
(1996) 10 BOM CK 0040
In the Bombay High Court
Case No : Arbi. Petition No. 84 of 1994

M.M.T.C. Ltd.

APPELLANT

Vs

Kastelli Shipping Corporation of Monrovia

RESPONDENT

Date of Decision : 07-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 16, 30

Citation : (1996) 10 BOM CK 0040

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : Sh. S.K. Mukherjee and Ms. Nasreen Paperwalla, for the Appellant;
Sh. G.A. Rebello, for the Respondent

Judgement

S.M. Jhunjhunwala, J.—By this petition, the petitioner, formerly known as Messrs. Minerals and Metal Trading Corporation Limited, a Government Company incorporated under The Companies Act, 1956, seeks to have the Award dated 29th July, 1993, filed in this court and numbered as "Award No. 177 of 1993" set aside. Alternatively, the petitioner has prayed that the claim and counter-claim be remitted for fresh determination either to the same arbitrators or to such other arbitrator(s) as this court may be pleased to appoint.

Vessel "M.V. Free Wave" was chartered by the Respondent from the Petitioner for carriage of rock phosphate in bulk 14,300 m.t. 5% more or less at owners' option from Aqaba to Bombay as nominated by the Petitioner as per the terms and conditions of the Charterparty dated 8th July, 1988. The said vessel arrived at Aqaba, loaded 14,300 m.t. cargo and sailed for Bombay on 1st August, 1988 at 0050 hours. The said vessel arrived at Bombay Floating Light (for short, "BFL") at 0300 hours on 12th August, 1988 and waited for her turn for berth. The said vessel moved from BFL to various ports on various dates for berthing at inner anchorage or stream discharge on 19th September, 1988 and 30th September, 1988 and commenced discharging in stream on 2nd October, 1988 and had berthed on 12th October, 1988. The said vessel completed discharging

including sweeping at 2000 hours on 22nd October, 1988, the said vessel discharged 14304.38 m.t. of cargo as per Dock Survey Report.

Clause 44 of the said charterparty provided for reference of any dispute arising thereunder to arbitration for resolution thereof, each party having a right to appoint its arbitrator. As the dispute arose between the Petitioner and the Respondent under the said Charterparty, the Respondent appointed one Paresh Cooper as its arbitrator. The Petitioner appointed one Vinayak R. Kolambekar as its arbitrator. On 9th October, 1989, the arbitrators issued the order sheet directing the parties to submit their respective Statement of claim, counter-claim and rejoinder, if any, together with the relevant documents which the parties intended to rely upon. The Respondent submitted its Statement of claim dated 8th November, 1989. On 12th July, 1990, the Petitioner submitted its Statement in reply together with its counter-claim. On 23rd July, 1990, the Respondent filed its rejoinder as also reply to the counter-claim of the Petitioner. The claim of the Respondent pertained for demurrage at loading port and demurrage at discharge port aggregating to US \$ 173,477.93. After giving credit for the amount received from the Petitioner, the Respondent claimed US \$ 85,060.57 from the Petitioner in arbitration. However, at the hearing before the arbitrators, the Respondent reduced its claim to US \$ 85,040. The dispute as per the counter-statement and counter-claim of the Petitioner before the arbitrators was as under :

"(1) At Load Port Aqaba (Load Port) :

Laytime allowed basis Min./Max. cargo) in hatches DHM 04-12-54.

Laytime used to load cargo. DHM 0-2-22-00.

Laytime saved. Therefore (Dispatched). DHM 01-14-54.

Despatch earned on sum of US \$ 3082.18 at Load Port Aqaba.

(2) At Bombay (Discharge Port) : Laytime allowable :

(L/T used DHM 15, 16, 25) 25-23-53.

Laytime saved DHM 10-7-28 despatch US \$ 19591.11.

(Based on quantity of 5199 m.t. Loaded in Hatch No. 2 (Maximum Load) at proportionate rate of 200 m.t. per W.S. day).

Amount paid in error US \$ 81,909.36 as demurrage.

Total claim for US \$ 104582.65 limited to US \$ 84,380.19."

