation sheet counts time on these above facts and exceptions. Since there is no dispute amongst the parties regarding the total lay time allowed, the time sheet will undergo change to the extent of the total time used and demurrage incurred based on the above findings of the Tribunal. The tribunal has therefore reworked the lay time calculations based on the tribunal findings in respect of commencement of lay time at the discharge ports of Vizag and Kolkata at the average rate of discharge of 4000 mts PWWD. The reworked time counting sheet is attached as annexure A to this Award."

11. While deciding the counter-claim filed by the petitioner, an issue was framed as to whether the petitioner was entitled to the counter-claim and the Arbitral Tribunal had given the following findings by dismissing the said counter-claim:-

"The Tribunal finds that the Respondent is not entitled to the counter claim as based on the findings of the Tribunal

and the reworked lay time calculations the Claimant is entitled to a demurrage claim as per the reworked time sheet. Therefore the Respondent's counter claim of dispatch of US\$ 30,712 fails.

During arguments the Respondent introduced some new issues to the pleadings before the arbitral tribunal. We shall briefly deal with these:-

**a) There was no agreed demurrage rate under the Contract**

The Respondent argued that the Contract provided for ".... Demurrage as per charter party maximum up to USD 25,000" and that since there was no charter party in existence at the time of the contract, no demurrage rate was agreed.

The Tribunal does not agree with this contention. Being a C&F contract, the charter party was signed between the Claimant and the ship owner to which the Respondent was not privy. The Claimant has cited Division Bench judgment of Delhi High Court in MMTC v/s International Commodities Export Corp of New York FAO(OS) No.523/2012 delivered on 28.2.2013 which dealt with a similar clause and concluded that the clause provides for pre-estimate of damages is valid, if the compensation named in the contract is a genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence and prove actual loss suffered by him. This Tribunal is bound by this interpretation as applicable to this present case. Moreover, since the Respondent himself in his calculation of the dispatch, applied a rate of dispatch as USD 12,500 (i.e. half of demurrage) it is clear to the Tribunal that there was never any controversy over the rate but only of the number of day.

**b) The Respondent is entitled to the Defenses contained within the Charter Party dated 24/06/2008**

The Respondent argued that Clause 16 annexure II of the contract refers to the Charter Party and by virtue of it, all the terms of the charter party also become part of the contract. The Tribunal again refers to the Delhi High Court judgment in the MMTC v/s International Commodities case cited above wherein it is concluded that the clause simply provided for pre-estimate of damages. The Contract was done under C&F free out terms wherein shipping of the cargo being fully the responsibility of the Claimant, there was no scope for any charter party incorporation in the contract, The Respondent's role is only limited to the discharge of the cargo once the vessel arrives at the nominated discharge port. Therefore the Tribunal does not agree with Respondent's proposition that the terms of the charter party become part of the Contract. Such a proposition could lead to absurd and contradictory terms particularly when the Respondent is neither a signatory nor privy to the Charter Party. The Tribunal is of the view that the present arbitration on the demurrage claim is under the Contract between the Claimant and the Respondent and therefore the shipping terms of the Charter Party have no relevance.

**c) Demurrage does not accrue during period of strike**

The Respondent cited clause 16 Force Majeure of the Contract to claim that the period of contract gets extended for any force majeure causes. However the Tribunal does not find any valid notice or certificate from Chamber of Commerce, as required under the same clause, referring to any strike during the discharge operations.

12. The Tribunal while passing the Award in favour of the respondent and against the petitioner held that the respondent is entitled to demurrage of 15 days 16 hours 9 minutes amounting to a sum of US\$391,823 along with interest @ 5% from the date of invoking arbitration till the date of payment.

13. The first submission addressed by the learned counsel appearing on behalf of the petitioner during the course of hearing was that out of the total 16 excess days for which the liability has been fastened upon the petitioner by the Arbitral Tribunal, there was strike for 13 days. Thus, the petitioner cannot be burdened with any damage during the period of strike for which the petitioner had no control. It is submitted that under the Force Majeure clause, it is stipulated that any act of Government or strike is an exception in calculation of the number of days. Further, a certificate issued by a Chamber of Commerce was a sufficient proof for the existence of strike and duration of such period. Counsel submits that the factum of strike is not and cannot be disputed. The benefit of these strike days is claimed by the petitioner in its reply/counter Claim filed before the Tribunal that the strike was for political disturbance.

