IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.10.2019
Judgment pronounced on	31.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.97 of 2010

Chennai Port Trust
Rep. By its Traffic Manager,
Rajaji Salai,
Chennai – 600 001. ... Petitioner

Vs.

1.M/s.T.Arumaidurai & Co.
Rep. By its Chief Executive
Mr.Joachim Robert,
DIVA, 5, II Cross Street,
Kasturibai Nagar, Adyar,
Chennai – 600 020.

2.Justice R.Balasubramanian
No.157/17, P.S.Kumarasamy Raja Road,
Raja Annamalaipuram,
Chennai – 600 028.

3.Justice A.Ramamoorthy
No.9, 32nd Main Road,
Mogappair,
Chennai.

4.K.Ramasamy
Retd. District Judge,
No.138, LB Road, Judges Avenue,
No.138, L.B. Road, Judges Avenue,
Kamarajar Nagar, Chennai – 41. ... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 26.01.2009 passed by the Arbitrators/Respondents 20 4.

For Petitioner	:	Mr.R.Arumugam for M/s.Aiyar and Dolia
For Respondents	:	No appearance for R-1

ORDER

The claimant in the arbitration is the Petitioner before this Court. The dispute arises out of a licence that was granted to the first Respondent by the Petitioner under the Agreement for Licensing of JD1 Berth dated 4 March 1998 (the Agreement), Ex.C-7. The term of licence was for a period of 20 years from the date of commencement. However, the admitted position is that the licence was terminated in the fourth year of operation and that from 25 August 2001, the licensed area was not permitted to be used by the first Respondent. As per the Agreement, the first Respondent was required to pay berth hire charges (BHC) and berth reservation charges (BRC). The dispute largely relates to the alleged non-payment of BRC, the consequential termination, etc. The Agreement provides that BRC is to be paid at the equivalent of one day's average BHC or at 25% of the BHC of the vessels total stay in the berth, whichever is higher. According to the Petitioner, it is entitled to revise the BRC as per directions issued by the Government under the applicable scheme. Therefore, as per directions issued by the Government, by letter dated 01.04.1999, Ex.C-8, the BRC was revised from 25% of the BHC to 50% thereof for the actual stay of the vessels. On account of the failure/refusal of the first Respondent to pay its dues, the Petitioner was constrained to terminate the licence by issuing notices dated 04.08.2001 (Ex.C-26) and 24.08.2001 (Ex.C-27) as per the terms thereof.

2.Thereafter, the Petitioner initiated arbitration proceedings wherein it claimed a sum of Rs.1,47,35,800/- towards BHC and BRC during the first three years of operation and for a part of the fourth year of operation. In response, the first Respondent filed a reply and counterclaim whereby it prayed that the claims should be rejected and for a declaration that the Petitioner committed a breach-of-contract by illegally terminating the licence. In addition, eight counterclaims were made for an aggregate sum of Rs.8,35,79,209/-. In the said arbitration, upon completion of pleadings, 17 issues were framed by the Arbitral Tribunal (internal pages 19-21 of the Award). The Petitioner/Claimant therein adduced oral evidence through three witnesses and exhibited 47 documents as Exs.C1 to C-47. The first Respondent adduced oral evidence through two witnesses and exhibited 44 documents as Exs.R-1 to R-44. By Arbitral

Award dated January 26, 2009(the Award), the Arbitral Tribunal held that the Petitioner is entitled to collect BRC only in the manner specified in clause f of Article III of Exhibit C-7, i.e. at 25% of BHC and not at 50%. On that basis, the Petitioner's claim for BRC for the first year was rejected; it was accepted for the second year on the basis of the first Respondent's admission, in that regard; the BRC for the third year of operation was fixed at Rs.29,89,780/- and for the fourth year at Rs.4,86,297/-. The termination of the Agreement by the Petitioner was upheld by the Arbitral Tribunal but claims made by the Petitioner for damages were rejected on the ground of lack of evidence. Counter claim 1 was allowed to the extent that the Petitioner was directed to refund the excess adjustment of Rs.12,77,064/- with interest thereon at 18% per annum from 01.12.1999 till the date of payment. All the other counter claims were rejected. The said Award is challenged in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) insofar as the claims of the Petitioner were rejected and to the extent that the counter claims of the first Respondent were allowed.

3.I heard the learned counsel for the Petitioner. In spite of service of notice and the printing of the name of the first Respondent in the cause list, the first Respondent did not attend the hearing either through counsel or in person.

