
(2019) 01 BOM CK 0078

In the Bombay High Court

Case No : Commercial Arbitration Petition No. 13 Of 2015

Madgavkar Salvage

APPELLANT

Vs

Norsea Global Offshore PTE

RESPONDENT

Date of Decision : 11-01-2019

Acts Referred:

Indian Contract Act, 1872 — Section 55, 73, 74

Arbitration And Conciliation Act, 1996 — Section 12(1), 34

Citation : (2019) 01 BOM CK 0078

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Bimal Rajashekar, Ashwin Shanker, Naira Jejeebhoy, Arjun Mital, Jyotika Jain

Final Decision : Dismissed

Judgement

S.C. GUPTE, J.

1. This arbitration petition challenges an award passed by a tribunal of three arbitrators in a reference arising out of a salvage contract. The Petitioner, who was the salvor, had raised claims against the Respondent-shipowner on account of damages for breach of contract. The Respondent had raised counter-claims against the Petitioner. Both the claims and the counter-claims were rejected by the arbitral tribunal. The Petitioner-salvor has come in challenge from rejection of its claims.

2. The Petitioner had raised claims against the Respondent- shipowner on account of idling charges. It was the Petitioner's case that though security for the salvage operations to be carried out by the Petitioner was to be provided to the salvors within ten days of signing of the contract, i.e. by 17 September 2009, the Respondent did not do so until 9 December 2009. It was submitted that the Petitioner nevertheless commenced salvage operations on 7 November 2009 against a sum of Rs.40 lakhs paid to it on an adhoc basis and as an interim measure by the Respondent. It was submitted that the Petitioner did not want to

carry out any substantial work or incur substantial costs before the Respondent submitted the payment guarantee and hence mobilised only some salvage personnel and basic equipment in tune with the amount paid at that point of time, i.e. between 7 November 2009 and 9 December 2009. The Petitioner claimed to have accordingly mobilised personnel and basic equipment, and carried out minimum work so as to prevent the dredger from drifting further aground and for her safety. It was the case of the Petitioner that the payment guarantee was furnished by the Respondent finally on 9 December 2009. It was submitted that on account of non- furnishing of the payment guarantee in time, the Petitioner was entitled to claim idling charges as it had kept its vessel on stand-bye but could not mobilise it and the vessel kept idling all this while. Secondly, it was claimed that there was some interference or sabotage by the previous contractor of the Respondent. It was the Petitioner's case that the contractor had come to the site on 17 November 2009 and removed the wire ropes connecting the dredger and the ground anchors (which had been put out in preparation to pull the dredger towards deeper water) and consequently the dredger drifted further aground and this practically negated the work that had been carried out by the Petitioner until then. Thirdly, it was claimed that there was stoppage of work by Gujarat Maritime Board due to want of permission to carry out salvage work. According to the Petitioner, as per oral understanding between the parties, besides paying the port, customs and government charges, the Respondent was also responsible for obtaining requisite permissions from the authorities, including Gujarat Maritime Board, and stoppage of work on account of want of the latter's permission was to the account of the Respondent and idling charges resulting thereby were payable by the Respondent. It was, on the other hand, the Respondent's case that the Petitioner, in the first place, had accepted performance of the promise of payment guarantee on the part of the Respondent on 7 December 2009 without putting the Respondent to the notice of any claim for damages or otherwise; and this disentitled the Petitioner from claiming any damages for late performance. Secondly, it was submitted that by reason of the pre-receipt issued by the Petitioner on 11 January 2010 as well as the subsequent receipt to the underwriters of the salvaged vessel, the Petitioner was estopped from raising any further claims under the salvage contract. It was submitted that these receipts amounted to discharge of the Petitioner's claims, if any, under the contract of salvage. On individual claims of idling charges made by the Petitioner, the Respondent submitted answers on merits. In the light of the pleadings of the parties and material placed on record by them, the learned arbitrators, whilst holding that the Petitioner was not estopped from raising its claims by reason of the receipts referred to above, held the Petitioner to be disentitled to any idling charges on account of non- furnishing of payment guarantee before 9 December 2009. The arbitrators, in particular, held that though, according to the Petitioner, furnishing of a security within the agreed time was an essential term of the contract and the Respondent's failure to do so had rendered the contract voidable at the Petitioner's option, and the Petitioner, accordingly, had terminated the contract, yet on 7 December 2009, the Petitioner

