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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 29/2015

STEEL AUTHORITY OF INDIA LTD.

..... Petitioner

Through: Mr. A.K.Ganguli, Senior Advocate with
Mr. Shaiwal Srivastava and Mr. Arunabh Ganguli,
Advocates.

versus

GREAT EASTERN SHIPPING COMPANY LIMITED... Respondent

Through: Mr. Amitava Majumdar, Mr. Arvind
Kumar Gupta, Mr. Abhishek Goyal and Mr. Arjun
Mittal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

28.02.2017

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Steel Authority of India Ltd. ('SAIL') is to an Award dated 30th June 2015 passed by the Arbitral Tribunal ('AT') in the disputes between SAIL and the Respondent Great Eastern Shipping Company Limited ('GE Shipping').

2. This is actually the third round of litigation between the parties.

Background facts

3. The background facts are that GE Shipping, which is in the business of operating vessels, which are let out for carriage of goods by sea, is the owner of a vessel M.V. Jag Riddhi. GE Shipping entered into a Charter

Party (CP) contract with SAIL on 19th December 2007 in terms of which GE Shipping undertook to transport 47,000 metric tons ('MTs') (5% more or less at the option of GE Shipping) of coking coal in the above vessel from Haypoint Australia to 1/2 safe Berth(s) Visakhapatnam/Paradip/Haldia in India.

4. M.V. Jag Riddhi was loaded with a cargo of 47,102 MTs at Haypoint on 18th January 2008. It arrived at Visakhapatnam and issued a notice of readiness ('NOR') at 0930 hours on 5th February 2008 for discharge of the cargo at Visakhapatnam. According to SAIL, all four hooks were not ready for supply when the NOR was issued. It is claimed that cargo in Hatch-I and Hatch-II were not accessible to SAIL at the port of discharge at the material time. Therefore, the NOR could only be accepted at 1430 hours on 16th February 2008. Thereafter it discharged 24,938 MTs of the cargo. It then proceeded to Haldia where the balance of cargo was discharged. The discharge was completed on 20th February 2008.

The first round of litigation

5. GE Shipping invoked the arbitration clause in the CP which contemplated the disputes arising thereunder being settled in accordance with the provisions of the Act and under the Maritime Arbitration Rules of the Indian Council for Arbitration ('ICA') and the Arbitrators were to be 'Commercial men'. GE Shipping nominated Captain S. M. Berry as its Arbitrator. SAIL nominated Shri R.S. Saran as its Arbitrator. The two Arbitrators jointly nominated Shri H.N. Singh as the third Arbitrator. GE Shipping filed a claim for the sum of Rs.1,23,28,252.20 as discharge port demurrage and Rs.1,04,87,542.91 as balance freight.

6. By an Award dated 7th/10th May 2010, the AT held that SAIL should refund to GE Shipping Rs. 13,47,917 being the sum in excess deducted by them from the freight. However, the AT rejected GE Shipping's claim for demurrage and balance freight. Incidentally, the above sum constituted the admitted liability of SAIL before the AT. The AT held as under:

(i) The statement of facts (SOF) indicated that "full discharging equipment was not ready when notice was tendered. Nor was it available for use when required on berthing. Therefore, NOR tendered on 5.02.2008 was not a valid notice."

(ii) In the time sheet, GE Shipping had conceded the pro rata deduction even before the berthing of the ship. In fact in the time sheet there was an admission by GE Shipping that all the four hooks were not ready 'in every respect' when the NOR was given. The exception clause came into application only after the commencement of the lay time and not before that. The surveys arranged corroborate the deficiency with regard to Cranes No.1 and 3.

(iii) As far as Vizag was concerned, lay time would count from 0245 hours to 1430 hours on 12th February 2008. After accounting for the breakdowns and for the pro rata deductions, the charterers on 12th February 2008 used an additionally time of about 5 hours 36 minutes after commencement of discharge. The lay time used at Vizag was, therefore, 2 days 11 hours and 43 minutes.

