
(2002) 03 CAL CK 0043
In the Calcutta High Court
Case No : A.P. No. 56 of 2001

Hindusthan Paper Corporation Ltd.

APPELLANT

Vs

Wellbrines Chemicals Private Ltd.

RESPONDENT

Date of Decision : 07-03-2002

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 39AA
Evidence Act, 1872 — Section 115, 116, 91, 92
Major Port Trusts Act, 1963 — Section 48

Citation : (2002) 3 CALLT 114

Hon'ble Judges : Ashok Kumar Ganguly, J

Bench : Single Bench

Advocate : B.K. Bachawat and Shibaji Sen, for the Appellant; Sanat Kumar Mukherjee and Ketaki De, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This petition has been filed under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as AA 1940) challenging on various grounds the award made and published by the Joint Arbitrators dated 17.10.2000. The material facts of the case are noted below.

2. On or about 10th May 1991, the petitioner invited a tender for transportation of approximately 25,000 MT to 50,000 MT of coal from the Port of Haldia to the Port of Cochin. The said coal was required for the consumption of the subsidiary of the petitioner, viz. M/s. Hindusthan Newsprint. Pursuant to the said tender, the respondents submitted their quotation on or about 12th June 1991 and, ultimately, on 18th September 1991, the quotation of the respondent was accepted on certain conditions.

3. In order to carry out the obligation under the said contract, the respondent, as a disponent owner chartered a Vessel, viz. M.V. Lok Prakash from M/s. Shipping Corporation of India Ltd. and, thereafter, a Charter Party agreement was entered into between the petitioner and the respondent.

4. Under the said Charter Party Agreement, Clause 47 contains an arbitration clause. The said clause is set out below :

"Clause 47: All disputes arising under this charter shall be settled in India in accordance with the provision of the Indian Arbitration Act. 1940, each party appointing an Arbitrator and the Two Arbitrators in the event of disagreement appointing an umpire, whose decision shall be final and binding upon both parties hereto. The Arbitrators shall be commercial men."

5. In the Letter of Intent dated 18.09.91, the following terms were indicated:

(A) Loading rate and Discharge rate:

(i) 7000 MT WWD SHEX-UU

(ii) Discharge rate; 3,000 MT WWD SHEX-EIU

(iii) 24 Hours turn time both ends

(iv) Lay time - reversible.

(B) The clause relating to demurrage and discharge money was as follows:

(i) Demurrage: Rs. 1,50,000.00 per day or pro-rata and dispatch money Rs. 1,12,500/- per day or pro-rata on working time saved both ends.

6. The clause of the letter of intent, which was much debated before this Court, is set out below:

"Please note that the expected date of loading of the vessel at Haldia Port would be around 2nd week of November. In case of any change, the loading date will be intimated to you well in advance, so that you can arrange placement of the vessel accordingly. We may be extending the contract on the same terms & conditions for placement of another vessel of around 25,000 tones which will be loaded somewhere in the month of January, 1992 or such date to be intimated to you well in advance."

7. Then a Charter Party agreement was entered between the parties on or about 18.10.1991. In that agreement the usual Charter Party clauses were included along with the clauses in the letter of intent. In the course of hearing the learned counsel for the petitioner very much relied on the following clauses of the Charter Party:

"Clause 21: At the Port of loading (Haldia), time shall begin to count after 24 hours of vessel's arrival and Notice of Readiness tendered during official working hours, whether in berth or not.

If vessel is unable to give Notice of Readiness by reason of congestion at Haldia, time shall commence to count 24 hours after Notice of vessel's arrival off Sandheads has been given by radio, to Charterers/Suppliers or their Agents.

If vessel is already in Haldia at the discharge berth, Notice of Readiness can be

served from that berth on completion of discharge of previous cargo.

If the 24 hours turntime expires on Saturday afternoon, Sunday or holiday, laytime shall commence at 0800 hours on next working day.

Any time lost by vessel in waiting for berth shall also count as loading time.

If any time is used by the suppliers/Shippers on Saturday afternoons, Sundays, or holidays to deliver/load the materials into the vessel, the time actually used shall count as laytime."

"Clause 23: The Charter shall arrange for a safe loading berth and shall load, stow, trim coal on board the vessel, free of risk and expenses to the vessel, but always under the supervision of the Master."

"Clause 25: If the vessel is detained longer than the time allowed for loading/ discharging, demurrage shall be paid by the charterer to the owners at the rate of Rs. 1,50,000/- (Rupees one lakh fifty thousand) on per running day or pro-rata and dispatch money for all working time saved at the loading Port and discharge Port will be paid to the charterer at half (later amended as 75%) the demurrage rate per running day or pro-rata (The respondents, during deliberation, conceded that the said clause was rectified from "half to "75%")."

"Clause 28: On completion of loading, a "Statement of Facts" shall be made out at the loading Port duly signed by the Master/Agent of the vessel and the suppliers/their representatives. Similarly, at the discharge Port, duly signed by the Master/Agent of the vessel and the receivers."

"Clause 30: Charterers to guarantee to discharge the cargo at the average rate of 3000 MT per Weather Working Day. Saturday afternoon. Sunday and Charter Party holidays excepted, even if, used, unless the vessel is already on demurrage."

The expected date of loading was around 20.11.1991.

8. Apart from highlighting those clauses, the learned counsel urged that at all material time the respondents had complete knowledge that at a time when the movement of coal had not started, they sent on 29.10.1991 a telex to the petitioners asking them to exercise their good offices with the authorities to ensure expeditious movement of coal at Haldia as the expected date of the arrival of the ship M.V. Lokprakash (hereinafter called the ship) was 15.11.91 with lay days between 15.11.91 and 20.11.91.

9. The petitioner by a telex replied that the movement of coal from Haldia Port would start by 15.11.91 and the entire quantity of coal that is 22,000 MT would arrive at Haldia Port by the end of November 1991. So the respondents were requested to fix the vessel for loading in the first/second week of December 1991.

10. It has been further submitted that immediately thereafter one Mr. Jaswant Seth a representative from the respondents came to Calcutta on 4.11.91 and

held a meeting with Mr. R.K. Sinha, the representative of the petitioner and agreed to bring the ship at the end of November/first week of December 1991 and the probable date of loading was agreed upon as 06.12.1991.

11. It may be noted that this has been strongly denied by the respondents both in their affidavit and in the course of the submission made on their behalf and this Court will advert to it later.

12. However, the further case of the petitioner is that contrary to this understanding which was arrived at in the meeting with Mr. Jaswant Seth, the respondent sent the ship on 23.11.91 at the sandheads, and which, according to the petitioners, is outside the Haldia Port. The petitioner received on 25.11.91 a communication that the ship had arrived and to that the petitioners sent a telex on 26.11.91, allegedly expressing its surprise at the arrival of the ship and informed the respondents that the Cargo will be ready for loading after 6.12.1991 and asked the respondents to plan the brining of the ship after 6.12.91.

13. Further case of the petitioner is that the respondent's Agent accepted the position that the previous notices of readiness issued on 23.11.91 and 4.12.91 could not be treated as such notices and another notice of readiness was issued on 7.12.91 upon the arrival of the ship at Haldia Dock.

14. The petitioner's further case is loading started, thereafter from 7.12.91 and was completed by 13.50 hours on 9.12.91 and the ship sailed from Haldia Dock for Cochin on 9.12.91 itself and arrived at Cochin on 14.12.91. Immediately notice of readiness was served on the respondent's Agent at 16.30 hours on 14.12.91. The petitioner's case is that 14.12.91, being a Saturday and notice being served after 1.00 p.m., it was after office hours on that day and 15.12.91 was a Sunday. The notice of readiness was received, as per the petitioner's case, by the respondent's Agent at 09.30 hours on 16.12.91. The further case of the petitioner is that thereafter, discharge operations were disrupted between 9.30 hours on 17.12.91 to 08 hours on 19.12.91 and, thereafter, for 26 minutes for reasons attributable to the respondents.

15. Then on 30.04.92 the advocates on behalf of the respondents served a notice on the petitioner claiming a damages for Rs. 14.72.080/- for delay and then claimed Rs. 6,53,396/- towards 10% balance freight and thus commenced the Arbitration proceedings.

