

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.12.2017

DATE OF VERDICT : 03.01.2018

CORAM

THE HONOURABLE MR. JUSTICE **M.M.SUNDRESH**

O.P. No. 372 of 2008

M/s.Oil and Natural Gas Corporation

Limited rep. By its Executive Director,
Southern Region, CMDA Tower,
9th Floor, Egmore, Chennai – 8.

.. Petitioner

Vs.

1.M/s.Annam Steels rep. By its
Managing Partner C.Vijayakumar

2.Justice K.T.Thomas,
Presiding Arbitrator, Thadathil House,
Muttambalam (P.O.), Kottayam,
Kerala – 686 004.

3.Dr. Justice B.P.Saraf,
Arbitrator,Chambers:110A,
Vardhman Chambers,
Cawasjee Patel Street, Fort,
Mumbai – 400 001.

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4. Justice E. Padmanabhan,
Arbitrator,
No. 11, Madha Church Street,
Mandavelipakkam, Chennai – 28.

.. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 15.03.2008.

For Petitioner .. Mr. G. Masilamani,
Senior Counsel
For M/s. King and Patridge

For Respondents .. Mr. R. Thiagarajan,
Senior Counsel
For Mr. R. N. Amarnath

ORDER

The petitioner, being the respondent before the Tribunal, has filed this Original Petition seeking to set aside the Award passed.

2. The petitioner invited tenders for the sale of ship "DS SAGAR PRABHAT", a Drill Ship. The first respondent/claimant became the successful bidder. The parties were governed by special terms and conditions as well as general terms and conditions of tender. The relevant terms and conditions governing the parties are reproduced and dealt with hereunder:

2.1. **Clause 11 – INSPECTION**

Clause 11.3: The particulars of the ship are given in Annexures for ready reference, but without any guarantee for their correctness.

The Ship will be sold on "AS IS WHERE IS" basis and "NO COMPLAINT " basis. That is to say, the Tenderers will be deemed to have made themselves aware of the physical conditions, dimension, size, weight, working conditions, specifications etc., by inspecting the Ship before submitting their tender and no complaint/claim in this regard will be entertained by ONGC after the submission of the Tender by the Tenderer, ONGC shall not entertain any claim/complaint from the buyer for any deficiency in quantity/quality/size/dimension/specification etc., or for refund of the whole or part of the sale price or for any compensation on account of loss of profit of interest/damages or otherwise.

2.2. As per the above said clause, the ship was to be sold on "As is where is" basis and "No complaint" basis.

2.3. **Clause 12 – PRICE**

Clause 12.1: The offer of the Tenderer should be for the net price of the ship (including all the items available within the ship) excluding all duties and taxes etc., for sale and delivery of the ship on “As is where is” and “No complaint” basis ex-the Port/the location where the ship is lying at the time of inspection. That is the price offered by the Tenderer will be on the basis of the Buyer clearing ship through the Customs/Excise authorities (as may be applicable) and the Customs/Excise Duty being payable by the Buyer directly to the concerned Customs/Excise authorities.

2.4. This clause also reiterates the same thing. It also provides for payment to be made by the buyer towards customs and central excise duty.

2.5. **Clause 14 – OTHERS**

Clause 14.1:The buyer shall acknowledge the sale acceptance letter within seven days from the date of issue of sale acceptance letter.

2.6. This clause mandates the buyer to acknowledge the sale

acceptance letter within seven days from its issuance.

2.7.**Clause 14.3:** The earnest money deposit in case of successful tenderer shall automatically stand converted into Security Deposit on issue of Letter of Acceptance and shall be refunded only after taking physical delivery of the vessel by the Buyer.

2.8.The earnest money deposit would be converted into security deposit and to be refunded after taking physical delivery by the buyer.

2.9. **Clause 15 – PORT CHARGES :** All Port Trust charges, duties, etc., wages and such other charges and expenses as may be or become due after the delivery of the ship shall be borne and paid by the Buyer while the Port Trust Charges and crew charges of the ship payable, if any, prior to the delivery of the ship shall be borne by ONGC. For this purpose, the last day of the seven days period from the date of issue of sale release order/sale release cum delivery order as envisaged in clause 19.2 hereinafter shall be treated as the date of delivery. However if the buyer has taken physical delivery within this

seven days period, then the date of physical delivery pursuant to clause 19.3 hereinafter shall be treated as the date of delivery.

