
(2004) 06 BOM CK 0076
In the Bombay High Court
Case No : Arbitration Petition No. 152 of 2004

Indian Oil Corporation Ltd.	Vs	APPELLANT
Langkawi Shipping Ltd.		RESPONDENT

Date of Decision : 11-06-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2004) 3 ARBLR 568 : (2005) 2 BomCR 458 : (2004) 4 MhLj 969

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Vasant Kotwal, instructed by Desai, Diwanji and Monika Deshmukh, from Desai and Diwanji, for the Appellant; Prasant Pratap, Amitava Majumdar and Puja S. Puri, , instructed by Hariani and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—The petition challenges the award passed by the Arbitration Tribunal, comprising of three learned Arbitrators pursuant to Clause 29 of the Charter Party Agreement dated 19th July, 2001.

2. The relevant facts are few. On 18th June, 2001 there was a strike at the port of loading. On 18th July, 2001 a fire broke out close to the port of loading affecting the flow to the terminal. It is pertinent to note that the charter party agreement which is the subject matter of the present proceeding was entered into only thereafter on 19th July, 2001. The respondent carrier tendered a notice of readiness on 9th August, 2001 to the petitioner. Admittedly, the petitioner was provided with a berth only on 13th August, 2001 at 0948 hours. There is no dispute as to the quantification of the respondent's claim. Mr. Kotwal, the learned Senior Counsel appearing on behalf of the respondent however sought to challenge the award on two legal grounds.

3. Firstly, he submits that the Arbitrators have misconstrued Clause (8) of the charter party agreement which reads as under :-

"8. DEMURRAGE. - Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part 17 for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge by reason of fire, explosion, storm or by a strike, lockout, stoppage or restraint of labour or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo the rate of demurrage shall be reduced one-half of the amount stated in Part I per running hour or pro rata for part of an hour for demurrage so incurred. The Charterer shall not be liable for any demurrage or delay caused by strike, lockout, stoppage or restraint of labour for Master, Officers and crew of the Vessel or tugboat or pilots."

4. According to Mr. Kotwal, the portion emphasized, properly construed, provides that if on the date of the notice of readiness, the consequences of an earlier event contained in Clause (8) were present, the charterers were entitled to pay only one half of the normal demurrage. The words "by reason of warrant an interpretation wider than the strict language of the clause

5. The learned Arbitrators considered this argument exhaustively and referred to various authorities before making the award. That this very submission was considered is evident from paragraph (e) of the Award under the caption "ISSUES IN DISPUTE". This is clearer from the award where the arbitrators have dealt with the issue. They noted the rival contentions thus :

"(e) QUANTUM OF DEMURRAGE

We now come to the dispute with regard to the quantum of demurrage claimed by the owners. The charterers' Counsel contended that even if laytime did commence on 9-8-2001 and the charterers were found liable for demurrage, such liability would be limited only to the extent of half the agreed demurrage rate, as per the second sentence of the printed Clause 8 of the charter party, which states that "if, however, the demurrage shall be incurred at ports of loading and/or discharge by reason of fire....., the rate of demurrage shall be reduced one half of the amount stated.....".

The owners disagreed with the charterers' contention and submitted that the key words in the relevant portion of Clause 8 were ".....by reason of.....", which meant that the charterers could avail the benefit of this Clause only if the contingencies like fire etc. referred to therein were actually in existence during the currency of laytime (and not merely the consequences thereof), but in this case none of the incidents referred to by the charterers either existed at the time "Front Birch" arrived at Bonny Terminal or occurred during the operation of laytime."

6. It is important to note that the arbitrators recorded the issue to be decided thus :

"The issue, therefore, which we have to decide, is whether as a matter of construction the words "by reason of, as used in Clause 8, should be given a limited meaning as owners contended or a broader meaning as the charterers contended."

7. Thereafter, the learned arbitrators considered the various authorities cited by both the parties. That the authorities referred to by them do not support the construction sought to be placed on Clause 8 by the petitioners is not in dispute.

8. The learned arbitrators, after considering three judgments cited by them gave reasons why, according to them, the present case differs from the questions which arose therein. It is not possible to find any fault in the award in this regard.

9. The arbitrators accepted the construction placed on Clause 8 on behalf of the respondent. In doing so, the arbitrators *inter alia* relied upon, an award in another matter. It is important, however, to note that the learned arbitrators placed reliance upon the judgment in the case of *Sametiet M/T Johs Stove v. Istanbul Petrol Refineries A/S* 1984 (Vol. 1) Lloyd's Law Report 38 where the Queen's Bench Division had occasion to consider an identical clause. A similar argument raised before the Court was negatived. After setting out the clause, the Court held as under :

"Mr. Aikens argues that the demurrage incurred between Dec. 18 and 26 was incurred "by reason of a strike" within the meaning of Clause 8, and should therefore only be charged at the half rate. The difficulty with that argument is the finding of fact in par. K. 1(b), to which I have already referred, that the effective cause of the failure to procure a berth for the vessel on arrival was congestion, not the strike. Mr. Aikens seeks to circumnavigate that difficulty by arguing that the finding was made in relation to Clause 19 and not Clause 8; and, further, that the finding may have been coloured by the arbitrator's view that "strike" in Clause 8, as well as Clause 19, means a strike at the loading port or in the immediate vicinity of the loading port, and cannot, as a matter of construction, include a strike in the oilfields: see paras. 2 and 4 of the arbitrator's reasons. It may be that the arbitrator was wrong in his construction of "strike". But that cannot affect the clear finding of fact, which applies equally to Clause 8 and Clause 19, that the effective cause of the delay was congestion, which is not one of the causes enumerated in Clause 8. The charterers are bound by that finding of fact. In the circumstances, the second main issue must be determined in favour of the owners as well as the first."