2. The arbitrators granted personal hearing to the parties. Both the parties were present before the arbitrators alongwith their respective learned Counsel. Submissions were made before the arbitrators and issues involved in the reference were exhaustively dealt with by the learned counsel appearing for the parties before the arbitrators. The main issues related to the basis of the calculation of Laytime allowable so as to determine the vessel's dispatch/

demurrage liabilities and to the concept of arrived vessel in the port. The Respondent examined Captain Manohar S. Karnik, a retired Senior Officer of the Bombay Port Trust as its witness. The arbitrators considered the evidence, the submissions made before them and after giving full opportunity to the parties for representing themselves before the arbitrators and making submissions before them and after carefully considering the pleadings and documents placed for consideration, made and published the Award dated 29th July, 1993 by which the arbitrators held as under :

"(A) We do not agree with the claimants contention regarding vessels to be treated as "Arrived" vessel at BFL in Outer Anchorage. The vessel, as per SOF, arrived/entered the Inner Anchorage on 12.8.1988 at 17.00 hours.

(B)(1) The owners succeeded to the extent of their claim in the sum of US \$ 82,823 which the Respondents shall pay to the claimants within one month from the date of the receipt of the Award.

(2) Consequently the Respondents counter-claim being not maintainable is hereby disallowed.

(3) We grant an interest at 12% P.A. on the amount awarded from 8.11.1989 till the date of the Award.

(4) Each party shall bear their own cost."

The said award has been filed in this court and numbered as Award No. 177 of 1993.

3. Mr. Mukherjee, learned Counsel for the Petitioner, has submitted that there is a patent error of law on the face of the Award inasmuch as the arbitrators on the one hand upheld the contentions of the Petitioner that the said vessel was not an "arrived" vessel within the meaning of Clause 32 of the said Charterparty merely by Anchoring outside the harbour of BFL at 0500 hours on 12th August, 1988 and simultaneously on the other hand held that the said vessel did become an "arrived" vessel at 1700 hours on the same day when she temporarily entered the port for her particular requirements. Mr. Mukherjee further submitted that the Award is perverse and against the entire weight of legal authority. In the submission of Mr. Mukherjee, the arbitrators failed to apply their mind and have misconducted themselves and the proceedings before them. Mr. Mukherjee has further submitted once the arbitrators have given reasons for the Award, the reasons must support the decision and must properly disclose the mind of the arbitrators as to why the arbitrators have come to the conclusion which the arbitrators have reached.

4. Mr. Rebello, learned Counsel appearing for the Respondent, has submitted that the Award is a unanimous award of both the arbitrators and there is no error of law apparent on the face thereof. Mr. Rebello further submitted that the arbitrators have not made any wrong calculations and the questions of fact and law determined by the arbitrators have been correctly determined. Mr. Rebello

has also submitted that there is no misconduct either on the part of the arbitrators or the proceedings before them and that in the facts and circumstances of the case, the printed Clause 9 in the said Charterparty was not operative since Clause 32 of the said Charterparty, which was a typed clause, prevailed over it. Mr. Rebello also submitted that the Petitioner has deliberately omitted to submit a specific clause, being Clause 45, contained in the said charterparty which is relevant. The said Clause 45 reads as under :

"It is understood that if special provisions, as attached, conflict with printed provisions of the charterparty, the special provisions are to apply."

Mr. Rebello further submitted that in view of the said typed Clause 32 in the said charterparty which provided that time would count irrespective of whether the vessel is in berth or not, the claim of the Petitioner before the arbitrators was considered and rightly rejected. Mr. Rebello further submitted that the arbitrators were not required to write a detailed judgment when the Award is a speaking Award but only to indicate the mind as to how and why the arbitrators acted in the manner in which they have acted. Mr. Rebello has supported the Award and submitted that the Award is fair, legal and binding on the parties to the proceedings.

