

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: August 06, 2020

+ OMP(I)(COMM) 183/2020, I.A. 5920/2020

JAGUAR OVERSEAS LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Adv. with
Ms. Shyel Trehan, Ms. Manjira Das,
Mr. Saurabh Seth and Mr. Raghv
Anand, Advs.

versus

SEAGULL MARITIME AGENCIES PVT LTD

..... Respondent

Through: Mr. Prashant Mehta and Ms. Neha
Tanwar, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed under section 9 of the Arbitration and Conciliation Act, 1996 ('Act of 1996' in short) by the petitioner seeking the following reliefs:

- “(a) Direct the Respondent to immediately make payment to the port authorities/ shipping lines or any other authority toward the 'detention & demurrage' and other charges that are being incurred on the 41 containers that are halted at Dar Es Salaam port and thereby facilitate the release and delivery of the 41 containers at Dar Es Salaam port, and complete their shipment to the project sites at Zambia at the earliest, and;*
- (b) Direct the Respondent to disclose to the Petitioner all details, alongwith supporting documents, with respect to the payment which shall be made by the Respondent to the port authorities, shipping lines, and any other entity/authority towards the*

'detention & demurrage' charges that are being incurred on the 41 containers which are halted at Dar Es Salaam port, and;

- (c) Direct the Respondent to make full efforts to apply to the port authorities and shipping lines, seeking discount/waiver on the 'detention & demurrage' charges being incurred on the 41 containers halted at Dar Es Salaam port, and thereafter, if and when the Respondent receives any refund on the said payment in the form of 'Discount/waiver', then disclose to the Petitioner, the complete details alongwith supporting documents of the said 'Discount/ Waiver' which has been received, and;*
- (d) Restrain the Respondent from obstructing and halting the movement of the remaining other 20 containers which have been assigned under the Agreement, and out of which 5 have already reached Dar Es Salaam port on 01.07.2020, and others would be reaching soon, and facilitate their movement and complete shipment of 61 containers at the earliest as per the terms of the Agreement;*
- (e) Pass any other Order(s) that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

2. It is the case of the petitioner and so contended by Mr. Rajiv Nayyar learned senior counsel that on August 30, 2018 the petitioner entered into a contract with the Government of Zambia through the Ministry of Health, Zambia for construction of health posts, including providing prefabricated structures and for supply and installation of essential equipment in various regions of Zambia.

3. For the purpose of exporting the material for the project, the petitioner entered into an agreement dated July 15, 2019 (hereinafter 'the agreement') with the respondent wherein the

respondent was appointed as the handling agent for the purposes of ex-works, FOB arrangements, customs clearance, transportation, freight forwarding, multimodal activities, etc. with respect to the shipment of around 250 containers containing the material for the above mentioned project to the sites in Zambia.

4. It was his submission that the 57 containers remain assigned to the respondent under the agreement.

5. He also stated that the petitioner vide notice of termination dated July 03, 2020, had terminated the agreement with the respondent in respect to the remaining 18 containers on ground of breaches committed by the respondent. The respondent continues to be under the obligation to complete the shipment of the 57 containers that have already been assigned to the respondent, prior to the notice of termination dated July 03, 2020 and are currently stated to be under the custody of the respondent at Dar Es Salaam.

6. Mr. Nayyar submitted that the petitioner has been forced to approach this Court on account of breach of the agreement by the respondent, wherein the respondent had failed to act in accordance with its admitted obligation and also failed to complete the shipment of the 57 containers assigned to the respondent under the agreement.

7. Further, it was submitted that the respondent is arm twisting the petitioner into paying the 'detention and demurrage' charges by stating that only when the petitioner accepts the liability of the aforementioned charges, only then the respondent

would proceed to pay the 'detention and demurrage' charges to the port authorities and shipping lines, in order to get the said containers released and facilitate their movement towards the project site in Zambia. Whereas the petitioner vehemently contests this condition proposed by the respondent, as under the agreement the petitioner is not liable to incur 'detention and demurrage' charges imposed beyond the 'free days'. On the contrary he submitted the liability of payment of detention and demurrage charges is of the respondent in terms of the agreement. According to him, the respondent is acting in contravention to the agreement wherein the respondent and/or its agents are restrained from holding lien on the cargo.

8. He also challenged the stand of the respondent that the 'detention and demurrage' charges incurred on the containers were on the account of delay due to the petitioner failing to fulfill its obligation of payment under the agreement. He stated as per the admission of the respondent vide email dated June 16, 2020 the sum of Rs. 2.67 Crores which was due for the shipment of containers, the petitioner had already paid a sum of Rs.2.12 crore (Rs. 1 crore each on June 15 and 17, 2020) and that the remaining sum of Rs. 55 lacs is disputed, since as per the petitioner Rs. 51 lacs of the said amount pertained to a separate agreement with the respondent for another project. Further the amount mentioned in email dated June 16, 2020 would've become due only after 14 days from the delivery between the period of March 26, 2020 to June 1, 2020.

