

(2011) 07 DEL CK 0212
In the Delhi High Court
Case No : O.M.P. 482 of 2010

Southern Petrochemical Industries Corporation Limited and
Another

APPELLANT

Vs

The Great Eastern Shipping Co Ltd.

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Arbitration Act, 1940 — Section 33, 37(3)
Arbitration and Conciliation Act, 1996 — Section 34
Evidence Act, 1872 — Section 31
Maritime Arbitration Rules — Rule 14, 15(2), 3

Citation : (2011) 07 DEL CK 0212

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : K.V. Viswanathan and Gagan Gupta, for the Appellant; Amitava Majumdar, Arvind Kumar and Saurabh Arun Chaudhari, for the Respondent

Judgement

Vipin Sanghi, J.—The present is a petition filed u/s 34 of the Arbitration and Conciliation Act to assail the arbitral award dated 17.02.2010 passed by an arbitral tribunal consisting of three learned Arbitrators, namely Mr. H.M.Singh, Mr. R.S. Saran and Capt. S.M.Berry. By the impugned award, the arbitral tribunal has allowed the claim of the Respondent to the tune of Rs. 44,19,527.78 and has granted interest at the rate of 6.5% per annum from 18.05.1994 onwards till the date of payment. The Tribunal has also quantified the fee at Rs. 3,20,000/-, which is to be shared equally between the parties.

2. The Petitioner No. 2, Government of India, Through the Ministry of Chemicals and Fertilizers, Department of Fertilizers, took the Respondents vessel "Jag Rahul" under a charter party dated 10.06.1992, to carry 35,000 mts, 5% more or less at the Respondent's option, of bulk Di-Ammonium Phosphate (DAP). Petitioner No. 1, M/s Southern Petrochemical Industries Corporation Limited were the receivers of the cargo at the port of Kakinada. In pursuance of the Charter Party, the vessel carried 36,145 mts of bulk DAP from port of Morehead City to

Kakinanda and discharged the cargo at Kakinada. The voyage was completed on 23.11.1992.

3. There is No. dispute that the Respondent's vessel arrived at the port of Kakinada on 0706 hours on 08.08.1992 and tendered Notice of Readiness (NOR) at 1000 hours on the same day. In accordance with Clause 28 of the Charter Party, the lay time commenced to run at 0800 hours on 10.08.1992. The Petitioner commenced discharge operations at 1045 hours on 01.10.1992 and completed discharge at 0800 hours on 23.11.1992. In terms of the Charter Party, the lay time available to the Petitioner for discharge of the cargo of 36,145.891 mts was 30 days 2 hours and 55 minutes. However, the Petitioner utilized 92 days and 5 hours. On this basis the Respondent claimed demurrage for 62 days 2 hours and 5 minutes at the rate of 1,40,000 per running day pro-rata.

4. The Petitioner, on the other hand, vide communication dated 08.04.1993 contended that the demurrage period was 27 days 17 hours and 22 minutes. The Petitioner calculated the said period on the basis that there was, inter alia, a stevedore labour strike at the port of Kakinada. In relation to the said period, demurrage stands paid to the Respondent. The dispute before the arbitral tribunal pertained to the remaining period only.

5. On 16.05.1994, the Ministry of Surface Transport forwarded to the Respondent a revised time sheet thereby agreeing to count the period of strike/labour problem as lay time used at discharge port. The Ministry of Surface Transport conveyed the agreement to pay demurrage on the basis that the demurrage period was 59 days and 7 hours. Thereafter, the Ministry of Surface Transport vide communication dated 02.06.1994, addressed to the Department of Fertilizers, called upon the Department of Fertilizer to pay the demurrage for the period of 59 days and 7 hours. It appears, the Petitioners, who were to bear the burden of the additional demurrage disputed the said claim of the Respondent. Consequently, vide communication dated 27.10.1994 addressed to the Respondent, the Ministry of Surface Transport restated its earlier position that the discharge demurrage amounted to only 27 days 17 hours and 22 minutes.

6. Disputes arose between the parties about the calculation and payment of discharge port demurrage. The Respondent on 27.07.1995 invoked the arbitration agreement between the parties contained in Clause 51 of the Charter party and nominated an Arbitrator. According to the Petitioner, the invocation of the arbitration by the Respondent was not in accordance with the arbitration agreement and, consequently, the claim of the Respondent was barred by limitation. This aspect shall be dealt with in detail a little later while dealing with the Petitioner's submission that the claim of the Respondent was barred by limitation. Suffice it to state at this stage, that the arbitral tribunal consisting of the aforesaid three arbitrators was constituted in terms of the order dated 18.06.2008 in OMP No. 194/1998 passed by a learned single Judge of this Court. All the three learned Arbitrators are men with experience in the maritime field.

7. To claim exclusion of the period (from lay time calculation) for which the Petitioner claimed that there was a strike of the stevedores/labour at the discharge port, the Petitioner relied upon Clause 33 of the Charter Party. Clause 33 of the Charter Party reads as follows:

If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lockout of any class of workmen essential to the loading of the cargo, or by reason of obstructions or stoppages beyond the control of the Charterers caused by riots, civil commotions or of a strike or lockout, on the railways, or in the Docks or other loading places, or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lockout of any class of workmen essential to the discharge, the time for loading or discharging as the case may be shall not count during the continuance, of such causes, provided that a strike or lockout of the Shippers and/or receivers, men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lockout. In case of any delay by reason of the before mentioned causes, No. claim for damages or demurrage, shall be made by the Charterers, Receivers of the cargo or Owners of the steamer. For the purpose, however, of settling dispatch money accounts, any time lost by the steamer through any of the above causes shall be counted as time used in loading and discharging as the case may be.

8. In support of its claim that there was a strike of the stevedore labourers at the Kakinada port, the Petitioner placed before the Arbitral tribunal, a certificate dated 03.03.1994 issued by the Kakinada Steamer Agents Association (Regd.) wherein it was certified as follows:

The mv. "JAG RAHUL" which arrived in Kakinada Port on 8th August, 1992 for discharge of about 36,245 mt D.A.P A/C. SPIC was not allowed discharge turn till 23.08.92 as per norms of allotment of working turns to vessels at Kakinada Port. When she was about to get into turn the Stevedoring Labour declared strike on 23.08.92 which resulted in delay in allotment of turn to the said ship till the strike was resolved. The stevedors strike was called off on 27.09.92 and finally the vessel was allotted discharge turn on 29.09.92.