5. It may be stated at the very outset that the Award is a non-speaking award. The ambit and scope of challenge to an Award u/s 30 of the Arbitration Act, 1940 (for short, "the Act") has now been circumscribed by the catena of decisions of the Supreme Court, our court and other High Courts. An Award is not vulnerable to any challenge thereto. Needless to state that when the arbitrator is made the final arbiter of the disputes between the parties, an Award is not open to challenge on the ground that the arbitrator reached a wrong conclusion or failed to appreciate the facts. The arbitrator is the sole Judge of the quality and quantity of the evidence and it will not be open for the court to take upon itself the task of being a Judge on the evidence before the arbitrator. Once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator on which the court cannot substitute its own decision. If on the view taken of a contract, the decision of arbitrator on certain amounts awarded is a plausible view though perhaps not the only correct view, the Award cannot be examined by the court. No doubt, an award can be set aside if the arbitrator misconducts himself or the proceedings before him or proceeds beyond his jurisdiction. However, there is distinction between a dispute as to the jurisdiction of the arbitrator and the dispute as to in what way that jurisdiction should be exercised. A distinction has to be drawn between an error within the jurisdiction, and an error in excess of jurisdiction. The arbitrator's Award is generally considered binding between the parties since he is the tribunal selected by the parties. As held by the Supreme Court in the case of *Bijayendranath Srivastava v. Mayank Srivastava* (1994) 6 SC C 1417, the Court should approach an Award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. With this background I shall now examine the contentions of

the Petitioners raised in the Petition.

6. The main controversy related to the basis of calculation of Laytime allowable so as to determine vessel's dispatch/demurrage liabilities and to the concept of an "arrived vessel" in the port. The arbitrators have rejected the contention of the Respondent insofar as it pertained to the vessel to be treated as an arrived vessel at BFL in outer anchorage. The arbitrators, on the facts of the case and taking into consideration the evidence and the submissions made before them, concluded that the said vessel arrived/entered the inner anchorage on 12th August, 1988 at 1700 hours and that the Respondent is entitled to its claim in the sum of US \$ 82,823. In view of the settled legal position as summarised hereinabove, I find no fault with the finding and conclusions arrived at by the arbitrators. There is no error of law apparent on the face of the Award and there is nothing to show that the arbitrators misconducted themselves or the proceedings before them. The Award is not perverse nor it is against the weightage of legal authorities. There is no failure to apply the mind on the part of the arbitrators.

7. Even if the Award is held to be a speaking Award, as held by the Supreme Court in the case of Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., , the arbitrators are only to indicate the mind as to how and why they acted in that manner. They are not required to give detailed judgment as the court is required while passing the decree. The arbitrators have rightly held that in view of the typed Clause 32, the printed Clause 9 in the said Charterparty did not operate. Therefore, there was no conflict between Clause 32 and Clause 9 of the said Charterparty so far as the case before the arbitrators was concerned.

8. Mr. Mukherjee made a statement that prayer (a) of the petition is not pressed by the Petitioner and that prayer (b), which related to remittance of the Award, was the prayer pressed by the Petitioner. Section 16 of the Arbitration Act, 1940 deals with power of the Court to remit the Award to the arbitrators for reconsideration where the Award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matter referred or where the Award is so indefinite as to be incapable of execution or where an objection to the legality of the Award is apparent upon the face of it. The only ground on which remittance of the Award for reconsideration is sought is that according to the petitioner there is error of law apparent on the face thereof. Since, in my view, there is no error of law apparent on the face of the Award the question of remittance thereof to the Arbitrators for reconsideration does not arise.

9. In the circumstances, the Petition is dismissed with costs.

10. In view of the dismissal of the Petition, Mr. Rebello applies for decree in terms of the Award. In view of Rule 787(5) of the Rules of the High Court as applicable on its Original Side, Mr. Rebello is right in his submission that at this

stage the Court has power to pass the decree in terms of the Award. Accordingly, judgment is pronounced and decree passed in terms of the Award dated 29th July, 1993 filed in this court and numbered as Award No. 177 of 1993.

11. Mr. Rebello applies for grant of interest at the rate of 12% per annum on the amount awarded from 29th July, 1993, that is, the date of the Award till the date of payment or realisation while relying upon the judgment of the Supreme Court reported in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, . However, in view of the judgment of the Division Bench of this Court in Arjandas Naraindas Adnani v. Narsingdas Naraindas Adnani and others 1996 (4) All MR 1, the Respondent shall be entitled to further interest on the awarded principal amount at the rate of 12% per annum only from the date hereof till payment or realisation, whichever is earlier. Accordingly, the Decree is passed with further interest to be paid by the Petitioner on the principal sum of US \$ 82,823 at the rate of 12% per annum from the date here of till payment or realisation, whichever is earlier.

CC expedited.

12. Petitioner dismissed.