16. The parties filed their statement of claims and counter statement and rejoinder before the arbitrators. It is the petitioner's case that between July 1998 and August 2000 there were 12 sittings by Joint Arbitrators, each party nominating its arbitrator. Then on 17.11.2000 the joint arbitrators gave an award directing the petitioners to pay a sum of Rs. 6,53,396/- towards 10% balance freight and then to pay Rs. 11,83,645.80 towards demurrage and to pay interest on both freight and demurrage from the day they became due till the last date of arbitration.

17. This application for setting the award was filed on 3.4.2001.

18. It is a speaking award. Challenging the award, the learned counsel for the petitioner advanced six points which are noted below :

"(a) The Arbitrators acted contrary to or in violation of the express terms of the contract and thereby committed jurisdictional error.

(b) The Arbitrators based the award on erroneous proposition of law and which is apparent on the face of the award.

(c) The Arbitrators awarded demurrage as liquidated damages. This is contrary to the express provision of Contract Act.

(d) The Arbitrators failed to consider material evidence and this can be demonstrated from the face of the award.

(e) The Arbitrators determined the validity of Notice of Readiness on an erroneous appreciation of law laid down in -- Johanna Olden Droff, reported in (1973)3 All ER 148.

(f) The payment of interest directed by the Arbitrators was beyond the scope of reference."

19. The learned counsel, therefore, prayed that the award be set aside and the application be allowed with costs.

20. The learned counsel for the respondent, on the other hand, supported the award on various grounds and submitted that the Court while exercising jurisdiction in a proceeding for setting aside award does not sit as a Court of Appeal and should not interfere with the assessment and appreciation of evidence by the arbitrators. The learned counsel submitted that the Court will interfere only when the arbitrators had acted in clear breach of the express terms of the contract between the parties and in a case relating to interpretation of terms of contract, no interference is called for. The learned counsel further submitted that in the instant case in the Charter Party agreement, the petitioner is the charterer. The said charterer is hirer of the ship for carrying its cargo from the Port of loading to the Port of discharge and for the use of the vessel, charterer pays hire charges known as freight. As a result of paying the freight the charterer obtains the service of the ship over a carrying voyage and also over an agreed period of time for loading and discharging cargo. This is known as the lay time. In other words, it has been submitted that the lay time is the load and discharge time, which the charterer has paid for as a part of the freight. Now if the time engaged in loading or discharging exceeds the lay time, then the charterer must pay for that additional time, this is known as demurrage. Therefore, in the calculation of lay time and demurrage, the first question which one has to consider is the point when the lay time should start counting and the next one is to ascertain when the lay time comes to an end. It is only when the lay time comes to an end that the ship goes on demurrage and during that

period, the charter has to pay for every hour which the ship takes till she completes her loading and discharging. The learned counsel submitted that in the instant Charter Party agreement Clause 20 of the Charter Party sets out the manner in which the length of laytime has to be calculated. Clause 20 is as follows :

"Clause 20. At the loading Port, suppliers shall load the materials on board the vessel at an average rate of 7000 Metric Tons per weather working day of 24 consecutive hours, Saturday afternoons, Sundays and Charter Party holidays excepted unless used and if used actual time used to count as Laytime."

21. According to the learned counsel, the said calculation consists of dividing the quantity of cargo loaded and on board by the vessel by the figure of 7,000. As a result, one will arrive at the number of days on free time or lay time for the use of which no demurrage can be charged. According to the learned counsel, in the instant case, the quantity of cargo loaded is about 17,240 MT. So the total period of lay time at the loading Port available to the petitioner is 2 days 11 hours and 8 minutes. The period when the lay time is to commence is mentioned in Clause 21. According to the learned counsel, the Clause 21 lays down two pre-conditions for lay time to commence. The first condition is that the vessel had to arrive at the Port of loading, which is Haldia in this case, and the notice of readiness had to be tendered to the petitioner of the arrival of the ship. It has also been submitted that under Clause 25 it was provided that the demurrage shall be @ Rs. 1,50,000/- per day payable by the charterer if the lay time is exceeded.

22. The learned counsel for the respondent further stated that the defence of the petitioner in this case, is mainly based on the assumption that the petitioner had a right to change or alter the contractual date of loading and the petitioner's further case is that by its telex dated 31st October, 1991 the petitioner had duly changed the contractual date of loading from middle of November 1991 to the first week of December 1991. Therefore, the petitioner's contention is that as a result of such alteration, the arrival of the ship at Sandheads on 23rd November 1991 was premature and consequently, the lay time cannot commence running until the end of the 1st week of December 1991.

23. The learned counsel for the respondent submitted that this defense was taken by the petitioner before the learned. The further defensive taken by the petitioner before the arbitrator is that even if the petitioner's telex dated 31 st October 1991 did not affect the postponement of the loading date, nevertheless, the oral agreement entered between the petitioner and the representative of the respondent on 4th November 1991 mutually agreed to the postponement of the loading date till 6th December 1991. The further stand of the petitioner is that even if it is assumed that date of loading continuous to be around the middle of November 1991, nevertheless, the vessel for the purpose of Clause 21 of the Charter Party agreement cannot be said to have arrived at Haldia till 6th December 1991. According to the petitioner, arrival at Sandheads could not be treated as arrival at Haldia. Further argument is that claim for demurrage being

essentially a claim for liquidated damages, it was incumbent upon the respondent to actually prove its damages before the arbitrator and not having done so, its claim for demurrage must fail.

24. The learned counsel for the respondents submits that the aforesaid contentions of the petitioner have no basis.

25. The learned counsel contended that the letter of intent (hereinafter called LOI) made a specific provision for the expected date for loading of vessel. The learned counsel submits that in any Charter Party agreement this stipulation is extremely important from various angles. This stipulation in a Charter Party agreement places the owner of the ship under an obligation to bring the vessel to the loading Port by a specified date. Similarly, it places an obligation upon the charterer to ensure that the cargo is available at the loading Port so that the loading can commence immediately. Admittedly, in the instant case, the LOI stipulates the expected loading date as around the second week of November 1991 and the LOI further stipulates that in case of change of the loading date, the respondents will be informed well in advance so that they can arrange the placement of the ship accordingly. Now obviously the question arises whether the change in the placement of the ship which was sought to be affected by the telex dated 31st October 1991 falls within the aforesaid stipulation of informing the respondents well in advance.

26. The learned counsel for the respondent submitted that from the facts of the case, it cannot be said that the respondents were informed well in advance about the alleged change of the loading date. The learned counsel submitted that after the issuance of LOI dated 18th September, 1991, the Charter Party was prepared on 18th October 1991, so one month lapsed without any change in the loading date. The said Charter Party Itself indicates that the respondents had to arrange for the placement of the ship from the Shipping Corporation of India and in the said Charter Party there is a box headed "Ready to load (A&B)" and the direction was that it was "around 20th November 1991". The learned counsel for the respondent argued that the ship, therefore, had to be fixed with the Shipping Corporation of India with reference to loading date which has been stipulated around 20th November 1991. Both the ship and loading date are fixed. After this was done in the Charter Party agreement dated 18th October 1991, a purported attempt to change the same by the telex dated 31st October 1991 cannot be said to have been well in advance so that the respondents can arrange the placement of the vessel accordingly. In this connection, the learned counsel has drawn the attention of this Court to the evidence given by the principal witness of the petitioner, Mr. R.K. Sinha about the time which is required for fixing a ship. The evidence given by the said witness is set out below :

"10. Why was the tender issued in May of 1991 for shipments to be made even as late as October/November 1991?

We wanted to Inform shipping companies for providing vessel in the month of

November/December 1991 as availability of vessel at short notice or a notice of one or two months is not possible."

27. The learned counsel for the respondent submitted that since it is clear from the admission of Mr. R.K. Sinha, the main witness of the petitioner, that the availability of vessels at a short notice of one or two months is not possible, the Arbitrator was justified in coming to the conclusion that the notice of change given on 31.10.1991 by the petitioner and after coming to know that the respondent had already fixed the vessels for around 20.11.1999 is not a notice which can be to be a notice "well in advance". Therefore, the finding of the Arbitrator on the aforesaid fact cannot be termed to be either perverse or unreasonable.

