

\$~3

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

+ **FAO(OS) (COMM) 2/2019 & CM No.379/2019(Stay)**

MMTC LIMITED

..... Appellant

Through: Mr. Sanat Kumar, Senior Advocate
with Mr. Vikram Mehta and Mr.
Sarthak Khurana, Advocates.

versus

M/S KARAM CHAND THAPAR & BROS (COAL SALES) LTD

..... Respondent

Through: None.

CORAM:

JUSTICE SANJEEV NARULA

JUSTICE S.MURALIDHAR

ORDER

%

25.02.2019

SANJEEV NARULA, J.

1. This is an appeal filed under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'Commercial Courts Act') read with Section 37 of Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the Act'). The Appellant challenges the judgment dated 31st October 2018 passed by learned Single Judge in O.M.P. (COMM) No. 193 of 2017 whereby objections against a unanimous Award dated 7th January 2017 have been dismissed, and resultantly the claims preferred by the Respondents before the Arbitral Tribunal have been upheld.

BRIEF FACTUAL BACKGROUND

2. The nature of disputes that were referred to Arbitration, the respective

versions and contentions of the parties are recorded in detail in the unanimous arbitral award. The same have also been elaborately discussed by the learned Single Judge in the impugned order. We, therefore, do not deem it necessary to discuss the facts of the case extensively, and it would suffice to note the bare essential facts that are relevant for the disposal of the present appeal.

3. The National Thermal Power Corporation Ltd. (NTPC) placed orders on the Appellant-MMTC for import of coal for supply to its various Power Stations in the country.

3.1. The Appellant issued a tender notice dated 11th March 2005 inviting offers for the purpose of importing coal to Indian Ports and for arranging vessels and having them cleared and delivered to NTPC Thermal Power Station. The Respondent, a company engaged in the business of stevedoring and handling, clearing and forwarding, transportation and escorting of cargo from vessels, participated in the tender. Its bid was selected and a Contract dated 1st June 2005 was executed between the Respondent and the Appellant (hereinafter, “the Contract”).

3.2. As per the Contract, Appellant was to provide the services of stevedoring, handling and forwarding, unloading, transportation etc of the coal supplied by a Foreign Supplier (Adani Global Pte. Ltd.) to NTPC Thermal Power Stations etc.

3.3. As per the salient terms of the Contract between the parties, Respondent

was entitled to earn an incentive of ‘despatch’ for timely unloading of vessels. Likewise, in the event of delay, the Respondent is held liable for ‘demurrage’.

3.4. In terms of the Contract, for the period from June 2005 to May 2006, the Respondent handled 31 Vessels. Indisputably, the Respondent earned despatch qua 25 vessels. Out of the remaining 6 vessels, it was admitted between the parties before the Arbitral Tribunal that Respondent had incurred demurrage vis-a-vis two vessels. The dispute between the parties thus revolves around four vessels bearing the following names:-

- (i) MV Jia Xin Shan
- (ii) MV Pacific Pioneer
- (iii) MV Dubai Guardian; and
- (iv) MV Vancouver Victory.

3.5. In respect of the fourth vessel, it was claimed by the Respondent that there was Customary Quick Despatch (CQD). To clarify, in the event there is CQD in respect of a vessel, then no amount is payable, either by way of demurrage or by way of despatch.

3.6. The Respondent filed its claim before the Arbitral Tribunal in respect of four vessels claiming despatch in respect of three vessels and status of CQD in respect of fourth vessel.

3.7. The Appellant, on the other hand, disputed the claim and alleged that the Respondent’s quantification was incorrect and that it was instead liable to pay demurrage.

3.8. The record of the Tribunal, as noticed by the learned Single Judge, makes reference to the letter dated 22nd February 2006. This communication is written by the Appellant's Regional Office forwarding the lay time calculation sheets to the Foreign Supplier with respect to three vessels for which Respondent was claiming despatch.

3.9. The record also reveals that Appellant lays considerable stress on the meetings with the Foreign Supplier held on 22nd November 2006 and 23rd November 2006 on the issue of claim of despatch and demurrage. It is professed that in the said meetings it was agreed that all the four above noted vessels had incurred demurrage. It is also asserted that in the said meetings, in respect of two out of four vessels, demurrage had been quantified; for the remaining two, although it was agreed that the demurrage would be levied, the amount to be paid was not quantified.

3.10. The Appellant also contended that in the subsequent communication dated 28th November 2006, its Regional Office (RO) erroneously reiterated its earlier stand vis-a-vis four vessels in question.

