

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED : 16.02.2017**

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
13.02.2017	16.02.2017

CORAM :**The Honourable Mr.Justice T.S.SIVAGNANAM****O.P.No.20 of 2006**

M/s.MMTC Limited,
Rep., by its Deputy General Manager
P.Ramachandran
"Chennai House",
No.7, Esplanade,
Chennai – 600 108

..... Petitioner

Vs

1.M/s.Sanco Tans Limited,
Rep., by its Managing Director,
No.19, Moore Street,
Chennai – 600 001.

2.Mr.Justice K.Swamidurai (Retd.)
Sole Arbitrator,
No.223, Y.M.C.A.Building,
N.S.C.Bose Road,
Chennai – 600 001.

..... Respondents

Prayer: Original Petition filed under section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 to set aside the award dated 07.07.2004 passed by the second respondent herein granting only 20%

of the demurrage amount claimed and disallowing the balance amount and the other claims made by the petitioner and allowing the counter claim with interest, as claimed by the first respondent.

For Petitioner : Mr.N.R.Chandran Senior counsel for
Mr.K.C.Ramamurthy

For Respondents : Mr.K.Bijai Sundar for R1
Mr.S.Krishnasamy for R2

ORDER

This petition has been filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the "Act"), to set aside the Arbitral award, dated 07.07.2004, passed by the Arbitral Tribunal in claim petition No.1 of 1999, between the petitioner and the respondent. The petitioner is a Government of India undertaking company called 'MMTC Limited', and the first respondent is M/s.Sanco Tans Limited, stevedoring, clearing and forwarding agent. Though the Hon'ble Arbitrator has been impleaded as second respondent, he is neither a proper nor necessary party in this proceedings and accordingly, deleted from the cause title. The parties in this order, are referred to as the 'petitioner' and the 'respondent'.

2. The petitioner invited tenders for handling of fertilizers at Madras Port, for a period of one year till 30.06.1996. The respondent was one of the participants in the tender. The petitioner communicated the terms and conditions of the tender and directed the respondent to agree to the said terms. By reply dated 27.07.1995, the respondent addressed the petitioner enclosing the signed copy of the terms and conditions and also mentioning about the facilities available with them and their past experience. Ultimately, the respondent was awarded the tender and a letter of intent was issued on 01.08.1995 for the period from 1st August 1995 to 31st July 1996, at the approved rates for operation as given in the annexure to the said letter. All terms and conditions furnished prior to tendering and the terms and conditions of the proposed agreement for the work, were stated to apply in respect of the said offer. The respondent was requested to give offer of acceptance which was done by them on 02.08.1995. An agreement was entered into between the petitioner and the respondent on 15.09.1995, which essentially contains two items namely 1) stevedoring; and 2) stevedoring and transport of fertilizer to godowns, stitching, bagging etc., and booking of bagged fertilizer by rail/road for different destinations. The third set of conditions were general terms and conditions applicable to both works. The product which was required to

be cleared and transported, was being imported from Israel, pursuant to a contract entered into between the petitioner and M/s. Dead Sea Works Ltd., Israel, for import of 1,25,000 MT of Nutriate of Potash (MOP). Out of the said quantity, 26,180 of MOP was despatched by the vessel mv VITAJoy. The scheduled time of arrival of the said vessel at the Chennai Port was on 05.09.1995, but the vessel berthed at JD-5 on 30.09.1995. The dispute between the parties, which is subject matter of this petition is largely on two heads, namely, demurrage and discolouration of the fertilizer. Of the two, the demurrage claim is substantial and the other is minimal and the petitioner has challenged/supported the award primarily on these two heads. Therefore, this Court can safely conclude that the dispute that has to be resolved is whether that the award could be faulted on these two heads.