28. The next contention of the learned counsel for the respondent is that the alleged mutual agreement dated 4.11.1991 purportedly entered into between the petitioner and the respondent's representative viz. Mr. Jaswant Seth, has not been pleaded by the petitioner before in its application before this Hon'ble Court. The learned counsel further submitted that the evidence of Mr. R.K. Sinha, the main witness of the petitioner, in the cross-examination does not show that there was such an agreement. On the other hand, the evidence is that during the discussion, the petitioner intimated Mr. Seth that the vessels should be made available around 6.12.1991 when the full quantity of coal will be available at the Haldia Port for loading. The attention of this Court was specifically drawn to the answer of Mr. Sinha to question No. 105 which is quoted below :

"Q. 105. At the meeting, in addition to your intimating him, there also came an agreement from him to bring the vessel at that time, correct?

He did not say anything on that."

29. Relying on the aforesaid evidence of Mr. Sinha, the learned counsel contended that there was no agreement. It was merely an intimation.

30. The learned counsel further contended that from the conduct of the parties after 4.11.1991, the date of the meeting between Mr. Seth and the petitioner, it will be clear that there was no agreement. The learned counsel further contended that on 7.11.1991, the respondent informed the petitioner that the ship has been fixed to transport the cargo and was expected to be in the Haldia Port around 16/18.11.1991 and the petitioner was requested to make an appropriate arrangement for the cargo. In answer to that, the petitioner sent a Telex on 8.11.1991 without protesting that the message incorporated in the respondent's Telex dated 7.11.1991 was in breach of the agreement alleged to be entered on 4.11.1991. On the other hand, all that transpires from the Telex dated 8.11.1991 is that in its discussion with Mr. Seth on 4.11.1991, Mr. Seth was intimated about the arrival of the coal by 30.11.1991. The learned counsel also highlighted that on 19.11.1991 the respondent sent a fax notice to the petitioner clearly stating that the expected date of arrival of the ship at Haldia was 23.11.1991. To that also, the petitioner raised no objection. Then on 25.11.1991, when the

respondent submitted its Telex which is a notice of readiness to the petitioner, the reply of the petitioner dated 26.11.1991 once again made no reference to any agreement of 4.11.1991. Therefore, in the background of these facts, if the Arbitrator has rejected the alleged case sought to be put forward by the petitioner about its agreement on 4.11.1991, it cannot be assailed as either perverse or contrary to evidence.

31. So far as the Notice of Readiness (hereinafter referred to as N.O.R.) served on the petitioner on 25.11.1991 is concerned, the learned counsel submitted that the same is not invalid. The learned counsel pointed out that under the general law, arrival of ship on the sandheads does constitute an arrival. The learned counsel submitted that the petitioner throughout accepted the arrival of the ship at the sandheads as arrival of the ship within the Haldia Port. In support of this contention, the learned counsel placed reliance on the petition filed by the petitioner under Sections 5, 9 and 41 of the Arbitration Act. The attention of the Court was drawn to paragraph 8 of the said petition. The relevant part of the same is set out below :

"Despite the aforesaid, the respondent No. 1 purported to have sent the said vessel to Haldia which arrived at sandheads of Haldia Port on the 23rd November 1991. The dispatch and arrival of the said vessel at Haldia Port on the said date was without the request of and contrary to the instructions of the petitioner and/or the agreed terms of the contract between the parties."

The attention of the Court was also drawn to the petitioner's case before the Arbitrator. In para 1(g) of the petitioner's reply it has been stated by the petitioner, "the said vessel purported to arrive at the sandheads of the Haldia Port allegedly on 23rd November 1991."

32. The learned counsel submitted that the Calcutta Port is constituted under the provisions of the Major Port-Trust Act. The limits of the Calcutta Port of which the Haldia is a part extends right upto the sandheads, therefore, the learned counsel asserted that both legally and administratively the sandheads are a part of the Port. The learned counsel also pointed out that the petitioner always contended that the sandheads as the place where the waiting ships usually lie. Therefore, there is no error on the part of the Arbitrator in appreciating the principles decided in the case of Johonna Oldendorf.

33. In so far as the N.O.R. dated 25.11.1991 is concerned the learned counsel for the petitioner urged that the same is invalid and the Arbitrators erred by not holding it to be so and in the process acted contrary to Clause 21 of the Charter Party. The learned counsel submitted that in view of the second paragraph of Clause 21 of the Charter Party N.O.R. can be given at sandheads only when the vessel is unable to proceed to Haldia berth by reason of congestion.

34. On the N.O.R. the learned counsel for the petitioner further urged that in any event the respondents must be deemed to have waived its right to rely on the notice dated 25.11.1991 in view of subsequent notices issued by its Agent M/s.

Oceanic Shipping Agency Private Limited.

35. The learned counsel for the respondent on the other hand submitted that charter parties are commercial documents and those commercial documents cannot be interpreted like statutes. A statute cannot be interpreted in a way which makes a part of it redundant. But the same principle of interpretation does not hold good in the case of interpretation of clauses in charter parties.

36. Apart from that factually it was argued by the learned counsel for the respondent that the ship had to remain in anchorage at sandheads till 06.12.1991 as the petitioner failed to bring sufficient cargo to Haldia Docks. The learned counsel submitted that this is clear from the admission of Mr. Sinha before the arbitrator.

37. The relevant part of the evidence of Mr. Sinha to which the attention of this Court was drawn is set out below :

"Q. 144. I put to you that under Clause 23 of the Charter Party it was the charterers, viz. HPCL who shall arrange for the safe loading berth. Do you agree or not?

Yes. I agree.

Q. 145. To the best of your knowledge why did your company apply for a berth for the vessel only on 6/7th December 1991 to the Port Authority?

Since a total quantity of coal was not available at the loading dock.

Q. 146. Is that the reason why your company did not apply for berth earlier?

Because the coal was not available we could not apply for the berth."

38. In so far as the plea of waiver raised by the petitioner is concerned, the learned counsel for the respondent urged that waiver was never pleaded and not even in the present application for setting aside. A plea of waiver being a mixed one of fact and law, this Court cannot in the absence of any pleading entertain the same. Apart from that the learned counsel urged that in all three NORs were issued. So there is no reason to hold that the other two notices were waived, the learned counsel urged that there is no such case. Apart from that the settled maritime practice, according to the learned counsel, is to go on giving such N.O.R.s and he cited some authorities on the question.

39. In so far as the petitioner's argument that no demurrage can be allowed without proof of actual damage, the learned counsel submitted that the joint arbitrators, in this regard, on an interpretation of the contract between the parties have come to a correct view before awarding damages. Various decisions on this question have been cited by both the parties which the Court will have occasion to refer to subsequently in this judgment. The learned counsel submitted that in this case damages have admittedly been suffered by the respondent and the rate of demurrage being mutually fixed and accepted, the

same should be accepted unless the petitioner proves that no loss has actually been suffered. The learned counsel urged that no such case has been made out or even suggested. So the arbitrators were justified in accepting the demurrage rate in assessing the claim of the respondent.

40. These are the rival contentions of the parties.

41. Before deciding those contentions in the context of the award by the joint arbitrator, the Court's jurisdiction in setting aside an award must be kept in mind.

42. Various decisions were cited at the bar but before considering those decisions a few facts may be noted. In terms of the governing arbitration clause, each party has a right to nominate and appoint an arbitrator and, in the event of any disagreement among them they may appoint an umpire. In the instant case, there is no disagreement amongst arbitrators appointed by the parties. The respondent appointed its arbitrator earlier. There were some difficulties about the petitioner appointing its arbitrator. The petitioner, therefore, filed a petition before this Court under Sections 5, 9 and 41 of "AA-40" praying for leave to appoint its arbitrator in terms of the arbitration agreement.

43. The said petition was disposed of by this Hon'ble Court by a consent order dated 13.05.1996 passed by Justice Shyamal Kumar Sen (as His Lordship then was). The operative Portion of the said order is set out below:

"It is agreed by the parties that the petitioner will nominate its Arbitrator within 2 weeks thereafter. In view of this agreed order there is no scope for Arbitrator to enter upon reference alone. The Joint Arbitrators will make and publish their Award within 4 months from the date of entering upon reference."

44. So the award in question is a unanimous speaking award by arbitrators nominated by the parties themselves. And the arbitrators under the arbitration clause are commercial men having regard to the commercial nature of the dispute.