4. In view of the rival stand taken by the parties, the Respondents invoked the arbitration clause and called upon the Indian Council of Arbitration (ICA) to appoint an Arbitrator. Pursuant thereto, proceedings commenced before the Arbitral Tribunal.

FINDINGS OF THE ARBITRAL TRIBUNAL

5. The Arbitral Tribunal noted and decided the following claims:-

Claim No. 1: Service charges payable as per Clause 2.6 of the Contract on the basis of quantity of coal received by NTPC

6. The Arbitral Tribunal noted that Appellant has not disputed that the said amount was payable to the Claimant and allowed the claim for an amount of Rs. 1,27,62,425/- with interest at the rate of 12% per annum from the date of filing of the claim petition.

Claim No. 2: Payment of despatch or demurrage on 4 vessels under dispute

7. Arbitral Tribunal noted that the Appellant did not lead any evidence either documentary or oral to contradict the claim of the Respondents or to establish that instead they were liable for demurrage. The Tribunal also rejected the contention of the Appellant that the Foreign Supplier had raised demurrage claim on the handling agent and that demurrage was payable by the Respondent. The Tribunal noted that no such statement was produced on record and as a result, it held that Respondents had earned despatch of US Dollar 2,42,445.03/-

Claim No. 3: Bank charges on account of bank guarantee in terms of Clause 2.12 of the Contract

8. A bank guarantee had been furnished by the Respondent in terms of the Contract. This was to be released on conclusion of the Contract. Despite the completion of the Contract, on Appellant's directions, the bank guarantee had to be kept alive and renewed from time to time. As a result,

Respondents incurred bank charges. The Tribunal held that the same were recoverable with interest from 22nd June 2009 till 9th September 2010.

Claim No. 4: *Pendente lite and future interest*

9. Since the amount had been withheld without any lawful justification, the Appellant was directed to pay *pendente lite* interest on Claim 1, 2 and 3 from 9th September 2010 at the rate of 12% per annum from the date of filing of the Statement of Claim till the date of the award. Future interest was also awarded at 12% per annum till the date of payment.

10. Besides, litigation expenses were also awarded in favour of the Respondents.

FINDINGS OF THE LEARNED SINGLE JUDGE

11. The learned Single Judge has upheld the award and dismissed the objections *inter alia* holding as under:-

Claim No. 1

11.1. Noting that there is no objection by the Appellant on this issue, the Learned Single Judge upheld the claim. The Court also took note of the testimony of the Appellant's witness admitting that a sum of Rs. 1,28,23,183/- was payable to the Respondent. The quantum of the claim was however restricted to the amount calculated in the Statement of Claim.

Claim No. 2

11.2. The communications dated 28th November 2006 and the Minutes of

Meeting dated 22nd November 2006 and 23rd November 2006 were deliberated and analysed extensively. Learned Single Judge has held that there is no material placed on record to show that a settlement was arrived at with the Foreign Supplier, as claimed by the Appellant.

11.3. The Learned Single Judge also held that in the absence of any factual foundation to the contrary, the findings and conclusion arrived at by the Tribunal based on the appreciation of evidence placed before it, are correct.

Claim No. 3

11.4. The evidence before the Arbitral Tribunal was taken into consideration and deliberated. The learned Single Judge noted the Appellant's contention that the extension of bank guarantee was necessitated on account of a counter bank guarantee furnished to NTPC. Further noticing that there was no cross examination of Appellant's witness on the quantum of bank charges, the conclusion of Arbitral Tribunal was found to be correct.

Claim No. 4

11.5. No error was found in the reasoning of the Arbitral Tribunal for awarding the interest by relying upon the judgment of the Supreme Court in *M/s Hyder Consulting (UK) Ltd. v. Governor State of Orissa, (2015) 2 SCC 189*. No provision was noticed in the Contract prohibiting the grant of interest at the rate awarded by the tribunal.

11.6. The objection with respect to litigation expenses was sustained. The Award of full costs to the Respondent, was set aside.

GROUND OF CHALLENGE

12. The present appeal raises several grounds, however, the grounds of challenge urged during the hearing can be summarised as under:-

12.1. The finding of the learned Single Judge that there was no material to prove the settlement between the Appellant and the Foreign Supplier, is erroneous.