9. The Petitioner also produced a communication dated 01.10.1994 from the Commissioner of Labour, Labour Department, Government of Andhra Pradesh stating that the stevedore labour workers at Kakinada went on strike w.e.f. 23.08.1992 and called off the same on 24.09.1992. The said communication was statedly founded upon the report of the Assistant Commissioner of Labour, Kakinada.

10. The learned arbitral tribunal rejected the defence of the Petitioner and awarded the Respondent/claimants claim. The reasoning of the tribunal for allowing the said claim reads as follows:

In the course of the arguments the claimants accepted that there may have been a strike whose commencement, ending and duration varies from document to

document. However, the same does not affect the claim since the charterer had the option to nominate the second port, as per Clause 24 of the charter party which specifically states that such orders can be given even during the period of discharge, which for reasons known to the charterers, they have not exercised.

For determining the demurrage/dispatch in voyage charters the most important documents are the Notice of Readiness (NOR) and the Statement of Facts (SOF). These are contemporaneous documents which record day to day events during the course of vessel's stay in the port for loading/discharging operations. The Statement of Facts (SOF) in the subject case is completely silent about the vital point at the issue ie. Strike. The fact of strike is just not mentioned and recorded in the SOF. The subsequent evidence produced by the Respondent to show and prove strike is at much later stage. and evidence on strike that has been provided is rather inconsistent. When preparing the time sheet for determining the duration of delay/demurrage the charterers went by the Statement of Facts and conveyed the demurrage calculations unequivocally. Subsequently they resiled and retracted from the acceptance on grounds/evidence which is just not sufficient enough to support the charterers' case and the Tribunal is not convinced that there are sufficient acceptable grounds to deviate from the position outlined in NOR/SOF.

11. The submission of Mr. K.V. Vishwanathan, learned senior counsel for the Petitioner is that the award made by the arbitral tribunal is patently illegal. He submits that even the Respondent/claimant had accepted that there was a strike of the stevedores/labourers at the relevant time. This fact is even recorded by the arbitral tribunal in the aforesaid extract of the award. My attention is also drawn to para 15 of the statement of claim filed by the Respondent, wherein the Respondent had, inter alia, stated "The claimant states that the Respondent had sufficient knowledge of the intended strike of the Stevedores labour and could have obtained other suitable labour. The Respondents failed to exercise reasonable diligence in the matter and the alleged strike cannot prevent the accrual of the demurrage".

12. Learned senior counsel for the Petitioner submits that the aforesaid extract clearly shows the admission of the Respondent/claimant of the factum of the strike. The case of the Respondent/claimant was that the said strike would not stop running of the lay time and the accrual of the demurrage as, by exercise of reasonable diligence, the Petitioner could have arranged for other suitable labour. In this argument of the Respondent, there is a clear admission of the factum of the strike. The same position was restated by the Respondent in its rejoinder filed before the arbitral tribunal, particularly in para 3 under the heading rejoinder "rejoinder to Respondents defence submission".

13. The submission of the Petitioner is that the tribunal has not even considered the evidence produced by the Petitioner to prove the existence of the strike. Neither the certificate issued by the Kakinada Steamer Agents Association (Regd.) dated 03.09.1994, which certified that the stevedores labour declared

strike on 23.08.1992 and the same was called off on 27.09.1992, nor the communication dated 01.10.1994 issued by the Commissioner of Labour, Govt. of Andhra Pradesh Labour Department, certifying that there was a strike of the stevedore labour between 23.08.1992 and 24.09.1992 have been considered by the tribunal.

14. Learned senior counsel for the Petitioner submits that in one of the proceedings of the tribunal, the parties had recorded that they do not deny the existence of the documents filed by the opposite party. However, the interpretation and applicability of the documents to the facts of the case, after hearing the parties, was left to the tribunal. In the said order passed by the tribunal, it was, *inter alia*, recorded as follows:

The Respondents have filed another application under Rule 14 and 15(2) of the Maritime Arbitration Rules of ICA. On admission and denial of documents there are mostly inter party documents and about the other documents the position is that while the existence is not denied, their interpretation and applicability to the facts of the case was left to the Tribunal to take a view after hearing the parties. On this basis the Respondents did not press their application and the application stands disposed off. The claimants were heard on the merits of the case.

15. Mr. Vishwanathan submits that as there was No. dispute raised by the Respondent to the authenticity of the aforesaid two certificates - one issued by the Kakinada Steamer Agents Association (regd.), and the other by the Labour Commissioner, Govt. of Andhra Pradesh, there was No. occasion for the Petitioner to lead any further evidence to establish the existence of the strike of the stevedores labour at the relevant time. He submits that the learned tribunal, despite the aforesaid undisputed evidence and admission of the Respondent/claimant in its statement of claim and rejoinder, has returned a finding that merely because the factum of the strike was not recorded in the Statement of Facts (SOF), it could not be accepted that there was indeed a strike at the relevant time.

16. Mr. Vishwanathan further submits that the only inconsistency pointed out in the aforesaid certificates was with regard to the date on which the strike of the stevedore labour ended/was called off. While, according to the Kakinada Steamer Agents Association (Regd.), the said strike was called off on 27.09.1992, according to the certificate issued by the Commissioner of Labour, Govt. of Andhra Pradesh, the same was called off on 24.09.1992. He submits that the Petitioner had, in fact, while computing the demurrage period as 27 days 17 hours and 22 minutes, treated the strike as lasting only upto 17.09.1992, which was therefore advantageous to the Respondent. He submits that the arbitral tribunal should have therefore accepted the calculation of the demurrage period as done by the Petitioner as 27 days 17 hours and 22 minutes, as the addition of the period thereafter either upto 24.09.1992, or upto 27.09.1992, would have reduced the demurrage period even further.

17. Mr. Vishwanathan submits that there is a fundamental error in the approach of the arbitral tribunal in proceeding on the basis that the SOF is the only repository of all facts, and if the event of strike of stevedore labour was not mentioned in the SOF, the same could not be pleaded or proved otherwise. He submits that it is well settled in law that the SOF is considered only as a prima facie evidence of the facts which existed at the relevant time. The SOF, in the present case, records the occurrence of events which have taken place on and from the date on which the discharge turn was allotted to the Respondent, i.e. 29.09.1992. It does not record the earlier events. That is why the factum of strike/labour unrest has not been recorded.