14. In its second submission, it is submitted that the respondent is hirer of the ship from the owner of the ship. The only hiring agreement between the supplier and the owner of the ship is the Charter Party Agreement. Even the respondent would be entitled to exemption from the owner as per clause 29 of the Charter Party Agreement. The Clause 29 has to be read with Clause 44 of the Charter Party Agreement where the respondent/hirer of the ship stands discharged from the owner. It is submitted that no demand has been made by the owner for strike days, yet the hirer/respondent wants to claim these strike days exemptions from the petitioner. The Arbitral Tribunal has not appreciated this fact. The Charter Party Agreement is an integral part of the contract between the owner of the ship and which flows directly down the line to the importer, i.e. the petitioner. The Notice of Readiness tendered at Vizag endorsed that the Notice of Readiness

received and accepted was subject to the Charter Party Agreement. Again, the Notice of Readiness for Kolkata where it is endorsed that the Notice of Readiness received and accepted is subject to the Charter Party Agreement categorically. Thus, laytime is to be counted strictly as per Charter Party, which is signed by all the three parties, i.e. the petitioner, the respondent and the Master of the Ship. In the contract between the petitioner and the respondent, there is specific mention about the Charter Party at sub clause 16 which reads as "if detained longer, receiver to pay demurrage as per Charter Party maximum upto USD 25,000/-". Thus, Charter Party is the principal contract which would be the basis of grant of demurrage. As since the owners of the ship have not claimed any amount on the account of strike days, therefore, it is implied that exemption has been given by the master of the ship who is the representative of the owner.

15. It is submitted on behalf of the petitioner in its third submission that the Arbitral Tribunal has wrongly applied the case of **MMTC v. International Commodities Export Corp of New York** in OMP 242/2012 decided on 26<sup>th</sup> April, 2012 as there is a difference in the clause which was interpreted in that case and the present case which was completely ignored by the Arbitral Tribunal. In **MMTC** case, the clause was worded as "demurrage rate as per charter party, Maximum upto.....", whereas in the present case the clause is "demurrage as per charter party, maximum upto USD 25000", therefore this clause incorporates the demurrage terms of the charter party.

16. Insofar as fumigation is concerned, the petitioner seeks to rely on documents which provide that Fumigation has to be done prior to sailing by the respondent. It is stated that as there was no certificate of prior fumigation, the said fumigation was carried out at



Vishakapatnam. In this regard, the Notice of Readiness was given on 14<sup>th</sup> October, 2008, whereas the fumigation got completed on 16<sup>th</sup> October, 2008. This aspect can be seen from the entry in the Statement of Facts which reads that degassing and sampling completed on 16<sup>th</sup> October, 2008 at 1700 hrs. Whereas, the discharge commenced on the next date i.e. 17<sup>th</sup> October, 2008 however, the Arbitrator in the impugned order chose to refer to a discharge certificate. Discharge started on 17<sup>th</sup> October, 2008. There is nothing to show the date or time or copy of the Discharge Certificate. Thus, the Tribunal has wrongly calculated the laytime; firstly, not to fumigate edible goods, and then to claim merit and benefit for non fumigation.

17. On the aspect of hatches, counsel has relied upon sub-Clause 16 of the Terms of Shipment and submits that the parties had agreed to an average Rate of Discharge "based on minimum number of four hatches or pro rata." In the Statement of Facts issued by the Master of the Ship which is an admitted document between all the parties, there is a clear undisputed recording that at Vizag, the respondent only made available three hatches discharge and at Kolkata, the respondent only made available two hatches discharge. Despite there being an admitted failure on the part of the respondent to provide "minimum number of four hatches" in both Vizag as well as Kolkata ports, the Arbitral Tribunal had allowed the respondent to claim demurrage in complete deviation and disregard of sub-Clause 16 of the Terms of Shipment agreed between the parties.

18. It is stated that the Tribunal has wrongly interpreted sub-Clause 16 of the Terms of Shipment by relying upon the judgment of "General Capinpin" which is also cited and reproduced in the impugned Award.