(iv) The calculation of the GE Shipping for the lay time used at Haldia as 1 day 2 hours and 45 minutes was correct.

(v) The claim of the GE Shipping for demurrage and balance freight did not survive. In terms of the lay time allowed and used and the dispatch amount deducted in excess, it was held that SAIL required to refund to the GE Shipping Rs.13,47,917 together with interest @ 8% per annum from 19th June 2008 till

the date of the Award. SAIL was also directed to pay interest at 8% per annum on the balance of the 10% freight amounting to Rs.72,22,959 that was withheld from 20th May 2008 to 4th March 2009.

7. The aforementioned Award was challenged by the GE Shipping in this Court by filing OMP No. 582 of 2010 under Section 34 of the Act. By a judgment dated 9th May 2012 (*Great Eastern Shipping Company Limited v. Steel Authority of India Limited 2012 IV AD (Del) 655*), this Court set aside the Award dated 10th May 2010 of the AT by holding as under:

(i) Between the dates when the NOR was given and the time that the ship berthed, there was no inspection undertaken to show that the vessel was not ready to discharge cargo when the NOR was issued.

(ii) It was not as if all the equipments of the ship were non-functioning for discharge. In terms of the SOF, at the time of commencement of discharge, Grabs-I and II were under repair as a result of which Hatch-I could not be opened. Therefore, 50% of the cargo was able to be discharged and a pro rata discount was given as regards lay time.

(iii) The expression 'ready in all respects' in Clause 33 had to be interpreted in the context of readiness to 'discharge' and not to 'load'. It also had to be interpreted in the context of the fact that the CP was a port charter and not a berth charter and that Clause 38 of the CP provided for *pro rata* discount in lay time to the extent any of the equipments were non-functional.

(iv) Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time the NOR was served. This was a question of fact which had to be established by the party alleging it. It was not a matter for surmise and conjecture. Nothing was placed on record before the AT by SAIL to show that at the time of issuance of NOR by the master of the vessel none of the equipments on board were working. Therefore, it was erroneous for the AT to conclude that the NOR was not valid.

(v) The ship's gears did not have to be shown to be functional at a time when it was not physically possible for her to commence discharge. This view would be consistent with a harmonious interpretation of Clauses 33 and 38 of CP which envisaged *pro rata* reduction in the lay time. Factually, there was a *pro rata* reduction given in the lay time in the present case as was evident from the time statement itself.

(vi) The conclusion of the AT that when the NOR was issued, the ship was not ready in all respects was not based on evidence but on conjecture. The Award suffered from a patent illegality. It was on the basis of a misreading of the documents placed on record. Therefore, the AT's rejection of the claim of GE Shipping for demurrage and balance freight cannot be sustained on law. That portion of the impugned Award was accordingly set aside.

8. This Court by the said judgment dated 9th May 2012 allowed OMP No. 582 of 2010 with costs of Rs.20,000.

Second round of litigation

9. Thereafter GE Shipping sent a letter dated 20th July 2012 to the Secretary of the Indian Council of Arbitration ('ICA') invoking the arbitration clause and stating that the disputes had arisen between it and SAIL. In terms of the Maritime Arbitration Rules of the ICA ('MAR'), GE Shipping enclosed a statement of claims. It also nominated Mr. V.K. Gupta as Arbitrator.

10. In terms of the MAR, ICA wrote to SAIL on 16th August 2012 asking SAIL to nominate an Arbitrator from the ICA's Maritime Panel of Arbitrators within 30 days failing which SAIL's nominated Arbitrator would be appointed by the Maritime Arbitration Committee under Rule 10(3)(b) of the MAR of ICA. SAIL was asked to respond to the claims filed by GE Shipping and deposit the requisite costs.

11. By its letter dated 5th September 2012, SAIL sought extension of time till 29th September 2012 for submitting the defence statement, the name of the Arbitrator and the arbitration fees. However, SAIL thereafter sent another communication on 20th September 2012 to the ICA by email in which it contended that a *de novo* arbitration was not permissible. According to SAIL, with the Award having been passed in the first round in respect of the same disputes arising out of the same contract, GE Shipping had exhausted the provision for reference of disputes to arbitration.

