

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.1295 OF 2015

Ashirwad Projects
a Partnership firm

... Petitioner

Versus

Addhar Mercantile Pvt. Ltd.

... Respondent

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Mr. Nimay D. Dave a/w Mr. Aman Rungta, Ms. Jyotika Jain I/b Bose & Mitra & Co. for the Petitioner.

Mr. Rahul Narichania, Senior Advocate a/w Ms. Varsha Ramann, Mr. Manoj Khatri, Mr. Arnab Ghosh and Ms. Alvia Crasta I/b Mr. Manoj Khatri for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 30 JANUARY 2019

(Oral Judgement)

. This arbitration petition challenges an award passed by an arbitral tribunal in a matter of disputes between parties arising out of a contract for carriage of goods contained in a Fixture Note. The Petitioner resisted the Respondent's claims and had counter-claims under an oral Joint Venture Agreement ("JVA"), which it claimed to have entered into with the Respondent concerning the suit contract of carriage of goods. Though the Fixture note had a specific arbitration clause, at the stage of an application in the matter under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act"), the parties agreed that all disputes and differences between them including disputes arising out of the fixture note and the purported oral JVA should be referred to arbitration. The learned arbitrators accordingly

heard the reference. The Respondent was the claimant before the arbitral tribunal, whereas the Petitioner was the respondent/counter-claimant. The arbitral tribunal awarded the Respondent's claim partly, whilst rejecting the counter-claim of the Petitioner.

2 The Respondent's claim was for breach of fixture note dated 12 February 2013, which the Respondent, in its capacity as Disponent-owner of the vessel, had entered into with the Petitioner, as charterers, for charter of a vessel known as 'Eternal Hope' for carriage of 20.843 MTS of Rice and Soya Bean Meal (SBM) cargo from Port of Kandla, India to Port Bushehr, Iran. It was, on the other hand, the Petitioner's case that there was an existing Joint Venture Agreement (JVA) between the parties for sharing of profits in a contract of carriage of goods contained in two documents : one between head owners of the vessel, Global Oceanic Chartering S.A. Greece, and the Respondent, and the other between the Petitioner and the shipper K.A. Agro Exports. It was the Petitioner's case that the fixture note dated 12 February 2013 between the Petitioner and the Respondent was merely a notional charterparty agreement entered into purely for accounting purposes. Under the oral JVA, the parties had undertaken the contract of carriage of goods, i.e. shipping of cargo from Kandla to Bushehr. On 10 February 2013, the vessel MV Eternal Hope arrived at the port of Kandla. On 23 February 2013, it sailed out of Kandla port for the port of Bushehr, Iran. On 1 March 2013, the vessel arrived at the port of Bushehr and completed discharge of cargo on 29 March 2013. At that stage, the vessel was arrested under an order passed by an Iranian Court in pursuance of the consignee's claim of shortlanding of cargo. Finally, on 10 April 2013, the arrest was vacated and the vessel sailed out

of Bushehr in view of a settlement of cargo claim as between the head owner and the Iranian consignee. The Respondent herein was claiming balance freight and demurrage, when all disputes between the parties were referred to arbitration as above. The tribunal not only allowed the Respondent's claim for balance freight and demurrage, but also its claim of detention charges for the period of arrest.

3 The impugned award has been challenged by the Petitioner mainly on three grounds. Firstly, it is submitted that the claim for detention charges allowed by the learned arbitrators was beyond the terms of submission; no such claim was raised or referred to arbitration when the reference was made; and the arbitrators accordingly had no jurisdiction to entertain it. It is submitted that there is hardly any discussion worth the name in the impugned award on this aspect of the matter. Secondly, it is submitted that the claim of demurrage awarded by the arbitrators was without any evidence of the Respondent having paid any demurrage to any party concerned with the subject carriage of goods. Thirdly, it is submitted that whilst considering the Petitioner's submissions on the oral JVA and sharing of profits between the parties thereunder, the learned arbitrators completely disregarded a vital piece of evidence, which had a crucial bearing on the controversy. Learned Counsel submits that it was not in dispute that originally there was an oral JVA between the Petitioner and the Respondent for sharing of profits. The Respondent's case before the arbitral tribunal was that this oral JVA was terminated by it in the circumstances mentioned in its pleadings. It is submitted that after the purported letter of termination, namely, e-mail dated 25 February 2013, the Respondent itself had addressed a communication to the Petitioner (e-

mail dated 5 March 2013, forwarded again on 25 February 2013), submitting a provisional statement of accounts based on the JVA, which showed that the Respondent never treated the JVA as terminated. It is submitted that this communication was altogether disregarded by the learned arbitrators whilst arriving at their conclusion.

