
(2004) 08 DEL CK 0141
In the Delhi High Court
Case No : OMP 135 of 2002

Steel Authority of India Limited

APPELLANT

Vs

Fednav Asia Limited

RESPONDENT

Date of Decision : 17-08-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16(5), 28(1A), 28(3), 34

Citation : (2004) 3 ARBLR 90 : (2004) 113 DLT 428 : (2004) 76 DRJ 389

Hon'ble Judges : Ramesh Chand Jain, J

Bench : Single Bench

Advocate : Prabhjit Jauhar, for the Appellant; Prashant Pratap and O.P. Gaggar, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Jain, J.—Steel Authority of India Limited (SAIL) has filed this application u/s 34 read with Sections 13(5), 16(5), 28(1A) and 28(3) of the Arbitration and Conciliation Act, 1996 (in short "Act"), for setting aside the majority award of the Arbitral tribunal dated 30.8.2001. The relevant facts which may be noted for the disposal of the present application/objections are that SAIL entered into a Charterparty contract dated 14.6.1995 for the carriage of cargo of coking coal in bulk on board, the Vessel m.v. "Blest Future" from Queens Land, Australia to the port of Visakhapatnam or Paradeep in India, at the Charterers option and on terms and conditions as set out in the said Charterparty. The vessel carrying the cargo arrived at Visakhapatnam Port of 25.7.1995 and discharge of cargo was commenced at 15.30 hours on 09.08.1995 because the vessel could not be berthed earlier on account of non-availability of berth during the interterm period. Discharge of cargo was completed at 13.00 hours on 17.8.1995 and the vessel released. On 13.9.1995 the respondent/owner submitted its laytime calculation and based on that claimed an amount of US Dollars 96,375,66 as demurrage charges for 9 days, 2 hours and 28 minutes. SAIL disputed the said claim and sent the or calculation of the laytime statement and claimed dispatch

money of US Dollars 1863.89 earned as per Charterparty in terms of clauses 36 and 57 of the Charterparty. The disputes/differences arose between the parties, arbitration was invoked in terms of the arbitration agreement and an Arbitral tribunal comprising Mr.R.S.Saran and Mr.R.S.Cooper as arbitrators and Mr.K.P.Patel as the presiding arbitrator was constituted. The respondent filed its claim and the petitioner filed its counter-claim. The Arbitral Tribunal by a majority award dated 30.8.2001 i.e. as per Mr.K.P.Patel, Presiding Arbitrator and Mr. R.S. Cooper, Co-arbitrator allowed the entire claim of the respondent in the sum of US Dollars 96,375,66. Vide a minority award dated 24.11.2001, Mr.R.S.Saran, arbitrator dismissed the claim of the respondent. Aggrieved by the majority award of the Arbitral Tribunal, SAIL has filed the objections challenging the award on a variety of grounds. The respondent has opposed the application/objections and wave filed a detailed reply thereby controverting the grounds and the pleas raised by SAIL in their petition.

2. I have heard Mr.Prabhjit Jauhar, learned counsel representing the petitioner/objector and Mr.Prashant Pratap, learned counsel representing the respondent and have given my thoughtful consideration to their respective submissions. During the course of hearing Mr.Jauhar has largely confined his attack of the majority award on the following grounds:

- i) The majority award of the Arbitral tribunal is in violation of Section 28(3) of the Act as the same is contrary to the terms and conditions of Charterparty;
- ii) The majority award is based on no evidence and does not give any reasons for the findings reached by it; and
- iii) The minority award is correct and it is based on true and correct construction of the terms and conditions of Charterparty.

All the above grounds are inter-linked and so may be dealt together.

3. The foremost ground put-forth on behalf of the petitioner is that the majority award is contrary to the terms and conditions of the Charterparty because it has overlooked or in any case has mis-interpreted clauses 36 and 57 of the Charterparty while deciding the liability of the petitioner to pay demurrage charges. To appreciate this contention, it would be of help to refer to the said clauses of the Charterparty, which are as under:

""Clause 36:

Chatterers guarantee to discharge the cargo at the average rate of 4,000 metric tones, basis five or more workable hatches pro rata for less numbers of hatches with 4 x 25T cranes plus 4 x 8 cbm grabs per weather working day, Saturday afternoon, Sundays and Charterparty holidays excepted even if used unless the vessel is already on demurrage.

