

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

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Judgment delivered on: 31.05.2021

+ **O.M.P. (COMM.) 169/2021 & IA Nos. 6071/2021 & 6073/2021**

**STEEL AUTHORITY OF INDIA LIMITED**

..... Petitioner

versus

**M/S JALDHI OVERSEAS PTE LTD.**

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Joy Basu, Senior Advocate with Mr Ashish Rana, Mr Kanak Bose, Advocates.

For the Respondent : Mr Ashwin Shankar and Mr Rishi Murarka, Ms Shweta Sadanandan, Mr Aditya Raj, Mr George Rebello, Advocate.

**CORAM**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. Steel Authority of India Limited (hereafter 'SAIL') has filed the present petition under Section 34 of the Arbitration and Conciliation

Act, 1996 (hereafter the ‘A&C Act’) impugning an arbitral award dated 02.11.2020 (hereafter ‘the impugned award’) delivered by the Arbitral Tribunal comprising of three arbitrators [Justice (Retd.) V.K. Gupta, former Chief Justice of Uttarakhand High Court, Sh. R.P. Singh, Director (HR & Legal), IIFCO and Justice (Retd.) Madan B. Lokur, former judge of the Supreme Court of India as the Presiding Arbitrator].

2. The respondent (hereafter ‘JOPL’) is a company incorporated in Singapore and was the claimant before Arbitral Tribunal. SAIL is a Public Sector Enterprise, *inter alia*, engaged in manufacture of steel. The arbitration between the parties was an international commercial arbitration within the meaning of Section 2(1)(f) of the A&C Act. It was conducted under the aegis of Delhi International Arbitration Centre (DIAC) and in accordance with its Rules.

3. JOPL is engaged in the business of maritime logistics including vessel operations and chartering.

4. The disputes between the parties arose in connection with a Contract of Affreightment dated 28.06.2017 (hereafter referred to as ‘the CoA’). In terms of the CoA, the parties had agreed that JOPL would load, carry and discharge a cargo of 13,50,000 metric tons (25% more or less at the option of SAIL) of limestone in lots of 50,000 metric tons (5% more or less at the option of SAIL) on terms and conditions as stipulated. The cargo was to be loaded at Mina Saqr Port in Ras Al Khaimah, UAE and was discharged at the ports of

Vishakhapatnam/Gangavarnam/Paradip/Haldia. In terms of Clause 47 of the CoA, it was agreed that the freight payable to JOPL would be USD 8.55 per metric ton on FIOT basis in case of discharge at the port of Vishakhapatnam, Gangavarnam or Paradip and further, USD 1.75 per metric ton extra would be charged if the cargo was required to be discharged at two ports. In terms of Clause 48 of the CoA, 90% of the freight payment was required to be made initially on the Bill(s) of Lading less 2% in lieu of weighment, within a period of seven working days of the vessel and cargo's safe arrival at the first or sole port of discharge. The balance 10% of the freight together with the demurrage, or less dispatch, if any, was payable within a period of one hundred and twenty days from the date of completion of the discharge on submission of certain documents specified therein.

5. There is no substantial dispute as to the freight and charges payable by SAIL to JOPL. There is a minor difference of USD 6,045.12 between the amounts as claimed by JOPL and the aggregate of amounts acknowledged by SAIL as withheld from the freight/demurrages payable to JOPL. According to JOPL, USD 444,741.79 was due and payable by SAIL in respect of the cargo transported and discharged in terms of the CoA. However, according to SAIL, it has withheld only a sum of USD 438,696.64 being the balance amount payable to JOPL. The Arbitral Tribunal had noted that JOPL did not press its claim for the amount of USD 6,045.12 and sought recovery of the amount as admittedly withheld by SAIL.

6. After the parties had entered into a CoA on 28.06.2017, SAIL entered into a contract for supply of limestone with one Stevin Rock (the Supplier) on 29.07.2017. JOPL transported the limestone supplied by the Supplier to SAIL.

