

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No. 199/2001**

8th January, 2010

M/S HINDUSTAN FERTILIZER CORPORATION LTD. ...Petitioner

Through: Mr. Sanjay Poddar, Advocate

VERSUS

M/S C.V.JANI & CO.Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

% **JUDGMENT (ORAL)**

VALMIKI J.MEHTA, J

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996, whereby, the petitioner seeks to challenge the Award dated 19.3.2001 passed by the Sole Arbitrator. At the outset, I may note that the counsel for the petitioner has stated that he has not been able to receive instructions from his client although strenuous efforts were made by him. This according to the counsel may possibly be because the petitioner has become a sick company and after the proceedings before the Board for Industrial and

Financial Reconstruction (BIFR), concluded orders have been passed for winding up of the company. Mr. Poddar has therefore assisted the court to the best of his ability on the basis of the record as available.

2. The disputes which arose between the petitioner and the respondent was with regard to the contract dated 20.9.1996 awarded by the petitioner to the respondent pertaining to providing of services of Stevedoring/shore handling (including bagging and standardization), clearing and forwarding of imported fertilizers from the Port of Navlakhi in Gujrat, for the period 1996-1997.

3. The scope of hearing of objections under Section 34 is now well settled. This court can interfere with the findings and conclusions of the Arbitrator only if, the Award is illegal or against the provisions of the contract or is so perverse that it shocks the judicial conscience. This court does not sit as an appellate court to re-apprise the entire findings of the Arbitrator. Once the view which is taken by the Arbitrator is a plausible view, this court will not interfere with the findings and conclusions merely because a different view is possible as is sought to be canvassed by the objector. Keeping these aforesaid principles in mind, I have considered the arguments of Mr. Sanjay Poddar, the counsel for the objector.

4. The first objection on behalf of the petitioner was with respect to Claim No.1 whereby the Arbitrator decided the issue of non-liability of the Contractor for demurrage charges. The Arbitrator has arrived at a finding of fact that delay in unloading the vessel and the consequent demurrage charges were on account

of failure on the part of the petitioner to give the original Bill of Lading and in the absence of which the master of the ship refused to unload the cargo. This aspect is not disputed that the original Bill of Lading was not given by the petitioner to the contractor, and what was contended before the Arbitrator was that in spite of the non-availability of the original Bill of Lading, the contractor ought to have “persuaded” the master of the ship to release the goods on an indemnity bond. The Arbitrator has then recorded that even for unloading on indemnity bond, the same took time and was available only on 10.2.1997. Considering therefore all the aforesaid facts, including the default of the petitioner, the Arbitrator has apportioned the demurrage charges and thereby held the petitioner partly responsible and the contractor also partly responsible. The relevant findings and observations of the Arbitrator in this regard and with which I cannot find any fault whatsoever, are as under:-

“The facts of the case are that the vessel arrived on Saturday, 8.2.97 at 0900 hrs. tendered notice of readiness at the same time on the same date. The laytime commenced to count at 1000 hrs. on 10.2.97 (Monday), but discharge commenced at 1735 hrs. on 10.2.97 (Monday). The permissible laytime expired at 0058 hrs. on 26.2.97 (Wednesday), but the vessel completed discharge at 2300 hrs. on 28.2.97 (Friday), resulting in demurrage of 2 days 20 hrs. and 44 mts. It is correct that the original Bill of Lading was not available when the vessel arrived on 8.2.97 and the master declined to give delivery and commence operations unless the original Bill of Lading was produced. The master also declined to give delivery on the letter of Indemnity, which was sent to the owners for approval and the approval of owners did not come until about noontime on 10.2.97. The responsibility for providing the original Bill of Lading was that of the Corporation and not of the Contractor and the master of a ship has absolute legal right to decline delivery unless the Bill of Lading owner presents the original Bill of Lading. Notwithstanding the provision stated to be provided for in the Charter Party for delivery against a letter of Indemnity, it has to be kept in view that such letters of indemnity have been held to be of no legal validity and even a true owner of the goods cannot obtain delivery unless the original Bill of Lading is presented. The demurrage dues are in the nature of liquidated damages