2.10. This clause speaks about the payment of port charges. The last date of the seven days period mentioned in Clause 14.1 has to be reckoned as the date of delivery, provided the buyer has not taken physical delivery before that.

2.11. Clause 16 – TRANSPORTING/ TOWING/ BEACHING/ ANCHORAGE OF SHIP:

Clause 16.1: It should be noted by the Buyer that obtaining space for beaching/anchorage of the ship from the Port authorities/Maritime Board authorities will be the sole responsibility of the Buyer and ONGC is not concerned with the permission or space for beaching/anchorage of the ship from Port/Maritime Board Authorities. The Buyer will still be responsible for making payments of the full purchase price and sales tax on their due dates and for taking delivery of the ship and in no case the Buyer can or will be allowed to withdraw from his contractual obligations

or terminate the contract on this account. Tenderer(s) may specifically take note of the limitations and difficulties at the concerned ports for beaching/anchorage of ship including the long waiting, delays, before getting berth from Port/Maritime Board Authorities and the Tenderer(s) may like to take these into account before submitting their Tenders.

Clause 16.2: The ship will be delivered by ONGC to the Buyer on "As is where is" and "No complaint" Basis where the ship is lying at the time of inspection and after its delivery, ONGC will have no responsibility whatsoever in respect of the ship. It will be, the responsibility of the Buyer to transport/take the ship to the Port/anchorage/beach/location of his choice subject to the Buyer being solely responsible for taking all necessary permissions from any concerned authority/statutory authority that may be necessary under the prevailing Laws/Acts/Rules at his cost, and ONGC will not be concerned with it. The Buyer will have to make his own cost assessment for this purpose and ONGC will not be responsible for any error of the Buyer in this cost

assessment. Obtaining the required certificates and complying with the requisite statutory requirements to enable the ship to move to the Port/anchorage/beach/location desired by the Buyer, will be the sole responsibility of the Buyer who will do it at his cost and consequences.

The Buyer will not be entitled to raise any dispute about the conditions of the ship on the plea that the ship was not in proper condition or that the ship has deteriorated in its condition after conclusion of the sale of the ship to him, for moving the ship to the Port/anchorage/beach/location of Buyer's choice even after obtaining if the required statutory certificates and meeting with the statutory requirement or on the ground that the port or other authorities decline to give the necessary permission.

Clause 16.3: All cost of transporting the ship from the place of delivery to any place of its beaching/berthing/scrapping/anchorage etc., shall be on buyer's account and all necessary licenses/permissions from any statutory authority (viz., State Maritime

Dept./Port Authority/Mercantile Marine Department/D.G. Shipping/Customs/Excise/Octroi Authority etc.) and equipment, tugs, labour etc., required for the purpose will have to be arranged by the buyer at his own risk and costs. ONGC will not be responsible for any damages or losses that may happen to ship during the course of shifting of the ship to such port/anchorage/beach/location as above and this will solely be at risk and cost of the Buyer.

2.12. These clauses speak about the transporting and towing of the ship. They also reiterate that it is the sole responsibility of the buyer with respect to obtaining space for beaching/anchorage of the ship. These clauses also again stipulate the earlier clause with respect to "As is where is" basis and "No complaint" basis. This is with specific reference to the place where the ship was lying. It continues for transportation/anchorage among other things. Therefore, any necessary permission that is required was the look out of the buyer. Thus the cost factor is something which the buyer will have to take care of.

2.13. **Clause 18 - PAYMENT**

Clause 18.1: The contract will be treated as having been concluded with the issue of Sale Order by ONGC to the successful Tenderer (referred to as "Buyer" elsewhere in the Tender catalogue/Terms and Conditions of Sale).

2.14. This clause speaks about the contract being concluded with the issue of sale order by the petitioner.

2.15. **Clause 19 – SALE AND DELIVERY OF THE VESSEL**

Clause 19.1: The sale and delivery of the ship shall be on "AS IS WHERE IS BASIS" & "NO COMPLAINT BASIS".

Clause 19.2: In exchange for payment of full sale value and Sales Tax/Duties in full from the Buyer, ONGC shall issue a Sale Release Order/Sale Release cum Delivery Order in favour of the Buyer thereby passing on the ownership and the risk of the ship to the Buyer on "as is where is" and "No complaint" basis Ex-Port/location place where the ship has been lying at the time of inspection, irrespective of physical delivery of the vessel. The buyer must complete all formalities and take physical delivery of the vessel within a period of seven days from the date of

issue of sale release order. If the buyer fails to take physical delivery within the aforesaid seven day period the provisions of clause 20 of general terms and conditions of the tender relating to charging of compensation and other action shall apply. In addition actual expenses towards manning, berthing, insurance, port trust charges, etc., pursuant to clause 15 hereinbefore shall be chargeable. The period of seven days shall be reckoned from the date of issue of sale release order including the date of issue but excluding the Saturdays, Sundays and holidays of ONGC.