7. SAIL made its first declaration for laycan and called upon JOPL to nominate a vessel on 27.09.2017

8. Essentially, the controversy amongst the parties relates to the interpretation of Clause 74 of the CoA, which provided an option to SAIL to suspend shipment for a holiday period not exceeding two months and also to extend deliveries for a period of three months. In terms of Clause 74, the shipments were likely to commence in July 2017 and be completed within twelve months subject to a shipment holiday (limited to a maximum of two months) and extension of delivery (subject to a maximum of three months). According to JOPL, the term of the contract expired after a period of twelve months from the date of execution of the CoA, that is, on 27.06.2018. However, SAIL claims that the period of twelve months was required to be reckoned from the declaration of the first laycan, which was made on 27.09.2017. SAIL claimed that in addition, it was also entitled to extension on account of shipment holiday and extension of delivery.

9. JOPL accepted SAIL's request for nomination for laycan between 25.06.2018 to 04.07.2018. However, by an email dated 13.06.2018 sent by the shipping broker (Globus Marine Services), JOPL communicated to SAIL that the same would be the last

shipment under the CoA and it would not extend the term of the CoA any further. SAIL objected to the said email and sent an email on 14.06.2018 asserting that since the first shipment was intimated on 27.09.2017, the period of shipment under the CoA would continue for a period of twelve months thereafter and, would expire sometime in September 2018. This was not accepted by JOPL and by an email dated 27.06.2018, it reiterated its stand that CoA had expired by efflux of time on completion of the period of twelve months from 28.06.2017 – the date of execution of CoA. SAIL did not accept JOPL's stand that the term of the CoA was twelve months from the date of execution of the CoA. On 28.06.2018, SAIL sent an email invoking the shipment holiday and also seeking extension of delivery period. According to SAIL, the date of expiry of CoA would run beyond September 2018 to January 2019. The stand of SAIL in the said email is the heart of the disputes between the parties.

10. On 18.07.2018, SAIL sent an email requesting JOPL to nominate their vessel for the 20<sup>th</sup> shipment of 50,000 metric tons (plus/minus 5%) limestone for being loaded between 6.08.2018-15.08.2018. The said request was not accepted by JOPL.

11. SAIL claims that JOPL has breached the terms of the CoA by not accepting its request for nomination. SAIL claims that in the circumstances, it was compelled to avail the services of other charterers at the risk and cost of JOPL for shipping the goods in question. SAIL claims that it incurred additional expenses to the

extent of USD 11,87,847.318 on account of such shipments and raised a counter claim against JOPL for the said amount.

12. SAIL claims that in view of the above, it had withheld the amount of USD 444,741.79 payable under the CoA. In addition, it had also withheld a sum aggregating USD 7,43,105.74, which was due to JOPL in respect of other contracts.

### ***The Impugned Award***

13. In the context of the aforesaid disputes, the Arbitral Tribunal framed the following issues for determination:

- “(a) As per the contract of affreightment dated 28.06.2017, when did the period for shipment of limestone in bulk commence and when was it scheduled to end?
- (b) Whether the Respondent correctly invoked the procedure for shipment holiday and delivery extension?
- (c) Whether the Claimant is entitled to the amounts claimed as per the statement of claim?
- (d) Whether the Claimant breached the Contract of Affreightment dated 28.06.2017 and if so, to what effect?
- (e) Whether the Respondent is entitled to the amounts claimed as per the counter-claims?
- (f) Whether the parties are entitled to any costs and if so for what amount?
- (g) What reliefs are the parties entitled to?”

14. The Arbitral Tribunal held that the CoA was undeniably a commercial contract and the term of the CoA depended on the interpretation of the words “*likely commencement in July 2017 and completion in 12 months...*” as used in Clause 74 of the CoA. The Arbitral Tribunal held that the said words were required to be interpreted as any reasonable commercially minded person would. The Tribunal referred to the dictionary meaning of the word “likely”. It also examined the emails sent by the shipping broker (Globus Marine Services) to SAIL on 13.07.2017, 27.07.2017, 08.08.2017 and 17.08.2017, which in effect requested SAIL to advise the laycan for the first shipment. SAIL was reminded that it had entered into the CoA but had not yet intimated any laycan for the first shipment. The Arbitral Tribunal held that the word “likely” as used in the CoA was required to be reasonably interpreted to mean that the first shipment would take place in July 2017. The Arbitral Tribunal found that SAIL had misunderstood its obligation under the CoA and therefore, laycan for the first shipment was given by SAIL much later on 27.09.2017. The Arbitral Tribunal observed that this was perhaps because SAIL had entered into a contract for supply with Stevin Rock on 29.07.2017. The Arbitral Tribunal noted that the total cargo to be shipped was 13,50,000 metric tons and it was to be shipped in batches of 50,000 metric tons subject to increase/decrease in quantity to the extent of 25%. It reasoned that in the event SAIL opted to increase the quantity, then about 33 shipments would be required and in the event of its exercising the option to reduce the quantity, the number of shipments would reduce to 22. Such shipments were required to be made within