45. Now coming to the cases cited, this Court finds that the petitioner first relied on the judgment in the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . In that judgment, the learned judges held in para 26 that an arbitrator cannot act arbitrarily, irrationally or independently of the contract. His sole function is to arbitrate in terms of the contract. When the arbitrator travels outside the contract, he acts wholly without jurisdiction. The learned judges held if the arbitrator gives an award construing the provisions of the contract, that award cannot be interfered with unless of course the arbitrator gives reason for the award which discloses an error apparent on the face of it. In para 29 of the said judgment, it has been stated that if an arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction, but, when the arbitrator travels outside the contract and deals with matters not within the contract, in that case, the arbitrator commits a jurisdictional error. Whether such error goes to the very jurisdiction of the arbitrator can be

established by considering materials outside the award.

46. The next judgment relied upon was in the case of Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, . In Budharaja, the learned judges also relied on the previous decisions in the case of Associated Engineering Company and held in paras 16 and 17 that an interpretation of a particular condition in the agreement is within the jurisdiction of the arbitrator. But, in a case where there is no question of interpretation of the terms of the contract, but of solely reading the same, and still the arbitrator ignores the terms of the contract and awards an amount ignoring the prohibition in a contract, the award is arbitrary and without jurisdiction. In coming to the said finding, the learned judges relied on the well settled principle that the arbitrator derives his authority from the contract and the Arbitration Act does not give the arbitrator any power to act in manifest disregard of the contract.

47. The learned judges also held that in case of a speaking award, the Court can set aside the award if the reason disclosed contains an error which is apparent on the face of it. The other judgment cited was in the case of Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, . In that case, the learned judges reiterated the same principles by relying on the previous judgment of the Hon''ble Supreme Court in the case of Associated Engineering Co. and held that the arbitrator being a creature of the contract between the parties cannot ignore the specific term of the contract. If he does so. it will be a jurisdictional error which can be corrected by the Court. The learned judges held that the question whether the arbitrator has acted beyond his jurisdiction and the question whether the award is vitiated by error apparent on the face of it, are two different questions.

48. Various principles considered in the said judgment have been summarized in para 44. Relying on para 44, the learned counsel for the petitioner urged that in the instant case the arbitrator has travelled beyond the scope of the contract by ignoring Clause 21 of the Charter Party agreement, about the arrival of the ship. It has further been stated that the speaking award of the arbitrator is also in clear violation of various legal principles, viz. Section 74 of the Indian Contract Act and also the ratio in the judgment of the House of Lords in the case of Johanna Oldendorff.

49. The learned counsel very much relied on a recent judgment of the Hon''ble Supreme Court in the case of M/s. Sikkim Subba Associates Vs. State of Sikkim, and urged that Court's jurisdiction in setting aside an award has been widened as a result of the said judgment and relying on the said judgment, the learned counsel urged that the Court should interfere in this case. The learned counsel urged that principles of interference with an award as laid down in the case of AIR 1923 66 (Privy Council) are no longer governing the field. The learned counsel for the respondent, on the other hand, submitted that in the case of Sikkim Subba, no new principle has been laid down and the well settled principles in the matter of interfering with an award have also been only

reiterated in Sikkim Subba.

50. Every judgment is based on certain facts and the principles which are decided in a judgment cannot be divorced from the facts of the case. In other words, the principles in all its nuances are dictated by the facts of the case.

51. The facts in Sikkim Subba are that the State of Sikkim entered into an agreement with M/s. Sikkim Subba Associates under which the said firm was appointed the organizing Agents for its lotteries subject to the terms and conditions contained in the agreement. Thereafter, disputes arose about the term of the contract leading to its termination and Sikkim Subba seeking recourse to arbitration proceeding. Against an order of appointment of the arbitrator dated 24.10.1992 by the District Judge, Gangtok, the respondent-State filed an appeal before the High Court and the same was dismissed by the High Court on 23.11.1992. The matter thereafter was taken up before the Hon'ble Supreme Court by an SLP and the same was also dismissed subject to some observations that the arbitrator shall give a speaking award and those observations were given by the Apex Court as a result of agreement between the parties. Thereafter, the parties filed their statement and counter-statement before the arbitrator and the arbitrator after adjusting the counter-claim of the State gave an award under which the State was to pay Sikkim Subba an amount of Rs. 33,13,64,758/- along with costs and further interest was also granted @ 12% per annum on the said sum.

52. Being aggrieved by the said award, the State filed an application u/s 30 of the said AA-40 for setting aside the award. The District Judge by its decision 27.10.1994 rejected the State's application and made the award the Rule of Court. Then the order of the District Judge was challenged before the High Court by filing an appeal u/s 39 of the Act. The High Court by its judgment dated 29.9.1995 set aside the award and also the judgment of the District Judge, but, Justice Dayal, who was one of the members of the High Court Bench gave a dissenting judgment and held that though the quantum of damage arrived at by the arbitrator is vitiated by illegality on the face of the record, but, the matter is required to be remitted for reconsideration afresh by the arbitrator.

53. In view of this divergence the matter was placed before the Chief Justice and then various interlocutory proceedings followed. Ultimately, the Sikkim High Court allowed the State's appeal. Thereafter, the matter came to the Hon'ble Supreme Court.

54. Before laying down the principles the learned judges in Sikkim Subba made it clear that the scope and ambit of exercise of Court's jurisdiction under Sections 30 and 39 of AA would depend "in the context of the peculiar facts and circumstances of the cases", (page 641 of the report)

55. After making those observations, the learned judges found that the award which was under challenge in Sikkim Subba was vitiated on the ground of several errors of law apparent on the face. Their Lordship found that the award

proceeded on misreading of material and was rendered in utter disregard of law and precedents. The learned judges further found that the award was based on "mere conjecture" and "pure hypothetical exercise" and is totally divorced from realities (page 644). The learned judges also recorded towards end of para 15 that even dictates of common sense, reason and ordinary prudence would commend for rejecting the claim of the appellants as nothing but a "gamble and vexatious".

56. However, the Apex Court found that arbitrators throwing to the winds all basic and fundamental principles awarded an astronomical sum of damages. In the background of these overwhelming facts, the learned judges observed that "gross misreading of the materials" by the arbitrator comes for interference by the Court (page 645).

57. The learned judges further observed in page 648 of the report that "a cursory reading of clause would show that the arbitrator has adopted a narrow, pedantic and perfidious construction of the clause" and by doing so the arbitrator has done violence to its language by defeating the very object of the clause. The learned judges also held that the award of the arbitrator cannot be opposed to law and what is not permissible in law cannot be granted by an arbitrator.

58. This Court finds that the above principles are nothing new. It is a reiteration of the same principles and the facts of the case leading on to the award overwhelmingly influenced those observations of the learned judges.

59. But in the said judgment, the learned judges have also observed in para 14 "if there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the Arbitrator to accept one or the other of the available interpretations". But since in the facts of the case the arbitrator made a conscious and gross misreading of the clause and arrived at a totally perverse finding, the Hon'ble Supreme Court interfered with the same. So this Court is unable to agree with the contention of the learned counsel of the petitioner that as a result of the judgment of the Hon'ble Supreme Court in Sikkim Subba the scope of interference by Court with a speaking award has been widened.

60. On the other hand, this Court finds that the well-settled principles about interference with the award have been reiterated in Sikkim Subba.

61. Therefore, going by those principle this Court proposes to examine the objection to the award urged by the counsel of the petitioner.

62. The first objection is that the arbitrators acted contrary to the express terms to the contract namely Clause 21 by holding that the NOR dated 25.11.91 issued when the vessel was at sandheads is a valid NOR.

63. This Court finds that the arbitrators had not made any error by reaching the aforesaid finding since the sandheads have been repeatedly admitted by Mr. P.K. Sinha in his examination-in-chief as part of Haldia Port. It cannot be disputed that Calcutta Port is constituted under the Major Port Trust Act and the limits of

Calcutta Port of which Haldia is a part is extended right upto the sandheads of Haldia. In this connection, the learned counsel for the respondent has relied on a notification dated 26.02.1977 issued by the Government of India Ministry of Shipping and Transport. The said notification was issued u/s 5 of the India Port Trusts Act, 1908 and Section 2(q) of Major Port Trusts Act, 1963. Under the said notification, the limits of Port of Calcutta were demarcated. From the said notification, it is clear that sandheads of Haldia are included within Calcutta Port. The learned counsel for the petitioner, on the other hand, relied on Scrutton on Charter Parties, 19th Edition, in order to contend that a ship is an arrived ship when it comes to rest within the named Port and when it is at the immediate and effective disposition of the charterer. This Court finds that in the instant case the ship arrived at the sandheads on 23.11.1991 and under the agreement between the parties the date of arrival of the ship was around 20.11.2001. So her arrival was in term of the agreement. Here immediately upon the arrival of the ship NOR was served on the charterer on 25.11.1991. On this aspect, this Court finds that Scrutton on Charter Parties (20th Edition) has laid down the following general principles in page 139-140:

"(1) The ship must be at the place where she is bound to be ready for cargo (Article 74), or, if there is the provision in the charter and the circumstances justify its application, "so near thereto as she can safely get". (Articles 71, 72, 74)

(2) The ship must be, so far as she is concerned, ready to load. (Article 75)

(3) The charterer must have notice of the above facts. (Article 76)

When these conditions are fulfilled the vessel is "an arrived ship", and the lay-days, or days allowed for loading the ship, begin, unless there are special provisions regulating when time begins."