informed the Respondent that it had, after due deliberations, decided to accept late tender of security and to recommence the salvage operations in full swing. There was no notice given or intention expressed at that time to claim any damages for idling charges or otherwise due to the Respondent's failure to furnish salvage security within the stipulated period of time. The arbitrators held that consequently, in accordance with Section 55 of the Contract Act, the Petitioner was not legally entitled to claim any compensation due to the late tender of security by the Respondent.

3. Apropos of the Petitioner's claim for damages for the alleged interference or sabotage by the previous contractor, the arbitrators held that it was common knowledge that wire rope for ground tackle was not usually carried on board dredgers or other sea-going vessels and the Petitioner, as an experienced salvor, would be, or ought to have been, aware of the usual equipment on board such vessels. The arbitrators held that the vessel particulars provided by the Respondent did not include any wire rope that could be used as ground tackle and there was no statutory provision relied on to support the contention that wire ropes were required to be carried on board dredgers. The arbitrators also held that there was no evidence to support any active concealment by the Respondent in this behalf. The arbitrators, on the basis of the testimony of the witnesses before them, held that the earlier contractor had informed the Petitioner a day or two before 17 November 2009 that the wire rope actually belonged to them and they would remove it. The arbitrators held that having been forewarned, the Petitioner ought to have taken steps to lay out its own wire ropes and that there was no legitimate claim in this behalf. The arbitrators found that the Petitioner did not use its equipment in accordance with the agreed methodology or the usual contemporary industry practice; that the previous contractor's action in taking away the wire ropes and pumps could not be said to amount to any interference or sabotage. This is a matter of fact and the arbitrators have rendered a finding of fact in this behalf *inter alia* after considering the industry practice.

4. On the third claim for idling charges on account of stoppage of work for want of permission from Gujarat Maritime Board, the arbitrators came to the conclusion that there was no express term in the contract requiring the Respondent to obtain permission from the concerned authority. After construing the contract and in particular Clause 7 thereof, the arbitrators came to a conclusion that the only duty cast on the Respondent was to pay port dues, etc. and if the same or similar expenses be incurred by the salvors to re-imburse such expenses to the salvors. The arbitrators held that the fact that under the contractual terms, owners were to reimburse expenditure made by the salvors for any port charges, etc. suggested that the parties had contemplated that it would be the salvors, who would apply for permissions and port entry, etc. upon payment of requisite fees for the same, only to be reimbursed later. Even from the other evidence produced by the parties, the arbitrators found that the Petitioner was contractually responsible to get the requisite permissions. In the

premises, the arbitrators did not find the Respondent to be liable for the loss, if any, incurred by the Petitioner on account of stoppage of work for want of permission of Gujarat Maritime Board.

5. These conclusions of the learned arbitrators are essentially either conclusions of fact or are matters of interpretation of contract. As held by the Supreme Court in *Associate Builders vs. Delhi Development Authority* (2015) 3 Supreme Court Cases 49, as far as conclusions of fact and interpretation of contract are concerned, the matter is clearly within the province of the arbitrators and unless the challenge court under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') finds that the arbitrators' view on these matters is either an impossible view or a view which no fair or judiciously minded person would take or which would shock the conscience of the court, there is no reason to find fault with the award under Section 34.