3. As mentioned earlier, the vessel berthed at the Chennai Port on 13.09.1995, and upto 15.09.1995, it is alleged that only 1525 MTS of MOP was despatched. The petitioner's case is that on account of the poor performance and non-adherence to the minimum quantity agreed to be despatched in terms of the agreement namely, 1500MT per day, the vessel was pulled out of the berth by the Chennai Port Trust and was made to anchor outside the berth and was granted permission to

re-berth only on 31.10.1995 on and undertaking given by the respondent on 03.10.1995, that re-berthing being ordered, they will discharge the entire cargo. The substantial quantity of the cargo was discharged on 04.11.1995, on which date, due to cyclonic weather, the vessel was directed to move out of the berth and allowed to be re-berthed on 11.11.1995. The entire cargo was discharged on 21.11.1995.

4. The supplier of the cargo had demanded demurrage charges for the delay in offloading the cargo and idling of the vessel. It appears that the Board of Directors of the petitioner took a decision not to accede to the demand of the supplier, largely based on a letter given by the respondent stating that no demurrage is payable and that the matter should be contested by way of arbitration. Nevertheless payment was effected to the supplier, which is now being fastened on the respondent. It may not be necessary to refer to the correspondence between the parties, but suffice to note that the dispute arose between them and the matter was referred for arbitration and the Arbitral Tribunal chosen by the petitioner was agreed to by the respondent. Before the Arbitral Tribunal, the petitioner claimed demurrage charges of Rs.1,02,07,200/- and for loss suffered due to discolouration and

shortage in total sum of Rs.1,03,02,926.00ps and there was a counter claim by the respondent towards handling charges and the interest for the period from 22.11.1995 to 05.03.1999 at Rs.1,19,23,448/-. As against the claim, the Arbitral Tribunal awarded Rs.40,00,000/- and on the counter claim awarded Rs.1,34,87,000/-.

5. Mr.N.R.Chandran, the learned Senior counsel appearing for the petitioner challenged the impugned award on the following grounds:-

a) the arbitration proceedings commenced with the filing of the claim petition on 05.03.1999, and concluded with the filing of the reply arguments by the claimant on 26.09.2002 and after nearly two years, the award was passed on 07.07.2004 and this delay is sufficient to set aside the award. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Bhagwandas Fatech and Daswani & Ors., vs. HPA International & Ors.***, reported in ***(2002) 2 SCC 13***, and the decision of this Court in the case of ***Thomas Kuruvilla vs. Canara Bank & ors.***, reported in ***2015 (5) CTC 741***.

b) the cargo, which was MOP, was stored in the Chennai Port adjacent to coal and since the cargo was not covered by the respondent, due to wind, coal got deposited on the MOP causing discolouration and

also resulted in shortage, thereby causing loss to the petitioner, which is recoverable from the respondent.

c) the respondent cannot claim that the deposit of coal on the MOP or shortage were "acts of God" and what can be prevented, cannot be termed of 'act of God'. To support the said contention, the decision of the Hon'ble Division in the case of ***P.K.Kalasami Nadar vs. K.Ponnuswami Mudaliar & Ors.,*** reported in ***AIR 1962 Madras 44*** was relied on.

d. In terms of the agreement between the parties, the respondent had to ensure minimum daily discharge rate of 1500MTS per day per vessel and this was not achieved by the respondent and between 13.09.1995 and 15.09.1995, only 1525MTs was discharged and due to the poor discharge, the ship was pulled out of the berth and was compelled to anchor outside which resulted in demurrage being charged by the supplier. The fact that on being re-berthed on 31.10.1995 within four days, the respondent was able to despatch the entire cargo, which is sufficient to hold that the removal of the vessel from the berth was due to default of the respondent in complying with the terms and conditions of the agreement.

e) the impugned award is a non-speaking award with mere repetition of the written arguments and no objective consideration has

been given, which would vitiate the award, as it is against the public policy of India.

On the above grounds, the learned Senior counsel sought for setting aside the impugned award.