64. Going by the aforesaid principles this Court finds under the relevant clauses of the charterparty agreement namely Clause 21, it has been made clear that on the Port of loading (Haldia) time will begin to count after 24 running hours of vessel's arrival and NOR tendered during official working hours whether the vessel is in berth or not. The ship will, therefore, be considered an arrived ship whether it is berthed or not. There are of course, several other stipulations in Clause 21 but in the instant case, immediately upon arrival of the ship, NOR was given by the ship owner to the charterer. Therefore, there was no error on the part of the arbitrators in holding that the NOR dated 25.11.1991 is a valid notice. It is nobody's case that the vessel on 25.11.1991 was not at the immediate disposition of the charterer.

65. Apart from that it has already been pointed out hereinabove that the petitioner previously in its pleading before the High Court and at various stages have accepted sandheads of Haldia as part of Haldia Port. This is also administratively true as has been pointed out above. On the aspect, this Court finds that the learned counsel for the respondent has rightly placed reliance on

Lloyd's Maritime Laws News Letter, page 274 in which in London Arbitration 5/90, it was held that a vessel on arrival at sandheads at Haldia is an arrived ship. From the said News Letter it would appear "All the evidence indicated that the commercial practice that had developed was for vessels to arrive at Sandheads and there give notice of readiness.

Accordingly, the vessel was an arrived ship when she gave notice of readiness at Sandheads."

66. The learned counsel for the petitioner, however, submitted that in view of the second sub-paragraph of Clause 21, NOR can be given at . sandheads only on special occasion when the ship is unable to proceed to Haldia because of congestion. It was further submitted that if Clause 21 is construed in a different way to mean that NOR could be given from sandheads under any circumstances that would make the second part of Clause 21 a mere surplusage.

67. For various reasons this Court is unable to accept this interpretation of Clause 21 advanced on behalf of the petitioner. Firstly, the facts in this case do not call for such an interpretation as NOR has been given by the ship immediately on her arrival. Therefore, the consequences arising out of the inability of the ship to give the NOR do not arise. Secondly, it has been rightly contended by the learned counsel for the respondent, relying on authorities, that charterparties are commercial documents and they are notorious for their superfluous drafting. In this connection, reference be made to Scrutton of Charterparties (20th Edition) page 11. Relying on various authorities, Scrutton has pointed out this basic factor in the clauses of Charterparty by saying, "charterparties often contain many redundant words and the presumption against surplusage is of little value in their construction." So in the instant case, if the joint arbitrators, as commercial men have given a construction to Clause 21 of charterparties by holding that NOR issued on 25.11.1991 on the arrival of the ship at Haldia on 23.11.1991 is a valid notice, the said interpretation cannot be either called perverse or made in disregard of the clauses to the contract.

68. In *Chandris v. Isbrandtsen-Moller Co.*, reported in 1951(1) Kings Bench 240, Justice Devlin at page 245 held as follows :

"The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial Judges have recognised. In *Burrell & Sons v. F. Green and Co.*, Bailhache J. said that he was unimpressed by the argument of redundancy "because charterparties often contain many redundant words". In *Schloss Brothers v. Stevens*, Walton J. stated "it was said for the defendant that, if all risks were covered, why refer specially to risks of robbery with or without violence, negligence etc.? On the other hand, it is very common to find in such contracts, although perfectly general words are made use of, including practically all risks, special reference to particular perils to which it is desired to draw special attention". Scott LJ in *Beaumont-Thomas v. Blue Star Line Ltd.* referred to the

same habit but less kindly as "the common and pernicious practice of cramming a contract with particular illustrations of some general stipulation, which in a legal sense are wholly unnecessary, and just because they are unnecessary often afford a pretext for limiting general words in a way that was never intended."

69. This Court is in respectful agreement with views expressed Justice Devlin in the aforesaid passage.

70. The learned counsel also urged that in the instant case, several NORs were issued by the respondent, apart from the one issued on 25.11.1991. The learned counsel relied on the NOR dated 07.12.1991 and contended that the same that gives a clear go-by to the previous notices dated 25.11.1991 and 04.12.1991. Therefore, it must be held that the respondent has waived its two previous NORs any by not holding so the arbitrators have committed an error apparent on the face of record.

71. This Court finds that the said contention is not sound at all. The NOR which was issued on 25.11.1991 does not become bad because of a subsequent notice. In fact, the learned counsel for the respondent has relied on a decision of Justice Donaldson, reported in 1970(2) LR 409. of the report, the learned Judge has observed as follows :

"It is a good working rule in such situations to give notice of readiness and to go on giving such notices in order that, when later lawyers are brought in, no one shall be able to say : "If only Master had given notice of readiness, laytime would have begun and owners would not be able to claim demurrage."

72. Therefore, the arbitrators have accepted the first notice as a valid NOR and by doing so, the arbitrators have not at all committed any error vitiating the award. Apart from that it has come on record from the evidence of Mr. Sinha, the principal witness of the petitioner that under Clause 23 of the charterparty, the obligation of the charter i.e. the petitioner is to arrange for safe loading berth and Mr. Sinha has also submitted that the charterer applied for a berth only on 6/7th December 1991 to the Port Authority as the total quantity of coal was not available on the loading dock and that is the reason why they did not apply for berth before. Therefore the obligation of the charter under Clause 23 of the charterparty was not fulfilled. The charterer cannot take advantage of its own wrong and cannot in order to cover it up urge that the joint arbitrators committed a grave error by holding that NOR dated 25.11.1991 is a valid NOR. In fact, the obligation of the charterer to arrange for a berth has been highlighted by Carver's in his Carriage by Sea and also by the joint arbitrators. Therefore, the joint arbitrators have not acted contrary to law by relying on Clause 23 of Charterparty. Here if I may extract the relevant passage from Carver :

"In the absence of express qualification the undertaking of the Charterers to supply a cargo is absolute. And further, he undertakes absolutely that the cargo shall be ready at the place at which the loading is agreed to be done. The

charterparty does not usually deal with the manner in which the charterer is to get the cargo; it assumes that he has it in readiness at the Port. Any difficulty that may arise in bringing it there is outside the contract, and cannot be a matter of excuse in estimating whether proper dispatch has been used, unless it is covered by an express stipulation. Thus, where the dock authorities refused to allow a ship to come to a loading berth because there was not a reasonable Portion of the cargo there ready for her, the charterer was held liable in damages for the detention of the ship in consequence of such refusal. Where the provision of a cargo (or part thereof) is necessary to enable the ship to perform its obligation of becoming an arrived ship, the charterers are under an absolute obligation to provide such cargo in time to enable the ship to perform its obligation; the charterers are not relieved from their obligation in this regard by taking all reasonable steps to provide a cargo."

73. It is clear from what has been discussed above that the petitioner cannot demand that NOR could be given only after the vessel has been berthed when the reason of the vessel not getting its the berth is the failure of the petitioner to arrange for a berth in derogation of their obligation under Clause 23 of the charterparty.

74. Apart from the fact the other contentions raised by the petitioner that the respondent has waived It previous NOR is a plea which was not raised before the arbitrators. It may be noted that a plea of waiver is always a mixed question of fact and law [kindly see the decision of Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, . Waiver always means a conscious relinquishment of a known right. Here by giving NOR dated 07.12.1991, there has been no relinquishment of any of the right of the respondent. Therefore, repeated NORs which were given on the basis of a valid maritime practice cannot vitiate the NOR dated 25.11.1991.