18. Mr. Vishwanathan submits that in the SOF, there is nothing recorded to contraindicate or to deny the existence of the strike. In support of his submission that the SOF cannot be construed as recording the emergence of any lis or dispute for adjudication, and that the said document merely recorded the catalogue of events, he relies upon the decision of the Calcutta High Court in *Hindusthan Paper Corporation Ltd. v. Wellbrines Chemicals Private Ltd.*, 2002 (3) Cal LT 114 (HC). It has also been held in this decision that the said document does not have much of an impact on the adjudication by the arbitrators. He, therefore, submits that the adjudication by the arbitrators of the disputed questions of fact (assuming that the factum of strike was a disputed fact) cannot solely depend upon the recordings made in the SOF.

19. Mr. Vishwanathan submits that the award made by the arbitral tribunal is unreasoned. The arbitral tribunal has merely recorded that the Petitioner resiled and retracted from the acceptance of the demurrage period as 59 days and 7 hours "which is just not sufficient enough to support the charterers' case and the Tribunal is not convinced that there are sufficient acceptable grounds to deviate from the position outlined in NOR/SOF". The Arbitral Tribunal has not stated as to why the reasons given by the Petitioners for claiming that the demurrage period as 27 days 17 hours and 22 minutes are not sufficient, and why the grounds to "deviate" (according to the Petitioner there is No. "deviation") from the SOF are not sufficiently acceptable.

20. He further submits that the Arbitral Tribunal does not say as to how, or why, the Petitioners who are not even the author of the communication dated 16.05.1994, could be bound down by the said communication which had been issued by the Ministry of Surface Transport without taking the Petitioners into confidence. As to what constitutes reasons, Mr. Vishwanathan relies on the observations of the Supreme Court in *Union of India (UOI) Vs. Mohan Lal Capoor and Others*, The Supreme Court had held that "Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts

considered and the conclusions reached. Only in this way can opinions or

decisions recorded be shown to be manifestly just and reasonable".

21. Mr. Vishwanathan submits that, admittedly, it was the Govt. of India acting through the Ministry of Chemicals and Fertilizers and Southern Petro Chemicals Industries Corporation Ltd., i.e. the Petitioners herein, who are the beneficiaries under the charter party in question. The charges towards demurrage were payable by the Petitioners.

22. At this stage itself I may note that learned Counsel for the Respondent has also submitted that, at the relevant time, all charter parties entered into between various departments/organizations of the Government were formally entered into by the Ministry of Surface Transport. The submission of Mr. Vishwanathan is that the Petitioners communicated the demurrage period, according to their calculation, on 07.04.1993. The lay time calculation had taken into account the strike period upto 17.09.1992. Thereafter, the Ministry of Surface Transport had, on its own, unilaterally communicated that the charterers are agreeable to count the strike/labour problem period as lay time used at discharge port and computed the demurrage period as 59 days and 7 hours.

23. When the Ministry of Surface Transport required the Department of Fertilizers to make payment of the demurrage charges for 59 days and 7 hours, the same was disputed by the Petitioners. The Petitioners

insisted that the demurrage period was 27 days 17 hours and 22 minutes on the basis of irrefutable evidence. As a consequence, the Ministry of Surface Transport on 27.10.1994 communicated to the Respondent that the demurrage period was only 27 days 17 hours and 22 minutes, and No. more.

24. Mr. Vishwanathan further submits that there is No. admission in any of the communications relied upon by the Respondent of the fact that there was No. strike/labour unrest at the Kakinada Port. At best, it could be said that the Ministry of Surface Transport, without the concurrence of the Charterers and on its own, without having the advantage of perusing the relevant documents, had communicated the premature decision to pay the demurrage even for the period during which the strike/labour unrest was there. He submits that even a perusal of the letter dated 16.05.1994 would shows that in the said letter it was not admitted that there was No. strike/labour problem. What was recorded by the Ministry of Surface Transport was that the Charterers are agreeable to counting of strike/labour party as lay time used at discharge port.

25. Mr. Vishwanathan submits that the Respondent while filing its statement of claim, did not even implead the Ministry of Surface Transport as a party Respondent, knowing fully well that the Charter Party was entered into with the Petitioner No. 2 through the agency of the Ministry of Surface Transport. Had the Respondent impleaded the Govt. of India through the Ministry of Surface Transport, the reason for issuance of the unilateral communication dated 16.05.1994 could have been explored and brought out. Mr. Vishwanathan submits that the communication dated 16.05.1994 could not be attributed to the

Petitioners or be considered to be an admission of liability by the Petitioners, as the same had not been issued by either of them, and on that basis, liability could not have been fastened on them.

26. Mr. Vishwanathan relied upon Section 31 of the Evidence Act to submit that, even assuming for the sake of argument that there was an admission that there was No. strike/labour problem, such an admission would not be a conclusive proof of the said matter and that it may only operate as an estoppel in certain cases. He submits that the Respondent did not alter its position to its disadvantage in any manner on account of issuance of the communication dated 16.05.1994 and, therefore, there is No. question of the Petitioners being estopped from denying the Respondents claim for discharge demurrage beyond 27 days 17 hours 22 minutes.

27. In support of his aforesaid submission, he places reliance on the Supreme Court judgement in Geo-Group Communications Inc. Vs. IOL Broadband Ltd., . In paragraph 25 of this decision, the Supreme Court held as follows:

25. It is well settled that admission previously made can be allowed to be explained in order to show that it was erroneous. The maker of the admission can very well show that the facts admitted are not correct. In the present case, the applicant Company has not only explained the so-called admission to show that it was erroneous but has successfully demonstrated that the facts admitted are not correct. Therefore, the applicant Company cannot be non-suited on the basis of so-called admission made in Para 4 of the notice dated 31.07.2008.

28. Learned Counsel for the Petitioners submits that the Arbitral Tribunal in its award, while dealing with the claim of the Respondent on merits, has purported to quote paragraph 3 of page 10 and paragraph 5 of page 11. However, it is not clear as to from where the Arbitral Tribunal has taken the quoted passage, which reads as follows:

(3) The Claimants state that in the first instance there was No. strike and subsequently aver that even if the strike was there its commencement, conclusion and duration has not been established. The Respondents themselves have given different dates and periods and in any case the Respondents had the option of second port discharge as per Clause 24 of the Charter Party - page 12 - "orders of second discharge port if required can be given by the charterers while the vessel is discharging at the first port unless given earlier". The charterers gave No. such orders and hence they cannot escape the consequence of the strike.