On the other hand, the Tribunal demonstrated that the said judgment was dealing with an entire different set of agreed terms between the parties which focused on "Available Workable Hatches", whereas, in the present case, the terms and conditions agreed between the parties were that the rate of discharge was based on "minimum number of four hatches". The Tribunal does not deal with any provision agreed between the parties where the provision itself provided for "minimum number of four hatches or prorata". There was no question of either availability or workability of hatches. It was incumbent upon the respondent to provide "minimum number of four hatches" which it admittedly failed to provide. The reliance by the Arbitral Tribunal upon the case law cited by the respondent to allow such deviation and complete disregard of the agreed terms and conditions between the petitioner and the respondent is, therefore, contrary to the law and taken resort to by the Arbitral Tribunal to ignore a completely different set of facts in the present case. In this regard, Section 28(3) of the Act is relied upon by the petitioner.

19. In support of his submissions, learned counsel for the petitioner has referred the following decisions:-

- (i) ***Associate Builders v. Delhi Development Authority***, AIR 2015 Supreme Court 620, (para 17).
- (ii) ***Jagdish Singh v. Punjab Engineering College & Ors.***, (2009) 7 SCC 301 (para 8).
- (iii) ***V. Ramana vs. A.P.S.R.T.C. and Ors.***, (2005) 7 SCC 338, (paras 10 & 11).
- (iv) ***The Abu Road Electricity & Industries Co. Ltd. v. Industrial Gases Ltd.***, AIR 1977 Cal 482, (para 27).
- (v) ***M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.***, (2009) 7 SCC 696 (para 8).

20. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the respondent has made his submissions which are outlined as under:-

- (i) The Award is an unanimous award, passed by a Tribunal of three arbitrators after considering all rival pleadings, documents on record and contentions of the parties and on the written submissions the Award has been published, however, the petitioner has failed to establish that its case falls within any of the limbs of Section 34(2) of the Act.
- (ii) The petitioner is making vague assertions who failed to show in which manner the Award is contrary to Indian law or public policy. The petitioner attempted that this Court to re-visit the evidence and facts which have been considered and decided upon by the Arbitral Tribunal. The same is impermissible under the scope of Section 34 of the Act.
- (iii) It is also submitted that the grounds namely grounds D,E,F,G,H,I,S,T,X,AA-BB and paragraph 29, were never pleaded before the Tribunal and were only introduced at the stage of arguments without any pleadings in support of such arguments. The Tribunal in its award at paragraph 3 after answering the issues framed on the basis of the pleadings (which did not deal with the issues raised in the above grounds) recorded the contentions which were introduced during the course of the arguments and after considering the same in detail rejected the same for reasons set out at paragraph 3 (a) to (c) of the award.

- (iv) Mr.Sethi submits that even otherwise, none of the grounds is sustainable. He submits that the Tribunal has dealt with the issue in detail and after taking into consideration the terms of the contract and documentary evidence on record given its finding at para 2A of the Award. At no stage during the arbitration or in its pleading, has the petitioner denied having commenced discharging operation before receiving the phyto-sanitary certificate. It evidences that this was not a pre-requisite to tendering NOR, let alone for discharging of cargo.
- (v) The pleas taken in grounds D and E were not pleaded in the defence statement or argued before the Tribunal; Engine problem does not affect the discharging of cargo operations; there was admittedly no engine problem when the NOR was issued on 14<sup>th</sup> October, 2008; the time lost due to engine problem has not been counted towards laytime by the respondent in its laytime calculation i.e. the said time, during which there was engine problem, has been excluded from the laytime calculation.
- (vi) The pleas raised now in grounds E to H were not pleaded by the petitioner in the Defence Statement and hence not an issue before the Tribunal. The petitioner had pleaded a new case during oral arguments, without there being any pleadings in support. Despite of the same, the Tribunal has considered this issue and concluded that the petitioner had failed to establish the Force Majeure event as per Clause 16 of the Sale Contract.