75. Closely, connected with this objection is the criticism of the petitioner that the arbitrators acted with error of law which is apparent from the face of the award by wrongly applying the ratio of the decision of the House of Lords in Oldendorff. The learned counsel for the petitioner urged that on an erroneous appreciation of law laid down in Oldendorff, the arbitrators determined the validity of NOR when such NOR was admittedly given by the ship when she was at the sandheads.

76. This Court does not find any substance in this objection. The fact that the sandheads are within Haldia Port Complex cannot be disputed and it has not been disputed on facts by the petitioner. In support of the contention of the respondent that sandheads fall within the Port of Haldia, the learned counsel referred to Lloyd's Maritime Law Newsletter which has been discussed above as also to the notification issued under the Major Port Trust Act and there is no reason to dispute the fact that administratively sandheads are included within the Port of Haldia.

77. Now coming to the ratio of Oldendorff, this Court finds that Oldendorff was considered by Scrutton. The reading by Scrutton of the Oldendorff ratio is that the said decision "has considerably extended the area within which a ship may be "arrived" under a Port charter, to include not merely that part of the Port where a ship can be loaded when a berth is available, but the whole area of the Port in its commercial sense, i.e. the Port as understood by shippers, charterers and shipowners. This may or may not coincide with the legal area of the Port : the area within which the Port authority exercises powers regulating the movements and conduct of ships may be some indication, although powers over matters such as pilotage are sometimes exercised far beyond the limits of the Port in its commercial sense". [Scrutton : Charterparties, 20th Edition page 144]

[Underlined for emphasis]

78. This is the understanding of the ratio of Oldendorff by Scrutton. The appreciation of the Oldendorff ratio by the Joint arbitrators is also in consonance with same and does not call for any interference by this Court.

79. Two other objections, raised by the petitioner for setting aside the award, are taken up together. They are (1) the arbitrators passed the award on erroneous proposition of law and this is apparent from the face of the award. This submission has been made, inter alia, on the ground that the arbitrators held that the loading date mentioned in the charterparty can be changed only by formal amendment or by formal document. This, according to the learned counsel of the petitioner, is an erroneous proposition of law. The other objection is that the arbitrators failed to consider the material evidence and the same is demonstrated from the face of the award. In support of this the learned counsel submitted that the arbitrators failed to take into account the statement of fact in coming to the conclusion that the NOR dated 25.11.1991 was lawfully served and that the oral agreement between the parties to change the loading date is a piece of uncontroverted evidence and the same has been ignored by the arbitrators. Both these objections are correlated and as such taken up together.

80. In support of this submission the learned counsel for the petitioner relied on Section 91(4) of the Evidence Act, Scrutton on Charterparty, 19th Edition page 3 & 4, Halsbury's Laws of England, 3rd Edition on Charterparty and also an Old English decision in the case of Hall v. Brown, reported in 3 English Report 1897 and also the case of Niranjana Kumar and Others Vs. Dhyani Singh and Another, .

81. This Court proposes to consider these authorities one by one.

82. It may be stated that when the arbitration proceeding was going on before the arbitrators for the first time this stand of extension of the loading date was taken up by Mr. R.K. Sinha on behalf of the petitioner. In this connection, the Court has already noted the evidence of Mr. R.K. Sinha in this regard and the specific stand of Mr. R.K. Sinha in cross-examination to Question No. 104 & 105 that during discussion Mr. Seth was merely intimated that the vessel should be made available around 6th December 1991 when full quantity of Coal will be available

in Haldia Port for loading. Apart from giving intimation to Mr. Seth, the meeting did not record any agreement. This is the evidence of Mr. Sinha. The other factual aspect of the matter has already been adverted to in the earlier part of the judgment. From those factual aspects it was clear that the request to defer the arrival of the ship given on 30th October 1991 cannot be treated as notice which can be said to have been given well in advance in view of the agreed date of arrival of the ship around 20th November 1991. It has also been admitted by Mr. Sinha that it takes about two months to book a ship. In view of the admitted factual position there can be no agreement about extending the date of loading. In that context, the Court must judge the position stated in the award by the joint arbitrators that such a vital amendment as changing the loading date ought to be made by amendment of the charterparty. The amendment in this case is very vital inasmuch as the amendment has a direct effect on the counting of lay days. Therefore, the recital in the award that such an important issue should have been by means of amendment of the charterparty and which according to the joint arbitrators is consistent with commercial practice is not perverse at all.

83. Reference to Section 91 and 92 Sub-section (4) of the Evidence Act, in this connection, is not very appropriate. The joint arbitrators as commercial men of the trade was referring to a commercial practice and the provisions of Section 92(4) of the Evidence Act do not relate to any commercial practice but is a general provision of law. The judgment on which reliance was placed by the learned counsel of the petitioner in the case of Niranjana Kumar and Others also deals with a landlord and tenant dispute.

84. Referring to the provisions of Sub-section 4 of Section 92 of the Evidence Act, the learned judges of the Supreme Court held that under proviso 4 of Section 92, the existence of any distinct subsequent oral agreement to modify any contract or grant may be proved except when the contract or grant is by law required to be in writing or has been registered according to law in force relating to registration of document.

85. The learned Judges held that in view of this provision it was open to the appellant to lead evidence to show that apart from the rent note there is a distinct oral agreement under which the terms of original contract or grant were modified and that the partners of the firm were the real tenant of the shop. In the instant case, the evidence, which has been discussed above, does not show that there has been any subsequent agreement altering the loading date which is a vital part of the charterparty agreement. On the other hand, the evidence shows that Mr. Seth just been intimated of the request to change but there is no agreement about the change. Therefore, the finding of the arbitrator is not contrary to the evidence nor is it contrary to law either. Actually, what the arbitrators meant was that such an important change in the date of loading should have been by normal substandard of commercial practice incorporated by way of amendment in the charterparty. This is not exactly a statement of law but it is actually a reason given by the arbitrators as prudent men having experience

of commercial transaction in the same field. The fact that there is no such amendment recorded in the charterparty lead the arbitrators to conclude, in view of the evidence available on the record, that there is no such agreement and which, in fact, is not there.

86. In fact, the principles which have been stated by Scrutton also supports the view taken by the arbitrators. Scrutton has stated the following principles in Article 4 at page 4 of Charterparty (20th Edition) :

"Formerly a Charterparty was made by deed, but in modern times it is not usually made under seal. Indeed it may be, and after is, made by word of mouth, although almost invariably the intention of the parties is to reduce it to writing at a later stage."

87. Apart from stating the aforesaid principles, Scrutton has also stated "when the contract is reduced to writing evidence of earlier or contemporaneous agreement is not admissible to contradict, vary or to add the written terms". [Page 4 of the 20th Edition]

88. In the instant case, the terms of agreement have been reduced in writing. Therefore, such an important amendment claimed by the petitioner should have been in writing and if it is not so, it is not admissible to contradict, vary or add to the written terms. Therefore, by taking the aforesaid view, which finds support from Scrutton, the arbitrators have not acted erroneously at all.

89. The decision in Hall v. Brown was rendered on completely different fact. In that case, according to the initial agreement a British Vessel was chartered for a voyage from Odessa to Rotterdam. In the meantime war having broken out between Great Britain and Holland, the Master was instructed by the freighter's Agents at Odessa, that in case he could not get to Rotterdam, should proceed to Hamburgh or Bremen; but to enter a London or Newcastle in the first instance, where he might receive different orders from the freighters and the difference in the freight is to be settled by arbitration. On those facts it was held that the original destination having been Rotterdam and the same having been changed for England by subsequent agreement, a new contract has come into existence. The aforesaid finding was made by the learned Judges on the peculiar facts of the case, namely of war having been broken out and the evidence was clearly established about such change in the stipulation in charterparty but the same is not the case here. Therefore, the ratio in Hall v. Brown is not attracted in the facts of this case.

90. The same principles of Hall v. Brown have been referred to in Halsbury [Charterparty, 3rd Edition, Article 397]. Since the facts of Hall v. Brown are clearly distinguishable and the ratio in the case of Hall v. Brown is not attracted the principles based on Hall v. Brown do not govern the position in this case. Therefore, objection to the award on this ground cannot be sustained.