(5) It is only Ex D pages 21, 22 and 23 which refer to the strike. The only difference being that Exh. "C" is contemporary document whereas Ex D was sent by the Respondents to the Claimants later on, Ex E Page 24 is the letter written by Transchart to the Claimants that the Charterers are agreeable for counting the strike labour problem period as a lay time use at discharge port. This document has been subsequently updated by the Respondent 2 on the ground that

Transchart is not authorized agent and were not in full possession of the facts - though the Charter Party was signed by Transchart on behalf of the charterers Exh. "B" page 18.

29. Mr. Vishwanathan submits that neither in the pleadings of the parties, nor any of the documents filed before the Tribunal, the aforesaid statements/submissions were made by either of the parties. Mr. Vishwanathan has challenged the Respondent to point out as to from which document the Tribunal has picked up the aforesaid quotation. He submits that this shows that the tribunal has taken into consideration extraneous materials and also that the award suffers from non-application of mind.

30. The next submission of Mr. Vishwanathan is that the claim of the Respondent was barred by limitation. In this regard, he places reliance on Clause 51 of the charter party which contains the arbitration agreement. The said clause provides that the disputes arising under the charter party shall be settled under the provisions of the Arbitration Act "and under the Maritime Arbitration Rules of the Indian Council of Arbitration, each party appointing an arbitrator from out of the maritime panel of arbitrators and two arbitrators in the event of disagreement, appoint an umpire whose decision shall be final and binding upon both parties hereto".

31. The submission of Mr. Vishwanathan is that the cause of action arose in favour of the Respondent upon the issuance of the communication dated 27.10.1994, whereby it was communicated to the Respondent that the discharge demurrage amounted to only 27 days 17 hours and 22 minutes. Therefore, unless the claim was filed before the validly constituted arbitral tribunal before 27.10.1997, the same would be barred by limitation. The Respondent vide communication dated 27.07.1995 invoked the arbitration agreement under the charter party and nominated Mr. B.L. Mehta as an arbitrator in the matter. The Petitioner was also called upon to nominate an arbitrator within 21 days of the receipt of the said letter. The Petitioner vide communication dated 17.08.1995 appointed Mr. Tony Adam as the second nominee arbitrator. It appears, objection was raised by the Respondent to the appointment of Mr. Tony Adam as an arbitrator on 08.10.1995. However, the Petitioners persisted with the said appointment by stating that Mr. Tony Adam is a member of the Indian Council of Arbitration (ICA), whose appointment had been done independently.

32. The submission of Mr. Vishwanathan is that Rule 3 of the Maritime Arbitration Rules of the ICA, inter alia, provides that the number of arbitrators shall be either one or three where the parties fail to agree on a sole arbitrator. Where the number of arbitrators is three, each party shall appoint one arbitrator. The party invoking the arbitration agreement shall appoint an arbitrator from out of the ICA Maritime Panel of Arbitrators, and give intimation and notice of appointment to the other party under intimation to the Secretary of the Council, calling upon the other party to appoint the second arbitrator within 30 days from the receipt of the request to do so. If the other party fails to make appointment of the

arbitrator, the second arbitrator will be appointed by Maritime Arbitration Committee of the ICA. The two arbitrators so appointed, shall appoint the third arbitrator within 30 days, who shall act as the presiding arbitrator. Where the third arbitrator is not so appointed, the third/presiding arbitrator shall be appointed by the Maritime Arbitration Committee of the ICA.

33. Mr. Vishwanathan submits that the Respondent did not follow the aforesaid procedure inasmuch, as, the Respondent did not intimate to the Secretary of the ICA the nomination of Mr. B.L. Mehta as an arbitrator. Even the Petitioner did not communicate the nomination of Mr. Tony Adam as the second nominee arbitrator. He submits that only subsequently, the ICA was approached in the matter who, vide their letter dated 26.12.1997 stated that "since the above arbitration matter has not been processed as per the Maritime Arbitration Rules of the Council, we are not taking note of the above letter and we are not aware whether the charter party contains the arbitration clause of the Indian Council of Arbitration. Therefore, please first clarify all the above points to enable us to take note of the above arbitration matter".

34. Mr. Vishwanathan submits that the Respondent in its communication 10.12.1998 addressed to the ICA admitted the position that the arbitration had not been commenced in strict compliance of the Maritime Arbitration Rules of the ICA. Mr. Vishwanathan submits that the first Statement of Claim was filed by the Respondent only on 29.10.1997, i.e. after the expiry of the period of limitation.

35. On the other hand, the submission of Mr. Amitava Majumdar, learned Counsel for the Respondent is that the award in question has been made by commercial men, who are drawn from the ICA Maritime Panel of Arbitrators. It is argued that the arbitral tribunal has appreciated the sacrosance attached to the SOF in the maritime industry. He submits that the parties draw the SOF after the discharge of cargo is complete, and the same is signed by the master of the ship as well as the charterer. All the relevant facts, which entitle the charterer to suspension of the lay time, are meticulously noted in the SOF. Subsequently, it is not open either to the charterer or to the shipper to contend otherwise. He submits that if the SOF is not given due regard, one or the other party to the charter party would always raise issues with regard to the calculation of the demurrage, if any, which would create chaos in the maritime industry. The SOF in the present case is completely silent about any strike or labour problem at the discharge port of Kakinada.

36. Learned Counsel further submits that the two certificates relied upon by the Petitioner to support their claim of strike/labour problem at the discharge port cannot be said to be contemporaneous documents inasmuch, as, the certificate from Kakinada Steamer Agents Association (Regd.) was obtained on 03.09.1994, i.e. over two years after the alleged strike/labour problem, and similarly the certificate issued by the Commissioner of Labour, Govt. of Andhra Pradesh was also issued after over two years of the alleged strike on 01.10.1994. He submits that a reading of the communication dated 01.10.1994 issued by the

Commissioner of Labour, Govt. of Andhra Pradesh shows that the Petitioner No. 1 in fact extracted the same from the concerned authorities as it was issued in response to their communication dated 29.09.1994. He submits that the tribunal was entitled to consider the weight of the evidence produced by the Petitioners. The arbitral tribunal noted that the evidence adduced is inconsistent inasmuch, as, the certificate issued by the Kakinada Steamer Agents Association (Regd.) states that the strike was called off on 27.09.1992, whereas the certificate issued by the Commissioner of Labour states that the strike was called off on 24.09.1992.