9. He stated there is no delay in making payment by the petitioner and the delay which resulted was on account of the respondent who vide emails dated June 24 and 25, 2020 informed the petitioner that their accounts had been frozen by the Income Tax Department and themselves requested the petitioner to not remit the amount due into their bank account as they were undergoing restructuring and had some issues with their banks.

10. According to Mr. Nayyar the respondent also admitted vide emails dated, May 01, 2020, June 14, 2020 and June 16, 2020 that the delay in the movement of the containers had been affected on the account of the fact that they are facing operational difficulties at port due to the ongoing corona virus pandemic, which has curtailed the movement of the containers and delay in payment by the petitioner if any, was not the reason behind the delay in movement.

11. Mr. Nayyar submitted that as on the date, no amount is due or outstanding to the respondent as per the agreement. He also stated, despite the fact that the petitioner has cleared all outstanding dues the respondent in their reply claimed a sum of Rs. 11.42 crores which as per the averments of the respondent was inclusive of Rs 6.92 crores which the respondent claimed was overdue as per the ledger amount maintained by the respondent, and another Rs. 4.50 crores that the respondent claims is payable as 'detention and demurrage' charges incurred on the containers halted at Dar Es Salaam port.

12. In this regard he would submit an amount of Rs. 6.92 crores being claimed by the respondent is not payable to them as out of the said amount, an amount Rs.4,21,23,466/- is being claimed by the respondent for delivery of 57 containers which are presently assigned to the respondent under the agreement on a 'deemed delivery' basis, whereas it is stipulated in this agreement that the payment for the services of the respondent towards the shipment of the said 57 containers would only be due after a period of 14 days from the date of delivery of the said containers at the project site in Zambia. He also stated that another claim of Rs. 1,06,11,844/- out of the amount of Rs.6.92 crores was claimed on grounds of 'detention and demurrage' charges against 15 containers delivered under the agreement at Zambia between May 24, 2020 and June 01, 2020; which is an amount not due for payment as the liability of any 'detention and demurrage' charges rests upon the respondent. Out of the remaining amount the petitioner stated that Rs. 46,87,084 is being claimed by the respondent which is under a completely different contract, which was due for delivery at Benin and; the with respect to the remaining Rs. 1,18,45,800 the petitioner stated that the respondent had not issued any invoice with regard to this amount.

13. In so far as Rs. 4.50 crore demanded by the respondent towards the 'detention and demurrage' charges being incurred on the 57 containers held at Dar Es Salaam port, Mr. Nayyar reiterated his earlier submission that the petitioner as per the agreement is not liable to pay any 'detention and demurrage'

charges. It was further submitted that the Respondent had failed to produce any document from the shipping lines/ port authorities in support of the said amount being claimed. The figure so quoted is incorrect and inflated and as per the assessment done by the petitioner, based on the 'detention and demurrage' charges mentioned on the website of the port authorities and shipping lines, the real figure should be USD 4,29,596 as on July 13, 2020 as incurred on the 41 containers.

14. Mr. Nayyar placed reliance on *Mafatlal Industries Ltd. & Anr. v. Mahanagar Telephone Nigam Ltd, (2002) 64 DRJ 94* on the proposition that it is an admitted obligation of the respondent under the agreement to facilitate the movement and complete the shipment to the various project sites and that under section 9 of the Act of 1996 it would be within the power of the court to direct enforcement of an admitted obligation, by way of interim relief. In this regard he has relied on the provisions of section 9 (1) (ii) (b) and (e) of the Act of 1996.

15. He also stated that as per the admitted terms of the agreement the respondent would not be permitted to hold the shipment of the containers assigned under the agreement for any reasons whatsoever and further submitted that the respondent breached the agreement by stopping the movement of 57 containers currently held at Dar Es Salaam thereby delaying the expected date of delivery by a period of 12 to 85 days which is still continuing. That grave irreparable loss has been caused to the petitioner and that even the balance of convenience would be in its favour for seeking a direction for the release of the

containers from the port. Mr. Nayyar in the end also stated that, the due amount of Rs. 6.92 crores being claimed by the respondent, which is although not payable, still the petitioner, is ready to deposit before this Court an amount of Rs. 4.21 crores; which is payable to the respondent after 14 days of delivery of containers in Zambia and further secure the balance amount. In support of these submissions the Mr. Nayyar placed reliance on the following judgments:

- (i) ***Bhubaneswar Expressways Pvt. Ltd. v. National Highways Authority of India, 2019 SCC Online Del 11390;***
- (ii) ***Huawei Technologies Limited v. Sterlite Technologies Limited, 2016 SCC OnLine Del 604;***
- (iii) ***Jetpur Somnath Tollways Limited v. National Highways Authority of India, 2017 SCC Online Del 9453***