Clause 57:

owners guarantee that the vessel has 4 cranes each of capacity 25 tons and 4

grabs each 8 cbm capacity with cycle time of about 3 minutes and serving all hatches and accordingly the capacity to discharge is about 8,000 metric tones per day of 24 consecutive hours. A joint survey shall be conducted in order to ascertain the particulars of cranes and grabs as above. In the case of any deficiency, the Surveyors report shall be binding on owners and Chatterers and the rate of discharge shall be reduced proportionately.'"

4. Mr.Jauhar, learned counsel for SAIL submitted that these clauses read together provide for calculation of laytime i.e. the time available to the Chatterers (SAIL) for discharging the cargo on board the ship with the rate of 4000 MTs per day provided under clause 36 (supra) is qualified and relatable to the grab capacity of the ship. According to him the optimum rate of discharge of 4000 MTs would apply only if the ship owners could provide 4 grabs of 8 cbm capacity as guaranteed by them under clause 7 and in the event of the ship owners providing grabs with reduced and less capacity the prescribed daily rate of discharge would be required to be reduced proportionately. Mr.Jauhar argued that the minority award rendered by Mr.R.S.Saran, arbitrator is based on this construction of the above clauses and is the correct award. The minority award rendered by the co-arbitrator Mr. Saran has observed as under:

"The clauses 36 and 57, read together, provide for calculation of laytime i.e. the time available to the Chatterers (SAIL) for discharging the cargo on board the ship. The rate stipulated is rate of 4000 metric tonnes per day. This is however qualified and related to the grab capacity of the ship. The full rate of 4000 per day is applicable if the shipowners provided 4 grabs of 8 cbm capacity each as guaranteed by them. However the prescribed daily rate is required to be reduced proportionately in the event of the shipowners providing grabs with reduced and less capacity. If for example the grab capacity provided is 5 cbm (instead of 8 cbm), as is contended by the charterers in this case, the rate of 4000 mt per day stands reduced to 2500 mt per day and the available laytime is required to be calculated and fixed at the pro-rata rate of 2500 mt. Per day. Also the laytime for the operations is to be calculated and determined at the outset regardless of the actual performance or holdups.

There is no dispute between the parties, and they agree on the point, that the applicable rate for calculating the laytime at the discharging port would be 2500 mt per day if the grab capacity provided was indeed 5 cbm instead of 8 cbm and that if the grab capacity provided was 8 cbm the applicable rate would be 4000 mt per day. The issue before the Arbitral tribunal, Therefore, is whether at the discharging port the ship worked with 5 cbm grabs or 8 cbm grabs.

I find and hold that there was no mistake and the vessel at discharging port operated with grabs with capacity of 5 cbm and with spill place not in place, detached earlier in some undisclosed voyage best known to the ship's owner. The plea of mistake has been taken as an after thought to avoid admitting deficiency and gain unmerited demurrage. The SOF is a contemporary document signed by four parties on the spot and is evidence enough that at the time of

discharge vessel operated with grabs capacity of 5 cbm each. The SOF being the most important and crucial document in the shipping trade for determining demurrage/dispatch cannot be ignored and set aside lightly.

5. Mr.Prashant Pratap, learned counsel representing the respondent has refuted the above contention and submitted that clause 57 cannot be construed so as to provide for any reduction in the rate of discharge dependent on the less grab capacity. Alternatively his submission is that the petitioner was not entitled to calculate the laytime based on the reduced capacity of the grabs because the vessel of the respondent was fitted with the requisite 5 hatches of 8 cbm capacity which were in working condition and made available and that is why it had been possible for the Chatterers to achieve the requisite discharge capacity of more than 4,000 MTs per day. He contended that had it not been so, the entire cargo weighing more than 36,000 MTs could not have been discharged in 8 days. Yet, another submission is that the Chatterers were already on demurrage even before the commencement of the discharge of the cargo on 9.8.1995 and, Therefore, the Chatterers (SAIL) is not within its right to calculate the laytime based on the alleged reduced capacity of the grabs of the vessel. He further submitted that no joint survey as envisaged by clause 57 was asked for by the Chatterers or conducted in order to ascertain the particulars of the cranes and grabs which would in turn show that there was no dispute / doubt in the mind of the petitioner with regard to either the number or the capacity of the cranes and grabs.