a period of twelve months. The Arbitral Tribunal reasoned that given the tight schedule, it would be difficult to accept that the word “likely” as used in Clause 74 of the CoA was intended to provide SAIL a flexibility of three months from July to September/October 2017 to commence the first shipment. It did not accept SAIL’s interpretation of Clause 74 of the CoA that the period of twelve months would commence with the first shipment and there was no restriction as to when the first shipment could be made. The Tribunal held that the word “likely” was used as the date of shipment was not specified but it was understood that the same would be in July 2017. And at best, the words “*likely commencement in July*” could be interpreted to give a flexibility from 1<sup>st</sup> July 2017 to 31<sup>st</sup> July 2017. Accordingly, the period of twelve months would come to an end latest by July 2018. To the said extent, the Arbitral Tribunal did not accept JOPL’s contention that CoA came to an end on 27.06.2017, that is, on expiry of twelve months from the date on which the parties had entered into the CoA.

15. The Arbitral Tribunal proceeded to examine SAIL’s stand as stated in its email dated 28.06.2018. In terms of the said communication, SAIL declared a shipment holiday for a period of one month of July 2018. In addition to the above, it extended the delivery for a further period of three months thereafter; thereby, extending the delivery schedule to January 2019.

16. The Arbitral Tribunal held that the said communication was not in conformity with Clause 74 of the CoA, which required the fulfillment of two conditions cumulatively. First, that the option could

be exercised only once. Second, it was required to be exercised one month prior to the declaration of the shipment holiday and SAIL was obliged to intimate the shipping holiday at least one month prior to the expiry of the agreed/extended delivery schedule. The Arbitral Tribunal held that if SAIL wanted to declare July 2018 as a period of shipment holiday, it was required to communicate the same to JOPL at least by 31.05.2018 or at the latest by 01.06.2018, which would be one month prior to 01.07.2018. SAIL also contended that in the event its exercise of declaring July 2018 as a shipment holiday was not accepted, its decision to extend the delivery period by another three months ought to be accepted. The Arbitral Tribunal rejected this contention as well, as it found that the email dated 28.06.2018 did not exercise the option of extending the delivery schedule on a standalone basis but the same was dependent upon the shipment holiday declared in the month of July 2018, which was not a valid exercise of the option.

17. The Arbitral Tribunal found that there was no breach on the part of JOPL as the shipments were required to be completed within twelve months of July 2017, that is, by July 2018. The loading of the last shipment was completed on 06.07.2018 and it had reached Paradip port on 22.07.2018, the port of Sagar on or about 05.08.2018 and the Haldia port on or about 07.08.2018. The Tribunal found that there was no request made by SAIL for any shipment in the month of July 2018. JOPL's claim that it was not obliged to provide any vessel after 28.06.2018 was not accepted. But as SAIL did not make any request for a shipment in the month of July, the Arbitral Tribunal held JOPL

could not be held to have breached any of its obligations. The Tribunal also noted that SAIL had not make any alternative arrangement for shipment of the goods in question during the term of the CoA.

18. In view of the aforesaid finding, the Arbitral Tribunal rejected SAIL's counter claim of damages for a sum of USD 11,87,847.53. The Tribunal also noted that although it has alleged that JOPL had breached the CoA on 13.06.2018 or 25.06.2018, however, SAIL had called for tenders for the subsequent shipments between 09.08.2018 and 12.09.2018 and therefore, the tenders received were not at rates prevailing on the crucial dates of alleged breach.