6. Mr.K.Bijai Sundar, learned counsel for the respondent countered the submissions on the following lines.

i) in the grounds of the Original Petition, more particularly, paragraph 7, the petitioner has not specifically raised the issue relating to delay, the Original Petition has been pending since 2006, no additional grounds were raised and such a plea cannot be raised after 11 years during the course of oral submission;

ii)without prejudice to the above submission, delay by itself cannot be a reason to set aside the award, especially when, the arbitration proceedings pertained to a contract under the maritime laws, a specialised subject. Voluminous documents were placed before the Arbitral Tribunal; witnesses were examined and cross examined; elaborate written submissions were made and therefore, the alleged delay cannot be a ground to set aside the award. To support his contentions, the learned counsel referred to the decision of the Hon'ble Delhi High Court in the cases of ***Peak Chemical Corpn., Inc., vs.***

National Aluminium Co., Ltd., in O.M.P.No.160 of 2005, dated 07.02.2012; Union of India vs. Niko Resources Ltd., & Anr., in O.M.P.No.192 of 2010, dated 02.07.2012; and Oil India Limited vs. Essar Oil Limited in OMP.No.416 of 2004, dated 17.08.2012.

iii) The award is a speaking award; elaborate reasons have been given; documents have been referred to and discussed; uncontroverted evidence has been relied upon and by reading the award in bits and pieces and stating that it is a verbatim repetition of the written arguments, is not tenable and the Court cannot go into the sufficiency of the reasoning and would test the award based on the discussion and the material evidence available before the Arbitral Tribunal.

iv) the condition regarding the quantity to be discharged is only an average discharge rate and it is not mandated minimum guaranteed quantity and if two interpretations are possible in a same contract, the one which is favourable to the party, who has not drafted the contract should be given and the rule contra-proferendum should be applied to the instant case.

v) the performance of the respondent could not have been gauged within three days between 13.09.1995 and 15.09.1995 and the reason for pulling out the ship is not on account of the low discharge of the cargo, but on account of the size of the vessel and the draft was more

than 33feet and unless the draft was brought down, the vessel could not be berthed and there were several vessels of the same size, which had to be provided suitable berth and the reason assigned by the petitioner is unsustainable;

vi) apart from the respondent, there were two other parties namely, the steamer agent and the protection agent, whose role is very important and they have been left scot free and the respondent alone has been proceeded with;

vii) the demurrages claimed by the seller was paid by the petitioner in spite of the protest by the respondent not to effect payment. Though the Board of Directors of the petitioner took a decision not to pay the money to the seller by way of demurrages, the then Managing Director of the petitioner appears to have taken a stand and paid the money, which is now sought to be mulched on the respondent.

viii) the discolouration alleged to be on account of the deposit of coal dust is beyond the control of the respondent, however, the respondent's case is that there was no negligence in handling of cargo and the discolouration is possible, as the MOP cargo is hydroscopic in nature having a tendency to absorb moisture.

ix) the award passed by the Arbitral Tribunal, is a reasoned award and if the entirety of the award is carefully perused, it could be seen that all the contentions have been considered and the claim as well as counter claim was not allowed in its entirety, but reasons have been recorded, while discussing each and every claim and merely because in certain portions of the award, the written submissions of the both the parties have been referred to, it cannot be stated that the award is without reasons. In support of such a contention, reliance was placed on the decision of the Hon'ble Delhi High Court in the case of ***P.Dhandapani & Anr., vs. The Motor and General Finance Ltd.,*** reported in ***2006 (2) ARBLR 274 Delhi***, and the decision of the Calcutta High Court in the case of ***National Highway Authority of India vs. Gammon India Ltd.,*** in FMA 2536 of 2013, dated 21.08.2014.

x) The judgments relied on by the petitioner are judgments under the Code of Civil Procedure pertaining to a common career liability, which is very strict and the decisions are distinguishable on facts.