6. Learned Counsel for the Petitioner also submits that the award is vitiated as a result of contradictions concerning the maintainability of these claims. Learned Counsel refers to the finding of the learned arbitrators on the question as to whether or not the claim was alive, and compares the same to the arbitrators' finding on maintainability of the claim in the face of Section 55 of the Contract Act. There is no contradiction there. The two findings are clearly on different issues and rendered in different contexts. On the first issue, namely, whether the claim was alive, the case of the Respondent before the arbitrators was that by reason of receipts both pre and post part-payment of the claim amount, there was a discharge of the Respondent's liability or alternatively, an estoppel on the part of the Petitioner for raising any claim. The arbitrators found that the receipts issued by the Petitioner did not imply its having waived or given up the claim and the claim was very much alive. On the second issue, namely, whether or not the Petitioner's claim was justifiable, the arbitrators came to a conclusion that by reason of the letter of 7 December 2009, the Petitioner could be said to have accepted the performance of the promise of a payment guarantee on the part of the Respondent, though such guarantee was not submitted within the specified time, rendering the contract voidable on account of such failure. The arbitrators held that the Petitioner having accepted such promise at a time other than the agreed time, it could not claim compensation for any loss occasioned by non-performance within the agreed time, unless at the time of the acceptance it had given notice of its intention to do so. The arbitrators found that since this was not done, the effect of acceptance of the performance after the stipulated period did not admit of any claim of compensation on the part of the Petitioner. As I have noted above, there is per se no fault to be found with the conclusion in itself. Learned Counsel for the Petitioner, however, submits that the arbitrators have taken into account only one particular piece of correspondence addressed by the Petitioner to the Respondent in this behalf, namely, the letter of 7 December 2009, but not the other correspondence both before and after this letter. In the first place, whether or not the Respondent, as a promisee, put the Petitioner promisor to the notice of any prospective claim of damages whilst

accepting late performance of the promise, is a question of fact and the arbitrators' conclusion in this behalf is based on assessment of evidence. As long as the conclusion is supported by some evidence and the view expressed by the arbitrators is a possible view, there is nothing further for the challenge court to do. Appreciation of evidence, and in particular, its sufficiency, is for the arbitrators to decide. Unless the award on the particular issue is without any evidence or based on an impossible view, or a view, which no fair or judiciously minded person may take, the award does not call for any interference under Section 34 of the Act.

7. Learned Counsel for the Petitioner relies on the case of Amrutnjan Limited vs. Shamrock International Limited MANU/MH/2704/2014 decided by our Court. That was a case, where the promisor had claimed that no notice was given by the promisee, whilst accepting the performance at a time other than the agreed time. But this contention was rejected by the Court. The court accepted the arbitrator's finding in this behalf. The arbitrator had not rejected the legal submissions based on Section 55, but what he had found was that the promisee had addressed various communications regarding the loss caused to him on account of late deliveries and that a claim for damages was clearly found in the account submitted to the promisor. The learned arbitrator's finding on a matter of fact, namely, whether the promisee had actually made his intention to claim the losses clear and, therefore, his claim was not barred under Section 55 of the Contract Act, was found acceptable by this Court. It was a conclusion of fact, and a possible conclusion at that, and no fault could be found with it under the law of challenge to an arbitral award. The assessment of the Court on the promisor's case under Section 55, accordingly, really turned on the assessment of evidence, where the arbitrator had entered a finding of fact in favour of the promisee. It does not either detract from the legal position under Section 55 of the Contract Act or the factual assessment made in the present case.

8. Learned Counsel for the Petitioner submits that discharge of liability on the part of the Respondent by reason of the letter written by the Petitioner on 7 December 2009, was not pleaded by the Respondent. It is true that there was no such specific plea raised by the Respondent, but then the arbitrators were fully seized of the issue as to whether or not the Petitioner was justified in making its claim for idling charges in the face of the correspondence and conduct of the parties. The letter of 7 December 2009 was pleaded and placed before the arbitrators. If, on the basis of the letter, the arbitrators held the Petitioner to be dis-entitled to any relief, the arbitrators were perfectly within their rights to do so. There is no question of the Respondent making an express plea of discharge on that count. Section 55 of the Contract Act deals with the effect of accepting performance at a time other than the stipulated time. It is a matter of law. If this law can be applied to proven facts, which are not disputed, there is no fault to be found with such application.