19. Accordingly, the Arbitral Tribunal awarded a sum of USD 438,696.64 (being the amount claimed in the statement of claim less USD 6,045.12). Since the contract between the parties was a commercial contract, the Arbitral Tribunal also awarded interest at the rate of 12% per annum compounded with quarterly rests on the said amount from the dates on which the amounts became due in terms of the CoA. The counter claims made by SAIL were rejected. The Arbitral Tribunal also awarded cost of the arbitration being the cost deposited by JOPL with the DIAC.

### ***Submissions***

20. Mr. Basu, learned Senior Counsel appearing for SAIL, assailed the impugned award on, essentially, four fronts. First, he submitted that the Arbitral Tribunal had in effect re-written the contract. According to him, the Arbitral Tribunal's interpretation of Clause 74

of the CoA was plainly contrary to the plain terms of the contract. He contended that foisting a contract in this manner was violative of the fundamental policy of Indian law.

21. Second, he submitted that there was an intrinsic inconsistency in the impugned award. The Arbitral Tribunal held that the first shipment could be made any time between 1<sup>st</sup> July 2017 and 31<sup>st</sup> July 2017 and therefore, the term of the CoA would extend till 30.07.2017. However, the Arbitral Tribunal had erroneously held that no request had been made by SAIL during the month of July 2018. He submitted that the Tribunal overlooked the email dated 18.07.2018, whereby SAIL had requested JOPL to nominate a vessel for the 20<sup>th</sup> shipment. He contended that the finding of the Arbitral Tribunal that no such request was made is therefore, patently erroneous and the impugned award is liable to be set aside for the said reason.

22. Third, he submitted that JOPL had not led any evidence or filed any affidavit in support of its claims and therefore, the impugned award is based on no evidence. He stated that the claims were also not properly instituted as the Statement of Claims was not signed by the authorized officer of JOPL but by an advocate.

23. Fourth, he submitted that the Arbitral Tribunal had erred in awarding interest at the rate of 12% per annum compounded with quarterly rests. He submitted that the said interest was grossly disproportionate and was unreasonable. He relied on the decision of the Supreme Court in *Vedanta Limited v. Shenzhen Shandong*

***Nuclear Power Construction Company Limited: (2019) 11 SCC 465,***  
in support of his contention. He also referred to the decision of the  
Supreme Court in ***State of Haryana and Ors. v. S.L. Arora and***  
***Company: (2010) 3 SCC 690,*** in support of his contention that  
compound interest could not be awarded by an arbitrator.

### ***Reasons and Conclusion***

24. As is apparent from the above, the principal controversy before  
the Arbitral Tribunal was with regard to the interpretation of Clauses  
73 and 74 of the CoA. Before proceeding further, it would be relevant  
to refer to the said Clauses. The same are set out below:

**“Clause 73. Total Cargo Quantity/Parcel Size:**

1,350,000 metric tons with 25% more or less  
Charterer's option Lime Stone in bulk. SAIL shall  
intimate about two weeks in advance for Nomination of  
the Vessel. Owners to nominate suitable tonnage within  
two working days.

**CARGO: LOW SILICA LIMESTONE**

**QUANTITY : SIZE 10-35 MM : 350,000 MT (+/-)  
25% CHARTERERS OPTION**

**SHIPLOAD & SHIPPING TOLERANCE : 50,000 MT  
(+/-) 5% OWNERS OPTION**

**QUANTITY : SIZE 30-60 MM : 1,000,000 MT (+/-)  
25% CHARTERERS OPTION**

**SHIPLOAD & SHIPPING TOLERANCE : 50,000 MT  
(+/-) 5% OWNERS OPTION**

Parcel size: 50,000mt 5 per more or less in Owner's option in single decker self trimming type Handymax / Supramax suitable for bulk discharge with self discharging gears / cranes fitted with Grabs fully automatic requiring no manual operation. Minimum 4 cranes preferably 30 mt (min 25 mt) Grab 12 GBM – capable of discharging 10000 MT per day.

Clause 74. Shipment Period/Performing Vessels' Nomination:

Likely commencement in July 2017 and completion in 12 months subject to shipment holiday (limited to maximum 2 months) and delivery extension (limited to maximum 3 months) at the option of the Charterer.