7. In reply, the learned Senior counsel appearing for the petitioner submitted that while the ship was shifted out of the berth, the respondent did not object to the same and only after obtaining a letter

of undertaking, Exhibit C-20, the ship was allowed to re-berth, after which, the entire cargo was discharged in four days, which shows that the respondent was liable for the delayed discharge of cargo and liable to pay demurrages. The learned Senior counsel referred to Section 31(3) of the Act and submitted that only under the two contingencies contemplated under sub-section (3) of Section 31, reasons need not be given and both contingencies are not contained in the contract entered into between the parties. Therefore, the Arbitral Tribunal was bound to give reasons, which has failed to do and therefore, the award is liable to be set aside.

8. Heard the learned counsels appearing for the parties and carefully perused the materials placed on record.

9. The first issue to be decided is whether the impugned award is vitiated on account of delay. In my considered view the delay in such cases is not only physical running of time. The Courts have held that the Arbitral Tribunal should adopt a judicious approach by observing principles of natural justice and set out reasons in support of its conclusion, unless otherwise agreed upon. Equally well settled is to principle that the delay or latches, cannot be a sole ground to throw out

a proceedings and the same cannot be decided in the abstract without reference to the facts and circumstances of the each case. The petitioner cannot and will not deny the fact that the arbitration proceedings pertained to a specialised subject relating to maritime laws. On behalf of the petitioner two witnesses were examined as CW-1 & CW-2 and 50 documents were marked as Exhibits C-1 to C-50. On behalf of the respondent, one witness was examined as RW-1 and 39 documents were marked as Exhibits R-1 to R39. From the list of dates furnished, it is seen that immediately upon the filing of the proof affidavit of CW-1, within three months, cross examination was done and completed within less than a month and after proof affidavit of CW-2 was filed, cross examination commenced and completed on 03.11.2000 and all the 50 documents were marked by the petitioner through CW-2. Proof affidavit of the respondent was filed, even prior to filing of the proof affidavit of CW-2, as it was filed on 06.05.2000. However, the cross examination of the respondent was commenced only on 05.12.2000, and went on for almost one year. Admittedly, the cross examination had to be done by the petitioner and therefore, the time spent for cross examination of the respondent should be solely attributable to the petitioner. After about one month after cross examination of the respondent, once again, it appears that the there

was re-examination of the respondent and documents were marked and the written arguments and reply arguments were submitted and orders were reserved by the Arbitral Tribunal during the end of September 2002 and the award was passed on 07.07.2004.

10. As pointed out by the learned counsel for the respondent, unlike the Arbitration Act, 1940, the 1996 Act does not provide any time limit for passing the award, though the time limit has been introduced in the 2015 Act by insertion of Section 29A. However, the impugned award being under the 1996 Act, there is no time limit fixed for passing the award. However, if according to the petitioner, the delay was inordinate, then the Act provides for a remedy under Section 14, which obviously the petitioner did not invoke. In such circumstances, the Delhi High Court in ***Niko Resources Ltd., & Anr.***(supra) held that given the scheme of the Act, it may be appropriate to exhaust the remedy under Section 14(2) before the stage of challenge to the award. Further, that delay *per se* is not identified, as one of the grounds under Section 34 of the Act and it should be shown that the award suffered from patent illegality on account of such delay. After referring to the decision in ***Peak Chemical Corpn., Inc.***,(supra), it was held that notwithstanding the delay, if the impugned award has comprehensively

dealt with all submissions made by the parties, the same should weigh with the Court. On facts, this Court is convinced that the alleged delay *per se* has not vitiated the award and the petitioner has miserably failed to show that the award suffered from patent illegality on the ground of such delay.

11. Apart from that, the petitioner has not raised this ground of challenge in the petition and in the decisions of the Delhi High Court referred *supra*, atleast by way of an amendment petition, additional grounds could have been raised, attacking the award on the ground of delay. This has also not been done by the petitioner. Hence, for all the above reasons, the first contention raised by the petitioner is liable to be rejected and accordingly, decided against the petitioner.

