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

Date of decision: 12th December, 2018

\+ **O.M.P. 378/2008**

M/S PRIYANKA OVERSEAS PVT.LTD ..... Petitioner

Through: Mr. Kuljeet Rawal, Advocate (M-9811088203).

versus

JOONGANG SHIPPING CO. LTD ..... Respondent

Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. The present Section 34 petition has been filed challenging the award dated 15th February, 2008 passed by a three members Tribunal by a 2:1 majority under the aegis of the Indian Council of Arbitration.

2. The background of the dispute is that the Petitioner – M/s Priyanka Overseas Pvt. Ltd. entered into a Charter Party Agreement with the Respondent –Joongang Shipping Co Ltd., a Korean shipping company for the transportation of 25,000 metric tonnes of wheat from Kandla in Gujarat to Umm Qasr in Iraq. The Charter Party Agreement is admitted and the terms and conditions thereto are also admitted. The voyage from Kandla to Umm Qasr, the Voyage from Kandla to Umm Qasr took place between 18th May, 2001 to 24th May, 2001. However, unfortunately, the buyer of the Petitioner rejected the goods at Umm Qasr on 14th June, 2001 and almost 15

days were consumed during the period when the Petitioner was looking for an alternate buyer. Thereafter, the ship sailed from Umm Qasr to Hodeidah in Yemen between 29th June, 2001 and 21st July, 2001. Thus, during the period of 14th June, 2001 to 29th June, 2001, the ship had to remain in the port at Umm Qasr. The voyage from 29th June, 2001 to 21st July, 2001, consumed more than 21 days. It is the Petitioner's case that the vessel was deviated unnecessarily. The entire voyage ought to have been completed in a period of 7.6388 days and hence it is not liable to pay voyage charges for 21.9340 days. The admitted position is that the cargo was discharged on 20th August, 2001. After the cargo was discharged, claims were raised by the shipping company and the Petitioner herein raised counter claims.

3. The various claims raised and the amounts awarded in respect thereof are:

i) <u>Claim for Balance Freight (USD 6,079.75)</u>

This amount was awarded. The Petitioner does not object to the award of this claim.

ii) <u>Demurrage at Kandla (USD 97,520.83)</u>

This claim was made by the Respondent on the basis of the time sheet for loading operations. The Petitioner admitted USD 91,396 was payable. The Tribunal awarded the said amount. There are no objections in respect of this claim as well.

iii) <u>Demurrage and detention claims at Umm Qasr (USD 21,062.50 and 1,23,053.12)</u>

The total claims are to the tune of USD 21,062.50 and USD 1,23,053.12. In respect of this claim, the Arbitral Tribunal has awarded USD 1,08,375. The said amount is not objected to and is conceded by the

Petitioner.

iv) <u>Deviation Charges (USD 1,97,406.24)</u>

Claim No.4 is for deviation charges for the sailing of the vessel from Umm Qasr to Hodeidah. The claim was for a period of 28.6806 days which has been awarded by the Arbitrator at USD 6,000 per day. This claim is under challenge. The claim for deviation was allowed to the extent of USD 86,749.20.

v) <u>Bunker Costs for Deviation (USD 47,282.50)</u>

Bunker costs are fuel costs for the ship. Against this claim, the Tribunal has awarded a sum of USD 18,318.31. This claim is under challenge.

vi) <u>Port charges (USD 43,669)</u>

Under this claim, the Petitioner conceded a sum of USD 40,231 as against the claimed amount of USD 43,669. USD 13,750 was already paid. The Tribunal thus allowed the sum USD 26,481 which is not objected to.

vii) <u>Agency fee at Umm Qasr (USD 6,000)</u>

This claim was rejected.

viii) <u>Cargo shortage (USD 8,333.33)</u>

This claim was rejected.

ix) <u>SOL cover and War Insurance (USD 5,000 and 7,928.57)</u>

This claim was rejected.