During the pendency of the contract, Charterer at its option may declare a period of "Shipment Holiday" maximum up to 2 (two) months deferring the shipments to the subsequent months. This option may be exercised only once and at least one month prior to the declaration of the "Shipment Holiday" In case of exercise of this option, the agreed delivery schedule would be treated to be automatically extended by a proportionate period (in months or part thereof).

Notwithstanding the provision of "Shipment Holiday", during the pendency of the contract, Charterer at its option may also extend the agreed/auto-extended delivery schedule further maximum up to 3 (three) months deferring the shipments to the subsequent months. This option may be exercised only once and at least one month prior to the expiry of agreed/auto-extended delivery schedule. In case of exercise of this option, the delivery schedule would be treated to be further extended automatically by a proportionate period (in months or part thereof).

The above options, if at all exercised by the Charterer, would be intimated to the Owner at least one month

prior to the expiry of the agreed/extended delivery schedule.

Actual performing vessel, in case substitution of vessel is necessary, to be nominated 10 days prior to ETA loadport subject to condition that there should not be any change in the agreed laycan. Only one substitute is allowed for each stem.

Charterers need minimum 2 working days for lifting “subjects” for the nominated and performing vessel.

In case of failure to nominate the vessel(s) by the COA holder in the laydays as required by Charterer’s, the Charterers reserve their right to nominate a suitable vessel in the laycan at the risk and cost of the Contract of Affreightment holder.

If the nominated vessel arrives (due to any reason whatsoever) after the cancelling date and if the charterers nevertheless do not cancel the nomination, laytime will start from commencement of loading.”

25. The dispute between the parties regarding the term of the CoA revolve around the opening sentence of Clause 74 of the CoA. Whereas SAIL contended that whilst it was agreed that shipment are likely commence in July 2017, it was not necessary that the first shipment be made during that month. According to SAIL, the first shipment could be made any time after execution of the CoA and the period of twelve months as agreed under Clause 74 of the CoA, would commence on and from that date. Plainly, the controversy in this regard, relates to interpretation of the words “*likely commencement in July 2017*”. The Arbitral Tribunal was well within its jurisdiction to interpret the said expression as used in Clause 74 of the CoA. It did so

after taking into consideration several aspects. The Arbitral Tribunal considered that CoA was a commercial contract and had to be construed as any reasonable minded commercial person would. Clearly, the said Clause could not be interpreted to be open ended, leaving it open for SAIL to choose at its will when to make the first shipment and JOPL would be bound down to the freight paid as agreed under the CoA. The Arbitral Tribunal also evaluated the correspondence sent at the instance of JOPL (four emails dated 13.07.2017, 27.07.2017, 08.08.2017 and 17.08.2017). The said emails clearly evidenced the understanding that SAIL would request for nomination of vessels for shipment immediately after the execution of the CoA.

26. Next, the Arbitral Tribunal also examined the meaning of the word “likely”. It then proceeded to interpret Clause 74 of the CoA to mean that it was agreed that the first shipment would be made in the month of July 2017 although the dates of the shipments were unspecified.

27. The contention that this constitutes a re-writing of the contract is an insubstantial argument. It is unmerited and is rejected as such.

28. This Court concurs with the view of the Arbitral Tribunal that Clause 74 of the CoA can be reasonably interpreted to mean that the shipments were agreed to commence in July 2017 and the said Clause was not an open ended clause leaving it to the discretion of SAIL to commence the shipments as and when it deemed fit. In any view, the

said Clause cannot be interpreted to mean that the period of twelve months could be extended indefinitely. Whilst, JOPL believed that the CoA would commence on the date of its execution and the shipments would be made thereafter. The Arbitral Tribunal took a reasonable view and concluded that it was agreed that the shipments would commence in July 2017 and the term of the CoA would extend for a period of twelve months thereafter, that is, till July 2018.

29. Having stated the above, it is also necessary to observe that the scope of challenge under Section 34 of the A&C Act is very limited. Since the impugned award is culmination of an international commercial arbitration within the meaning of Section 2(1)(f), it can be challenged only on the grounds as set out under Section 34(2) of the A&C Act. It has been reiterated in several decisions by the Supreme Court that in proceedings under Section 34 of the A&C Act, the court is not required to examine the award as a first appellate court to re-appreciate evidence and the applicable law. An Arbitral award can be set aside only if it is found that it violates the fundamental policy of Indian law. Plainly, the Arbitral Tribunal's interpretation cannot by any stretch be held to fall foul of any fundamental policy of Indian law. The contention that Arbitral Tribunal's interpretation in effect re-writes the CoA is, plainly, unsustainable.