4.The main contention of the learned counsel for the Petitioner was that the Petitioner is entitled to revise BRC and that such a revision is binding on the first Respondent as per the Agreement. In addition, it was contended that the first Respondent requested the Tariff Authority for Major Ports (TAMP) for a clarification as to whether the Petitioner is entitled to revise BRC and the TAMP, by order dated 30.08.2001(Ex. C-28) (the TAMP Order), held that the enhancement of the BRC was in order and, consequently, rejected the representation challenging the same. He also submitted that the Arbitral Tribunal disregarded the TAMP Order. In support of the said submissions, the learned counsel for the Petitioner relied upon the Agreement and, in particular, clauses e and f of Article III thereof, which relate to BHC and BRC respectively. By relying upon these clauses, the learned counsel contended that the said clauses envisage that BHC and BRC would be charged as per the scale of rates in force from time to time for the vessels handled under the scheme. He further pointed out that Article III, clause o (12), refers specifically to the Major Port Trusts Act, 1963 (the MPT Act) and, therefore, it is clear that the decision by TAMP is binding on the first Respondent. He also referred to the TAMP Order clarifying that the enhancement of the BRC was in order and that the representation challenging the enhancement thereof is rejected. In this regard, he also pointed out that the first Respondent agreed to bear the enhanced BRC based on the orders of TAMP. Notwithstanding such commitment, he pointed out that the first Respondent did not pay the enhanced BRC even after the final Order of TAMP.

5.The learned counsel for the Petitioner also challenged the Award in respect of counter claim 1 primarily on the ground of limitation. In specific, it was contended that the limitation period, as per section 120 of the MTP Act is six months from the date of the cause of action. In this case, it was pointed out that the counter claim was made in December 2012. Therefore, the learned counsel concluded his submissions by reiterating that the Award is liable to be set aside insofar as it was held therein that the enhancement of BRC is not binding on the first Respondent and with regard to the refusal to reject the counterclaim as barred by limitation.

6.The records were examined and the oral submissions of the learned counsel for the Petitioner were carefully considered. The main question that arises for consideration is whether the Award is liable to be set aside with regard to the findings on the enhancement of BRC by the Petitioner and with regard to the rejection of the contention that the counterclaims are barred by limitation. As regards BRC, the Arbitral Tribunal closely examined Article III (e) and (f) of the Agreement and concluded that BRC is contractual whereas BHC is statutory. In order to reach this conclusion, the Arbitral Tribunal examined not only the Agreement but also relevant exhibits such as the letter from the Ministry of Surface Transport dated 1 April 1999(Ex.C-8). By examining the said document, the Arbitral Tribunal concluded that the berth reservation scheme is in the nature of guidelines and that it does not have statutory force. In view of the conclusion that BRC is contractual, the Arbitral Tribunal held that any enhancement in BRC would require the consent of the first Respondent. In the absence of such consent, the Arbitral Tribunal held that BRC would be payable either on one day's average BHC or 25% of BHC of the vessels total stay in the berth, whichever is higher, as stipulated in clause f of Article III of the Agreement.

7.As regards BHC, as stated earlier, it was held that BHC is statutory because the scale of rates are fixed by TAMP as stipulated in the MTP Act and referred to in the Agreement. By contrast, the Arbitral Tribunal held that the authority of TAMP does not extend to the fixation of BRC as opposed to tariff and scale of rates. This conclusion was reached by also examining Article 3 (n) of the Agreement. Thus, it cannot be said that the Arbitral Tribunal disregarded the TAMP Order. In addition, the above conclusions cannot be said to be arbitrary or perverse. On the contrary, these conclusions are based on a fair and reasonable interpretation of the relevant clauses of the Agreement and upon a reasonable appraisal of the relevant exhibits. Thus, no case is made out to interfere with the Award on this ground.

8.As regards the plea of limitation with regard to the counter claims, the Arbitral Tribunal examined Section 120 of the MPT Act. After examining Section 120, the Arbitral Tribunal concluded that the said section only deals with the period of limitation in respect of anything done in pursuance of the MPT Act by the Port Trust or any employee thereof. In effect, it was held that it pertains to the services rendered by the Port Trust to port users and not to contractual claims made against the Port Trust. On the basis of the said reasoning, the Arbitral Tribunal held that the counter claims are not barred because Section 120 is not applicable to the counter claims. I find that this conclusion is based on a reasonable interpretation of Section 120 of the MPT Act and, therefore, interference is not warranted under Section 34 of the Arbitration Act.

9.Thus, none of the grounds of challenge are sustainable. As a consequence, the challenge to the Arbitral Award fails. In fine, the Petition to set aside the Award is dismissed.

31.10.2019

Speaking order
Index: Yes
Internet: Yes
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SENTHILKUMAR RAMAMOORTHY, J.

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Pre Delivery order
in
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