16. Mr. Prashant Mehta, learned counsel who appeared on behalf of the respondent on the outset stated that the relief prayed by the petitioner is not maintainable. He relied on section 41 (e) of the Specific Relief Act, 1963 to state that no injunction can be granted in cases of contracts which are not specifically enforceable. He further stated that the section 14 (1) (c) provides that specific performance cannot be granted in cases where the contract is terminable. No injunction can be granted in the present case as not only was the contract terminable but was terminated by the petitioner illegally. In support of this submission, he has placed reliance on the termination clause of the agreement. He also relied on a

judgment of the Bombay High Court in ***Spice Digital Ltd. v. Vistaas Digital Media Pvt. Ltd.*** MANU/MH/1682/2012.

17. He also argued that the contract has expired due to the efflux of time as on December 31, 2019 and it is a settled law that the contract which has expired by efflux of time cannot be specifically enforced. He also placed reliance on the judgment of a coordinate bench of this court in ***Fashion Television India Pvt. Ltd. v. FTV Bvi*** 2012 (127) DRJ 535; and also on ***H. Rubenstein and Co. v. Edgar Francis*** AIR 1930 Lah 597 and ***Royal Orchid Hotels Ltd. v. Ferdous Hotels Pvt. Ltd*** MANU/TN/0451/2013 in support of his submission.

18. He submitted that an injunction cannot be granted in a case where new set of facts are introduced by grant of such an injunction. It is common knowledge that an injunction can only be granted to restore *status quo* and not to establish a new factual scenario. In this regard he placed reliance on ***Samir Narain Bhojwani v. Aurora Properties and Investments and another***, (2018) 17 SCC 203.

19. Another argument advanced by Mr. Mehta was that an injunction cannot be granted for performance of services which are not unique. In the present case the services performed by the respondents are not unique and are being performed by several other companies and are readily available in the market; and has therefore argued that this court cannot grant injunction in the facts of the case. He relies on a judgment of this court in ***Jindal Steel and Power Limited v. Sap India Pvt. Ltd.*** 2015 (153) DRJ 225. He further relied on the judgments in ***Kailash***

Singh v. The Managing Committee, Mayo College, Ajmer and Ors., (2019) 2 SCC (L&S) 250 and *Association of Medical Super Speciality Aspirants and Residents and Ors. v. Union of India (UOI) and Ors.*, (2019) 8 SCC 607; in support of his submission that a contract of service cannot be specifically performed and therefore an injunction cannot be granted.

20. According to him, the petitioner has itself breached the contract by not performing its side of the bargain which in this case was stated to be non-fulfillment of payments which were due and that these payments were also delayed. He cites the agreement which reads, that if the petitioner fails to complete the defined responsibilities and/or asks the respondents to hold the containers, the cost would remain applicable to the petitioner. He argued, since there have been huge delays by the petitioner to make timely payments to the respondent, the respondent is not obligated to keep performing the contract without receiving the payments. Further the contractual provisions on which the petitioner places reliance are no longer applicable since the petitioner stopped making payments in a timely manner. He has argued that since 2017 there was an average delay of 60 days in making the payments and in one case the delay was of 350 days and in 63 cases the delay was of 100 days.

21. He also submitted that the respondent had informed the petitioner of the delays in payments and the impact on deliveries thereof. The petitioner was also informed about the holding of containers due to such non-payment. In this regard he has drawn

my attention to pages 32 to 39 of the reply.

22. He has placed reliance on section 16 of the Specific Relief Act, 1963 and section 55 of the Indian Contract Act, 1872 to submit that specific performance of a contract cannot be enforced in case where a party fails to perform its obligation under the contract. In the present case the petitioner has huge outstanding dues and had regularly failed to perform its obligation. He placed reliance on a judgment of the Bombay High Court in *T.V. Vision Pvt. Ltd. v. Raju Srivastava & Anr.* **Judgment dated 27.11.2009.**

23. He contended that the deemed delivery charges which are being sought are not contrary to the agreement. The deemed delivery charges were communicated to the petitioner vide email dated February 26, 2020 and the petitioner was reminded about the same again vide email dated July 3, 2020, however the petitioner only raised the issue for the first time just before the filing of the present petition i.e. on July 13, 2020. Mr. Mehta argued that the reliance placed by Mr. Nayyar on the judgment of *Mafatlal Industries Ltd. (supra)* is erroneous since the petitioner itself failed to perform its part under the agreement and upon such failure the respondent could not be bound to perform the contract.

24. It was the case of the respondent that they had always been proactive in fulfilling their part of the obligation despite the COVID-19 pandemic. In fact 15 containers were dispatched between May 12, 2020 and May 20, 2020. Even when the borders were sealed the respondent, timely and constantly

informed the petitioner of the status of the containers despite the irregular payment of dues by the petitioner. The respondent stated that the closure of borders was a *force majeure* condition and the respondent could not be held liable for the delays.