9. Learned Counsel for the Petitioner next submits that a sum of Rs.25 lakhs was

stipulated in the contract as idle time charges for a day and that this sum was not meant to be a penalty. Learned Counsel submits that these idle time charges, being a genuine pre-estimate of damages, it was for the Respondent to prove that no damages had, in fact, been suffered by the Petitioner on account of stoppage of work due to the Respondent's breaches. Before we examine the merits of this contention, it is important to note that the principle of liquidated damages emanating from Section 74 of the Contract Act, which deals with the particular case of breach of contract where a sum is named in the contract as amount to be paid in case of breach, as well as the general principle applied in cases of loss or damage caused by the breach contained in Section 73, are both subject to the other provisions of the Contract Act, including Section 55. If the promisee is not entitled to claim any damages for late performance of a promise on account of want of notice to the promisor at the time of the promisee's acceptance of such late performance, such dis-entitlement extends not only to a case of damages claimed under Section 73, but even in a case, where liquidated damages are specified in the contract within the meaning of Section 74. As this Court has held in the case of *Punj Lloyd Ltd. vs. IOT Infrastructure and Energy Services Ltd.* ARBP/1323/12, dtd. 14 December 2018 based on the law stated by the Supreme Court in *Kailash Nath Associates vs. Delhi Development Authority* (2015) 4 SCC 136, wherever it is possible to prove actual damage or loss, the party complaining of breach must tender its proof. If such proof is impossible or difficult to produce, the aggrieved party must make out such case and can, only thereafter, call upon the court to award the amount named in the contract as reasonable damages, which the court may do in exercise of its discretion. Accordingly, it is, in the first place, for the promisee to make out a case not only of breach of contract, but also of damage or loss suffered thereby and recoverable as a result of such breach. If the damage or loss is not recoverable by reason of want of notice under Section 55 of the Contract Act, the promisee must take the consequences. In the present case, the arbitrators held that the promisee had accepted the performance of the promise at a time other than the stipulated time without reserving his right to claim damages for non-performance at the stipulated time and that this dis-entitled the promisee from claiming any damages.

10. There was, therefore, no case to consider any liquidated damages under Section 74 of the Contract Act. The arbitrators nevertheless discussed the law of liquidated damages and came to a conclusion that the contention raised by the Petitioner to quantify its claim was not acceptable; it was inconsistent and discrepant with the pleadings and record. The arbitrators particularly noted that in the statement of claim the charges for backhoe dredger were stated to be Rs.10 lakhs per day, whereas in the affidavit of the Petitioner's witness (CW1), such charges were said to be Rs.8 lakhs per day, and cumulative charges of 'day rate' for personnel and machinery for the crane barge and back-hoe dredger were stated to be Rs.50 lakhs per day and that on this basis, 50% of these charges, amounting to Rs.25 lakhs per day, were fixed as idle time charges. The

arbitrators noted that whilst this was claimed in the statement of claim, the Petitioner's witness (CW1) had stated in his affidavit that Rs.25 lakhs per day was agreed because it was less than the market rate equivalent for idle time charges for hiring of equipment and personnel. As against this, the Respondent's witness (RW1) had stated that idle time charges were in the nature of penalty and the Petitioner had assured the Respondent that the former would not invoke these provisions. In the premises, the arbitrators found that the idle time charges of Rs.25 lakhs per day could not be said to be a genuine pre-estimate of damages. The arbitrators held that idle time charges could, in the premises, be reopened and the Petitioner had failed to prove the extent of the loss. Once again, no fault can be found with this assessment of the learned arbitrators.