12.2. The Minutes of Meeting dated 22nd and 23rd November 2006 demonstrate that the Foreign Supplier levied demurrage in respect of four ships and the same constitute sufficient material to prove that there was a settlement between Appellant and the Foreign Supplier. The said decision was final and binding upon the Respondent.

12.3 The lay time calculation sheets do not take into account the pre-berthing delay on account of the Respondents, as per Clause 2.2.8 of the Contract. Reliance on Statement of Facts (SOFs) and the lay time sheets prepared by the RO of the Appellant is erroneous. The benefit of despatch or demurrage was subject to the settlement between the Appellant and Foreign Supplier and consequently payments were to flow to the Respondent.

12.4. The learned Single Judge has failed to appreciate that the letter dated 28th November 2006 raises a doubt because of the manner in which it had been issued and should not have been relied upon by the learned Single

Judge. The lay time sheets are not binding on the parties.

12.5. The claim no. 2 could not have been granted in USD and the rate of interest granted at 12% p.a under claim no. 4 is highly excessive. Interest on the claim should have been at LIBOR rates.

12.6. Claim No. 3 of Rs. 17,46,576.27/- relating to bank charges in respect of bank guarantee has been allowed without any material placed on record by the Respondents to corroborate and validate its contention.

FINDINGS AND ANALYSIS

13. The Court has heard the learned counsel for the Appellant.

14. The extent of jurisdiction of the Court while dealing with the challenge to an Arbitration Award, now, stands authoritatively settled by a plethora of judgments of the Supreme Court. It is no longer *res integra* that the interference by a Court in a challenge to an arbitral award is limited and circumscribed. The scope of interference under Section 37 of the Act being in the nature of second appeal, is still narrower and restricted. The judicial pronouncements on this aspect that lay down the scope of judicial scrutiny and interference under Section 34 and 37 of the Act, are also being noted, however, a little later in this judgment.

15. At the first instance, we proceed to deal with the grounds of challenge.

16. The Claim No. 1 with respect to payment of service charges, is not under

challenge. With respect to Claim No. 2, the main contention of the Appellant is that the Minutes of Meeting dated 22nd and 23rd November 2006 indicate a settlement on the levy of demurrage. The meetings held on 22nd and 23rd November 2006 are between the Appellant and Adani Enterprises Limited (Foreign Supplier). The Minutes of the Meeting refer to certain vessels and are in the nature of a balance confirmation of accounts between Appellant and the Foreign Supplier. Both the Arbitrator as well as the learned Single Judge have considered the contention of the Appellant and have rejected the same and rightly so, in our considered opinion. In order to bind the Respondent to the stance as allegedly discussed in the meeting held on 22nd and 23rd November, 2006, it was necessary on the part of the Appellant to demonstrate that indeed the settlement had been arrived at with the Foreign Supplier, as reflected in the said Minutes of Meeting. It is noted by the learned Single Judge that the Appellant failed to produce any material on record to conclusively prove that in fact the settlement had been arrived at. It can thus be noticed that both the Arbitral tribunal and the learned Single Judge have found the Minutes of Meeting to be insufficient proof of the plea advanced by the Appellant. Sufficiency of evidence relating to proof of fact depends on several factors. The evidence in the nature of Minutes of Meeting were found to be falling short of the adequate proof that was expected from the Respondent on the contention raised before the Arbitral tribunal. It is also noteworthy that Appellant did not file a counter claim before the Arbitral Tribunal. Learned Single Judge has, taking note of this aspect rightly come to the conclusion that the findings of the Arbitral Tribunal based on SOFs would have to prevail. The plea of the delay being attributable to the Respondent on account of pre-berthing, also has been

found to be unmerited, as the SOFs prepared in respect of each vessel took the said aspect into account. In the remarks noted in the SOFs the Appellant did not hold the Respondents responsible for the delay.

17. Moreover, the factor that clinches the issue is the communication dated 28th November 2006 issued by the Appellant's office that held that Respondent had earned despatch. This is sequel to the decision taken in its earlier communication dated 22nd February 2006. The only exception taken in the said letter was in respect of a vessel named M.V Dubai Guardian where the quantum of despatch earned was shown to be USD 289178 as against USD 3277.20. The Appellant attempted to discredit the said letter by casting aspersions on the author of the said letter. The learned Single Judge has rejected this frivolous objection holding the contention as baseless and aforethought. In absence of any averment in the objections under section 34 and without any evidence, we have no reason to disagree with the findings of the learned Single Judge. The onus to prove the objection raised by the Appellant lay squarely upon it. This has not been discharged and in absence thereof, the factual narration in the letter dated 22nd November 2006 would prevail. Thus the findings of the Tribunal and the learned Single Judge on this issue, do not call for any interference.