Clause 19.3: The Sale Release Order/Sale Release cum Delivery Order issued by ONGC will be valid for a period of 7 (seven) days from the date of its issue (including the date of issue but excluding the Saturdays, Sundays and Holidays of ONGC) and will serve as a permit for the Buyer for taking physical delivery of the ship at the Port/location where physical delivery of the ship will be treated as completed by the signing of/issue of a Delivery Order/Certificate by the signing master/official in charge of

the ship (as the case may be) in favour of the Buyer.

Clause 19.4: The Buyer shall make every effort to complete all customs/excise and formalities including payments of customs/excise duty, port charges etc., and clear the ship through customs/excise authorities and Port authorities at the earliest and to remove the ship expeditiously from its location (where it is lying at the time of inspection) to the location/port/place of Buyer's choice and ONGC shall not be responsible for any undue delay in Customs/Excise and/or port clearance, if any.

Clause 19.5: The ownership and risk of the ship will be deemed to have passed on from ONGC to the Buyer with the issue of Sale Release Order/Sale Release cum Delivery Order by ONGC to the Buyer irrespective of any collateral acts to be completed by the Buyer and physical delivery of the vessel. The ship shall be and remain in every respect at the entire risk of the buyer from the date of issue of the Sale Release Order/Sale Release cum Delivery Order by ONGC to the Buyer. Should the ship be lost or become a constructive or compromised total loss

before the issue of the Sale Release Order/Sale Release cum Delivery Order by ONGC, the earnest money deposit or security deposit (as the case may be) and the portion of the purchase price paid by the Buyer, if any, shall be returned in full to the buyer without any interest thereon and the sale contract shall be considered null and void and the buyer shall not be entitled to any compensation/losses/damages.

Clause 19.6: The Buyer shall make all payments towards the sale price of the ship and applicable sales tax on scheduled dates as well as take delivery of the ship with all faults and errors of description without any allowance or abatement whatsoever. Any minor damage or normal deterioration of the ship will not absolve the buyer from his obligations. No complaint, claim of any nature or otherwise from the buyer will be accepted or entertained by ONGC at the time of making due payments or at the time of taking delivery of the ship as the sale is outright, definite and without items by item inspection.

2.16. **Clause 19.8 :** ONGC shall deliver the ship to

the buyer free from all encumbrances and mortgages, maritime liens and any other debts whatsoever.

2.17. Clause 19 is most important one. This clause once again reiterates the earlier clauses. It also speaks about liability *sans* physical delivery. The buyer must complete all the formalities and thereafter take physical delivery. As per Clause 19.3, the Sale Order would be a permit for the buyer for taking physical delivery. Under Clause 19.4, it is the duty of the buyer to pay the charges and remove the ship. Clause 19.5 speaks about the transfer of ownership along with risk from the petitioner to the buyer with the issue of Sale Release Order. This would happen notwithstanding the collateral act to be done by the buyer beyond physical delivery of the vessel.

2.18. Sub-clause 19.8 speaks about encumbrances and mortgages. Therefore, it only deals with liability on the part of the petitioner such as lien, debts and encumbrances etc.,

2.19. **Clause 22 – IMPORTANT:** The ship will be sold strictly on “AS IS WHERE IS” and “NO COMPLAINT” basis without any linkage with the ultimate use of the ship by the buyer. As such normally sales tax will be payable by

buyer at applicable rate prevailing on the date of delivery of sale of ship as a ship on "As is where is" and "No complaint" basis and not as a scrap ship meant for scrapping. However, in case of the successful tenderer being a shipbreaker and submitting necessary statutory documentary evidence of his status as a shipbreaker and certifying that the purchase is being made for scrapping. Sales tax may be paid by such buyer at the applicable rate prevailing on date of delivery for vessel being sold as scrap and for scrapping only. However, even in such cases the buyer shall have to initially pay sales tax at full rate as applicable for the ship being sold on "AS IS WHERE IS" and "NO COMPLAINT" basis as a vessel only and not as a scrap vessel meant for scrapping.