37. Learned Counsel further submits that the inconsistency in the stand of the Petitioners is borne out from the fact that in its initial calculation of demurrage period, the strike had been shown as existing up till 17.09.1992; as per the certificate issued by the Commissioner of Labour, Govt. of Andhra Pradesh it was shown as 24.09.1992, and; as per the certificate issued by the Kakinada Steamer Agents Association (regd.), it was shown as 27.09.1992.

38. Mr. Majumdar submits that the Petitioners had accepted to the counting of the strike/labour problem period as lay time in their communication dated 16.05.1994 and revised the demurrage period of 59 days and 7 hours at the discharge port. The Respondent was called upon to accept the time sheet and the calculation of demurrage. The Respondent gave their acceptance on 18.05.1994.

39. Mr. Majumdar submits that from the aforesaid, it is evident that the Petitioner sought to resile from their own admission subsequently. The arbitral tribunal has rightly relied upon the admission as there was No. justification offered by the Petitioners in resiling from the same. Mr. Majumdar further submits that MV Prabhu Daya arrived at the Kakinada discharge port on 20.08.1992 and tendered its NOR at 10:00 hrs. on 20.08.1992, which was accepted at 10:00 hrs. on 28.08.1992. It commenced discharge at 20:00 hrs. on 27.09.1992. He submits that the aforesaid facts show that even though MV Prabhu Daya arrived at the said port after the Respondent's vessel, it was given precedence in the matter of discharge of the cargo. In this regard, he places reliance on the award dated 26.03.1992 passed in the case of MV Prabhu Daya by an arbitral tribunal, which was also placed before the arbitral tribunal.

40. Mr. Majumdar next submits that Clause 33, relied upon by the Petitioner, did not become applicable in the facts of the present case. According to him, in the present case, there was No. strike/labour problem on 08.08.1992 (i.e. the date of issuance of the NOR) as, even according to the Petitioners, the said strike commenced on 23.08.1992. For attracting Clause 33, it was necessary that the strike or lock-out should have been in existence on the date when the NOR was given. He submits that it is for this reason that the factum of the strike has not been mentioned in the SOF.

41. Mr. Majumdar submits that the Petitioner having become aware of the alleged strike/labour problem, was obliged to exercise reasonable diligence either to

obtain other suitable labour at the current rates, or to nominate a second port by resort to Clause 24 of the charter party. Clause 24 of the charter party reads as follows:

24. Discharging port(s) stated in Bills of Lading are not necessarily final discharge ports and actual discharging port to be declared by KRISHKHAD NEWDELHI on vessel's passing Suez/Cape Town in response to Master's telegram to KRISHKHAD NEWDELHI, EMTICIFERT NEWDELHI and TRANSCHART NEWDELHI giving 96 hours notice of ETA Suez/Cape Town. Orders for second discharge port if required, can be given by Charterers while the vessel is discharging at the first port unless given earlier.

42. On the aspect of limitation, the submission of Mr. Majumdar is that the Respondent admittedly invoked the arbitration agreement on 27.07.1995 by nominating an arbitrator. The arbitrator nominated by the Respondent met the required qualification. He further submits that the rules of the ICA relied upon by the Petitioner are not the rules that were applicable, since the rules relied upon by the Petitioner are those amended in the year 2004. He has tendered in Court the Rules of Arbitration of the ICA as amended on 24th April, 1990. Clause 16 of these rules provides the manner in which the arbitration is to be initiated.

43. Mr. Majumdar also places reliance on Section 37(3) of the Arbitration Act, 1940, which stipulates that:

(3) For the purposes of this section and of the Indian Limitation Act, 1908, (9 of 1908.) an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

44. Mr. Majumdar places reliance on Chowgule Brothers and Others Vs. Rashtriya Chemicals and Fertilizers Ltd. and Others, to submit that the provision of Section 37(3) would override the arbitration rules made applicable as per the agreement. Section 37(3) is very clear that the arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto, a notice requiring the appointment of an arbitrator.

45. In his rejoinder, Mr. Vishwanathan submits that the reliance placed by the Respondent on Clause 24 of the Charter Party is an afterthought. Mr. Vishwanathan submits that in their statement of claim, it was not even claimed by the Respondent that the Petitioners were obliged to invoke Clause 24 of the Charter Party if there was strike/labour unrest at Kakinada Port.

46. He submits that on a plain reading of Clause 33 of the Charter Party, it is clear that the strike or lock-out shall not suspend the lay time and shall not prevent the demurrage from accruing only if by the use of reasonable diligence the shipper and/or receivers could have obtained other suitable labour at rates

current before the strike or lock-out. Clause 33 does not oblige the Charter to nominate another port for discharge of the cargo. He submits that Clause 24 merely gives an additional right to the Charterer to nominate a second discharge port and the Charterer is not bound to nominate a second port merely because there may have been a strike or lock-out at the contractually notified discharge port.

47. I will first deal with the aspect of limitation. Undoubtedly, the cause of action arose on 27.10.1994 when the Petitioner repudiated the Respondent's claim for demurrage by contending that the demurrage duration was only 27 days 17 hours 22 minutes.

48. It is not in dispute that the Respondent invoked the arbitration agreement by issuing the notice dated 27.07.1995. This notice was addressed by the Respondent to the Ministry of Chemical & Fertilisers and copies of the same were sent to the Ministry of Surface Transport as well as the Respondent's nominee Mr. B.L. Mehta. It appears that without raising any protest or demur to the invocation of the arbitration agreement in the aforesaid manner, the Petitioners themselves nominated the Arbitrator, namely, Mr. Tony Adam on 17.08.1995. Therefore, the Petitioners also treated the invocation of the arbitration agreement by the Respondent to be valid and effective. The parties, while doing so, apparently acted in accordance with the arbitration agreement which, inter alia, provided "... .. each party appointing an arbitrator from out of the maritime panel of arbitrators". When the Respondent sought to raise an objection to the nomination of Mr. Tony Adam, the Petitioners maintained its nomination as an Arbitrator vide their telefax dated 02.11.1995. It is also not in dispute that before the Tribunal constituted, as aforesaid, the Respondent filed its statement of claim on 29.10.1997. The Indian Council of Arbitration (ICA) vide a communication dated 26.12.1997 refused to take note of the matter on the ground that the arbitration case had not been processed as per the Maritime Arbitration Rules of the ICA and that they were not aware whether the Charter Party contains an arbitration clause of the ICA. The ICA sought further clarification on the aforesaid aspects.