payable to the ship owner for receivers/charterers failure to complete the operations within the lay time allowed. On the basis of the facts as stated above the laytime in this case did not commence to count until 1000 hrs. on 10.2.97. Therefore time loss affecting demurrage in this case, which can be attributed to non-availability of the Bill of Lading is from 1000 hrs. on 10.2.97 till actual commencement of discharging operation at 1735 hrs. on 10.2.97. I therefore, hold and find that liability of the Contractor for demurrage stands reduced by 9 hrs. and 35 mts. In other words the Contractor is liable for demurrage incurred in the discharging operations of Amar Jyoti to the extent of 2 days 11 hrs. and 9 mts. which in terms of money works out to Rs.4,75,283/- and deduction by the Corporation stands limited to Rs.4,75,283/-. The balance of Rs.92,240/- needs to be refunded to the Contractor.”

5. Since there can be no possible challenge with regard to this finding of the Arbitrator, the counsel for the petitioner sought to then urge, that no doubt the demurrage charges as apportioned by the Arbitrator are correct, but, according to the counsel for the petitioner such demurrage charges were not deducted by the petitioner from the bills of the contractor and therefore the Arbitrator ought not to have ordered for the refund of Rs.92,240/- so far as this claim is concerned.

I do not agree at all with the contention of the counsel for the petitioner because the Arbitrator has given the following observation at internal page 9 of the Award while dealing with this aspect:-

“The Corporation stated that demurrage had actually been incurred and paid to the owner and so according to the Corporation, the amount had been rightfully deducted from the dues of the Contractor.”

The aforesaid is a factual narration by the Arbitrator and once the Arbitrator notes in his Award that a particular stand was taken before him, if the

petitioner was of the opinion that this factual narration was incorrect, it was incumbent upon the petitioner to approach the Arbitrator immediately after passing of the Award and complain that the narration has been wrongly recorded factually. Admittedly this has not been done.

6. The counsel for the petitioner then sought to refer para 15.2 of the reply filed by the petitioner before the Arbitrator, and on the basis of which it was sought to be contended that the recoveries were not made from the bills of the contractor by the petitioner. I have gone through para 15.2 and I do not find any such clear statement in this paragraph. This paragraph 15.2 relied upon by the counsel for the petitioner reads as under:-

“15.2 Thus from the above stated facts it is clear that a sum of Rs.1,26,33,969.40 is payable to the claimant subject to the deductions narrated hereinafter. As admitted by the claimant a sum of Rs.1,18,58,384.00 has already been received by him, whereas the respondent has paid a total sum of Rs.1,18,22,418.00 to the claimant under this agreement. The difference between the amount as stated to have been received by the claimant and the amount paid by the answering respondent is due to the fact that the claimant has included the payment of Rs.36,366/- {which was made to the claimant by the answering respondent on account of cost of Tarpaulin (@ Rs.15/- per MT for a quantity of 2424.4 MT) and which is beyond the scope of the contract itself} and has not included the payment of Rs.400/-{recoverable as DD charges}. More over the answering respondent is entitled to recover Rs.5,67,523/- as ship demurrage, Rs.50,337.80 towards cost of material short supplied, Rs.45,933/- for difference in price to sale of damaged material at reduced price, Rs.1,224.85 towards cost of unaccounted bags and Rs.1,18,492/- towards TDS. Therefore, after deducting these amounts from the amount payable to the claimant the answering respondent is liable to pay Rs.28,040.75 to the claimant. It is submitted that this amount has been with-held to be adjusted in respect of the dues against the claimant on account of the losses suffered by the respondent in respect of the second vessel i.e. MV Dubai Valour handled by the claimant at the Navlakhi Port. The respondent is filing their

counter claim separately. It is that the claimant has handled the said two vessel under the single contract and is required to file one statement of claim. The claimant has deliberately filed two statement of claim in order to mislead the learned arbitrator and with malafide intention. Therefore, the contention of the claimant that it has suffered serious financial loss and damages is not tenable and claimant is not entitled to any interest as per terms of Clause 26(b) of NIT.”