6. The submissions made on behalf of the respondent cannot be said to be devoid of merits because even if on a joint reading and construction of clause 36 and 57, it is assumed that the petitioner was entitled to calculate the laytime having regard to the alleged reduced capacity of the grabs, still the petitioner has not suffered any loss on account of the said reduced capacity as admittedly the consignment was discharged within the contemplated laytime and the delay had largely been occasioned due to non-berthing of the vessel between 25.7.1995 to 09.08.1995. As per the Rider Clause 36 of the Charterparty, the total laytime available for discharge was 9 days, 9 hours and 2 minutes at the discharge rate of 4,000 MTs per day while the actual time taken or discharge was only 5 days and 15 minutes and leaving the margin of any holidays etc., the discharge was, in fact, achieved within the stipulated laytime of 9 days and 9 hours. The plea about the recalculation of laytime based on the alleged reduced capacity of the grabs could perhaps been available to the petitioner, if the discharge of the cargo had not been achieved within the stipulated period.

7. Reference to clause 39 of the Charterparty would also be of help to reach the real intent of the parties in this regard. The same clause reads as under:

""39. At discharge port, time to count 26 hours after Notice of Readiness is served on arrival of vessel within port limits, whether in berth or not and in free pratique and ready in all respect to discharge the cargo. If turn time 24 hours expires on Saturday afternoon laytime will commence at 0800 hours on the first

working day. Time shall not count between noon on Saturday and 8 a.m. on Monday nor between 5 p.m. (noon if Saturday) on the last working day preceding a Charterparty holiday and 8 a.m. on the first working day thereafter, even if used, unless the vessel is already on demurrage.'"

A careful construction of the above clause would show that the computation of laytime is further governed by this clause and can be calculated having regard to the provisions of clause 36 and 57 (supra) provided the vessel is not already on demurrage.

This would imply that the charter was liable to pay demurrage for any delay in berthing the vessel due to non-availability of berth and the charterer was not entitled to recalculate the laytime based on the alleged reduced capacity of the grabs.

8. Mr.Jauhar then argued that the majority award is without any basis as admittedly no cogent evidence has been led by the respondent to show that the vessel was fitted with the requisite number of cranes and grabs of requisite capacity and that whatever has been produced on record was a fake document issued sometimes in 1985 although the vessel itself was launched in 1994. In the opinion of this Court once it was established that the discharge of the cargo was made almost @8,000 MT for 24 hours against the minimum stipulated quantity of 4,000 MT per day, the arbitrators were fully justified in assuming that there was no reduction in the grab capacity affecting the discharge of the cargo in any way. The same would be the answer to the using or detach in the spill plates at the time of discharge of the cargo. The majority award concludes that throughout the discharge operation, the spill plates were retained in place of each grab thereby providing a volume of 8 cbm for each of the 5 grabs. In the opinion of this Court this seems to be a perfect logical conclusion because had the spill plates been detached it would have the effect of reduction in the discharge capacity of the actual discharge rate of about 8,000 MTs per 24 hours could not have been achieved. No doubt in the daily statements signed by the officers of the ship it was mentioned that the vessel was a bulk carrier with 5 hatches / 5 holds single decker with 4 ships cranes of 25 tonnes and 4 ships grabs of 5 cbm each but this was stated to be a mistake of fact which was satisfactorily explained and established through the subsequent voyages undertaken by the vessel for carrying the cargo of the petitioner.

9. In the opinion of this Court, the opinion in the majority award that the vessel went on demurrage because of the long berthing delay from 25.7.1995 to 09.8.1995 as a result of which the vessel was on demurrage even before the commencement of the discharge is fully justified. The total laytime available to the petitioner was 9 days, 9 hours and 2 minutes while the actual discharge time after berthing of the vessel was only 5 days and 15 minutes. This would clearly bring out that the petitioner SAIL was not entitled to any extension of layout time beyond the stipulated time of 9 days, 9 hours and 2 minutes, which has been fully accounted for. The respondent was, Therefore, within its right to claim

damages for the demurrage period. Assuming for the sake of argument that the view expressed in the minority award was a probable one, still in view of the constitution of the Arbitral tribunal and the majority award rendered by the co-arbitrator and the presiding arbitrator, this Court is of the opinion that it is not open to this Court to set aside the said award only for the reason that another view was possible. In the opinion of this Court no good ground within the meaning of Section 34 of the Act has been made out for setting aside the award.

10. In the result this petition u/s 34 of the Act fails and is hereby dismissed, leaving the parties to bear their own costs.