25. It is the case of Mr. Mehta that the respondent had been regularly writing to the port authorities and had also sought the support of the petitioner in seeking waiver of the detention and demurrage charges under the present conditions of COVID-19 and in fact the respondent continued their approach for waiver even after the petitioner terminated the contract. It was his submission that since respondent has been acting in the position of an agent and without the support of the principal; it would not be in a position to get the demurrage charges waived.

26. He also submitted that not only did the petitioner shy away from its responsibility to pay their financial obligations; the petitioner has also suppressed the fact that the petitioner is in direct negotiation with the respondent's agent and is trying to get the goods delivered by-passing the the respondent.

27. Lastly, he argued that damages being an adequate remedy in the present case, the Court should not pass an injunction. In this regard he has placed reliance on the judgment of ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Others (1991) 1 SCC 533.***

28. Having heard the learned counsel for the parties and considered the record, the first issue, which arises for consideration, is whether the prayers as made in the petition can be granted. It was the submission of Mr. Mehta that the prayers

made in the petition are in the nature of a mandatory directions, which if granted shall amount to granting the final relief and as such cannot be granted. Further on the ground that the agreement being terminable, it is settled law that specific performance of a contract cannot be granted.

29. In his submissions, Mr. Nayyar, stated that the petition being under section 9 of the Act of 1996, surely is maintainable and the petitioner is calling upon this Court to grant such interim measures which may appear just and convenient in the facts of this case. He stated all that the petitioner is praying for from this Court is to safeguard its rights pending adjudication of the disputes before the arbitrator.

30. The prayers as made by the petitioner in effect are, that this Court may direct the respondent, to ensure the transportation/ release of the containers from the Port authorities to their onward destination to Zambia. The prayers are opposed by the respondent on the ground, that the petitioner is guilty of not making the payment of shipments in terms of the agreement.

31. According to Mr. Mehta, if the containers are transported to the final destination then nothing further would survive to be decided as far as the petitioner is concerned, whereas the grievance of the respondent with regard to its payment shall remain pending.

32. The plea of Mr. Mehta looks appealing on a first blush but on a deeper consideration including the provision of the agreement which clearly stipulates that even if the agreement is terminated by the petitioner by serving a notice, the respondent

is still under an obligation to transport the containers handed over to it till the service of notice as per the agreement. It is nobody's case that the 57 containers which are the subject matter of the dispute between the parties were handed over after the serving of notice for termination on July 03, 2020. In other words, these containers having been handed over before July 03, 2020 and the respondent is required to ship these containers to Zambia, the directions as sought in the petition by the petitioner are in terms of the obligation of the respondent in terms of the aforesaid stipulation in the agreement. No doubt Mr. Mehta has disputed the obligation on the part of the respondent to ship the containers without the petitioner paying the demurrage charges, it is to be looked into whether such a stand is a correct stand on part of the respondent. The question is, whether pending arbitration the containers must continue to lie at Dar Es Salaam port resulting in the increase in the demurrage charges, more so when the shipment is for a project of the Government of Zambia.

33. That apart it is a settled position of law, that under section 9 of the Act of 1996, the Court has a wide discretion to mould the relief for safeguarding the rights of the parties in other words under section 9 of the Act of 1996, the court has the discretion to pass an interim order of protection as may be just and convenient when the court arrives at a finding that the rights of the party are going to be adversely affected pending the arbitration. In this regard I may refer to the judgment of a coordinate bench of this court in the case of *Ashok Kumar v.*

SBI Officers Association 2013 (3) Arb LR 246 (Del)/ 2013

SCC OnLine 1631 wherein in this court has held as under:

“57. There is another reason which persuades me to reject which is the limited scope of Section 9 of the Act. The mere reading of Section 9 of the Act would reveal that the power of the court under Section 9 can be exercised prior to or during the pendency of the arbitral proceeding or even after passing the award but before enforcement to protect or preserve or sale of any good, amount, or property or thing or any other interim measure as may appear to court just and convenient. The said orders of interim measures under Section 9 are aimed at safeguarding the rights of a party to the arbitration agreement pending the arbitration or its enforcement so that no prejudice can be caused to the said party on account of pendency of the proceedings. However, the said orders of interim protection are not passed on the mere asking when there exists no possibility of safeguarding any private right of the party.

58. It is true that this court has power to pass interim order of interim protection if it appears to the court as “just and convenient”. The wordings just and convenient provide wide discretion to the court to mould the interim relief for safeguarding the rights of the parties. But the said discretion has to be exercised judiciously and not capriciously or in an arbitrary manner. I agree with Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the respondents, that the show cause notice issued by the respondents is not liable to be stayed under the scheme of Section 9 of the Act as the petitioners instead of giving the explanation in the meeting or following the prescribed procedure have approached the Court.