12. In view of the failure by SAIL to appoint its Arbitrator and pay the costs, ICA on 20th August 2012 granted it a final opportunity for compliance till 11th January 2013 for naming the arbitrator and till 6th February 2013 for payment of its share of arbitration costs. With SAIL failing to avail the above opportunity, ICA wrote a letter dated 9th April 2013 informing SAIL as to the constitution of the AT. ICA appointed one Shri Gajendra Singh Sahni as an Arbitrator on behalf of the SAIL. The two Arbitrators then appointed Shri Ashok Sharma as the Presiding Arbitrator of the AT.

Writ proceedings by SAIL: Single Judge

13. Meanwhile SAIL filed Writ Petition (C) No. 3013 of 2013 against ICA and GE Shipping in this Court under Article 226 of the Constitution challenging the appointment of an Arbitrator on its behalf by ICA. GE Shipping questioned the very maintainability of the writ petition and also submitted that the principles of *res judicata* were not applicable. It was pointed out that while the Award dated 7th May 2010 passed by the AT was set aside by this Court by the judgment dated 19th May 2012, the disputes

were not finally adjudicated. It was pointed out that once the Court had decided to set aside an Award under Section 34 of the Act it had no power to pass further directions to remand the matter to the AT. Reliance inter alia was placed on the decision of the Supreme Court in ***McDermott International v. Burn Standard Corporation Ltd. (2006) 11 SCC 181.***

14. The learned Single Judge who heard the aforementioned writ petition formulated the three questions for determination:

(1) Whether in the facts and circumstances any interference with the arbitration proceedings pending between GE Shipping and SAIL is warranted by this court in proceedings under Article 226 of the Constitution of India;

(2) Whether the arbitration proceedings initiated by GE Shipping are maintainable, given that the proceedings are in respect of disputes that have been the subject matter of an earlier arbitration award, which was set aside under Section 34 of the Act; and

(3) Whether the appointment of Arbitrators to the Arbitral Tribunal by ICA is illegal and contrary to the provisions of Section 11 of the Act.”

15. By the judgment dated 16th November 2015, in Writ Petition (C) No. 3013 of 2013 (***Steel Authority of India Limited v. Indian Council of Arbitration***), the learned Single Judge held as under:

(1) The appointment of an Arbitrator in terms of the agreed procedure was

not a judicial function. ICA had merely acted in terms of the contract between the parties. Since the action was purely contractual, no interference under Articles 226 and 227 of the Constitution was called for.

(2) Even assuming that “ICA was a State, its actions in the private law domain could not be subject to judicial review unless it was shown that such actions offend any of the constitutional guarantees.” Consequently, the petition was not maintainable.

(3) The contention that ICA had usurped the power of the Chief Justice in constitution of the AT was bereft of any merit and contrary to the plain meaning of Section 16 of the Act. The AT had been constituted, in terms of the procedure agreed to between the parties.

(4) After the decision dated 9th May 2012 passed by this Court in OMP No. 582 of 2010, GE Shipping’s claims survive and cannot be said to have been finally decided. Therefore, the principle of *res judicata* did not apply. As long as the disputes covered under the arbitration agreement remained unresolved, parties would be free to take recourse to arbitration of the said disputes and the either party would be contractually bound to submit the disputes for arbitration. The claims made by GE Shipping arose under the CP and thus covered under clause 57 of the CP i.e. the arbitration agreement.

(5) Following the decision of the Supreme Court in ***McDermott International*** (*supra*), a Division Bench (DB) of this Court had in ***Puri Construction Pvt. Ltd. v. Larsen & Toubro Ltd.*** ***Manu/DE/1316/2015*** held that “the power to modify, vary or remit the Award does not exist under Section 34 of the Act.” It was, therefore, no longer open for SAIL to contend that since this Court did not remit under Section 34 of the Act, the disputes therein could not be referred to a *de novo* arbitration.