18. The contention of the Appellant that under the Contract, payments were to be made only in INR and therefore, claim could not have been awarded in USD, is misconceived. There is no such clause prohibiting the grant of the Award in USD. The learned Single Judge has perused the relevant Clauses 2.6.1 and 2.12.1 and has observed that the said clauses relate to service

charges and the bank guarantee to be furnished by the Respondent and do not, in any manner, prohibit the quantification of the claim of despatch in US dollars. We have also examined the said provisions as also Clause 2.6.1, referred to, by the Appellant and the same are found to bear no relevance to the aforesaid contention of the Appellant. The learned Single Judge has also rightly held that the Minutes of Meeting dated 22nd and 23rd November 2006 also show that the calculation of despatch and demurrage is in US Dollars. The learned Single Judge has also observed that the objection regarding quantification of the claim amount in USD had been raised for the first time in the objection petition and has therefore affirmed the same to be meritless. We do not find anything wrong with this finding as well. This objection is purely based on facts and should have been taken up at the first instance. The Appellant cannot be permitted to raise the same at the stage of filing objections by claiming to be a purely legal objection. Moreover, contentions of the Appellant are concerning the examination and appraisal of the documents and evidence. While exercising jurisdiction under Section 37 of the Act, we are not inclined to re-visit and re-appraise the documents or evidence and upset the findings of fact arrived at by the Arbitral Tribunal and confirmed by the learned Single Judge. The findings of fact that are based on the evidence produced before the Tribunal cannot be faulted with under section 37 of the Arbitration Act.

19. The findings of the learned Single Judge on Claim no. 3 qua bank charges are in consonance with the terms of the Contract and the material

placed on record. Clause 2.12 of the Contract required the Respondents to furnish the security-cum-performance bank guarantee in the sum of Rs. 2.5 crores during the contract period. Concededly, the bank guarantee was extended 11 times. The Respondent was constrained to extend the bank guarantee on account of the stand taken by the Appellant. The Appellant has disputed the said claim without any basis and seriousness. The Respondent has also produced evidence in the nature of oral testimony to establish this claim. There is no effective and compelling objection to the same. This finding of fact as arrived at by the Arbitral Tribunal has been rightly confirmed by the learned Single Judge. We concur with the same.

20. Learned counsel for the Appellant has contested Claim no. 4 by relying upon the judgment of the Supreme Court in the case of ***Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*** 2018 SCC Online SC 1922. His contention is that rate of interest at 12% is excessive as the same has been awarded on the claim in US Dollars. He contended that interest should have been granted at LIBOR rates. LIBOR is an average interest rate calculated from time to time, based on inputs given by major banks in London as to their interest rates. Under the LIBOR regime, banks give details *vis-a-vis* actual interest rate that they are paying, or would be required to pay for borrowing from other banks. LIBOR is a 3-month rate which has been adopted in some cases of a breach of contract (or other obligation) (*Vedanta (supra)*).

21. The judgment relied upon *Vedanta (supra)* by the Appellant is not applicable to the facts of the present case. In the said case, the Supreme

Court modified the interest awarded by the Arbitral Tribunal for the reason that the award directed dual rate of interest. The Court also observed that the high rate of interest made in foreign currency was contrary to the conditions stipulated in the Contract. This is evident from the following observations made in the said judgment as noted in paras 12, 15, 16 and 20 are reproduced hereunder:-

“12. The discretion of the arbitrator to award interest must be exercised reasonably. An arbitral tribunal while making an award for Interest must take into consideration a host of factors, such as: (i) the 'loss of use' of the principal sum; (ii) the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation, (viii) proportionality of the count awarded as Interest to the principal sums awarded.

On the one hand, the rate of Interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature.

Courts may reduce the Interest rate awarded by an arbitral tribunal where such Interest rate does not reflect the prevailing economic conditions or where it is not found reasonable, or promotes the interests of justice.

15. In the present case, the arbitral tribunal has adopted a dual rate of Interest in the Award. The Award directs payment of Interest @ 9% for 120 days post award; if the amount awarded is not paid within 120 days', the rate of Interest is scaled up to 15% on the sum awarded.