30. Clause 74 of CoA entitled SAIL to extend the term of the CoA on account of any shipment holiday up to a period of two months and for extension of delivery for a period of three months. It was

contended that the Arbitral Tribunal had erred in not accepting that SAIL was entitled to claim benefit of such extension at its option.

31. At this stage, it would be relevant to refer to the email dated 28.06.2018 sent by SAIL seeking to exercise its right for declaring a shipment holiday and for extension of delivery in terms of Clause 74 of the CoA. The said email is set out below:

“Subject: SAIL – JALDHI COA CP DTD 28/6/17:  
LSLS SHIPMENTS FROM PORT OF  
MINA SAQR, UAE TO ECI - Declaration  
of Shipment Holiday and Extension in  
Delivery Schedule.

Dear Sir,

As per clause 74 of the subject CoA, the following are hereby declared:

1.0 Shipment Holiday:- Shipment Holiday for the month of July 2018 i.e. one month is declared. Therefore, the delivery schedule gets automatically extended till October 2018.

Delivery Extension:- In addition to the above shipment Holiday, the delivery is extended by further three months for completing delivery of balance shipments. Therefore, the delivery schedule gets extended automatically till January 2019.

All other terms & conditions of the subject CoA remain unchanged.

Regards

Jasmina  
DGM (M-T&S)  
Transport & Shipping HQ

Steel Authority of India Ltd.”

32. It is clear from the above that SAIL had sought the extension on account of shipment holiday in the month of July 2018 and the delivery extension for a period of three months in sequence thereof. The Arbitral Tribunal had found that Clause 74 of the CoA entitled SAIL to exercise the option for declaring a shipment holiday. However, this option could be exercised only once and SAIL was required to exercise this option at least one month prior to the declaration of the shipment holiday. Clearly, in order to exercise an option for a shipment holiday in July 2018, SAIL was required to exercise its option one month prior to the first date of July 2018, that is, latest by 31.05.2018. Thus, the notice exercising such option was clearly not in terms of Clause 74 of the CoA and therefore, was invalid. The Arbitral Tribunal’s decision to the aforesaid effect cannot be faulted.

33. Mr. Basu had contended that notwithstanding the above, the Arbitral Tribunal should have considered SAIL’s right for extension of delivery period from July 2018. However, it is apparent that no such extension was sought. As noticed by the Arbitral Tribunal, SAIL had exercised its option of declaration of shipment holiday and extension of delivery in a sequence. First, it declared July 2018 as a period of shipment holiday followed by the extension of delivery. Therefore, the exercise of option of extension of delivery could not be read on a standalone basis. In any event, the same could not be considered as an extension from July 2018. This option was also

required to be exercised one month prior to the agreed/extended delivery schedule. The contention that the impugned award can be faulted on the aforesaid ground is, without any substance.

34. The contention that there is any inherent inconsistency in the impugned award is also unmerited. Mr. Basu had drawn the attention of this Court to paragraph 33 of the impugned award and pointed out that the Arbitral Tribunal had held that “*At best, the words ‘likely commencement in July’ can be interpreted to give a flexibility from 1<sup>st</sup> July to 31<sup>st</sup> July*”. He submitted that contrary to the aforesaid finding, the Arbitral Tribunal had rejected SAIL’s contention that JOPL had breached the CoA on the incorrect assumption that no request had been made for shipment in July 2018. He referred to the penultimate sentence of paragraph 61 of the impugned award where the Arbitral Tribunal had observed as under:

“There is nothing on record to suggest that the Respondent asked for any other vessel to be made available for shipments in the month of July 2018”.

35. Mr. Basu contended that the said finding is *ex facie* erroneous as by an email dated 18.07.2018, SAIL had requested for the nomination of a vessel.