(6) The decision in ***McDermott International*** (*supra*) held that once an Award has been set aside the parties would be free to start the arbitration once again. There was merit in the contention of GE Shipping that the writ petition was filed only to obstruct and delay the final resolution of the claims

of GE Shipping. The conduct of SAIL has been “less than fair; it has sought to delay the adjudication of the claims made by GE Shipping and resile from its contractual agreement for resolution of disputes through arbitration. In my view, the present proceedings are an abuse of process of this Court.” The writ petition was dismissed with costs of Rs. 75,000.

Writ proceedings by SAIL: Appeal before the DB

16. Aggrieved by the above decision, SAIL filed LPA No. 103 of 2016 before the Division bench of this Court. By a decision dated 28th March 2016 in LPA No. 103 of 2016 (***Steel Authority of India Limited v. Indian Council of Arbitration***), the DB dismissed the appeal.

17. The DB reiterated that after the Award was set aside by the Court, the parties could again invoke the arbitration clause. In particular the DB held as under:

“17. The decisions of the Division Benches of this Court in ***National Highways Authority of India v. ITD Cementation India Ltd. 2008 (100) DRJ 431 (DB)*** and ***BSNL v. Canara Bank 169 (2010) DLT 253 (DB)*** holding that the power to remit disputes back to the Arbitral Tribunal is envisaged in Section 34(4) of the Arbitration and Conciliation Act, 1996 cannot be understood to have laid down that in the absence of such remand by the Court, the parties are precluded from invoking the Arbitration clause for settlement of the same dispute. As already mentioned above, we are of the view that in the event of the Arbitral award being set aside by the Court under Section 34, the dispute between the parties stands revived and the same can be settled in terms of the Arbitration clause under the agreement.

18. While considering the question whether a claim is barred by *res judicata* needs consideration in a proceeding under Section 11 of the Arbitration and Conciliation Act, it was held in ***Indian Oil Corporation Limited v. SPS Engineering Limited***

(2011) 3 SCC 507 that the question whether the claim is barred by the principles of *res judicata* has to be examined by the Arbitral Tribunal since a decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. It was also held that there can be no threshold consideration and rejection of a claim on the ground of *res judicata* while considering an application under Section 11 of the Arbitration and Conciliation Act.

19. On application of the said principle, it appears to us that it is not open to the appellant to raise an objection on the ground of principles of *res judicata* at the stage of nomination of the Arbitrators as provided under Maritime Arbitration Rules of ICA. Hence the respondent No.1/ICA was justified in considering the request of the respondent No.2 and proceeding further to appoint an Arbitrator on behalf of SAIL.”

Impugned Award by AT in the second round

18. It must be noticed at this stage that there was no stay of the arbitration proceedings during the pendency of either the Writ Petition (C) No. 3013 of 2013 or the LPA No. 103 of 2016. Meanwhile, the impugned Award was passed by the AT unanimously on 30th June 2015.

19. The AT in the impugned unanimous Award held as under:

(i) The only ‘commercial’ and ‘common sense’ interpretation of Clause 33 of the CP (the Time Counting Provision) could be that time starts to count 24 hours after service of NOR, whether the vessel is in berth or not-as long as the vessel can discharge, but not necessarily that it can discharge at the same rate as provided in the CP.

(ii) Clause 38 which deals with the consequence of breakdown of cranes, comes into play only after the lay time is commenced after the tender of

NOR-it does not come into play at the stage of tendering the NOR.

(iii) There is no provision in the entire CP which contemplates availability of minimum four functional cranes/grabs as a condition precedent to the tender or acceptance of a NOR. The contingency envisaged in Clause 38 and the guarantees in Clauses 41 and 42 do not invalidate the NOR nor do they stop the commencement of lay time. The consequence provided under the CP is limited to pro rata exclusion of the breakdown period for lay time.

(iv) If the owners are unable to provide the equipments in working order as envisaged in the contract, the discharge rate is reduced proportionately. However, commencement of lay time was entirely a different matter altogether. The question relating to commencement of lay time was different from the time relating to reduction of rate of discharge.