12. The other aspect of the matter, as projected by the petitioner and as argued by the learned Senior counsel, touch upon the factual matrix. The question would be whether in a petition under Section 34, this Court can re-examine the factual findings, re-appreciate the evidence or go into the sufficiency of the findings. The answer to the question should only be in the negative. However, leaving this issue to be discussed later, the Court proceeds to consider the main challenge to

the impugned award, as being devoid of reasons, lack of objective consideration, failure to discuss the claims and the award being a replica or a repetition of the written arguments. The learned counsel for the petitioner had taken trouble of making photocopy of the impugned award and has marked with green and red ink, the portions which have been extracted verbatim from the written arguments. Therefore, the contention of the petitioner is that the award being a non-speaking award, mere extraction of the claim and defence is liable to be set aside. Written submissions are received by Courts, Tribunals, Arbitrators etc., largely for two purposes, firstly to facilitate the parties to put their submissions, both factual and legal in a concise manner and it is a well marinated, result of the oral submissions.

13. One of the grounds raised by the petitioner is that the Arbitral Tribunal merely extracted the claim and defence and there is no discussion. However, what has been quoted in the impugned award is not the claim of the petitioner or the defence, but the written submissions of the respective parties, which is the extract of the oral submissions or in other words, the contentions which they have put forth before the Arbitral Tribunal. Therefore, to say that the Arbitral Tribunal committed grave error in quoting from the written arguments is a plea

to be rejected. The Courts and Tribunals, while referring to the contentions raised them, have invariably even adopted the language used by the respective counsels or the phraseology adopted in the pleadings. Therefore, I find there is no error in the manner in which the Arbitral Tribunal has proceeded to set out the claims, the counter claims, contentions advanced, defence raised etc. Therefore, the said contention raised by the petitioner deserves to be outrightly rejected.

14. On a plain reading of the impugned award shows that the Arbitral Tribunal after elaborately referring to the contentions, the documents, the evidence of the parties and in the process of making such references, while referring to the written arguments, has rendered its findings, observations under each of the contentions raised. Therefore, to read the impugned award only from paragraph 61 is highly improper and to test the validity of the award, the award should be read in its entirety and this is an elementary principle of law, while testing the correctness of any order or judgment, as in the instant case an award of an Arbitral Tribunal.

15. After elaborately discussing the contentions raised and making observations touching upon the merits, the Arbitral Tribunal proceeded

to deal with the issues. Issue Nos.1, 3 & 6, issue Nos.2,4&5 were dealt together and the other issues were dealt separately.

16. As held in ***P.Dhandapani & Anr.,*** (supra), what is required to be kept in mind is that an Arbitrator is not like a Court, which writes a judgment and what is required to be done is that the thought process of the Arbitrator should be available from the reasons set out.

17. In ***National Highway Authority of India vs. Gammon India Ltd.,*** (supra), Calcutta High Court considered the various decisions on the said point and pointed out that the modern tendency, more especially in commercial arbitration is to endeavour to uphold awards of skilled persons that the parties themselves have selected to decide the question at issues between them. If an Arbitrator has acted within the terms of his submissions and has not violated any rules, such as rules of natural justice, Court should be slow to set aside the award. In the instant case, the Arbitral Tribunal was appointed by the petitioner and accepted by the respondent without demur. The arbitration being a commercial arbitration involving maritime laws, clearly reveals the thought process of the Arbitral Tribunal in the light of the discussions, which have to be culled out not only from paragraph 61 onwards, but

from the earlier paragraphs as well and this would be an appropriate way to read the impugned award. However, to establish the same, it may not be necessary for this Court to extract certain findings of the Arbitral Tribunal, as this is vivid on a reading of the award itself. Regarding the negligence of handling of the cargo, the alleged discolouration, the Arbitral Tribunal has referred to Exhibits C-28 & C-22 etc., and rendered a finding.

18. Likewise, portion of the claims and counter claims have been also rejected and the respondent has not challenged that portion of the award which went against them.