10. It was only after due consideration of the entire case that the arbitral tribunal came to the following conclusion :

"Now, whatever be the cause - congestion or short supply of oil due to an earlier strike/fire - the fact remains that as none of the contingencies enumerated in Clause 8 to trigger off the payment of demurrage at half the rate actually existed at the material time, this clause does not assist the charterers, and we therefore hold that the owners are entitled to claim demurrage at full rate."

11. Mr. Kotwal however submits that the words "by reason of in Clause 8 ought to be given a wider interpretation to cover within their scope the consequences arising as a result of events mentioned therein which might have taken place before the relevant date i.e. the date of notice of readiness.

12. The learned arbitrators have by no means ignored Clause 8. Indeed, they have specifically construed it. The reasoning given by the learned Arbitrators is not absurd, or clearly contrary to Clause 8. It is certainly a plausible view. To say the least, it is not a view which is impossible of acceptance. Indeed, the interpretation is in accordance with the plain language of the clause.

The entire tenor of the award indicates that the arbitrators decided the disputes in accordance with the terms of the contract. They considered themselves bound by it. They did not travel outside the boundary of the contract. They did not ignore or disregard the contractual terms. The question whether Clause 8 included within its scope the after-effects of events rather than merely to their actual existence was a matter which fell within the jurisdiction of the arbitrators as they would have to interpret Clause 8 to determine the same. They proceeded to determine the scope and ambit of Clause 8. In doing so they interpreted the clause. In that view of the matter, it is not open to me to set aside the award by substituting my view for that of the arbitrators even if I am of the opinion that the clause could be construed differently.

13. It is established law that in these circumstances, even if the arbitrators commit an error in the construction of the contract, that is an error within their jurisdiction. In *Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company*, the Supreme Court held :

"25. From the aforesaid decisions of this Court, and the last one in particular, it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award."

"27. In this case the arbitration clause is widely worded. The dispute which was referred to the arbitrators, inter alia, related to the construction of the contract. The contract did visualise the contractor raising a claim for revision of rates. The dispute was as to when such a claim could be raised. According to the appellant herein this being an item rate contract the revision of rates could take place only in accordance with Clause 12-a when there was a deviation of more than 20 per cent with regard to individual items. On the other hand the terms of the contract, according to the claimant, permitted a claim being made of revision in rates if there was an increase of 20 per cent of the total value of the contract. The dispute before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous,

cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators."

14. The Supreme Court in *Smita Conductors Ltd. v. Euro Alloys Ltd.*, (2001)7 SCC 728 held as under:

"15. The view taken by the arbitrators on the effect of the force measure clause in the light of Reserve Bank of India's directives is a plausible view and cannot be ruled out as impossible of acceptance, and, therefore, the question of substituting our view for that of the arbitrators would not arise....."

15. Mr. Kotwal however submitted that the judgment of Supreme Court in *Smita Conductors Ltd.* as well as all the judgments of the Supreme Court and the High Courts on this point should be deemed to be no longer good law in view of the Arbitration and Conciliation c, 1996 and in view of the judgment of the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, . According to him, the judgment mandates that when an award is challenged on the ground that the arbitrator's interpretation of a term in the contract is incorrect, the Court must construe the clause itself and then set aside the award if its interpretation of the term is different from that of the arbitrators even if the Court comes to the conclusion that the arbitrator's interpretation is plausible and arrived at after due consideration thereof.

16. The submission is unfounded. The judgment in *Oil and Natural Gas Corporation Ltd.v. Saw Pipes Ltd.* does not either expressly or even impliedly support Mr. Kotwal's submission.

17. In *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others*, the Supreme Court held in paragraph 17 as under :

"17. Section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it will be noticed that under the 1996 Act the scope of the provisions for setting aside the award is far (sic more or) less the same as u/s 30 or Section 33 of the Arbitration Act of 1940."

18. Mr. Kotwal's submission is contrary to the judgment of the Supreme Court in the above case. To accept Mr. Kotwal's submission would be to radically alter the statutorily and judicially circumscribed limits to the Court's jurisdiction to interfere with arbitration awards. It would indeed confer a first appellate court's power on a court exercising jurisdiction u/s 34 of the 1996 Act. There is nothing in the 1996 Act which indicates such an intention on the part of the legislature. That the intention is to the contrary is clear inter alia from the Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act which stated as one of its main objectives the need "to minimize the supervisory role of Courts in the Arbitral process".

19. In the circumstances, the aforesaid principles laid down consistently by the Supreme Court and the various High Courts cannot be said to be no longer good

law in view of the 1996 Act. Nor can it be said that the observations of the Supreme Court in *Oil and Natural Gas Corporation v. Saw Pipes Ltd.* (supra) have expressly or impliedly rendered the aforesaid judgments and the principles contained therein no longer good law in view of the 1996 Act. The principles apply with equal force under the 1996 Act. In view thereof, the petitioner's challenge to the award in this regard must fail.

20. Mr. Kotwal then submitted that the award of interest was contrary to the law inasmuch as the interest was awarded from the date on which demurrage was due instead of from the date of the award. The plea was not raised before the learned arbitrators. It is a question of law and fact. The arbitrators had the jurisdiction to decide this question. The petitioner not having raised it before the respondent despite a claim for the same, cannot now be permitted to raise it as a challenge to the award. In this view of the matter it is not necessary in this case to decide whether the claim for interest is in any event tenable u/s 31(7) of the 1996 Act.

21. In the circumstances, the petition is dismissed with no order as to costs.

Parties to act on an ordinary copy of this order duly authenticated by the Associate/Court Stenographer.