(v) The contention of SAIL that in order for the NOR to be valid, not only must all her cranes and grabs be ready when the NOR is tendered, they should also be ready to discharge cargo at the rate provided in the CP cannot be accepted.

(vi) The AT was bound by the interpretation in law as laid down in the decision dated 9th May 2012 in OMP No. 582 of 2010. The NOR was valid even if some of the cranes/grabs and other equipments on the ship required for discharging the cargo were functional.

(vii) Upon examining the evidence on record, it was concluded that the joint survey undertaken was in the context of the vessel efficiency which was discharged and not linked to the tender of NOR and/or to the commencement of lay time.

(viii) The report which was signed only by the surveyors appointed by SAIL could not be accepted as a joint survey report. There was no evidence to show that GE Shipping was invited to attend the survey. SAIL also made no attempt to prove the report by examining its officers.

(ix) The report could not have assessed the condition of the equipments at the time the NOR was served. The possibility of the malfunctioning of the cranes and grabs beyond the tender of the NOR on 5th February and at the time of survey on 14th February could not be ruled out.

(x) The burden of proof was primarily on SAIL. There is nothing to show that SAIL called upon GE Shipping to produce its test certificates and other records pertaining to the maintenance and efficiency of the equipments. Consequently, SAIL failed to prove that the vessel cranes/grabs were malfunctioning or defective.

(xi) On the basis of the joint SOF presented by the parties, the AT drew up a tabulated lay time statement and found that the vessel was on demurrage for 5 days 14 hours and 26 minutes and the agreed daily rate of Rs.20 lakhs per day and *pro rated* for part of a day, the GE Shipping was entitled to receive the sum of Rs.1,12,02,780 towards demurrage before deducting 1% Chartering Service Fee, as is provided in Clause 46.

(x) GE Shipping was entitled to interest on the balance freight and demurrage from 17th July 2008 till 2nd March 2009 (both days included) and, therefore, the amount on which interest is due at 11% per annum would stand reduced by Rs.72,22,959. SAIL was liable to pay GE Shipping Rs.3,59,552 towards costs of arbitration. It is also entitled to award interest @ 10% per annum from the date of Award till the date of payment if the sums due were not paid within 30 days.

De novo arbitration maintainable?

20. Mr. A.K. Ganguli, learned Senior counsel appearing for SAIL, first sought to assail the impugned Award on two of the grounds that have already been decided against SAIL by both the learned Single Judge in Writ Petition (C) No. 3013 of 2013 and the Division Bench in LPA No. 103 of 2016. These two grounds were:

(i) that there could not be a *de novo* arbitration after this Court by its judgment dated 9th May 2012 set aside the Award dated 7th May 2010 in OMP No. 582 of 2010 under Section 34 of the Act; and

(ii) the ICA could not have constituted a fresh AT in terms of the ICA Rules different from the one which heard the earlier disputes and passed the first Award without the consent of SAIL.

21. As already noticed hereinbefore, both the aforementioned were dealt with exhaustively in the judgment of the learned Single Judge in Writ Petition (C) No. 3013 of 2013 and of the DB in LPA No. 103 of 2016 which has become final. The Court, therefore, declines to permit SAIL to reopen the said two issues which have been decided against it.

Challenge on merits

22. It was then contended by Mr. Ganguli that the impugned Award suffers from patent illegality and from an erroneous and contradictory construction of the clauses of the CP which vitiated the Award in its entirety. It was further contended that GE Shipping ought to have led evidence to prove that on the day the NOR was served, the vessel was 'ready in all respects'. Mr Ganguli submitted that from the SOF it was plain that cranes/grabs were not working when the vessel berthed on 12th February 2008. The status of the vessel between 5th and 12th February 2008 was within the exclusive knowledge of the GE Shipping ought to have been proved by it by leading evidence. Reliance was placed on the decisions in *State of Rajasthan v. Kashi Ram 2006 (12) SCC 254*, *Sushil Kumar v. Rakesh Kumar 2003 (8)*

SCC 673 and Sarbananda Sonowal v. Union of India (2007) 1 SCC 174.