2.20. This clause once again sums up the liability on the part of the buyer. The buyer is bound to submit all necessary documents, pay the charges and then transport the ship to the destination of its choice.

2.21. The relevant clauses governing general terms and conditions of tender are as under:

Clause 7 – CONDITION OF GOODS: The goods are sold as they lie. They shall be removed by the buyer with all faults and notwithstanding any errors or mis-statement of description, measurement, quantity, weight, enumeration or otherwise and without question on the part of buyer and no claim shall lie against ONGC for compensation, nor shall allowance be made on account of any such faults, mis-statements or errors although the same may be of a considerable nature.

Clause 8 - QUALITY AND QUANTITY

Clause 8.1: The goods will be sold on "As is where is basis" and "No complaint basis" in so far the physical condition of the goods are concerned. That is to say tenderer(s) will be deemed to have made themselves aware of the physical condition, size, weight, working condition etc., by inspecting the material before submitting their tender and no complaint/claim in this regard will be entertained by ONGC after the submission of the tender. Therefore, the principle of CAVEAT EMPTOR (let the buyer beware) will apply.

Clause 10 – RISK: The goods shall be and remain in every respect at the risk of the buyer from the date of Sale Release Order by ONGC and ONGC shall not be under any liability for the safe custody or preservation thereof from that date.

Clause 15 – RESPONSIBILITIES OF BUYER

.....
(a) All costs of transporting the vessel from the place of delivery of the vessel to any place for its beaching/berthing etc. shall be on buyer's account and necessary official permission, equipments, tugs, labour etc. required for the purpose, if any shall be arranged by the buyer. ONGC will not be responsible for any damage or anything that may happen to the vessel during the course of shifting the vessel to such port/anchorage as above and this will be solely at the risks, costs and consequences of the buyer. All expenses in connection with transporting the vessel as aforesaid will be on buyer's account. The obligations of obtaining licence or any other permission in respect of the delivery of the vessel and its beaching/scrapping/disposal from all the concerned

authorities including the Port Trust/Govt. Authorities shall be on buyer's account and seller shall not be concerned with this. Whether or not the buyer succeeds in getting permission of space for beaching of the vessel from the concerned authorities, the buyer will still be responsible to make payment to ONGC of purchase price as stated in this tender on their due dates and in no case the buyer can or will be allowed to withdraw from this contractual obligations or terminate the contract on this account. The buyer shall beach/transport the vessel at their risks and expenses.

(c) All Port Trust charges, duties, wages and such other charges and expenses, as may be or become due after the vessel's delivery and the charges of Watchmen, whom the buyer may post with prior permission on the vessel at their risk and cost shall be borne and paid by the buyer while the Port Trust charges and crew charges of the vessel, payable, if any, prior to the issue of delivery order of the vessel shall be borne by the ONGC.

2.22. These clauses would show once again the responsibility imposed on the buyer. The goods are to be sold as they lie, the

principle of caveat emptor would apply and the entire cost of transportation will have to be borne by the buyer. Resultantly, the petitioner would not be responsible for any damage to the vessel during the course of shifting. The obligation to obtain any licence or permission with respect to delivery would also be on the buyer. The buyer has to pay all charges including the expenses.

2.23. Clause 24 – LOCAL CONDITIONS:

Clause 24.2: It must be understood and agreed that such factors have properly been investigated and considered while submitting the tender. No claim for financial or any other adjustment to the quoted price on account of lack of clarity of such factors shall be entertained at a later date.

2.24. This clause once again makes it clear that the buyer has to understand all the local conditions. Along with other clauses, this clause reiterates that the buyer was on his own interest to make the inspection and understand the conditions. Thereafter, it was not open to the buyer to make any claim on account of lack of clarity.

2.25. The aforesaid clauses would make it very clear that the

onus is entirely on the buyer. One could see the covenants being repeated and reiterated, on more than one occasion.

3. The first respondent, after making the payment, has sent a letter dated 04.10.2000 to the petitioner stating that Hindustan Shipyard Limited (for short 'HSL') in whose place the vessel is berthed did not want to recognise it and therefore the petitioner will have to take steps to effect the delivery. Incidentally, it has also been stated that the vessel can only be moved after making it sea worthy/tow worthy. This could be done after getting statutory permissions which in turn can only be done by entering the yard and thereafter dealing with the vessel. Therefore, from the aforesaid letter, the first respondent has made it clear that the vessel can only be moved, after making it sea worthy/tow worthy and for that they would require to negotiate with HSL. Accordingly, the first respondent has asked the petitioner to ensure the physical delivery. By the subsequent letter dated 10.10.2000, the first respondent has informed the petitioner to give a time bound programme to prepare the vessel sea worthy/tow worthy.