49. The Respondent initiated proceedings u/s 33 of the Arbitration Act, 1940 in O.M.P. No. 194/1998, which were disposed of by this Court on 15.05.2007 by consent of parties. Therefore, the communication of the ICA dated 26.12.1997 did not put the matter to rest. It was agreed between the parties that the ICA may be directed to appoint a Sole Arbitrator from the maritime panel and the disputes & differences, claims & counter-claims between the parties may be referred to the Sole Arbitrator, so appointed. It was also agreed between the parties that the proceedings be held under the Arbitration & Conciliation Act, 1996 and that the parties may file their fresh statement of claims and defence, as with the passage of time the calculations have changed. A statement of claim was accordingly filed. The Petitioner thereafter preferred Review Application No. 135/2008 to seek a clarification to the extent that the Petitioner shall be entitled

to raised the objection with regard to limitation before the learned Arbitrator, and that the Arbitrator who had been appointed shall continue the proceedings on the basis of Maritime Arbitration Rules of the ICA. This modification was granted by the learned Single Judge on 11.04.2008.

50. Thereafter, I.A. Nos. 7341/2008 & 7344/2008 were preferred in O.M.P. No. 194/1998 to seek modification of the earlier orders dated 15.05.2007 & 11.04.2008. With the consent of parties, on 18.06.2008 while allowing these applications, the modification in the aforesaid orders was made to the effect that the disputes be referred to a panel of three Arbitrators as provided in Clause 51 of the Charter Party dated 10.06.1992 read with Maritime Arbitration Rules of the ICA. That is how the Arbitral Tribunal, which has eventually passed the award, came to be constituted.

51. From the aforesaid narration, it would be seen that the Petitioner did not raise any objection at the relevant time to the invocation of the arbitration agreement by the Respondent on the ground that it was not in accordance with the arbitration agreement and the Maritime Rules of the ICA. On the contrary, the Petitioners went along the same path and, in turn, nominated the second Arbitrator. These appointees were from the panel of arbitrators maintained by the ICA for maritime disputes. Had the Petitioners raised an objection at the relevant time, the Respondent would have had the occasion to take steps to invoke the arbitration agreement strictly in accordance with its terms and also in accordance with the Maritime Rules of the ICA.

52. Moreover, when the ICA refused to take note of the invocation of arbitration by both the parties on the ground that the Maritime Rules have not been followed, and it had not been shown that the Charter Party contains an arbitration agreement providing for conduct of arbitration under the Rules of the ICA, the Respondent preferred O.M.P. No. 194/1998 u/s 33 of the Act. Pertinently, this petition was disposed of by consent of parties on 15.05.2007. It was agreed that the ICA may appoint a Sole Arbitrator from the Maritime panel. This order having been passed without any objection by the Petitioners on the ground that the initial invocation of arbitration was not in accordance with the Maritime Rules of the ICA, in my view, it is too late in the day for the Petitioners to now contend that the invocation of the arbitration agreement at the relevant time was not in accordance with Clause 51 or the Maritime Rules of the ICA. The Petitioners cannot blow hot & cold at the same time. For the purpose of computation of limitation both - under the Arbitration Act, 1940 and also under the Arbitration & Conciliation Act, 1996, what is of relevance is the date of invocation of the arbitration agreement, and not the date on which the statement of claim is filed. The arbitration agreement stood validly invoked, if not earlier, by consent of parties on 15.05.2007. On the said date, the parties novated the arbitration agreement contained in Clause 51 of the Charter Party. Pertinently, the parties also agreed that the arbitration be held under the Arbitration & Conciliation Act, 1996, even though the agreement had earlier been invoked by

the

Respondent on 27.07.1995, even prior to coming into force of the Arbitration & Conciliation Act, 1996. The claims of the Respondent were certainly not barred as on 15.07.2007 since the cause of action arose in respect of the Respondent's claim on 27.10.2004. Admittedly, the claims were also filed within the period of three years from the date of passing of the order dated 15.05.2007 which, itself, was subsequently modified in respect of the constitution of the Tribunal on 18.06.2008.

53. The learned Arbitral Tribunal has considered and rejected the Petitioners submission on limitation in the following manner:

The question for consideration is whether a reference before an irregularly constituted Tribunal vitiated proceedings altogether and the time runs out.

The scheme of things mentioned above No. where states that the arbitration to commence have to be before a regularly constituted Tribunal. Even today the practice is that the arbitration gets initiated by the party starting the same by giving a notice to the opposite party and nominating their arbitrator. Lot of time gets consumed by the other party nominating their arbitrator and the two arbitrators nominating the third one. In case the opposite party does not appoint their nominee, a reference to the institution, if the agreement provides, or the competent court is called for and even if the two arbitrators are not able to select the third arbitrator then also a reference to the institution, if provided for, and the court, if called for, and this can take anything from two months to years together. Therefore, the constitution of the Tribunal is not the trigger point for the arbitration period to run out. Therefore, we hold that a reference in the above matter before an irregular constituted tribunal does not vitiates the proceedings and the claim is not time barred on this ground as well.

54. I find the reasoning of the learned tribunal to be plausible and reasonable. No. valid ground has been urged to successfully assail the same. I, therefore, find No. merit in the Petitioners' submission that the claim of the Respondent was barred by limitation. There is No. error in the award so far as the finding that the claims were not barred by limitation are concerned.

55. The reasons of the Tribunal for making its award on the merits of the claim have been set out hereinabove. The fundamental premise on which the award is founded is that the NOR and the SOF are the most important documents for determining demurrage/dispatch in voyage charters as these are contemporaneous documents which record day-to-day events during the course of vessel's stay in the port for loading/discharging operations. Because the SOF in this case was completely silent about the issue of strike, the Tribunal has rejected the evidence produced by the Petitioners on the ground that it had been produced much later, and on the ground that it was not consistent.