16. The dual rate of Interest awarded seems to be unjustified. The award of a much higher rate of Interest after 120 days' is arbitrary, since the Award-debtor is entitled to challenge the

award within a maximum period of 120 days' as provided by Section Achieving Coherence Through Purpose, Indian Journal of Arbitration Law, Volume 7, Issue 1 (July 2018) 34(3) of the 1996 Act. If the award-debtor is made liable to pay a higher rate of Interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the Award by filing objections Under Section 34 of the said Act.

20. The award of Interest @ 9% on the Euro component of the Claim is unjustified and unwarranted. The levy of such a high rate of Interest on a claim made in a foreign currency, would result in the Claimant being awarded compensation, contrary to the conditions stipulated in the Contract.”

22. Section 31 (7) of the Act provides for award of interest. The Supreme Court in **Hyder Consulting** (supra) has held that the Arbitrator has the discretion to award interest in the following words:

“8. Thus, Sub-section (7) of Section 31 of the Act provides, firstly, vide Clause (a) that the Arbitral Tribunal may include interest while making an award for payment of money in the sum for which the Award is made and further, vide Clause (b) that the sum so directed to be made by the Award shall carry interest at a certain rate for the post award period.

9. The purpose of enacting this provision is clear, namely, viz. to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the Award in the same manner as if it were a decree of the court vide Section 36 of the Act.

10. In this view of the matter, it is clear that the interest, the sum directed to be paid by the Arbitral Award under Clause (b) of Sub-section (7) of Section 31 of the Act is inclusive of interest pendent lite.

21. In the result, I am of the view that S.L. Arora's case is wrongly decided in that it holds that a sum directed to be paid

by an Arbitral Tribunal and the reference to the Award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon Award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the Award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language.

26. Section 31(7)(a) of the Act deals with grant of pre-award interest while Sub-clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance of the award. Pre-award interest is at the discretion of Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of statute-the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in Clause (b) of Section 31(7) of the Act, i.e., 18%."

This discretion must be exercised reasonably in facts of the present case. We do not find the said rate of interest to be excessive so as to require any interference. Accordingly, this contention is also rejected.

23. It is to be noted that though the Appellant has averred that the Award is

contrary to the terms of the Contract and has relied upon the judgment of the Supreme Court in *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, in support of his submission, however, during the course of arguments, the learned Counsel was not able to point out any Clause which is in conflict with the Award. The grounds raised by the Appellant fall within the realm of pure findings of fact. No palpable error on fact or in law or any manifest perversity has been pointed out in the impugned judgment, that would result in miscarriage of justice. Keeping in view the narrow scope of section 37 of the Act, we do not find any grounds of interference in the view taken by the Arbitrator and the learned Single Judge in the facts of the case.

24. Before parting with the judgment, we would refer to a few judgments which define the scope of interference by the Court and the principles of law enunciated for dealing with the objections under Section 34 and the appeal under Section 37 of the Act while dealing with the order passed under Section 34 petition. In the case of *Associate Builders v Delhi Development Authority* (*supra*), it was held by the Apex Court that “when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected”. Further, in *L.G. Electronics India (P) Ltd. v Dinesh Kalra* 2018 SCC Online Del 8367, it has been held by a Division Bench of this Court that findings, of fact as well as of law, of the arbitrator/Arbitral tribunal are ordinarily not amenable to interference either under sections 34 or 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie,

perverse, that interference, by this Court, is absolutely necessary. The scope of judicial scrutiny and interference by an appellate court under section 37 of the Act is even more restricted, while deciding a petition under section 34 of the Act. The same position has been reflected in multiple decisions of this Court in *State Trading Corporation of India Ltd. v Toepfer International Asia Pte. Ltd.* 2014 (144) DRJ 220 (DB), *P.C.L Suncon (JV) v N.H.A.I.*, 2015 SCC Online Del 13192, *NHAI v BSC-RBM-PATI Joint Venture* 2018 SCC OnLine Del 6780, *MTNL v Fujitshu India Private Limited* 2015 SCC OnLine Del 7437, *MTNL v Finolex Cables Limited*, 2017 SCC OnLine Del 10497, *Shree Vinayak Cement Clearing Agency v Cement Corpn. Of India* (2007) 142 DLT 385.

25. We agree with the said decisions and for the reasons given above, we do not find any ground or reason to interfere with the impugned judgment. The appeal is accordingly dismissed along with the pending applications. No order as to costs.

SANJEEV NARULA, J

S.MURALIDHAR, J

FEBRUARY 25, 2019

SS