4. The petitioner sent a reply dated 19.10.2000 taking the following stand:

At the outset, we are not agreed to your submissions made in your letters dated 03.10.2000 and 04.10.2000. We want to state that:

It was your duty to take permission in advance from HSL for berthing the vessel at their yard after taking delivery on 21.08.2000. ONGC cannot be held responsible for HSL not agreeing to give permission to M/s.Annam Steels, for berthing of the ship. You should have taken necessary permission for berthing from HSL or alternate berthing place could have been arranged, in advance.

You had not taken delivery on the specified date because of the above reason and hence as per the Tender Terms and Conditions, berthing, VPT and other charges are payable by you from 22.8.2000 to the actual delivery date.

You may arrange either permission from HSL for berthing or arrange to tow away the ship immediately, on delivery.

Since HSL has not given permission for berthing to M/s.Annam Steels, the ship is to be towed away by you immediately on taking possession of the ship, in presence of ONGC officials. Kindly take immediate action in this matter.

You have informed that some repairs had to be carried out on the ship for making the same sea

worthy/tow worthy. You have given this information only now in your letter dated 04.10.2000 received by us on 09.10.2000. We shall take up the matter with HSL on receipt of the details of repair works, from you. Please send us the same immediately. ONGC will take consent of HSL for delivery to you for immediate towing subject to availability of permissions from statutory bodies and suitable insurance cover and indemnity from you.

We find that you have not taken any insurance cover, so far. It is to remind you that as per para 19.5 of Special Terms and Conditions of the Tender, the ownership and risks have been passed to the buyer from the date of issue of Sale Release Order/Sale Release cum Delivery Order by ONGC ie. from 10.08.2000 onwards. It is very surprising that the ship has not been covered by any insurance. We suggest you to take necessary insurance cover towards damage, salvage, wreckage removal, third party etc without any further delay considering the fact that the risk remains with the buyer from the date of issue of Sale Release Order/Sale Release cum Delivery Order.

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ONGC shall extend all assistance as may be possible within the Tender Terms and conditions of the tender. We also confirm that necessary documents, as required, will be handed over to you at the time of physical delivery of

the ship.

5. Thus the petitioner has informed the first respondent that it is its look out as per the terms and conditions. Incidentally, the first respondent will have to pay the berthing and other charges. The first respondent was also informed that it has to comply with the statutory requirements of suitable insurance cover, indemnity etc., A specific reference was made to Clause 19.5 of the said terms and conditions of the tender.

6. Thereafter, the first respondent has informed the petitioner that it had taken the insurance cover for Rs.2.5 crores. The petitioner by letter dated 06.12.2000 reiterated the earlier stand. It also asked the first respondent to make further payments towards expenses calculated from 22.08.2000 upto the proposed date of taking over. By the subsequent letter dated 18.12.2000, the same stand was reiterated asking the first respondent to make the payment. The first respondent by the letter dated 08.01.2001 accepted the terms set out by the petitioner in the letter dated 04.01.2001 addressed to HSL. It was followed by another letter dated 10.01.2001 by which the first respondent has informed the petitioner that HSL has agreed to enter an agreement with it. It was further stated that the requisite expenses

will be made by the first respondent as stated by the petitioner. Therefore, the petitioner was asked to handover physical possession.

7. By the letter dated 23.01.2001, the first respondent has informed the petitioner that a sum of Rs.32,80,000/- sent by HSL is being deposited by it without prejudice and thus asked for delivery of the vessel. The following is the relevant portion of the letter:

Without prejudice, we are depositing Rs.32,80,000/- (Rupees thirty two lakhs and eighty thousand only) with you, for various charges demanded by ONGC vide the above referred letters, in the form of four Pay Orders drawn in favour of M/s.ONGC Ltd for a total sum of Rs.32,80,000/- (Rupees thirty two lakhs and eighty thousand only). Please deliver the vessel without further delay.

8. The petitioner once again reiterated its stand by the letter dated 24.01.2001 and asked the Visakapatnam Port to raise its bill on the first respondent.