(vii) The petitioner has tried to make out a case that while the Tribunal in its Revised Time Sheet attached to the Award, has allowed for certain periods on account of labour strike, it has incorrectly not allowed for other periods when the Petitioner claims there to be labour strike. The periods for which the existence of labour strike has been shown and excluded from the Arbitral Tribunal's Revised Time Sheet are labour strike during the periods which were not in dispute and for which credit had been given to by the respondent in its laytime calculation, i.e. for the following periods:-

- i. Between 1400 to 2400 hours on 24.10.08.*
- ii. Between 0000 to 0630 hours on 25.10.08.*
- iii. Between 0630 to 2400 hours on 25.10.08.*
- iv. Between 0000 to 2400 hours on 29.10.08.*
- v. Between 0000 to 1000 hours on 30.10.08.*

Hence, these period set out above were never before the Arbitral Tribunal for adjudication and therefore there was never any requirement for certificate from the Chamber of Commerce to be produced to establish a strike as these were admittedly excluded by the respondent itself in its laytime calculation which was attached to the Statement of Claim. However, for the periods which the petitioner is seeking to exclude laytime/demurrage on the account of the alleged strike being:-

- i. Between 1740 to 2400 hours on 06.11.08*
- ii. Between 0000 hours to 2400 hours on 07.11.08*
- iii. Between 0000 hours to 2400 hours on 08.11.08*
- iv. Between 0000 hours to 2400 hours on 09.11.08*

- v. *Between 0000 hours to 2400 hours on 10.11.08*
- vi. *Between 0000 hours to 2400 hours on 11.11.08*
- vii. *Between 0000 hours to 2400 hours on 12.11.08*

were disputed by the respondent and it is for this period that the Arbitral Tribunal has held that the petitioner has failed to establish the Force Majeure event as per Clause 16 of the Sale Contract;

Political disturbance is not strike.

Mr. Sethi submits that the contention is without merit as the same was never pleaded in the Defence Statement and hence not an issue before the Tribunal. In fact, the petitioner had raised its counter-claim for despatch basis the rate of demurrage, i.e. half the rate of demurrage. It was wholly a new case introduced during oral arguments.

(viii) The averments made in grounds S-T are without merit. The same were never pleaded in the Defence Statement and hence, not an issue before the Tribunal and it has been rightly mentioned in para 2 at page 6 of the Award.

21. Let me first deal with the aspect of scope of interference of the Court while deciding the objections under Section 34 of the Act filed by a party. The principles underlying in Section 34 of the Act, which allow the Court to interfere with an award, are well established in ***Connaught Plaza Restaurant Pvt. Ltd. v. Niamat Kaur***; 2013(3) Arb.LR 19 (Delhi) in the following terms:

"34. It is well settled that the court while exercising jurisdiction under section 34 of the arbitration and conciliation Act, 1996 does not sit as a court of appeal to reassess the material, evidence and the terms of the contract assessed and interpreted by the arbitrator. While

exercising jurisdiction under Section 34, the court is not to substitute its opinion with that of the arbitrator. Even otherwise, where two views were possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to by the arbitrator is a possible view. Re-appraisal of evidence or reinterpretation of clauses of an agreement by the court is also not permissible.”

22. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of **Markfed Vanaspati and Allied Industries v. Union of India**, (2007) 7 SCC 679, where in paragraph 17 of the said judgment it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavour of the court should be to honour and support the award as far as possible”.

23. Even, the scope of judicial review of an arbitral award as held in a series of decisions by the Supreme Court which are as under:

(i) In **Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar**, 1987 (4) SCC 497 at 503, the Supreme Court held as under:

"Appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of the evidence..... The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of

being a judge of the evidence before the arbitrator."

- (ii) In ***Indian Oil Corporation Ltd v. Indian Carbon Ltd***, 1988 (3) SCC 36, the Supreme Court held that the jurisdiction to set aside an award on the ground of an error apparent on the record is not to be "lightly exercised" and observed as under:

"The court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous."

- (iii) In ***Puri Construction Pvt Ltd. V. Union of India***, 1989 (1) SCC 411 the Court held as under:

"When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits."

- (iv) In ***P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H Securities Private Limited***, (2012) 1 SCC 594 it was held as under:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence."

24. Learned counsel for the petitioner has not denied the fact that few oral submissions were addressed before the Arbitral Tribunal which were not part of the pleadings, however, the counsel submitted



that the documents were placed on record before the Arbitral Tribunal, inference could have been drawn as the respondent cannot deny the fact that on the relevant period of time, there was a strike and even certificate was produced. It appears from the record that apart from pleadings on other points, the petitioner has also tried to introduce a new case during oral arguments as mentioned in the award para 3 at page 14. Despite of that, the Tribunal has considered this issue and concluded that the petitioner had failed to establish the Force Majeure event as per Clause 16 of the Sale Contract. He referred para 3 of the award in this regard which states that the Statement of Fact does not record the interruption due to strike during the periods for which the Tribunal was being called upon to adjudicate. Political disturbance cannot be considered as a strike.