36. This contention too, is without any merit. A plain reading of the email dated 18.07.2018 indicates that SAIL had requested for nomination of vessel for its 20<sup>th</sup> shipment for laycan from 6<sup>th</sup> to 15<sup>th</sup> August, 2018. Although SAIL had made the request in the month of July 2018, it had not requested for any shipment in the month of July

2018. The request was for a shipment in August 2018. Thus, the finding that SAIL had not requested for shipment in the month of July 2018 is correct. A request made for shipment in August could not be held to be within the period of 12 months from July 2017. The Arbitral Tribunal had held that the term of the CoA extended for a period of twelve month from the shipments in July. Thus, all shipments were required to be made within the said period of twelve months subject to SAIL's right for declaring a shipment holiday and claiming an extension of delivery as agreed under Clause 74 of the CoA.

37. The contention that the impugned award is based on no evidence is also unpersuasive. JOPL was not required to lead any evidence since its claim was accepted by SAIL. The burden of proof to establish that JOPL had breached the CoA; SAIL had incurred a loss as a consequence of such breach; and was entitled to recover the same from JOPL, was required to be discharged by SAIL. As noticed above, SAIL had set up a case of setoff and the same was contingent on it establishing that the damages as claimed were payable by JOPL. Since SAIL had failed to establish its claim, the award in favour of JOPL would necessarily have to follow. The contention that the claim was not properly instituted is an afterthought. No such defence was urged by SAIL before the Arbitral Tribunal and SAIL cannot be permitted to raise such pleas at this stage

38. The next contention to be considered is whether the award of interest at the rate of 12 percent per annum compounded with quarterly rests falls foul of the fundamental policy of Indian law.

39. At the outset, it is necessary to observe that SAIL had not contested JOPL's claim for interest on the ground that it was unreasonable or excessive before the Arbitral Tribunal. The Statement of Defence filed by SAIL indicates that it acknowledged that the amount due to JOPL was withheld. It had filed a counter claim seeking damages and claimed set-off against the amount admittedly due to JOPL. It is material to note that SAIL did not specifically dispute that the rate of interest as claimed by JOPL was excessive. The para-wise reply to the Statement of Claims indicate that SAIL had merely observed that paragraph 8 of the Statement of Claims recorded the prayers made by JOPL. The prayers included a prayer for interest. Concededly, no oral submissions were advanced before the Arbitral Tribunal for contesting JOPL's claim for interest as being excessive or disproportionate. It is also obvious that SAIL was in no position to take this stand since SAIL had claimed 18% interest on the damages quantified by it. Clearly, SAIL could not have disputed JOPL's claim for interest as excessive while at the same time pursuing its claim for interest at the rate of 18% per annum.

40. In the circumstances, this Court is of the view that it would be inapposite to now allow SAIL to urge this contention, which is clearly an afterthought.

41. In view of the above, this court is not required to examine SAIL's challenge to award of interest. But for the sake of completeness this court considers it apposite to do so.

42. This Court is also unable to accept that award of interest at the rate of 12% per annum with three monthly rests falls foul of the fundamental policy of Indian law.

43. In *Ssangyong Engineering & Construction Co. Limited v. NHAI: (2019) 15 SCC 131*, the Supreme Court had explained that the expression "fundamental policy of Indian law" would necessarily have to be understood as explained in paragraphs 18 and 27 of its decision in *Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49* and, its earlier decision in *Renusagar Power Co Ltd. V. General Electric Co: 1994 Supp (1) SCC 644*. Paragraph 34, 35 and 36 of the said decision are set out below:

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2

SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2

SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.”

44. Paragraphs 18 and 27 of the decision in *Associate Builders v. Delhi Development Authority* (*supra*) are set out below:

**18.** In *Renusagar Power Co. Ltd. v. General Electric Co.* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

**“7. Conditions for enforcement of foreign awards.—**

(1) A foreign award may not be enforced under this Act—

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(b) if the Court dealing with the case is satisfied that—

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(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national

economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95).