9. From the above, it is clear that the petitioner asked the first respondent to make necessary payment as per the terms and

conditions which is inclusive of insurance cover, statutory payments, cost and other charges. The stand of the petitioner was made well known during all the correspondences. The first respondent did agree for them. However, in the last of the communication, the first respondent has stated that the payment was made without prejudice. This was through the letter dated 23.01.2000. It appears, thereafter, there was no correspondence between the parties. The materials would also show that even according to the first respondent, the ship was not sea worthy/tow worthy and therefore, it could be done so, only after doing necessary repairs.

10. A suit was filed by the first respondent against HSL claiming damages in O.S.No.56 of 2001 on the file of District Court, Visakapatnam. In the said suit, it was contended that the first respondent was intending to file a separate suit against the petitioner for the recovery of amount illegally collected along with the damages. The aforesaid suit was filed in the month of October, 2001. Thereafter, a legal notice was issued on 14.07.2003 on behalf of the first respondent. In the said notice, damages were claimed interalia alleging that it was the petitioner who was responsible for the entire fiasco. A reply was given on 14.08.2003 on behalf of the petitioner denying the

allegations and once again relying on the terms and conditions discussed above.

11. Thereafter, the petitioner received the notice of request for referring the dispute to the arbitration Tribunal on 11.08.2004. Keeping that date as the starting point of limitation, being the date of commencement of proceedings for the purpose of limitation, the proceedings were allowed to go on.

12. Before the Tribunal, issues have been framed both on limitation and on merit. Placing reliance upon Clauses 7, 8.1, 18, 19.2, 19.3 and 19.8, it was held that the petitioner was duty bound to handover physical possession. Issue No.1 which was framed with respect to limitation was also held in favour of the first respondent by reckoning the date as 11.08.2004. The Tribunal thereafter went into the merit and passed the award. Inasmuch as the security deposit was not granted, it was also taken as a ground for getting over the limitation. Challenging the same, the present original petition has been filed.

13. Mr.G.Masilamani, learned senior counsel appearing for the petitioner would submit that the very claim itself is barred by

limitation. The petitioner right from the year 2000 onwards has taken a clear stand that it is the responsibility of the first respondent to take appropriate steps and transport the vessel. Admittedly, the vessel was not in sea worthy/tow worthy condition. The first respondent did not pay the requisite charges as mandated under the terms and conditions. It is not the responsibility of the petitioner to negotiate with HSL. A mere legal notice issued will not create a cause of action. Though Article 137 of the Limitation Act would apply, the limitation will have to be reckoned from the date of the clear stand taken by the petitioner or alternatively atleast from 23.01.2001, the date on which the first respondent reserved its right. What is relevant is the deemed handing over of possession. Once the sale certificate is issued, pursuant to the payment made, there is transfer of title. Therefore, there is no question of handing over physical possession thereafter. The claim for liquidated damages requires satisfaction of many tests. First of all, there has to be a breach. The breach would result in damage. The damage will have to be quantified. In the absence of these three material factors, the claims ought to have been dismissed.

14. Per contra, Mr.R.Thiagarajan, learned senior counsel appearing for the first respondent/claimant would submit that as the Tribunal has gone into every aspect, this is not a case where Section

34 of the Arbitration and Conciliation Act, 1996 requires to be invoked. The limitation has to be reckoned from the date on which the legal notice was issued by the first respondent denying the relief sought for by the petitioner. As per Section 21 of the Arbitration and Conciliation Act, 1996, the arbitration proceedings would commence on the date on which request for referring the dispute for arbitration is received by the first respondent. If that date is taken into consideration, the claim is within limitation. On merits, it is submitted that admittedly, there was delayed possession having been handed over, there is no question of deemed possession. Until and unless possession was with the first respondent, it cannot be made to suffer loss. As the Tribunal has gone into all these aspects, the same is not required to be readjudicated by this Court. The scope and applicability of Section 34 of the Arbitration and Conciliation Act, 1996 with its restriction will have to be taken note of. To buttress his submissions, learned senior counsel has made reliance upon the following decisions:

- (i) State of Orissa and Another Vs. Damodar Das*
((1996) 2 SCC 216)
- (ii) Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others* ((2006) 4 SCC 658)
- (iii) P.R. Shah Shares and Stock Brokers Private Limited*