60. Applying the said principle of law to section 9, it can be said that the courts discretion to pass the interim protection order as just and convenient can be exercised when the court arrives at the finding that the rights of the party are going to be affected pending the arbitration or prior to enforcement which needs protection in the

interim which makes it just and convenient to pass the order.”

34. Having said that insofar as the judgment relied upon by Mr. Mehta in the case of ***Samir Narain Bhojwani (supra)*** in support of his submission that there is a distinction between moulding the relief and granting mandatory relief at an interlocutory stage, as regards that the latter can be granted only to restore the status quo and not to establish a new set of facts differing from the state which existed at the date when the suit was instituted. There cannot be any dispute on the said proposition but given the stipulation in the agreement and the position of law narrated above the said judgment is clearly distinguishable. Similarly even the judgments of the Bombay High Court in the case of ***Spice Digital Ltd. (supra)***; Lahore High Court in ***H. Rubenstein and Co (Supra)*** and ***Fashion Television India Pvt. Ltd. (supra)*** in support of his contention that a contract which is terminable or has expired by the efflux of time cannot be specifically enforced is also misplaced, in view of a clear stipulation of the agreement. Even the judgments in the case of ***Jindal Steel and Power Limited (supra)*** and ***Kailash Singh (supra)*** and ***Association of Medical Super Speciality Aspirants and Residents and Ors. (supra)*** are distinguishable.

35. Now coming to the dispute raised by the petitioner in the present petition; it is the case of petitioner that the respondent is not getting 57 containers released from the port authorities at Dar Es Salaam port and transporting them further to Zambia.

According to Mr. Nayyar the demand of the respondent that the petitioner must pay demurrage charges and also make the payments for these containers as well is untenable, in as much as the demurrage charges are payable by the respondent and the payment for transporting the containers shall be made after 14 days of their reaching Zambia, further the obligation to pay the respondent's agent at Dar Es Salaam is on the respondent itself as the petitioner has no privity with the said agent and further a third party cannot claim lien on the said containers.

36. On the other hand, the case of the respondent as advanced by Mr. Mehta is that the obligation to pay the demurrage charges, release the payments and pay the agent is on the petitioner.

37. Having noted the broad submissions made by the counsels for the parties, in order to determine the second issue as to which of the parties is justified in its stand, it is necessary to look into the provisions of the agreement executed between them. At this juncture I find it apposite to highlight the provisions of the agreement on which reliance has been placed by Mr. Nayyar and Mr. Mehta hereunder:

“The Contract shall be valid for all the containers/ shipments handing over to SEAGULL or their Agent at Origin on or before 31-12-2019. JOL can terminate this Contract without assigning any reasons at any time by serving a written notice on the other Party and obligations incurred before termination of this Contract shall be fulfilled by both the parties. SEAGULL need to serve 30 days notice to JOL for the cancellation of the Contract and Shipments planned for these 30 days shall be handled and accepted by them for execution as per Contract. However, JOL can shift

the business after serving the notice as per Contract. The shipments booked upon (handed over to 'SEAGULL') till the serving of Notice shall be handled as per Contract. All dues shall be payable as per Contract for the services rendered and all jobs underway must be completed within this notice period. The Contract can be revalidated upon mutual consent of both parties.

Since 'SEAGULL' is not having their own Office in Mozambique, Tanzania, China, Zambia and any other Country involved in this business, hence they are operating in these countries by appointing Agents / Associates / Counterparts / Representatives. 'SEAGULL' shall remain fully and directly responsible for all actions / activities / tasks performed by its Agents / Associates / Counterparts / Representatives / Transporters under this Contract. In this Contract Agents, Associates, Counterparts, Representatives, Transporters and other Service Providers of SEAGULL shall also be called as SEAGULL.

JOL is appointing 'SEAGULL' as their handling agent for shipments (about 250 Containers approx.) to be exported under 'HEALTH POSTS CONSTRUCTION PROJECTS IN ZAMBIA'. 'SEAGULL' shall perform under this Contract by taking services from other Service Providers in India, China, Mozambique, Tanzania, Zambia and any other Country or place i.e., for Customs House Agents, Transporters, Lashing & Choking Agents, Fumigation Agencies, Warehouses, CFS / ICD Operators, CONCOR, Rail Operators, Shipping Lines and other Services Providers / Counterparts / Associates (located at the Countries of operations). SEAGULL is providing end to end solution (EX-WORKS to DELIVERY AT ZAMBIA STORE under duty exemption). All export shipments will be cleared against DUTY EXEMPTION.