23. Mr Ganguli further submitted that admission by GE Shipping about the non-working of the cranes/grabs was binding on it. The burden was wrongly shifted by the AT on to SAIL to prove it. Reliance was placed on the decisions in ***Thiru John v. Returning Officer (1977) 3 SCC 540***, ***Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673*** and ***Divisional Manager, United India Insurance Company Ltd. v. Samir Chandra Chaudhary 2005 (5) SCC 784***. Reliance was also placed on the decision of the Full Bench of the Rajasthan High Court in ***Nagori Ibrahim v. Shahji Babumal AIR 1954 Raj 83 (FB)***.

24. Mr Ganguli further submitted that the AT had ignored the contractual terms and misconstrued Clauses 33 and 38 of the CP. He contended that until lay time commences, Clause 38 was not applicable. Conversely, the condition in Clause 33 that the vessel should be ready in all respects had to be fulfilled prior to application of Clause 38. The condition had to be read and understood in the context of what had been guaranteed under Clause 42 of the CP which was a matter of bargain between the parties. Reliance was placed on the decision in ***Bank of India v. K. Mohandas (2009) 5 SCC 313*** to urge that the well recognised principle of construction of a contract is that it should be read as a whole in order to ascertain harmony of its several clauses.

25. Mr. Ganguli submitted that the findings of the AT that there is no provision in the entire CP which contemplates availability of minimum four functional cranes/grabs as a condition precedent to the tender or acceptance

of a NOR was a perverse finding as it was totally contrary to Clauses 10 and 42 of the CP. According to him, the whole purpose of having minimum 4 grabs/4 cranes was that the same should be functional and should have the minimum prescribed capacity to discharge the cargo.

26. Mr. Ganguli submitted that the impugned Award was based on surmises and conjectures particularly when the AT held that the probability of malfunctioning of the equipments between 5th and 12th February 2008 “cannot be ruled out.” He submitted that there could also be a probability that even on 5th February 2008 the cranes and grabs were not functioning. Mr. Ganguli finally relied upon the decisions in *ONGC v. Western Geco International 2014 (9) SCC 263* and *Associate Builders v. DDA (2015) 3 SCC 49* to submit that the Award suffered from inconsistencies making it untenable and, therefore, the Award suffered from patent illegality. He reiterated that the burden of establishing that the vessel was ready in all respects was on GE Shipping and it led no evidence to prove that fact.

Submissions of Counsel for GE Shipping

27. Countering the above submissions it was submitted by Mr. Amitava Majumdar, learned counsel appearing for GE Shipping, at the outset that the threshold for interference by the Court with an Award under Section 34 of the Act is very high. Unless the Award is found to be opposed to the fundamental public policy of India, the Court should not interfere. *Inter alia* he placed reliance on recent judgment of the Supreme Court in *National Highways Authority of India v. ITD Cementation India Ltd. 2008 (100) DRJ 431 (DB)*.

28. Mr. Majumdar submitted that the impugned Award was a unanimous one passed by an AT comprising three Arbitrators who were experienced men in the maritime field. The entire evidence has been perused and factual finding has been rendered. He pointed out that SAIL has failed to show in what manner the Award is contrary to Indian law or policy.

29. Mr. Majumdar further submitted that the earlier judgment of this Court allowing the petition filed by GE Shipping under Section 34 of the Act and setting aside the Award dated 10th May 2010 attained finality since there was no challenge by SAIL to the said judgment. The grounds urged by SAIL on merits in the present petition have already been rejected by the Court earlier. It was, therefore, not open to SAIL to reject those very grounds to assail the impugned Award which was more or less on the lines of the decision of the High Court. In particular he submitted that the validity of the NOR has been upheld by this Court in the aforementioned judgment dated 9th May 2012. This fact was also recorded in the judgment dated 16th November 2015 passed by the Court dismissing SAIL's writ petition against the ICA.