*Vs. B.H.H. Securities Private Limited and Others ((2012) 1
SCC 594)*

15. On the issue pertaining to limitation, it is quite clear that the petitioner has made its stand in clear and unequivocal manner. The first respondent did agree to the stand taken by the petitioner. Thereafter, the first respondent sent another communication on 23.01.2001 asking the petitioner to do the needful as it is making the payment without prejudice. It is to be noted that even at the time of handing over actual possession, the same situation was prevailing. If one takes the letter dated 23.01.2001 as a starting point, the claim made is barred by limitation. It is admitted by both sides that Article 137 of the Limitation Act would govern the case. Therefore, the period of limitation is for three years starting from the date from which the cause of action arises. There is absolutely no material to show that there was any discussion or negotiation after 23.01.2001 and before issuance of legal notice. In the meanwhile, the first respondent initiated civil action against HSL. Even in that suit filed in the month of October, 2001, the first respondent has made it very clear that the petitioner has taken a specific stand against which the first respondent has decided to reserve its right to proceed. Thus a legal notice *per se*

will not create a cause of action. There is absolutely no change in the stand of the petitioner. Section 21 of the Arbitration and Conciliation Act, 1996 merely speaks about the commencement of arbitral proceedings. This has got nothing to do with the period of limitation running prior to it. To put it differently, it is not open to the first respondent to contend that notwithstanding the issue pertaining to limitation, it has to be construed in all cases when a legal notice was received by a party to the arbitration as the starting point of the arbitral proceedings. Such a proposition of law, if accepted, will lead to dangerous consequences. The Tribunal has taken note of the exchange of legal notices as a factor to be considered from the point of view of limitation. The reply to the legal notice issued was only a rebuttal. When once the claim has become stale, a mere legal notice cannot resurrect the same and give limitation to it. Similarly, the non-payment of security deposit also will not be factored into the issue pertaining to limitation. As rightly contended by the learned senior counsel for the petitioner, the said issue has never been raised earlier. Even for that, three years period has elapsed. There is absolutely no material to hold that there was no negotiation or settlement *inter se* parties. Perhaps that is the reason why the first respondent filed a suit against HSL. The decisions relied upon by the learned senior counsel

appearing for the first respondent as dealt with by the Tribunal do not help the situation. In fact, the decision rendered in **State of Orissa and Another Vs. Damodar Das ((1996) 2 SCC 216)** only helps the petitioner. The following paragraph would be apposite:

6. In Law of Arbitration by Justice Bachawat at p.549 commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of arbitration' should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must therefore be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.

16. Similarly, the following paragraph in ***Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others ((2006) 4 SCC 658)*** is also in favour of the petitioner:

28. The period of three years prescribed in Article 137 of the Limitation Act, 1963 is applicable to file an application under Section 20 of the Arbitration Act, 1940 as decided by this Court in Vulcan Insurance Co. Ltd. vs. Maharaj Singh ((1976) 1 SCC 493 : AIR 1976 SC 287). The limitation period starts running from the time the right to apply accrues. An application filed under Section 20 of the Arbitration Act has to be filed within three years from the date when the right to apply accrues.

17. Accordingly, this Court is constrained to hold that the claim made by the first respondent is barred by limitation.

18. Having non-suited the first respondent on the issue of limitation, the further question is as to whether this Court will have to go into the merits or not. Since the Tribunal has gone into the merits

and passed an award accordingly, this Court is of the view that it would be appropriate to consider the same as well. The Tribunal has taken note of certain clauses in the general terms and conditions of the tender. The discussion made above would show that in several clauses, the petitioner has reiterated its stand that the vessel was sold "As is where is" and "No complaint" basis. The first respondent did make an inspection as per the terms and conditions. It was also expected to know the situation governing. This will also include the agreement between the petitioner and HSL. The first respondent was also bound to pay all the statutory charges, expenses and cost. The first respondent also has stated that the ship was not in sea worthy or tow worthy condition. For the aforesaid reason, certain repair work was supposed to be done. Even the charges which the first respondent would otherwise liable to pay have not been paid. That was one of the main reasons that the delay has occurred.

19. The first respondent did make the payment under protest after agreeing to accept the stand taken by the petitioner. In the case on hand, relevant clauses would clearly fix the liability on the part of the first respondent. The first respondent was not a novice in the field. Reliance made by the Tribunal on Clause 19.8 cannot be countenanced

as we are not dealing with encumbrances, mortgages, maritime liens and other debts. On the contrary, we are dealing with the liability of the first respondent to make the payment. Admittedly, title was passed on. What was done with respect to physical possession was a ministerial act. We are concerned with the principle of caveat emptor. As per the terms and conditions of the sale order, delivery order read along with the tender conditions it was the responsibility of the first respondent to make all the expenditure which it did pay accordingly. It cannot be presumed that insurance cover was taken by the first respondent by force. The liability of the first respondent has started from the date of issuance of the sale release order. It is to be seen that the first respondent did agree to comply with the terms and conditions by taking the insurance cover though subsequently. Once the title gets passed on to the respondent No.1, the agreement *inter se* between the petitioner and HSL would automatically come to a grinding halt. Thereafter, it was a matter between the respondent No.1 and HSL.