4 It is true that prior to the Respondent's application for interim reliefs pending arbitration, under Section 9 of the Act, there was no claim made by the Respondent in respect of any detention charges. The claims formulated by the date of the interim application involved balance freight and demurrage. It was claimed that the Petitioner had not paid freight charges in the sum of USD 29,006. Secondly, it was claimed that at the ports of both loading and discharge, there was delay of in loading/unloading of goods and as a result, the Petitioner was liable to pay demurrage in accordance with the terms of the fixture note. When the matter, however, was before the court for reliefs under Section 9 of the Act, the parties entered into a separate agreement, which is recorded by this court. Under this agreement, all disputes and differences between the parties "including disputes arising out of Fixture Note dated 12 February 2013" and "the purported oral JVA" were referred to arbitration. It was the Respondent's case before the arbitrators that the dispute concerning detention charges payable by the Petitioner as a result of arrest of the ship for twelve days, one hour and twenty minutes at the instance of the consignee of the cargo, did arise out of the fixture note dated 12 February 2013. Accordingly, it was claimed that it formed part of the submission and the arbitrators had jurisdiction to decide the same. It is pertinent to note that the Respondent, in its statement of defence before the arbitrators,

never questioned the authority or jurisdiction of the arbitrators to adjudicate this particular claim as being beyond the terms of submission. It appears that both parties went through the trial on the footing that the dispute did form part of the reference. It was only at the stage of oral submissions that the Petitioner appears to have raised the issue of jurisdiction for the first time. The learned arbitrators, considering the arbitration agreement recorded by this court in its order dated 1 October 2014 (at the hearing of the application under Section 9), held that the dispute was indeed covered by the terms of submission, since it arose out of Fixture Note dated 12 February 2013. There is no gainsaying that the dispute infact did arise out of the fixture note. The only submission is that this dispute did not exist when the reference order was passed by this court on 1 October 2014. It is important to note that the reference was made to the arbitral tribunal not on the basis of notice of invocation of arbitration agreement or any application under Section 11 of the Act; it was made at the hearing of a Section 9 application, when the parties arrived at a separate agreement to refer all disputes and differences as noted above to arbitration. The only condition of such reference was that such disputes or differences should arise out of the fixture note or the purported JVA. Since the dispute concerning detention charges arose out of the fixture note, it was clearly within the arbitrators' mandate to adjudicate upon. Thus, there is no substance in the Petitioner's submission on want of jurisdiction.

5 So far as demurrage charges are concerned, what the Respondent had originally claimed was that it had actually paid demurrage in the sum of USD 45667; it had relied on a receipt of such payment issued by one Adroit Shipping FZC. It was the Petitioner's case in reply that Adroit

Shipping FZC had no connection with the contract and payment, if any, made to it could not have sustained any claim for demurrage actually paid. Learned Counsel submits that this aspect of the matter was not considered or discussed by the learned arbitrators. The arbitrators, it is important to note, did not adjudicate the claim of demurrage on the basis of any actual demurrage paid by the Respondent. The learned arbitrators went through the contractual stipulations of the fixture note, which *inter alia* required the Petitioner to pay demurrage at the rate of USD 5000 per day. The arbitrators considered lay time lost (i.e. demurrage time), for which the Respondent could make a claim, as 4 days 11 hours 5 minutes as per lay time statement attached to the award. Based on the demurrage rate of USD 5000 per day, the total demurrage was worked out to USD 22309.03 instead of USD 45677 claimed by the Respondent. There is no infirmity to be found in such assessment of the claim by the arbitrators. The learned arbitrators evidently went by the contractual stipulation and not by any actual demurrage paid by the Respondent to any party. The consideration, therefore, whether or not Adroit Shipping FZC was authorized to receive demurrage was clearly immaterial. The award is based on reasonable interpretation of the terms of the contract and is supported by evidence. The arbitrators have taken an eminently possible view to arrive at their finding. No interference with the award is, accordingly, called for under the provisions of Section 34 of the Act.