27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

[ underlined for emphasis]

45. In view of the above decision, the contention that the award of 12% compound interest violates the fundamental policy of Indian law, cannot be accepted. Mr. Shankar had also pointed out that there are several legislations which provide for compound interest. In particular, he had referred to Section 16 of the Micro, Small and Medium Development Act, 2006, which specifically provides for payment of compound interest with monthly rests at three times the bank rate as notified by the Reserve Bank of India. In cases, where the contract, common trade practice, or statute contemplates payment of interest on

compound basis, the same is required to be paid. Thus, *per se*, compound interest cannot be held to be falling foul of the fundamental policy of Indian law.

46. The reliance placed by Mr. Basu on the decision of the Supreme Court in ***Vedanta Limited*** (*supra*) also does not carry SAIL's case any further. In the said case, the Supreme Court had examined an arbitral award where the arbitrators had awarded a uniform rate of interest on all the components of the award, which were in different currencies. Thus, the uniform rate of interest had been awarded on a component of the award, which was in Indian currency as well as the component of the award, which was in Euros. It is in the aforesaid context; it was necessary to take into account the currencies in which the parties operate for awarding interests. The said decision cannot be considered as an authority for the proposition that award of 12% percent compound interest with quarterly rests on an award made in foreign currency violates the fundamental policy of Indian law.

47. The decision of the Supreme Court in ***State of Haryana and Ors. v. S.L. Arora and Company*** (*supra*) is also of little assistance to SAIL. The said decision was overruled by the Supreme Court in a later decision in ***Hyder Consulting (UK) Limited v. Governor, State of Orissa: (2015) 2 SCC 189***. The issue involved in ***Hyder Consulting (UK) Limited's*** (*supra*) case was whether the post-award interest could be awarded on *pendente lite* and pre-award interest which formed a part of the arbitral award. Paragraph 21 of the said decision reads as under:

“21. In the result, I am of the view that *S.L. Arora case* [*State of Haryana v. S.L. Arora and Co.*, (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] 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.

48. The said decision cannot be read in a restrictive manner. It is also relevant to note that in this case, the Arbitral Tribunal had held that the contract between the parties was a commercial contract. In commercial contracts, interest to be awarded must be considered keeping in view the commercial practice. Indisputably, it is common practice for banks to charge compound interest on monthly or quarterly rests. Thus, awarding compound interest in respect of sums found payable under a commercial contract cannot be held to be contrary to the fundamental policy of Indian law.

49. In *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644*, the Hon’ble Supreme Court held as under:

“It is common knowledge that provision is made for compound interest in contracts for loans advanced by

banks and financial institutions and the said contracts are enforced by courts. Hence, it cannot be said that the award of interest on interest is against the public policy of India. We are, therefore, unable to accept the contention that award of interest on interest, i.e., compound interest is contrary to public policy of India..”

50. As observed earlier, the Supreme Court in the case of *Ssangyong Engineering and Construction Co. Ltd.* (*supra*) had expressly confirmed that the grounds on which an award can be set aside would be limited to those as expressed in paragraph 18 and paragraph 27 of its decision in *Associate Builders v. Delhi Development Authority* (*supra*). Paragraph 18 of the said decision expressly indicates that recovery of compound interest would not contravene any fundamental policy of Indian law.

51. Before concluding, it is also necessary to note that during the course of arguments, Mr. Shankar had stated that if SAIL was willing to pay the awarded amount with a lesser interest (say 6% instead of 12%) and put a quietus to the disputes, JOPL would accept the same and waive its right for receiving the balance interest.

52. In view of the above offer, this Court had adjourned the hearing to enable the counsel appearing for SAIL to take instructions in this regard. Mr. Basu had subsequently informed this Court that he was instructed to state that the said offer is not acceptable to SAIL. Nonetheless, considering that public funds are involved, this Court considers it apposite to grant SAIL another opportunity to reflect on the offer made on behalf of JOPL and binds down JOPL to the offer

made on its behalf for a further period of four weeks. In the event, SAIL pays the amount of USD 438,696.64 along with 6% interest per annum on a compounded basis with three monthly rests from the dates on which such amounts became due in terms of the CoA, that is within 120 days of discharge of the cargo, till the date of payment, within a period of four weeks from date, JOPL would accept the same as full and final settlement of its claims.

53. The petition is dismissed with the aforesaid observations. All pending applications are also disposed of.

**MAY 31, 2021**  
**RK**

**VIBHU BAKHRU, J**