56. The aforesaid fundamental premise of the Tribunal itself, unfortunately, is

flawed and incorrect. Not only the Calcutta High Court in the case of Hindustan Paper Corporation Limited (*supra*) has held that the SOF cannot be construed as recording any facts for adjudication; or that the SOF does not have much impact on the adjudication by the Arbitrators, even in the international filed the position appears to be the same.

57. I may refer to the decision in the case of "Newforest" reported as *High Seas Venture Limited Partnership v. Sinom (Hong Kong) Limited (The "Newforest")*, (2008) Vol. I Lloyd's Reports 504. In this case, the Charter Party specifically provided in Clause 11 that "Demurrage and dispatch shall be calculated on the basis of statement of facts made by Agents at loading and discharging port(s) entrusted by Owners and mutually confirmed by Master and loading port authorities or discharging port authorities". The ship owners submitted the demurrage claim accompanied by a copy of SOF. The charterers rejected the claim. It was the contention of the ship owners in July 2005 that there were very strong winds which had caused rough sea conditions in which it was not safe for the vessel to continue to operate. According to the ship owners, this time was not to count because it related to the safety of the vessel rather than to discharge operations. By February, 2006, the ship owners were contending that discharge could have continued during the bad weather periods identified in the SOF and that a lack of lighters was to blame.

58. The court first considered the question as to what is the status of a SOF. The court referred to the various decisions cited before it, including the decision in *The Khian Captain*, i.e., *Freedom Maritime Corporation v. International Bulk Carriers SA*, (1985) 2 LR 212, wherein it had been held that a SOF will always be good prima facie evidence, and concluded that "SOF is not final and binding because it does not say so and because the words "on the basis of" do not point clearly enough to finality". It was further held "But the evidential value of the SOF is unquestionably strong whether or not the requisite mutuality is achieved and almost regardless of its contractual status."

59. From the aforesaid, it would be seen that the SOF even when mutually prepared, cannot be taken as the gospel truth. This would be so, particularly in relation to matters which are not dealt with or recorded in the SOF at all. It would be one thing if the SOF expressly records a particular fact situation or circumstance as having existed, or as having not existed, and the owner or the Charterer subsequently contend to the contrary. In such a situation, it may be an uphill task for the party seeking to contend otherwise than what is expressly recorded in the SOF to establish the position to the contrary. But the situation would be somewhat different in a case where the SOF is silent about a particular circumstance or fact situation, which one or the other party subsequently contends as existing at the time of loading or discharge of the cargo. But, in either case, the SOF cannot be regarded as an absolutely unchallengeable document.

60. In this case, the SOF is completely silent on the aspect of strike/labour

problem. It neither records the existence of the said fact situation, nor does it record that such a fact situation/circumstance did not exist. Since the said circumstance of strike/labour unrest is not mentioned in the SOF, prima facie, and to begin with one would assume that such a fact and circumstance did not exist, and would accordingly place the onus on that party who wishes to contend otherwise. However, it cannot mean that the party which is contending otherwise will be non-suited, and will not be permitted to place evidence on record, or that its evidence would be brushed aside without considering its weight only because the said fact situation/circumstance is not recorded in the SOF. The observation of the Tribunal that the Petitioner had not disclosed sufficient grounds to "deviate" from the position outlined in the MOR/SOF does not appear to be correct inasmuch, as, there is No. "deviation". The SOF is completely silent about the existence/non-existence of the strike/labour unrest. The contention of the Petitioners about the existence of the strike/labour unrest, therefore, cannot be said to be a deviation, as it would have been a deviation if the SOF had expressly recorded to the contrary.

61. In the present case, due to the aforesaid fundamental erroneous approach of the Arbitral Tribunal in assuming that the SOF is the "be all and end all" in relation to the fact situation/circumstances existing at the relevant time, the Tribunal has brushed aside weighty evidence produced by the Petitioners which, inter alia, included the certificate issued by the Commissioner of Labour, Government of Andhra Pradesh. There is a clear contradiction in the reasoning found in the award inasmuch, as, on the one hand, the Tribunal records that the claimant accepted that there may have been a strike, while on the other hand, merely because the said fact is not recorded in the SOF, the Tribunal has brushed aside the evidence produced by the Petitioners on the ground of it being inconsistent.

62. What is the inconsistency in the evidence, I ask myself. At best, the inconsistency is with regard to the date on which the said strike was called off. The said strike of the stevedores was called off, according to the certificate issued by the Kakinada Steamer Agents Association (Regd.), on 27.09.1992, while according to the Commissioner of Labour, Government of Andhra Pradesh, the same was called off on 24.09.1992. The Petitioners themselves had computed the demurrage by treating the strike as having been called off after 17.09.1992. Even if the said inconsistency was there, it could not have led to the conclusion that there was No. strike at all. The said inconsistency, at best, could have resulted in taking the best case possible in favour of the Respondent and against the Petitioners, whose obligation it was to establish the existence of strike/labor unrest. The evidence produced by the Petitioners showed that the said strike continued up to 24.09.1992/27.09.1992, however, as the Petitioners had themselves computed the demurrage period by treating the said strike as lasting till 17.09.1992, the said computation could well have been accepted by the Tribunal without causing any prejudice to the Respondent.

63. In my view, there is a patent illegality in the award inasmuch, as, the Tribunal has adopted a fundamentally wrong principle in relation to the status of the SOF by treating the SOF as the record of the gospel truth.

64. I also find merit in the submission of Mr. Vishwanathan that the Tribunal has also erred in relying upon Clause 24 of the Charter Party, while brushing aside the Petitioners' reliance upon Clause 33 of the Charter Party. Firstly, It is clear that the Respondent did not even plead in its case before the Tribunal that the exercise of "reasonable diligence" under Clause 33 of the Charter Party entailed the nomination of a second discharge port under Clause 24 by the Charterer. On a plain reading of Clause 33, it is seen that the "reasonable diligence" pertains to the obtainment of other suitable labour at rates current before the strike or lock-out. The Respondent, admittedly, led No. evidence to establish that by exercise of reasonable diligence the Petitioners could have obtained other suitable labour at rates current before the strike or lock-out.