30. Mr. Majumdar pointed out that the survey report relied upon by SAIL was not in conformity with Clause 41 of the CP. In the first place it was not a joint survey; it was conducted two days after the discharge operations commenced; did not bear the signature of the surveyor of GE Shipping and SAIL did not call upon GE Shipping to conduct any joint survey. It is in this context that the AT observed that SAIL had failed to discharge the burden of proving the joint survey report which was put forth by it in support of its

contention that the vessel was not ready to discharge the cargo.

31. Mr. Majumdar further pointed out that Clause 33 was a standard clause dealing with commencement of lay time. It did not state that all the vessel cranes and grabs must be ready in all respects when the NOR was tendered. It did insist that the vessel must be ready to discharge cargo at the rate provided in the CP. The partial non-availability of discharging did not disqualify readiness in all respects since vessel was still capable of discharging cargo. Further with the parties having agreed on a clause as to how the time has to be proportionately adjusted when there is partial non-availability in discharging cargo as recorded in the rider Clause 43 of the CP, the contention of SAIL is rendered untenable. Clause 38 read with Clause 42 of the CP had the effect of excluding lay time (proportionately if at all) only where the breakdown of cranes and gears actually affected the cargo. In the event of such breakdown only the actual discharge time would be proportionately reduced.

Analysis of the clauses of the CP

32. Before discussing the above submissions, the relevant clauses of the CP require to be examined. Under Clause 10, where the description of the vessel has been given it has been stated that the vessel has a minimum of 4x25 tons cranes and 4x10 grabs each of minimum 10 cubic meters capacity and accordingly the minimum capacity to discharge is 10,000 tons per day.

33. Clause 19 states that upon arrival of the vessel at the outer anchorage or at loadport, the Master of the vessel would serve a NOR provided that the

vessel was in all respects ready to load. The lay time does not commence until the vessel is in fact ready to load. Clause 33 which is the Time Counting Provision states: "At each discharging port, even if at second discharge port vessel arrives on demurrage, time to count 24 hours after Notice of Readiness is served on arrival of the vessel within port limits at each port of discharge and whether in berth or not and in free pratique and ready in all respects to discharge the cargo."

34. Clause 38 states that in case of breakdown of gears/cranes and other equipment of the vessel by reason of disablement of insufficient power etc., "the period of such inefficiency shall not count as laytime." Clause 41 envisages that "a joint survey would be conducted and survey report will be final and binding on the owners." Clause 42 sets out the owner's guarantee that there would be a minimum capacity on the vessel to discharge 10,000 tons per day for 24 consecutive hours. It envisages proportionate deduction of the rate of discharge.

Did the vessel have to be 'ready in all respects' for a valid NOR?

35. The question that arose for consideration, for the second time before the AT, was whether the interpretation of the above led to the requirement of the vessel having to be ready in all respects to discharge the cargo?

36. As regards interpretation of the clauses of the contract, following findings in the judgment dated 9th May 2012, which has attained finality, should be held to be binding on SAIL:

“17. In the present case, the expression ‘ready in all respects’ in Clause 33 had to be interpreted in the context of readiness to

‘discharge’ and not to load. It also had to be interpreted in the context of the fact that the CP was a port charter and not a berth charger and that Clause 38 of the CP provided for pro rata discount in lay time to the extent any of the equipments were non-functional. Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time the NOR was served. This was a question of fact that had to be established by the party alleging it. It was not a matter for surmise or conjecture. There is nothing placed on record before the Tribunal by the charterer to show that on the date of the issuance of the NOR by the master of the vessel, none of the equipments on board were working. Consequently it was erroneous on the part of the Tribunal to conclude that the NOR issued in the present case was not valid. In a port charter when such NOR is issued it is normally some days before the actual berthing. If some of the equipments were temporarily non-functional at the commencement of discharge, it did not mean they were in that position even when the NOR was issued. The portion of the passage in *Scrutton on Charterparties and Bills of Lading*, 17th ed. (1964) highlighted in the extract from ***Tres Flores*** supports the conclusion that the ship’s gears did not have to be shown to be functional at a time when it was not physically possible for her to commence discharge. This view would be consistent with a harmonious interpretation of Clause 33 and Clause 38 which envisages *pro rata* reduction in the lay time. Factually, in the present case, there has been a *pro rata* reduction given in the lay time, as can be seen from the time statement itself.”