4. The operative portion of the award reads as under:

> *"10. The final position of the claims for which the Claimants are entitled is as follows:*

	USD
(i) Balance freight	*6,079.75*
(ii) Demurrage:	

(a) Kandla	*91,396.00*	
(b) Umm Qasr	*1,08,375.00*	
(c) Hodeidah	*1,72,083.60*	
	3,71,854.60	
Deduct 2.5% Address	*9,296.37*	
Net:	*3,62,558.23*	
Less: already paid by Respondents:	*2,60,000.00*	*1,02,518.23*
(iii) Deviation		
(a) Charges per day	*86,749.20*	
(b) Bunkers	*18,318.31*	
(c) Port charges	*26,481.00*	
	1,31,548.51	
Less: already paid	*1,14,263.65*	*17,284.86*
Total Amount Due (i+ii+iii)		*1,25,922.84"*

Counter Claims filed by Petitioner:

5. In respect of the counter claims, all the claims of the Petitioner were rejected except the counter claim for delayed receipt of payment of goods at Hodeidah. As against the claimed amount of USD 48,082.19, the Tribunal awarded a sum of USD 20,000. The restriction of this claim is under challenge. Apart from this, the address commission claimed by the Petitioner was allowed to the extent of USD 9,296.37. The restriction of this claim is also under challenge as the counter claim of the Petitioner on this count was USD 17,369.20.

6. The main objection that has been raised by Mr. Kuljeet Rawal, Ld. Counsel for the Petitioner is that the award of deviation charges and bunker costs for deviation, was on the basis that the voyage from Umm Qasr to Hodeidah was for a period of 28.6806 days. It is his submission that the

award is contradictory inasmuch as under the claim relating to deviation charges, the Tribunal came to the conclusion that the total sea time was 7.6388 days, and a further two days for UN Check Point and bunkering. Thus, according to the Tribunal itself, voyage and sea time from Umm Qasr to Hodeidah ought to have been only 9.3388 days and after exclusion of two days which were wrongly included by the Tribunal, it ought to have been 7.6388 days. Thus, the award of amount on basis that the voyage time was 28.6806 days was completely untenable. Mr. Rawal further submitted that the loss for delayed arrival of goods at Hodeidah could not have been arbitrarily restricted to USD 20,000. He also challenges the restriction of address commission to USD 9,296.37. Thus, it is submitted that the amount awarded under claims no.4 and 5 ought to be restricted to 7.6388 days and the counter claims no.1 and 2 ought to be fully allowed.

7. The Respondent has not appeared before this Court, but a Reply Statement was received by the Registrar General of this Court by means of courier which is signed by the Managing Director of the Respondent – Mr. Dong Ki Kim. This Court has perused the statement filed on behalf of the Respondent. The primarily contention of the Respondent is that no ground under Section 34 is made out for interfering with the award.

8. This Court has considered the submissions and the Reply Statement of the Respondent. It is the admitted position on record that the voyage from Umm Qasr to Hodeidah requires approximately 7 to 8 days under normal circumstances. The Arbitral Tribunal has come to a conclusion in the award that the deviation made by the vessel in route to Hodeidah was for the company's own reasons and was an unjustified stoppage/holdup. This is clear from a reading of the following portion of the award:

"...It is very clear from the agreement in the Addendum that the charges for deviation are restricted and applicable to the "journey period from Umm Qasr to Hodeidah". The journey period in shipping parlance is the voyage period at sea. It is not proper to attribute any liability and claim for period of deviation made by owners for their own account or for their own reasons or for the any unjustified stoppages and hold -ups. The Claimants accept that the call at Dubai was for their own need to take supplies and bunkers and concede remission from their claim. But there are no convincing grounds for stoppage at Khorfakkan and Fuzairah. The owners admit that the ship was waiting at Khorfakkan Anchorage, Fuzairah for receipt of Letter of Indemnity (LOI) to be provided by the Respondents. The Respondents were in the process of arranging the LOI, and there were no ostensible indications that the LOI would not be provided. In any case this was not a sufficient justification for the owners to interrupt or suspend the voyage and wait mid-way. The owners could have, and should have, continued with the voyage and instead, if necessary, wait at Hodeidah and withhold delivery if the LOI did not reach them even after arrival at Hodeidah. The LOI was in Claimants hands on 9th July 2001 and even after receiving the LOI, they sailed the vessel from Fuzairah on 12th/ 13th, July 2001. The reason given for this delay is an alleged request from the Respondents for a joint draft survey held on 10th July 2001. There is no evidence of any request from the Respondents for any joint draft survey. The Claimants are relying on a communication of 3rd July 2001 from Respondents advising owners to instruct Master for sampling of cargo on board. This was at the time when the vessel was at Dubai for taking supplies and bunkers and the fax of 3rd July does not speak of any draft survey. Although the survey, whatever it was for, was over in a day, on 10th July, the vessel sailed from Fuzairah on