Freight Forwarding & Multimodal Activities (India, China, Mozambique, Tanzania and any other Country which is in route / transit to Zambia)

11) In case 'SEAGULL' fails to load container despite of handing over the documents on available vessel well in time, it shall be at the risk, cost and responsibility of 'SEAGULL'. All detention / demurrage at Port / Shipping Line / CFS shall be on account of 'SEAGULL'.

17) SEAGULL and their local Counterpart will coordinate with Consignee, their nominated Agent, ZRA Authorities and Government Department in relation to the clearance, processing and delivery of shipments to Stores. In such scenario SEAGULL will remain responsible for the applicable demurrage and detention for the numbers of days delay by Seagull. JOL need to be provide necessary assistance by visiting consignee and government authorities along with authorized Seagull/Seagull agents team members.

18) Since JOL will provide necessary copies of Shipping Documents to SEAGULL well before arrival of Containers at African Seaports, hence it will remain SEAGULL responsibility to arrange Duty Exemptions and necessary permission to enable to perform Customs Clearance, Border Clearance and Transportation of Containers to Site. However, SEAGULL will coordinate with JOL's local representative for the completion of prior necessary formalities on the basis of scan copies provided by JOL (if required).

19) Seagull will coordinate with the representative of MOH - Client for getting Duty Exemption. SEAGULL will ensure that they should get the correct Duty Exemption Certificate from the concerned department, otherwise SEAGULL will be responsible for the delays. For this purpose SEAGULL may coordinate with Consignee or their nominated Agent / Representative.

22) Containers will take 5-6 days to reach Border once they are moved from African Seaport. SEAGULL will ensure that necessary documents must be made available at Border for Border Clearance, if the relevant documents are not made available and trucks & containers are waiting then it shall be SEAGULL cost.

25) SEAGULL will ensure that Transporter carrying containers from African Seaport to Zambia Store shall have adequate Bond Balance to carry the cargo to Zambia. JOL will not provide any support in this regard. The photocopy of the Transporter Transit Bond can be provided to JOL upon their requirement by SEAGULL.

26) During journey from Dar Es Salaam to Zambia, weigh bridges are installed by the Tanzania Transport Authorities to measure the weight per axle basis. At present it shall not be more than 8 Mtonns of cargo (only cargo - excluding container weight) shall be per axle basis. JOL ensure that Cargo will be equally distributed in the whole container. Otherwise there will be penalty as per Tanzania Road Authority and overloaded cargo has to be transported in another vehicle.

29) It will be SEAGULL responsibility to keep DUTY EXEMPTION documents ready before arrival of container at African Port. In case shipments are put on hold waiting for Duty Exemption; all charges on account of detention, demurrage and penalties shall on SEAGULL account. JOL may provide necessary assistance if initiative from SEAGULL is taken at right and well in time.

30) 'SEAGULL' confirms that Beira Port (Demurrage Free) free time is- 7 Days and at Dar Es Salaam Port it is- 14 days. It would be 'SEAGULL's' responsibility to perform the Port Customs Clearance and move the containers out of the port within these available free days. SEAGULL will be responsible for all detention and demurrage.

34) *The complete process of customs clearance and transportation to Site Ex-Beira 25 days and Ex-Dar Es Salaam is 25 days, Due to delay in above process, if any detention / demurrage / penalty arise, the same shall be on account of 'SEAGULL' subject to terms and conditions of this Contract.*

37) *In any case on MBL, SEAGULL'S agent / counterpart is mentioned as Consignee /Notify (such agent etc.), shall not have Lien on Cargo for any reason at point of time. If Cargo /Container is held by 'SEAGULL' / Associates / Transporters /Counterpart at destination port and / anywhere during journey to Zambia Stores Site because of any issue between 'SEAGULL' and their associates, the same shall be released to actual Consignee / Notify / JOL (as per JOL's requirement) on immediate basis at the cost and risk of 'SEAGULL'. SEAGULL has to ensure that Lien on Cargo shall not be with any of the Agent. In such case 'SEAGULL' will be responsible for Port Demurrage, Shipping Line Detention, truck detention and any other penalties and /consequential charges (if incurred).*

38) *'SEAGULL' or their Agent will have no lien on cargo due to any reasons or circumstances. 'SEAGULL' hereby unconditionally confirms the same.*

Additional Terms & Conditions-

(a) It is 'SEAGULLS' responsibility to arrange Duty Exemption document before arrival of containers at African Seaport. In case 'SEAGULL' fails to arrange Duty Exemption within free permissible days and further fails to perform for Port Clearance and Customs Clearance within free permissible days at Port; then all Port Demurrage shall remain on account of 'SEAGULL'.