6 As regards the oral JVA, the learned arbitrators accepted the Respondent's case that though such JVA for sharing of profits originally existed, the same was terminated by the Respondent's e-mail dated 25 February 2013. There is no substance in the Petitioner's submission that

whilst arriving at this conclusion, the arbitrators completely disregarded the Respondent's e-mail of 6 March 2013 (forwarded again on 25 March 2013). The arbitrators noted the e-mail of 6 March 2013 (forwarded again on 25 March 2013) as also rival submissions of the parties in its behalf. Merely because in the reasoning discussed by the arbitrators, there is no specific dealing with rival arguments of the parties on this e-mail, it cannot be said either that the e-mail was completely disregarded or that the award was vitiated for want of reasons. The arbitrators noted the e-mail as well as the e-mail of 23 February 2013 and drew their conclusion that the e-mail of 23 February 2013 terminated the oral JVA. Consideration of the e-mail of 6 March 2013 reflects on the sufficiency of evidence. It is anyway nothing like an absolute clincher. It is not wholly inconsistent with the view taken by the arbitrators. So long as the arbitrator's conclusion is based on some evidence on record, without going into sufficiency or otherwise of such evidence, the challenge court under Section 34 of the Act has no reason to interfere with an award. The arbitrators' view concerning the e-mail of 23 February 2013 is supported by some evidence. The award cannot be said to be based on no evidence, and it indeed contains a possible view. No interference is, therefore, warranted under Section 34 of the Act.

7 Learned Counsel for the Petitioner challenges the award on interest at the rate of 12 per cent per annum. Learned Counsel submits that discretion of the arbitrator to award interest was not exercised reasonably. Learned Counsel relies on the judgment of **Vedanta Ltd Vs. Shenzen Shandong Nuclker Power Construction Co. Ltd**¹ in support of his

1 2018 SCC OnLine SC 1922

submission. Learned Counsel submits that having regard to the law stated by the Supreme Court in this case, the rate of interest awarded by the arbitrators is far too excessive. **Vedanta Ltd** case was an international commercial arbitration, where challenge to interest awarded by the tribunal was considered in the peculiar facts and circumstances of the case as also the specific clause of the contract. One of the submissions was that the rate of interest awarded must correspond to the currency in which the award is given, and must be in conformity with the laws in force in the *lex fori*. The Supreme Court considered various factors, which the arbitral tribunal is supposed to take into account whilst making an award for interest. One of the factors to be considered was the prevailing international rate of interest. The suggestion before the court was that interest in accordance with LIBOR rate plus a reasonable margin (between 1% to 3%) could only have been ordered as reasonable rate of interest. The award had both Rupee and Euro components, for which a uniform rate was awarded by the arbitrator. The court was of the view that award of interest at the rate of 9 % on the Euro component of the award was unjustified and unwarranted. The levy of such high rate of interest on a claim made in a foreign currency would have resulted in the claimant being awarded compensation contrary to the conditions stipulated in the contract. The interest rate of 9 per cent for 120 days and 15 per cent post 120 days granted by the arbitral tribunal in that case on the entire sum awarded was modified by the Supreme Court and a uniform rate of interest at the rate of 9% was made applicable for the INR component of the award and LIBOR + 3 percentage points was ordered on the Euro component of the award. In the present case, the arbitration was a domestic arbitration between two Indian parties and there was no foreign currency component of the award.

The claim was made in Rupees and award was also in Rupees. The freight rate as also demurrage/detention rates which were denominated in US Dollars, were considered for the award, but the payment was essentially in Indian Rupees and to be made in India. The arbitrators, therefore, considered interest rates in India and not LIBOR rate and accordingly, determined 12 per cent per annum to be a reasonable rate of interest. There is no infirmity in this assessment of the learned arbitrators. The assessment is reasonable and exhibits a possible view. It is not a view that no fair or judiciously minded person would take or a view which would shock the conscience of the court. Thus, there is no case for interference with the award on the rate of interest.

8 There is, accordingly, no merit in the challenge. The Arbitration Petition is dismissed.

9 Learned Counsel for the Petitioner applies for stay of execution of the impugned award. After the Petitioner's challenge in the arbitration petition has been comprehensively heard and rejected, there is no question of staying the execution of the impugned award. The Application is rejected.

(S.C. GUPTE, J.)