> *the mid -night of 12th /13th July 2001. <u>There is no explanation or reason provided for this 2/3 day delay after the survey</u>. Further delay after sailing from Fuzairah is attributed to bad weather en-route. <u>The owners undoubtedly took an unreasonably long time in making to Hodeidah and the reasons advanced by them lack conviction and proper justification.</u> On 3rd July 2001 the Owners had provided the Respondents an estimate of expected time of voyage, bunker costs and ports charges. The sea time, from Umm Qasr to Hodeidah, indicated to the Respondents. was 7.6388 days and reckoning time for UN Check Point and bunkering, one day each, the total time (from Umm Qasr to Hodeidah) was assessed to be 9.6388 days. This is a fair and reasonable estimate for which the Claimants are entitled to the deviation charges at the daily deviation rate of USD 9,000 per day."*

9. A perusal of the above findings by the Tribunal clearly shows that while the voyage i.e. the sea time from Umm Qasr to Hodeidah was found to be 7.6388 days, by adding a further period of two days for the UN Check Point and bunkering, the Tribunal awarded deviation charges @ USD 9,000 per day for 9.6388 days. On the other hand, the Tribunal has awarded claim no.4 i.e. the deviation charges for 28.6806 days. This is a contradiction in terms inasmuch as if there was no unjustified stoppage, deviation and other delays owing to the shipping company, the vessel would not have taken 28.6806 days.

10. The finding of the Arbitrator that the deviation for such a long period was unjustified is not under challenge. Once the Tribunal found that the company took an unreasonably long time in reaching Hodeidah and the reasons given by the shipping company "*lack conviction and proper justification*", the award of deviation charges for 28.6806 days is completely

untenable.

11. It is the submission of Mr. Rawal that the deviation charges could at best be for 7.6388 days. However, this Court does not see any reason to interfere with the finding that two more days need to be added to this journey for purposes of UN check point and bunkering. Thus, claim no.4 for deviation ought to be calculated @ USD 6,000 per day for 9.6388 days. This would make the award in respect of claims no.4 and 5 consistent and without any contradiction. In the same manner the charges for bunkering awarded under claim no.5 for 7.6388 days and 9.6388 days do not call for any interference.

12. Insofar as the counter claims are concerned, the Arbitral Tribunal has deducted a sum of USD 9,296.37 i.e.,2.5% of the address commission from the demurrage charges awarded by it. The address commission objection is not pressed. Insofar as the losses suffered due to delayed delivery of goods is concerned, the admitted delay beyond 9.6388 days was on account of the shipping company. The claim of the Petitioner was for USD 48,082.19. According to Ld. Counsel, the Arbitral Tribunal has, without giving any reasons, restricted the same to USD 20,000. The extract from the award qua this claim is as follows:

> "*The Respondents claim USD 48,082.19 as the loss suffered by away of interest element for delayed receipt of payment for goods. They have estimated the period of delay as 30 days. However the delay for detaining the vessel en-route, and assignable to the owner is just about two weeks. <u>The Tribunal feels that a sum of USD 20,000 (as against USD 48,082.19) to be a reasonable compensation for the delay in Respondents collecting payment of over USD 3 million</u>.*"

It is the settled position that there have to be reasons given in an award. Having already held that the deviation and detention as also the delay only to the tune of about 7 days was justified out of the entire period of approx. 28 days, the restriction to USD 20,000 is completely unjustified and the Petitioner is awarded the full claim of USD 48,082.19 on this count.

13. Ld. Counsel also raises an objection that the Arbitral Tribunal accepted the documents after the final hearing had taken place on 17th March, 2007. No opportunity was awarded to the Petitioner to lead evidence in this respect. This Court has seen the award and is of the opinion that the facts in respect of dates and the voyage, etc. are almost admitted. There is nothing new that the Arbitrators have taken into consideration which would have a bearing on the final award. In this view of the matter, this objection is rejected.

14. None of the other objections are pressed.

15. OMP is disposed of in the above terms. No orders as to costs.

PRATHIBA M. SINGH
JUDGE

DECEMBER 12, 2018
Rahul