Demurrage & detention-

a) JOL shall not be responsible for payment of any detention/ demurrage/ penalty/ liability raised by

Shipping Line, Port Authority, Customs, Transporters or any other Agency Authority involve in this movement. The same shall be settled and paid by 'SEAGULL' directly to them on immediate basis, so that it should not affect the movement of Containers. If JOL doesn't complete their defined responsibilities or/and ask Seagull to hold the containers, the cost will remain applicable on JOL.

b) SEAGULL will carry up to 45 days free Shipping Line Detention and will deliver the containers within this permissible time. In any case 'SEAGULL' fails to complete the task within free days provided by Port and Shipping Line 'SEAGULL' will remain responsible for all detention/demurrage/ consequential charges whatsoever.

c) If any dispute arisen with any shipping line/ Agent/ Port Authority/ any other authority, 'SEAGULL' will inform JOL on immediate basis and as per their guidance (if required) Otherwise SEAGULL will resolve the issues within reasonable time.

Payment Terms-

a) Origin Charges + Forwarding & Multimodal Activity - All charges will be paid after 14 days of delivery of containers at Zambia Store.

c) 'SEAGULL' will not hold the shipment due to any reason whatsoever including any delay in release of payment by JOL beyond reasonable time. SEAGULL shall not be held responsible for the disputes those are directly related to the delay in receipt of payments from JOL. SEAGULL will also inform JOL in advance in case any movement is getting affected by such delays.

d) For any other additional cost / work / charges which is not included in the Contract are required to be paid by 'SEAGULL', prior approval is required from JOL.

f) In case 'SEAGULL' fails to deliver the cargo in specified time then all detention /demurrage shall be on 'SEAGULL' account and at the same time

‘SEAGULL’ India has to send their representative to Africa for the resolution of the matter (if required).

Arbitration, jurisdiction and applicable laws-

Parties have voluntarily agreed that all disputes arising out of or pertaining to this Contract shall be subject matter of jurisdiction of Courts of New Delhi alone.

All disputes or differences whatsoever arising between the parties to this Contract out of or relating to the construction, meaning, operation or effect of this Contract or breach thereof shall be amicably settled by mutual discussion. In case the parties fail to settle the dispute by mutual discussion within 15 days, the dispute shall be resolved by arbitration in accordance with Indian Arbitration Conciliation Act, 1996 amended from time to time. The seat of arbitration shall be New Delhi and the language of arbitration shall be English. The laws of India shall be the applicable law.”

From the perusal of the relevant clauses of the agreement the following position emerges:

- (a) That the agreement was valid for all the containers/ shipments handed over to the respondents or their agent at origin on or before December 31, 2019;
- (b) The petitioner had the liberty to terminate the agreement without assigning any reasons by serving a written notice on the respondents and obligations incurred before such termination of the agreement would be fulfilled by both the parties;
- (c) The petitioner once having terminated the contract by service of notice would be at liberty to shift the business;

(d) However all the shipments handed over to the respondent till the service of such notice of termination would be handled as per the agreement;

(e) In case of any delay incurred due to want of Duty exemptions, all charges on account of detention demurrage and penalty would be on the respondent

(f) It was confirmed by the respondents that the free time at Dar Es Salaam port stood at 14 days and it was the responsibility of the respondent to perform the port customs clearance and move the containers out of the port within these available days and that the respondent would be responsible for all detention and demurrage;

(g) It takes 25 days to complete the customs clearance and transport the material to the site at Zambia from Dar Es Salaam and any detention/ demurrage/ penalty that arises due to the delay in this process would be on account of the respondent;

(h) Neither respondent nor their agent would have lien on the cargo due to any reasons or circumstances and if during the journey the cargo is held by respondent or their agent due to any issue between the respondent or their agent the cargo shall be released to actual consignee immediately at the cost and risk of the respondent;

(i) Respondent to ensure that lien on cargo shall not be with any of the agent and in such a case the respondent would be liable for Port demurrage, shipping line penalties, truck detention and any other penalties;

(j) As per additional terms and conditions it was the duty of the respondent to arrange for duty exemption before the arrival of containers at the African port failure to arrange such duty exemption and fails to perform port and customs clearance then also respondent would be liable for the port demurrage;

(k) The petitioner would not be responsible for payment of any detention/ demurrage/ penalty/ liability raised by the shipping lines/ port authorities/ customs or any other agency authority involved in the movement of goods, shall be settled and paid by the respondent on immediate basis in order to not hinder the movement of containers;

(l) If the petitioner doesn't complete their defined responsibilities and/or asks the respondent to hold the containers then the cost would be on petitioner;

(m) Respondent would carry up to 45 days free shipping line detention in case the respondent fails to complete the task within the free days then respondent would be responsible for all detention/ demurrage or any consequential charges;

(n) Petitioner would pay the charges 14 days after delivery of containers at Zambia store;

(o) The respondent would not hold shipment due to any reason including any delay in release of payment by the petitioner within a reasonable time;

(p) Respondent would not be held accountable for

disputes those directly relate to delay in receipt of payments from the petitioner. Respondent would not be held responsible for the disputes that relate directly to the delay of receipt of payments;

(q) Respondent to inform the petitioner in advance in case of any movement affected by delay of payment.