37. Further the AT also has in the impugned Award on interpretation of the clauses come to the conclusion that there was no requirement under Clause 33 that all the cranes and equipments on board of the vessel must be ready at all times.

38. GE Shipping is right in its contention that the requirement of all four

cranes working is not a condition precedent under Clause 42 for issuance of a valid NOR. In any event, the parties had agreed that rate of discharge shall be reduced proportionately in case of any breakdown or deficiency. The key aspect as far as Clause 33 is concerned is that it deals with commencement of lay time and requires that the vessel must be in a position to discharge cargo and not that it must be ready to discharge at a particular time and at a particular rate. The Court, therefore, rejects the interpretation sought to be placed by the SAIL on expression 'ready in all respects' occurring in Clause 33 of the CP. The conclusion reached by the AT on the basis of the above interpretation of the clauses suffers from no illegality.

Re: shifting the burden of proof

39. As regards the observation of the AT that SAIL had failed to discharge the burden of making good its case that the vessel was not ready in all respects, it must be remembered that this was in the context of SAIL putting forth the Surveyor's report in support of the above submission. As rightly pointed out by the AT, SAIL failed to examine the Surveyor who prepared the report. SAIL was unable to counter the submission of GE Shipping that the report was in fact not a 'joint survey' report.

40. The reliance placed on the aforementioned decisions under the IEA by SAIL is misplaced for more than one reason. Under Section 19 (1) of the Act, the AT is not bound by the CPC or the IEA. Section 19(3) of the Act states that where the parties fail to agree on the procedure to be followed by the AT, the proceedings would be conducted by the AT "in the manner it considers appropriate." None of the decisions cited by SAIL before this

Court pertain to applicability of IEA in arbitration proceedings. In any event, it was SAIL which was seeking to rely on the Surveyor report in order to show that the NOR was not valid. It was, therefore, incumbent on SAIL to prove such Surveyor report to the satisfaction of the AT.

41. The Court finds nothing erroneous in the observation of the AT as regards the failure of SAIL to prove the Survey report. The fact that some of the cranes/grabs may not have been functional at the time of discharge cannot be construed to be an admission by GE Shipping that all the cranes and grabs were non-functional. The earlier judgment dated 9th May 2012, of this Court reaching the same conclusion has attained finality, are is binding on SAIL.

No ground made out under Section 34

42. None of the grounds of patent illegality as explained by the Supreme Court in ***ONGC v. Western Geco International (supra) or Associate Builders (supra)*** are attracted in the present case. On the other hand as held in ***National Highways Authority of India v. ITD Cementation India Ltd. (supra)***, the interpretation of the clauses of the contract by the AT should be taken to be final unless it is so perverse so as to shock the judicial conscience. Nothing in the impugned Award goes to attract any of the grounds under Section 34 of the Act as explained in the above decisions. In other words, SAIL has failed to show that the impugned Award is opposed to the fundamental policy of Indian law within the meaning of Section 34(2)(b)(ii) of the Act.

Conclusion

43. It must be recalled this is the third round of litigation at the instance of SAIL. The writ round which commenced with the filing of Writ Petition (C) No. 3013 of 2013 has been termed by the learned Single Judge in the judgment dated 16th November 2015 to be ‘an abuse of process of this Court’. Those observations were not interfered with by the DB when it dismissed SAIL’s LPA No. 103 of 2016 challenging the above judgment.

44. SAIL, however, has continued to persist with litigation notwithstanding the above observations. Considering that substantial costs have already been imposed on SAIL by the learned Single Judge while dismissing Writ Petition (C) No. 3013 of 2013, the Court refrains from imposing further costs on SAIL.

45. For all of the above reasons, the petition is dismissed.

FEBRUARY 28, 2017/dn

S. MURALIDHAR, J