11. Learned Counsel for the Petitioner relies on the decision of our Court in the case of Ultratech Cement Ltd. vs. Sunfield Resources Pty. Ltd. 2016 SCC OnLine Bom 10023 Relying on this decision, it is submitted that considering the ratio of Kailash Nath Associates (supra), our Division Bench has held that in a case, where a contract names a sum as liquidated damages, the party complaining of breach is bound to receive the named sum, if it is a genuine pre-estimate of damages and onus to show that there is no such loss or damage, is on the party committing the breach. As explained above, the effect of Section 74 and the entitlement of the aggrieved party to receive compensation for any loss or damage, whether in a named sum or otherwise, would be subject to a case under Section 55. But that apart, the Division Bench of our Court in Ultratech Cement Ltd. has not laid down any such absolute proposition. That was a case, where the respondent before the court was claiming loss by way of demurrage under a contract of bulk purchase of coal. The appellant's submission was that the claim for demurrage was in the nature of liquidated damages, whereas the arbitrator had held the demurrage to be in the nature of a fixed charge. It was submitted by the appellant that the respondent-seller was not the vessel owner; the goods were shipped in a third party vessel under a Contract of Affreightment; demurrage, if any, would have been paid to the vessel owner and if the respondent had paid any amount towards the demurrage to the vessel owner, it could have easily proved the damage suffered by it by merely producing proof of such payment. The Division Bench held that it was clear from the correspondence placed on record that the figure of demurrage referred to by the respondent for each of the shipments under the contract was mutually accepted as the amount to be paid by the appellant, if the vessel was to go on demurrage. The Court, accordingly, did not find fault with the observation of the arbitrator that the payment was a fixed charge amount to be paid under the contract. Alternatively, the Court considered the contention of the appellant that assuming that the payment of demurrage was to be accepted as liquidated damages, proof of actual damage would be a sine quo non for the respondent to sustain its claim. This was examined with reference to the facts, which had come on record before the arbitrator. The Division Bench observed that the vessels had in fact gone on demurrage; there was not even an iota of material brought on record by

the appellant to show that the appellant had, at any time, considered payment of demurrage to the ship-owners or proof of loss by the respondent as a condition for invoking the stipulation of payment of demurrage in the contract. (Such a condition would have meant that the clause of demurrage would be in the nature of an indemnity.) The issue was, thus, considered by the Court in the conspectus of these facts. The Court did not accept the appellant's contention that the provision of demurrage was in the nature of an indemnity or that it depended on actual demurrage being paid by the appellant to the vessel-owners. The Court observed that there was no privity of contract between the appellant and the owners of the vessel. The Court also observed that the arbitral tribunal had allowed the claim of the respondent interpreting the terms of the contract and the arbitrator's interpretation was reasonable and did not show any error apparent. The observations on the issue of liquidated damages made in the judgement have to be understood in this context. It is also important to note that the Division Bench was of the considered view that in the facts of the case and considering the peculiarity of the contract, the demurrage, as agreed between the parties, was required to be accepted as a genuine pre-estimate of damage or loss, since such damage or loss was impossible to prove. The Division Bench was in complete agreement with the contention of the respondent that considering the nature of the contract as a shipping contract, having peculiar traits on a variety of aspects, the parties had agreed to a rate of demurrage, considering several factors having elements of international commerce and trade; it would not only be unreasonable but wholly unrealistic and impossible to call upon the respondent to prove the loss suffered by it. The Court, in this context, observed that the particular clause of the contract providing for the agreed rate of demurrage reflected the certainty with which the parties expected to position themselves on the issue of damage. The Court observed that the very purpose of agreeing to the specified amount of demurrage was to avoid litigation and complexity in assessing damages in that regard. The Court, in this behalf, referred to the examples of cases discussed in paragraph 69 of the judgment of Oil and Natural Gas Corporation Ltd. vs. SAW Pipes Ltd. AIR 2003 SC 2629, being cases, where it was difficult to prove actual loss and was of the view that the case before it clearly fell within this class of cases and, in the premises, held the demurrage charges as pre-estimated measure of damages. In sum, the Division Bench in Ultratech Cement Ltd. expressly proceeded on the footing that the actual loss or damage was impossible to prove and that on this very consideration, a fixed charge agreed by the parties as demurrage payable, if the goods could not be discharged in time at the port of destination, would be a reasonable measure of damages. The Division Bench, in other words, could not be held to have laid down any absolute proposition that where the contract names a sum of money payable in the case of a breach, if the sum is considered by the parties as a genuine pre-estimate of the damage and held by the Court as such, there is no need for the Court to call for evidence of actual loss or damage. As this Court has explained in *Punj Lloyd Ltd.* (supra), it is only if the proof of loss or damage is impossible or difficult that the aggrieved party may pray for