19. With regard to the condition in the agreement whether the quantity of 1500MTs was a mandatory limit, the Arbitral Tribunal has recorded a factual finding that the respondent was not consulted before settling the demurrage claim of the overseas supplier. In paragraph 52 of the award, the Arbitral Tribunal has referred to Exhibits C-46, C-47, & C-48 and the respondent's letters dated Exhibits R-15, & 17 and therefore, the conclusion arrived at by the Tribunal in that regard cannot be stated to be devoid of reasons. However, it appears that the respondent accepted to pay 20% of the demurrage charges and when

the Court queried the learned counsel for the respondent, it is submitted that the respondent being a large commercial organisation, did not want to precipitate the matter further and agreed to accept 20% of the demurrage charges, which comes out to Rs.20.41 lakhs.

20. The Arbitral Tribunal has also referred to the dates as well as the contentions raised that between 13.09.1995 and 15.09.1995 only 1525MTS was discharged.

21. The learned Senior counsel for the petitioner by referring to Exhibit C-20, letter written by the Chennai Port Trust submitted that the ship was pulled out of the berth only because of poor unloading performance. The Arbitral Tribunal has taken into consideration the plea raised by the respondent with regard to the "draft", and their specific case that the vessel had a 33feet draft and to be berthed the draft had to be reduced and there were other ships of the same size berthed outside. The Arbitral Tribunal considered the oral and documentary evidence placed in that regard and concluded that the petitioner/claimant was responsible for the delay. However, this finding in issue No.16, should not be read in isolation, but should be read along with the findings on issue Nos.12 to 15, which specifically holds that in

spite of the request of the respondent to furnish the charter party conditions, the same were not furnished. Furthermore, even before the Arbitral Tribunal, it was not provided.

22. With regard to discolouration, the Arbitral Tribunal rendered a factual finding that the inherent nature of the cargo is also reason for discolouration. The shortage was held to be within the permissible limits and a finding has been given that there is no joint survey made at both the places. The reasons assigned for the counter claim are also just and proper.

23. In the light of the above discussion, the Court finds that the impugned award is a reasoned award and calls for no interference. In the preceding paragraphs, this Court pointed out about the scope and jurisdiction of intervention of the Court under Section 34 of the Act in ***ONGC Ltd. Vs. Saw Pipes Ltd. [reported in 2003 (5) SCC 705]***, wherein the scope of the court's jurisdiction under Section 34 of the Act was considered. The Hon'ble Supreme Court considered the meaning that can be assigned to the phrase 'public policy of India' occurring in Section 34(2)(b)(ii) of the Act being alive to the subtle distinction in the concept of "enforcement of the award" and "jurisdiction of the court in

setting aside the award" and the decision in **Renusagar Power Co. Ltd. Vs. General Electric Co. [reported in 1994 Supp. (1) SCC 644]**, and held in **Saw Pipes Ltd.**, as follows :-

"The term 'public policy of India' in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34, this Court said that the expression 'public policy of India' was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category - patent illegality - for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court."

24. Intervention of the Court is envisaged only in few circumstances to ensure fairness, eliminate bias, and violation of principles of natural justice, etc., and the Court, exercising power under Section 34, does not act as an appellate authority over the award

passed by the Tribunal and it cannot correct errors of the Arbitral Tribunal. Admittedly, in the instant case, the challenge to the impugned award is not on any of these grounds.

25. For all the above reasons, the petitioner has not made out any grounds to interfere with the impugned award. Accordingly, challenge to the impugned award dated 07.07.2004, fails and this Petition is dismissed.

16.02.2017

pbn
Index : Yes/No
Internet:Yes/No

To

- 1.M/s.Complex Pile Foundations,
Rep., by its Sole Proprietor,
Mr.K.Ramachandran,
presently having office at No.19/10,
Thalamuthu Street,
Annai Anjugam Nagar, GKM Colony,
Chennai – 600082
- 2.Mr.Hon'ble Justice A.S.Venkatachalamoorthy
(Former Chief Justice – High Court of Chattisgarh)
No.V-87 V Avenue,
Anna Nagar, Chennai - 600040

T.S.SIVAGNANAM, J.

pbn

Pre-Delivery Order in
O.P.No.20 of 2006

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