(r) In case respondent fails to deliver the goods within a specified time, then all detention/demurrage resulting out of such delay shall be on the respondent and the respondent has to send their representative to Africa for resolution of matter if required.

I may at this stage, state that the claim of the respondent is primarily for an amount of Rs. 11.42 crores. The breakup of which is Rs. 6.92 crores as transportation charges and balance against demurrage charges. Whereas Mr. Nayyar stated that the petitioner's liability is only against transportation charges to the extent of Rs. 4.21 crores which according to him even though is payable after 14 days of arrival of the cargo in Zambia, he shall ensure that the same is paid within 2 days of the containers reaching Zambia. With respect to to the balance amount between Rs. 6.92 crores minus Rs. 4.21 crores, the petitioner shall secure the amount. Mr. Nayyar has submitted a breakup of the amount of Rs 6.92 crores and has given an explanation with respect to the amounts in the following manner:-

S. No.	Particulars	Amount	Explanation

(I)	Detention and Demurrage charges claimed by the respondent.	Rs.46,87,084	The said amount claimed is under a different contract with the petitioner dated August 29, 2019 for deliveries to project site in Benin and belongs to a completely independent and separate contract and project and the same is also in dispute.
(II)	Respondent has never raised any invoice claiming this amount.	Rs. 1,18,45,800	As per the reply the the respondents state that invoices were to be raised after getting supporting documents
(III)	Detention and Demurrage charges being claimed with regard to 15 containers delivered to Zambia between May 24, 2020 and	Rs. 1,06,11,844	As per the terms of the agreement the petitioner would not be liable to pay any 'detention and demurrage' charges and if these charges had been incurred they were the liability of the respondent.

	June 01, 2020		
(IV)	Amount claimed by the respondent for delivery of 57 containers which are at present assigned to the respondent under the agreement	Rs.4,21,23,466	The Agreement does not entitle the respondent to deemed delivery and according to the agreement the payment of the 57 containers would be due only after a period of 14 days from the date of delivery at the project site in Zambia. Petitioner proposes to ensure payment within 2 days of the containers reaching Zambia.
(V)	Total amount being claimed by the Respondent	Rs.6,92,68,194	That this amount is which is being claimed is not due in light of the explanation above.

38. The issue clearly falls in a very narrow compass. It is clear there is no stipulation in the agreement which states that petitioner is liable to make payment to the agent in Dar Es Salaam. In fact, the agreement stipulates that the respondent

shall ensure that lien on cargo shall not be with any of the agent. So, Mr. Mehta cannot insist for payment under the said head.

39. In so far as the payment of demurrage charges are concerned the claims of the respondent in this regard are (I) demurrage charges during shipment to Benin; (II) demurrage charges for 15 containers and (III) demurrage charges for 57 containers.

40. The relevant clause which has been reproduced at (k) above, stipulates that the petitioner shall not be responsible for the same. But clause (l) also states if the petitioner doesn't complete the defined responsibilities the cost will remain applicable on the petitioner. The question is which party has not followed the defined responsibilities. It is noted from the submissions of the counsels for the parties, that they are blaming each other for the same. This is a question of fact which needs to be decided by the arbitrator, who shall fasten the liability on one party.

41. In so far as the payment for transporting the containers to Zambia, the relevant clause at (n) above stipulates that all the charges will be paid after 14 days of delivery of containers in Zambia, the amount which according to Mr. Nayyar is Rs. 4.21 crores. He has stated that he shall ensure the payment of the said amount is made to the respondent within 2 days of delivery of the 57 containers to the site at Zambia. Taking the said submission on record, and the fact the claims, of the respondent are also, the ones depicted at (I), (II) and (III) of the chart above, this court is of the view, that the petition be disposed of with the

following directions:

(A) That the respondent shall convey to the petitioner the demurrage charges which are payable to the port authorities after ascertaining the same from the port authorities, within 3 days from today;

(B) Once the amount due to the port authorities is conveyed to the petitioner, the petitioner and the respondent shall equally pay (i.e. 50% each) the demurrage charges to the port authorities within 3 days thereafter. On such payment, the respondent shall get the containers released and transport them to the sites at Zambia;

(C) Once the delivery of the said containers is completed, the amount of Rs. 4.21 crores shall be released to the respondent by the petitioner within 2 days thereafter;

(D) The dispute with regard to the demurrage charges paid by the parties in view of (B) above, shall be a question which shall be determined in the arbitration, along with any other claim(s) (if any) as and when raised by either of the parties in accordance with law.

42. No Costs.

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In view of my conclusion in the petition, this application has become infructuous and disposed of as such.

V. KAMESWAR RAO, J

AUGUST 06, 2020/jg