award of damages in the sum named in the contract. Even in that case, the aggrieved party must make out a case of impossibility or difficulty to produce proof; and the Court may then grant the named sum as reasonable damages in its discretion.

12. Learned Counsel for the Petitioner, secondly, submits that one of the arbitrators on the arbitral forum was biased. Learned Counsel submits that there existed circumstances giving rise to justifiable doubts as to his independence or impartiality. It is submitted that contrary to the mandate of sub-section (1) of Section 12 of the Act (as it stood prior to Amendment Act 3 of 2016), the particular arbitrator did not disclose in writing such circumstances, though specifically called upon by the Petitioner to do so. Learned Counsel submits that it was only in response to a communication made by his co-arbitrator that this arbitrator disclosed some of the circumstances, though not all, and even those circumstances showed that he was an employee of a company, which was engaging the firm of advocates representing the Respondent. It is submitted that the arbitrator had recused himself in an earlier reference involving the present Respondent. It is submitted that though the circumstances for such recusal persisted even at the time of the present arbitration reference, the arbitrator did not recuse himself though justifiable doubts as to his independence or impartiality were raised by the Petitioner. There is no substance in this ground of challenge. The record of the case indicates that the arbitrator was an employee of a company, who had engaged the firm of advocates appearing for the Respondent, but by reason of that circumstance alone, without anything else, it cannot possibly be said that there was a case for justifiable doubts as to his independence or impartiality. So far as his disclosure is concerned, it must be borne in mind that we are dealing here with an arbitration reference from a pre-amendment period. As the provisions of sub-section (1) of Section 12 stood at that time, whenever a person was approached in connection with his possible appointment as an arbitrator, he was required to disclose in writing any circumstance likely to give rise to justifiable doubts as to his independence or impartiality. The circumstances giving rise to such doubts were themselves not particularized at that time. As I have noted above, it is not possible to hold that the mere circumstance that the company, with whom he was working, was engaging the firm of advocates of the Respondent could give rise to any justifiable doubt as to his independence or impartiality. The arbitrator had explained, in his response to the communication in that behalf by his co-arbitrator, his earlier recusal and why similar course was not adopted by him in the present reference. The explanation implied that the earlier recusal was ad-hoc and without full regard to the circumstances attending the issues of legal propriety in this behalf; the arbitrator had just out of abundant caution disassociated himself from the earlier reference; but after taking into account legal opinions and considering the matter in greater detail when the question arose in the present reference, the arbitrator was of the view that the circumstance of his service with the employer referred to above was not one,

which could give rise to any justifiable doubt as to his independence or impartiality. This appears to be a fair and reasonable approach and there is no reason why it should not be accepted. There is, accordingly, no merit even in this objection.

13. There is, thus, no merit in the challenge to the impugned award. The petition is dismissed.

14. In view of the dismissal of the petition, the security furnished by the Respondent in pursuance of order dated 5 June 2017, passed in Commercial Suit No.12 of 2010, and which was continued pending the reference, must be returned to the Respondent. The Respondent had deposited a sum of Rs.1.50 crores towards this security. The Prothonotary and Senior Master is, accordingly, directed to refund the security amount of Rs.1.50 crores, together with accrued interest, if any, to the Respondent through the Respondent's Advocates.