65. I also find merit in the submission of the learned senior counsel for the Petitioners that there was No. admission of any liability by the Petitioners. The letter dated 16.05.1994 had been issued by the Ministry of Surface Transport, Government of India. It is clear that while issuing the said communication, the Ministry of Surface Transport had acted unilaterally and without even placing the matter before the Department of Fertiliser, Ministry of Chemical & Fertilisers. After the said communication dated 16.05.1994 had been issued, on 02.06.1994 the Ministry of Surface Transport sent its communication to the Director of Accounts, Department of Fertilisers recording that the owners had disputed the Charterers discharge port calculation showing demurrage of 27 days 17 hours and 22 minutes, and that examination on the basis of additional information had resulted in demurrage of 59 days and 7 hours.

66. Pertinently, as early as 30.04.1993, the Ministry of Chemical & Fertilisers had written to the Department of Fertilisers that the vessel in question had incurred demurrage of 27 days 17 hours and 22 minutes at the discharge port. Sanction for payment of Rs. 41,80,053/- which included the discharge port demurrage for 27 days 17 hours and 22 minutes, after adjusting the despatches and other recoveries due from the Respondent, was also granted.

67. On 24.12.1993, the Ministry of Surface Transport itself had communicated to the Respondent that the computation of demurrage at the discharge port as 27 days 17 hours and 22 minutes, payment for which had already been made, was in "full and final settlement of the subjected fixture". The Ministry of Surface Transport stated that MV Betanavis was discharging the cargo at Kakinada during the same period and charterers have excluded the stoppages based on the SOF of MV Betanavis. Unfortunately, these are aspects which have clearly escaped the attention of the Arbitral Tribunal while making the award.

68. The submission of the learned Counsel for the Respondent that the Petitioners had extracted the aforesaid certificates from the Kakinada Steamer

Agents Association (Regd.) and from the Commissioner of Labour, Government of Andhra Pradesh after over two years and, therefore, they could not have been relied upon, has to be rejected. Firstly, the Tribunal does not reject the said documents for the aforesaid reason. Secondly, the Petitioner itself had agreed in the proceedings held on 20.01.2010 not to deny the existence of the said documents, and the only issue was with regard to their interpretation and applicability to the facts of the case. Had the correctness of these documents been denied by the Respondents, the Petitioners would have the occasion to lead evidence to establish the existence of the strike/labour unrest at the Kakinada Port at the relevant time. Therefore, the Respondent could not have even contended before the tribunal that the said evidence was unreliable or not trust worthy.

69. I also find merit in the submission of Mr. Vishwanathan that the arbitral tribunal has made the impugned award on the basis of extraneous materials and that the award suffers from non application of mind. Despite the Petitioners challenge, learned Counsel for the Respondent has not been able to point out during his submissions as to where from the tribunal has extracted, what it claims, as facts enumerated "on page 5- items 7, 8 and paragraph 3 of page 10 and para 5 of page 11".

70. A perusal of the extract shows that the same is not an irrelevant extract to the issue dealt with by the tribunal. Though the aforesaid extract in the award does not contain any admission attributed to the Petitioners, and the learned arbitral tribunal has repeated more or less all that is recorded in the aforesaid extract in the later part of its award, the relevance of the extract is that it makes reference to the Respondents contention that the Petitioners ought to have nominated a second port under Clause 24 of the charter party. As aforesaid, this submission is not supported by the pleadings of the Respondent in its statement of claim. It appears that on account of the aforesaid extract, the tribunal has been misled into believing that the Respondent had pleaded Clause 24 of the charter party in answer to the Petitioners reliance upon Clause 33 of the charter party. In my view, the aforesaid is, independently, a ground to set aside the impugned award.

71. Though the arbitral tribunal takes note of the Petitioners submission that the so-called admission of liability was not made by the Petitioners but was made by the Ministry of Surface Transport, which was not even impleaded as a party to the arbitration proceedings, the arbitral tribunal has not dealt with the same by giving its reasons. All that the arbitral tribunal has stated is that the Petitioners have resiled and retracted from the acceptance of demurrage period as 59 days and 7 hours "which is just not sufficient enough to support the charterers case". It cannot be said that the arbitral tribunal has given any reason for thrusting the so-called admission made by the Ministry of Surface Transport upon the Petitioners, even though the Petitioners had categorically stated their position as early as on 07.04.1993. Even if the communication dated 16.05.1994

issued by the Ministry of Surface Transport could be attributed to the Petitioners, the Petitioners were indeed entitled u/s 31 of the Evidence Act to explain their so-called admission, which could not be taken to be a conclusive proof of the fact that there was No. strike/labour unrest during the relevant period. In fact, the said communication, even on the face of it, does not purport to admit the fact situation/circumstance that there was No. strike/labour unrest at the relevant time. On the contrary, it records that there was a strike/labour problem.

72. So far as the submission of Mr. Majumdar in relation to the Respondent being given step motherly treatment on account of MV Prabhu Daya being given priority over the Respondents vessel in the matter of discharge is concerned, the said aspect has not been dealt with by the learned tribunal. It is not clear as to in what circumstance MV Prabhu Daya was given priority, even though the NOR in relation to the said ship was given subsequent to the NOR given by the Respondent. In case, the Respondent is successfully able to make out a case of discrimination and the Petitioners are not able to explain the same, the Respondent may be entitled to be appropriately compensated for the delay occasioned thereby.

73. The interpretation of Clause 33 advanced by Mr. Majumdar to submit that the said clause did not become applicable as the strike/labour unrest did not occur after the start of discharge of the cargo does not even appear to have been advanced before the arbitral tribunal. The same cannot, therefore, be accepted in these proceedings.

74. For all the aforesaid reasons, in my view, there is patent illegality in the award of the arbitral tribunal insofar as it has allowed the claim of the Respondent on merits, inasmuch, as, the tribunal has proceeded on a fundamentally wrong premise in law, which has led it to ignore the evidence produced by the Petitioners. The arbitral tribunal has not considered the relevant and pertinent evidence led before it by the Petitioners while concluding that there was No. strike/labour unrest at the relevant time. The arbitral tribunal ought not to have taken into consideration the extraneous materials and this also shows non application of mind by the arbitral tribunal. Accordingly, I set aside the impugned award and remit the matter back to the arbitral tribunal for reconsideration of the Respondents claim on merits by taking into consideration the observations made herein above.

75. Petition stands disposed of.