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20. In such view of the matter, this Court is of the view that even on merits, the petitioner is entitled to succeed. A perusal of the letter of the first respondent dated 30.11.2000 would show that the

insurance cover was taken few days before only. This was an act done as per the terms and conditions. It is to be seen that initially the first respondent has proceeded against HSL. It is only thereafter a claim was made against the petitioner. To make a claim for liquidated damages, the first respondent has to show breach followed by damages. This Court has already held that there is no breach committed by the petitioner. The amount awarded would exceed the sale consideration itself. As discussed above, the first respondent was at fault in not making the requisite payment within the time limit. Even otherwise, any unacceptable act on the part of HSL would not create liability *qua* the petitioner. Therefore, this Court is of the considered view that the award requires to be interfered with.

21. A contention has been raised on the scope and applicability of Section 34 of the Arbitration and Conciliation Act, 1996. This Court is quite conscious of the scope. This Court is neither an appellate Court nor a Court having power of superintendence. Its powers are controlled and circumscribed by the Act. However, once it is held that the claim is barred by limitation, the award passed on it cannot be sustained in the eye of law. Similarly, when the claim has no basis from the agreement inter se, there cannot be any award. Having found

both the issues in favour of the petitioner, necessarily, the award requires to be set aside.

22. For the aforesaid reason, this Court is not going into the merits of individual claims as such an exercise is not warranted. Accordingly, the award dated 15.03.2008 stands set aside and the Original Petition is allowed. No costs.

03.01.2018

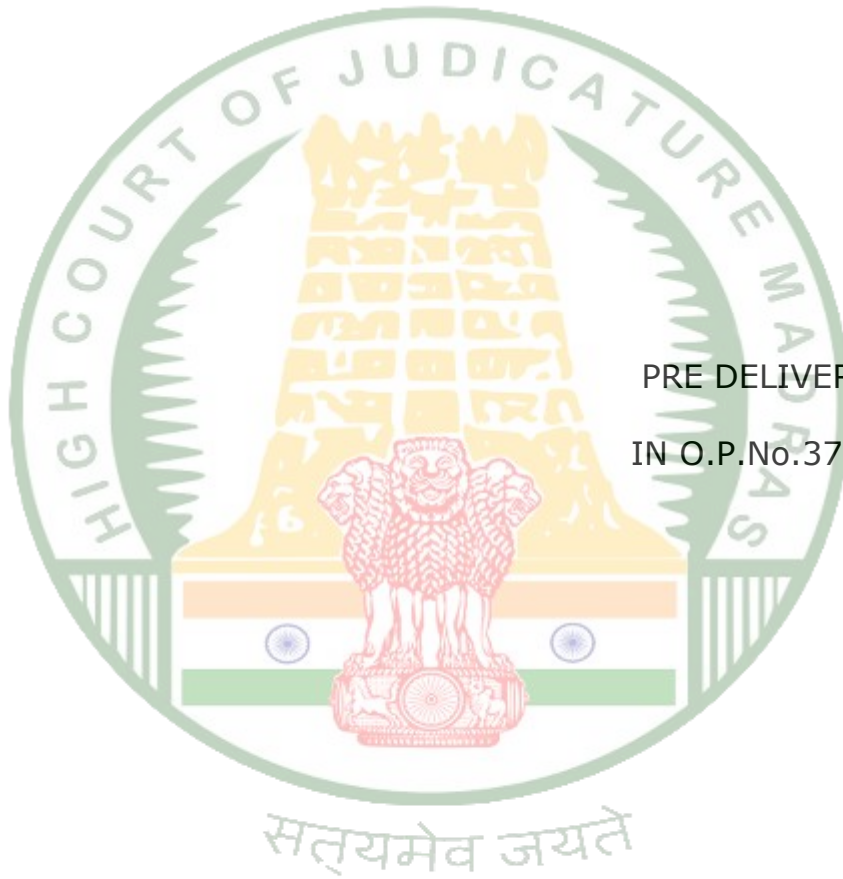
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M.M.SUNDRESH, J.

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PRE DELIVERY ORDER
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