91. The next objection to the award that the arbitrators failed to consider the

statement of facts in coming to the conclusion that the NOR dated 25.11.1991 was validly served is equally untenable. In this connection, the learned counsel referred to Clause 28 of the Charterparty. The said Clause 28 is as follows :

"Clause 28. On completion of loading, a Statement of Facts shall be made out at the loading Port duly signed by the Master/Agents of the vessel and the Suppliers/their Representatives. Similarly at discharge Port duly signed by Master/Agents of the vessel and Receivers,"

92. In this connection the learned counsel referred the statement of fact which is referred to as common document No. 15 and submitted that this is a joint statement signed by both the parties and by same statement it appears that NOR was tendered on 07.12.1991 and NOR was accepted on 07.12.1991. The learned counsel also submitted that ignoring the said document the finding of the arbitrators that NOR dated 25.11.1991 is valid is a perverse finding.

93. This Court has already held relying on authorities that issuance of successive NOR is an accepted maritime practice and it cannot be said that NOR dated 25.12.1991 is invalid just by reason of subsequent NOR dated 07.12.1991. It cannot be disputed that by giving the NOR on 25.12.1991, the respondent made it clear that the ship had arrived and she was at the disposal of the charterer. The fact that the charterer could not bring the cargo and did not apply for a berth prior to 06.12.1991 cannot invalidate the NOR dated 25.12.1991 nor does it stop the running of lay time since the NOR dated 25.12.1991 was served. The statement of fact referred to by the petitioner is mainly a recording of facts as they happened. This has nothing to do with any admission by the respondent that its previous NOR dated 25.11.1991 is invalid nor can the same operate as a waiver of the NOR dated 25.11.1991.

94. The statement of fact merely records the completion of loading. The said document cannot be construed as recording the emergence of any "lis" of dispute for adjudication. Nor can it be regarded as recording of facts after adjudication. The said document has merely recorded the catalogue of events and had not recorded finding on facts. The said document does not have much of an impact on the adjudication by the arbitrators.

95. The next challenge to the award urged by the petitioner is that the arbitrator awarded demurrage as liquidated damages and this is contrary to the express provisions of the Contract Act. As such, the arbitrator has proceeded contrary to law and the award should be set aside. The learned counsel submitted that the grant of demurrage as liquidated damage by the Arbitrator is contrary to Section 74 of the Contract Act. The learned counsel also submitted that no damage can be awarded unless It is proved. In the instant case, no such damages having been proved, the award of the arbitrator granting demurrage as liquidated damages should be set aside. The learned counsel submitted that the object of demurrage is to secure that the goods are put on board in time and to prevent the detention of the ship at the Port. Therefore, the demurrage is awarded to

penalise the charterer for undue detention of the ship at the Port. The learned counsel also submitted that Section 74 of the Contract Act has been enacted to eliminate the elaborate rules of the English Laws and the said section distinguishes between stipulation providing for payment of liquidated damages and penalty. But, in case where there are stipulations in terrorem, i.e. penalty, It is not payable. The learned counsel further submitted that under the common law, there may be genuine preestimation of damages which by agreement is payable as liquidated damages but, stipulation as penalty is not payable and the Indian Legislature by enacting Section 74 of the Contract Act has cut across the distinction between the pre-estimation of damage and penalty. Therefore, u/s 74 of the Contract Act, the duty is case upon the Court not to enforce the penalty clause, but to award reasonable compensation by way of liquidated damages.

96. The learned counsel also submitted that, in the instant case, the arbitrator held that Section 74 of the Indian Contract Act is not applicable. Therefore, the damage can only be awarded u/s 73 and in the instant case, there is no proof that the respondents suffered loss or damages @ Rs. 1,50,000/- per day and no evidence was led by the respondents to prove any damages. Therefore, by awarding Rs. 1,50,000/- as liquidated damages, the arbitrator acted contrary to the express provision of law. Thus, the award is bad.

97. In support of this contention, the learned counsel relied on a decision of the Hon''ble Supreme Court in the case of Fateh Chand Vs. Balkishan Das, . In Fateh Chand, the facts were that there was a contract for sale of land and in the said contract, there was stipulation that if the Vendee failed to register the Sale Deed within a certain date, the Vendor shall be entitled to forfeit the earnest money and the contract shall be deemed to be cancelled.

98. In that case, the delivery of possession of the building and land was made, but the sale of property was not completed before expiry of the period stipulated in the agreement. In such a situation, a suit was filed by the vendor for damages. In the said suit, the vendee contended that the Vendor has committed breach of contract and could not forfeit the amount of Rs. 25,000/- by way of earnest money nor the Vendor can claim any compensation and, ultimately, the Hon''ble Supreme Court held that the vendor is not entitled to recover any sum other than Rs. 1,000/- of the earnest money which was conceded and mesne profit @ Rs. 140/ - per month, which was assessed by the trial Court.

99. In that case, the Hon''ble Supreme Court came to the finding that there is not evidence of any loss having been suffered by the Vendor save and except that he was kept out of the possession of the property for sometime. The learned Judges also held that there is no evidence that the property had depreciated in value nor there was any evidence of any special damage. Therefore, the Court held that the Vendor is entitled to forfeit the amount of Rs. 1000/- which was paid as earnest money as a part of the damages and mesne profit @ Rs. 140/- per month from the date till the date possession was delivered to the Vendor together with interest @ 6%.

100. The learned counsel also relied on another decision of the Hon''ble Supreme Court in the case of Union of India (UOI) Vs. Raman Iron Foundry, . In that case, the learned Judges considered the principles relating to the claim for damages for breach of contract. The relevant clause in the contract which came up for consideration on before the Arbitrator and also of the Hon''ble Supreme Court was clause 18.

101. The learned Judges construed the said clause and held that the claim under the said clause is admittedly one for damages for breach of the contract between the parties and the damages which are claimed are liquidated damages. The learned Judges held that so far as the law in India is concerned, there is no qualitative difference between the nature of the claim whether it be for liquidated damages or for unliquidated damages and, in that context, the learned Judges construed Section 74 and held that Section 74 eliminates the some what elaborate refinement made under the English Common Law between the stipulation providing for payment of the liquidated damages and the stipulation which is in the nature of penalty. The learned Judges held that if there is stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation. But in the instant case by granting demurrage @ of Rs. 1,50,000/- per day without any proof of damage, the arbitrators committed an error on the face of the award. The learned counsel also urged that the arbitrators held that Section 74 of the Contract Act does not apply to demurrage and, therefore, it is contended that Section 73 will apply. Section 73 envisages grant of damages only upon its proof. Since no proof of damages has been given by the respondent the award is bad.

102. The learned counsel for the petitioner further urged that in Law, demurrage, is nothing more than liquidated damages. It has been further urged that there is no difference between liquidated damages and unliquidated damages save and except contending that in case of the liquidated damages, no compensation is payable under any circumstances in excess of the sum stipulated in the contract. On the basis of those contentions, it has been further asserted that as unliquidated damages had to be proved so the liquidated damages must also be proved. Not having proved any damage which it has allegedly sustained, the respondent is not entitled to the same and the award is, therefore, bad.

103. From a perusal of the award, it appears that in the award, the Joint Arbitrators have noted submission of the petitioner that in English Law demurrage is a form of liquidated damage. But, the award does not say whether the said contention is correct also in the context of the Indian Law.

104. This Court is of the view that even under the English Law, the concept of demurrage is capable of two shades of meaning. On a strict meaning, demurrage means a sum agreed by the charterer to be paid as liquidated damages for the detention of the ship beyond its stipulated or reasonable time for loading or unloading (see Scrutton on Charterparty, 20th Edition, page 298}.

105. Another meaning is also attributed to the concept of demurrage. The second interpretation of this concept is that demurrage means nothing more than a liquidated sum payable by the charterer to the owner for the further time taken in loading or unloading after the expiry of the lay time. In view of the second interpretation, demurrage is nothing but a liquidated price payable to the owner for using the ship beyond the period of lay time. On this interpretation, demurrage sounds more in debt than in damages. The learned counsel for the respondent in developing this argument has placed reliance on a decision of the English Court of Appeal in the case of *Clink v. Rod Ford*, reported in (1891)1 *Queens' Bench*, 625. At page 630 and 631 of the report, Lord Justice Brown held as follows :

"Now the word "demurrage" has a primary and a secondary sense and with regard to the construction of that word, I will take the language used by Cleasby J. in *Lodchart v. Falk* (Law Rep. 10 Ex. 132 at 135) -- a case which it is impossible I think to distinguish from the present -- as expressing shortly that which no doubt is expressed in many other judgments, namely, the way in which we ought to deal with the question of interpretation. He says : The word "demurrage" no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular and more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it", So far as to the meaning of the word "demurrage". It is an elastic word; it has a strict sense, but it can be stretched beyond its strict sense.....The word "demurrage" having two meanings we must look at the Charterparty to see if it is used in the strict sense or in the more popular and elastic sense."