25. Reliance can be placed upon the judgment rendered by a Division Bench of this Court in the case of **KEI Industries Ltd. v. D.V.B. & Ors.**, RFA(OS) No.325/2000, decided on 14<sup>th</sup> March, 2012, relevant para whereof reads as under:-

“22. There can be no quarrel with the proposition that a plea not taken before the arbitrator cannot be raised in a challenge to the award. (See the decision of the Supreme Court reported as J.G. Engineers Pvt. Ltd v Calcutta Improvement Trust AIR 2002 SC 766 and a decision of a Division Bench of this Court in FAO (OS) No.27/2007 titled as “Union of India v TRG Industries Pvt. Ltd” decided on 27.10.2009.)”

26. Even if the Arbitral Tribunal has taken the plausible view on interpretation of the relevant contractual terms, and assuming that an alternative interpretation is possible, the law is well settled that even if two interpretations are possible, if the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a

different view, the Award will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of **M/s. Arosan Enterprises Ltd. v. Union of India** (1999) 9 SCC 449, has held as under:

“39. ....The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.”

27. It has also been held time and again that an error relatable to interpretation of the contract by an Arbitrator is an error within his jurisdiction. The Supreme Court in the case of **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.** (2009) 10 SCC 63 has summarized the law on this point, in paragraph 26 of the said judgment which reads as under:

“26. (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.”

28. It appears from the record of Arbitral Tribunal as well as grounds taken in the appeal that there were no specific pleadings or the documents proved by the petitioner. The Arbitral Tribunal despite of the same still dealt with the same by rejecting the oral submissions. The petitioner is raising the same pleas before this Court and this Court is of the view that the same cannot be considered in the objections; it would be beyond the jurisdiction of the Court.

29. The Single Judge and Division Bench of this Court in **MMTC Limited v. International Commodities Export Corporation of New York** (in OMP 242/2012 and F.A.O.(OS) No.523/2012

respectively), have interpreted a similar clause holding that the same provided a pre-estimate rate of damages payable as demurrage which is referred in para 3 (as of the award). Although the petitioner has pleaded its case on this aspect, but the Tribunal has considered this issue and given its finding at para 3 (a) of the Award by relying on the judgments of this Court in **MMTC Limited** (supra). The interpretation of the Tribunal is in accordance with the judgment of the Court of Appeal [1989] 1 LLR 232 and the House of Lords [1991] 1 LLR 1 in the case of '**The General Capinpin**'. The Court of Appeal and the House of Lords in "**The General Capinpin**" (supra) have held when interpreting a similar clause that the clause provides a method of calculating the period of laytime. In the present case, admittedly, the period of laytime has been agreed by the petitioner to be 10 days since cargo was loaded in more than 4 hatches; pre-negotiations correspondence is a question of fact and cannot be re-considered when the clause is unambiguous.

30. The Tribunal has dealt with the issue and after taking into consideration the terms of the contract and the judgments cited by the respondent during the hearing, the Tribunal has come to its finding relying on the law laid down by the Supreme Court in **ONGC v. Saw Pipes**, 2003 (5) SCC 705. The Tribunal in rejecting the argument of unjust enrichment has followed the Single Judge and Division Bench of this Court in **MMTC** (supra) wherein in a similar argument of unjust enrichment was rejected. Many grounds taken in the objections filed under Section 34 of the Act were never pleaded in the Defence Statement. The Tribunal still has in any event dealt with the submission of the petitioner and after considering the terms of the

contract, evidence on record and the judgments, it came to its findings in paras 3A to 3C.

31. The findings of the Tribunal are in accordance with the judgments of the Single Judge and Division Bench of this Court in **MMTC Limited** (supra) wherein such a clause has been interpreted to provide a pre-estimate of damages. There is no force in the submissions of the petitioner that the facts are materially different. It is correct that the facts are totally identical in the present case but it is also a matter of fact that similar clause has been interpreted which cannot be denied by the petitioner.

32. With regard to other issue that the owner of the vessel has not sought to recover the demurrage from the respondent and the claim was raised as per order dated 25<sup>th</sup> August, 2015 passed by my Predecessor Bench, the respondent has filed the affidavit of Mr. Shailesh Kanani S/o Sh. Devkaran Kanani who is the Constituted Attorney of the respondent and stated on oath that the respondent has paid the ship-owners demurrage for the delay in discharging in India with regard to the vessel M.V. Tu Qiang, which was carrying the cargo of the petitioner under the contract as between the respondent and the petitioner.

33. In paras 4 to 8 of the affidavit, the following statement was made:-

"4. I state that in terms with the charterparty dated 24<sup>th</sup> June 2008 as between the Respondent and the Owner of the vessel M.V. Tu Qiang, under which the cargo under the contract as between the Respondent and the Petitioner was carried, a sum of USD 833,888 (United State Dollars Eight Hundred and Thirty Three Thousand Eight Hundred and Eighty Eight Only) was claimed as demurrage in respect of the vessel M.V. Tu Qiang by the Owners.

5. The Respondent disputed the demurrage calculation by the Owners of the vessel M.V. Tu Qiang and admitted a sum of USD 310,777.78 as being payable towards demurrage. The Owners of the vessel M.V. Tu Qiang accordingly raised a revised invoice for the admitted sum on 19<sup>th</sup> December 2008 for balance freight and admitted demurrage of USD 310,777.78. The said invoice thereby showed the total payable by the Respondent to the Owners as USD 470,243.06. A copy of the said Invoice dated 19<sup>th</sup> December 2008 is attached hereto and marked as Exhibit "A" and the same also forms part of the arbitral proceedings filed before this Hon'ble Court.

6. I state that the Respondent made payment of the sum of USD 470,243.06 being the amount under Invoice dated 19<sup>th</sup> December 2008, on 2<sup>nd</sup> January 2009 through its bankers Fortis Bank S.A./N.V Singapore. The payment was made to the Owners of the M.V. Tu Qiang's nominated account as stated in the said Invoice dated 19<sup>th</sup> December 2008 being held with DBS Bank, Singapore. I state that the payment effected of USD 470,243.06 included payment towards the undisputed demurrage claim of USD 310,777.78. The payment made by the Respondent is evidenced by a SWIFT Message as generated by the Respondent's Bankers dated 2<sup>nd</sup> January 2009. A copy of the SWIFT dated 2<sup>nd</sup> January 2009 generated by the Fortis Bank, Singapore is attached hereto and marked as Exhibit "B" and the same also forms part of the arbitral proceedings filed before this Hon'ble Court.

7. I state that Owners thereafter raised their invoice dated 20<sup>th</sup> January 2009 for USD 369,445.59 which included the balance disputed demurrage sum of USD 356,138.22 after giving credit to the Respondent for the admitted demurrage amount which had been paid by the Respondent to the owner on 2<sup>nd</sup> January 2009. The issue of the balance demurrage payable by the Respondent to the Owner is still pending settlement.

8. In view of the above, I state on behalf of the Respondent that the Respondent has paid a sum of USD 310,778 to the Owners of the vessel M.V. Tu Qiang on 2<sup>nd</sup> January 2009 through their bankers Fortis Bank, Singapore vide SWIFT Transfer to the Owners account held with DBS

Bank, Singapore bearing Senders Reference FT09010200090P08 towards demurrage due to the Owners by the Respondents.”

34. In response to the affidavit, the petitioner has filed the affidavit of Mr.Ajesh Aravind S/o Mr.Aravind M., who in para 9 deposed as under:-

“Even assuming for the sake of arguments that the statement made by the Respondent in its affidavit dated 14.09.2015 that it has made payment of USD 3,10,778/- towards satisfaction of claim for demurrage, it only demonstrates that the Ld. Arbitral Tribunal grossly erred in awarding demurrage of USD 391,823/-, alongwith interest @ 5% p.a., which is far in excess than the amount allegedly paid by the Respondent, thereby resulting in gross unjust enrichment of the Respondent.”

35. In view of the aforesaid reasons, I am of the view that there is no infirmity in the Award published by the Arbitral Tribunal. No interference is called for in view of the scope of interference while deciding the objections, as it is evident from the Award that the Arbitral Tribunal has not acted arbitrarily irrationally or independently of the contract nor the Tribunal had travelled outside the bounds of the contract nor the Award passed is without jurisdiction. Therefore, the objections are dismissed.

36. No costs.

**(MANMOHAN SINGH)**  
**JUDGE**

**JULY 13, 2016**