106. Therefore, the principle, which is deducible from the above passage is that the question whether the stipulation relating to the demurrage sounds more in damage than in debt is a question which falls within the domain of interpretation of the particular clause in the charterparty. In the instant case, the stipulation relating to the demurrage is contained in clause 25 of the Charterparty. The said clause is set out below :

"Clause 25. If the vessel is detained longer than the time allowed for loading/discharging, demurrage shall be paid by charterers to owners at the rate of Rs. 1,50,000/- (Rupees One Lakh Fifty thousand only) per running day or pro-rate and despatch money for all working time saved at the loading/discharge Port will be paid to charterers at half the demurrage rate per running day or pro-rate."

107. In the instant case, it has not been contended by the learned counsel for the petitioner that the aforesaid clause relating to the demurrage in the charterparty sounds only in damage and not in debt. The learned counsel for the petitioner merely relied on the strict meaning of the term "demurrage" given in *Scrutton* but completely ignored that there exists an equality acceptable meaning of the term demurrage. It is well known when between two equally acceptable

meanings or interpretations, the Arbitrators as commercial men have chosen one meaning or interpretation, the award does not become bad on that account. It has also held right from the decision of the Privy Council in *Champsey Bhara* right upto the decision of the Hon''ble Supreme Court in case of *Sikkim Subba* that the interpretation of the contract falls within the jurisdiction of the Arbitrator, unless of course in the name of interpretation, the Arbitrator makes a manifest disregard of the contractual provision or commits an apparent error of law which goes to jurisdiction. Here none of the aforesaid departures have been committed by the Joint Arbitrators while interpreting the demurrage stipulation in the Charterparty.

108. The statutory law in India also shows that the term demurrage has been employed more in the sense of liquidated charge or debt rather than as liquidated damages. Reference, in this connection, may be made to the Constitution Bench decision of the Hon''ble Supreme Court in the case of *M/s. Raichand Amulakh Shah v. Union of India and Ors.*, reported in AIR 1964 SC 1468. In that case, Section 46C of the Railways Act, 1890 came up for consideration. In para 7 sub-para (ii) at page 1271 of the report, the Hon''ble Supreme Court *inter alia*, held as follows :-

"Demurrage is therefore a charge levied on the goods not unloaded from the wagons within the free time of six daylight hours and wharfage is the charge levied on goods not removed from the railway premises after the expiry of the free time allowed for that purpose. Wharfage and demurrage are, therefore, charges levied in respect of goods retained in the wagons or in the railway premises beyond the free time allowed for clearance under the rules."

109. Similar meaning of demurrage is also attributable to Section 48 of the Major Port Trust Act, 1963 which deals with the scale of rate for service period by the Board. Therefore, under Sub-section (d) of Section 48 of the said Major Port Trust Act, 1963, it is clear that here demurrage has been referred to as a liquidated charge and not as damages.

110. In the case of the Consumer Education and Research center and others Vs. Union of India and others, , a Bench of three Hon''ble Judges of the Hon''ble Supreme Court observed in para 32 at page 942 of the report that liquidated damages by way of compensation are acceptable principles of compensation.

111. Then again in a judgment in the case of *United Breweries Ltd. Vs. State of Andhra Pradesh*, , a Bench of the three Hon''ble Judges of the Supreme Court was dealing with a case in which the petitioner-company sold bottles of Beer to its customers and was taking a deposit of Rs. 0.40p. per bottle which would be forfeited if the empty bottles are not returned. Commenting on the said amount of deposit. Justice Sen held in para 19 page 1321 of the report that by taking a deposit, the company was merely ensuring the return of the bottles and crates. The learned Judge held that in their views the deposit amount which was liable to be forfeited on failure of the return of the bottles was in the nature of liquidated

damages recoverable by the supplier u/s 74 of the Contract Act". The same statement was also repeated in para 33 at page 1324 of the said judgment.

112. This Court finds that In none of these decisions cited by the learned counsel for the petitioner, there is any observation or any suggestion by the learned Judges that the person who is receiving liquidated damages is first required to give the detailed evidence of proof of damage in support of his case. In fact, cases of liquidated damages of the kind which are stipulated in the charterparty between the parties, are those cases where proof of actual damage is practically not possible. But then this stipulation in the charterparty of liquidated damages cannot be called a penalty. Liquidated damages is a genuine pre-estimated sum of damages where proof of damage is not possible or is very onerous. In such a situation, the liquidated damages is adopted as the reasonable compensation. The concept of penalty is a different thing and in essence is a payment of money stipulated as in terrorem of the offending party, but the essence of the liquidated damages is a genuine and reasonable pre-estimated damages. In order to acquire the character of penalty, the sum stipulated must be proved to be extravagant and unconscionable. But here, no such evidence has been laid by the petitioner before the Arbitrator that the stipulated amount mentioned in clause 25 is either extravagant or unconscionable. In fact, no such evidence could be led as the amount was a mutually agreed reasonable sum.

113. Reference, in this connection, may be made to the judgment of the Hon'ble Supreme Court in the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., . In that matter, questions came up on a contract between the Company and Chunilal appointing Chunilal as its Management Agent. It has provided in that contract that in the event, the Managing Agency is terminated, the Managing Agent will be entitled to receive from the company as compensation by way of liquidated damages for the loss of appointment and the same amount is not less than Rs. 6,000/- per month for the unexpired portion of the agency. Considering the compensation for termination which was provided for payment to Chunilal, the learned Judges of the Hon'ble Supreme Court in par 11 at page 1319 of the rePort, after constructing Sections 73 and 74 of the Contract Act, held that where the parties have themselves provided for the precise amount of damages that would be payable that party must be "deemed to exclude right to claim an unascertained sum of money as damages". It was also held in the said para 11 that if the Court accepts that the parties intended to confer on the Managing Agent merely a right u/s 73 of the Contract Act, in that case, "the entire clause would be rendered otiose". Therefore, the requirement of proof u/s 73 of Contract was held not applicable to such a situation. Therefore, there is no difference in the Indian Law either. And the Hon'ble Supreme Court upheld the award of a sum of Rs. 6,000/- to the Agent for the unexpired period of the term of Agency and the interest thereon.

114. Further, in this connection, may be made in the judgment of Justice Donaldson in the case of Zim Israel Navigation Co. v. Trade ExPort S.A., reported

in (1970) 2 L R 409. In that case, the claim of the owner was on two counts. The first claim was for the demurrage and the next claim was for damages in view of the detention of the ship. The Court turned down the first claim. But, in so far as the second claim is concerned, the claim for damages for period of which the vessel has been kept waiting for orders from the Charterer as to the Port to which she should proceed, the Court held that the Charterer was in breach and a similar argument on behalf of the Charterer that the owner of the ship had failed to prove his loss was repelled by the Court in page 415 of the report as follows :-

"It is, of course that law that a claimant must prove his loss. However, a merchant ship is a profit-earning chattel and in the case of this ship it is agreed that the measure of loss for the vessel's detention is US \$ 2,500 per day or pro-rata, i.e. the same rate as that agreed between the parties as applicable to demurrage claims. If, therefore the owners prove that the ship was detained in a non-profit-earning state by the need to await orders, they establish a prima facie loss, which in the absence of further evidence, becomes a proved loss. If, on the other hand, there is evidence that the ship could not have been used as a profit-earning chattel even if she had not been so detained, the prima facie loss is rebutted."

115. The same principles should apply here. It is not in dispute that the respondent hired the vessel from the Shipping Corporation and the respondent will have to pay for it. It has been proved that the vessel was detained and kept waiting at the Port for the fault of the petitioner. No further loss is required to be proved in view of the mutually agreed sum which is payable by way of demurrage by way of change as a result of detention of the ship. Therefore, this contention of the petitioner has no merit and is overruled.

116. In so far as the arbitrator's jurisdiction to award interest is concerned, the same is no longer in dispute. If there is no express prohibition in the contract or in the arbitration clause, the arbitrator has the jurisdiction to award interest. Here there is no such prohibition, therefore, the Court holds that by granting interest the arbitrator has not committed any error.

This petition for setting aside the award is, therefore, dismissed. The award is affirmed.

There will no order as to costs.