I, therefore, do not find any basis whatsoever to hold that the deductions have not been made from the bills of the contractor and that the Arbitrator has wrongly allowed refund for the deductions made and the recoveries effected by the petitioner.

7. Two other claims which have been objected to by the counsel for the petitioner, and which can be dealt with together, are with regard to the godown charges paid to M/s. Prabhat Solvent Extension Industries Ltd., where the bags of urea were stored. The first claim is Claim No.4 with respect to the cargo ship ‘Amar Jyoti’ and the second claim is Claim No.9 with respect to the cargo from the ship ‘Dubai Valour’. With respect to these claims, the Arbitrator has arrived at a finding of fact, and which he was entitled to, whereby it has been found as a fact that the cargo was stored at such godown. So far as the rates of storage in these godowns are concerned the same is not disputed by the counsel for the petitioner. The Arbitrator, I note, has also referred to the fact that since godown charges have been paid, the contractor would be entitled to the same. The only grievance of the counsel for the petitioner was that no prior approval was taken before storing the cargo in the godown. This in my opinion is a technical objection and deserves to be rejected because the contractor

admittedly stored the goods in godowns and the rate for storage is not disputed. Once the storage of the cargo was taken place and the contractor has incurred expenses, I do not find any illegality in the approach of the Arbitrator in awarding this amount. Also, there is no loss or prejudice alleged on account of not taking prior permission. As regards the storage with respect to Claim No.9 of the vessel Dubai Valour, the counsel for the petitioner weakly sought to contend that even accepting all the findings of the Arbitrator, in reality there is miscalculation in the final figure awarded inasmuch as once the godown charges are taken at Rs.27,000/- per month, then, the final figure as arrived at by the Arbitrator is not correct. The contention of the counsel for the petitioner deserves rejection because the charges for May, 97 were of Rs.27,000/-, and which amount I find has in fact been reduced by the Arbitrator from the total amount claimed under this claim. The claim which was made under this head was for Rs.1,86,436/-. From this amount when we reduce an amount of Rs.27,000/-, then what has been awarded by the Arbitrator rightly comes to figure of Rs.1,59,436/-, and which is the difference of Rs.27,000/- being the charges for May, 1997 which was disallowed by the Arbitrator. This objection, therefore, is also misconceived and rejected.

8. The next objection which was raised by the counsel for the petitioner pertained to the shortage of the goods at the destination by rail. The counsel for the petitioner contended that there was an admitted shortage of tonnage at the

rail head and therefore the Arbitrator has erred in disallowing the counter-claim of the petitioner for the shortage.

Once again, I find that the objection of the petitioner is not sustainable. This is for the reason that the unloading at the rail destination was not within the scope of the contract and therefore beyond the legal duty of the contractor. This becomes further clear from the fact that as per Clause 4(c) of the contract, once, the cargo reaches the destination, it was the duty of the petitioner in fact to inform the contractor for any shortage. There was to take place a joint inspection provided of course, there is an intimation of shortage to the respondent and in which case, even if there is no inspection, the contractor would have been held liable. In the facts of the present case once, the goods reached the destination, any shortage thereof would be the responsibility of the petitioner and not the contractor unless shortage was intimated and inspection was insisted upon and which has been found not to be the case. It is noted by the Arbitrator that the goods were lying in open and which is clear from one committee report of the petitioner itself pertaining to at least one site of Basti wherein it was found that there were no covered railway sheds and there were heavy rains and goods were lying in the open. Considering all the facts including as aforesaid, the Arbitrator has disallowed the Counter-Claim under this head. The relevant portion of the Award on this aspect, and which in my opinion rightly decides the issue, reads as under:-

“3(i) The Contractor denied liability and stated that he handed over the correct weights and that there was no shortage in transit and if there was any shortage assessed at destinations, he was not liable for the same. And in case there was any short supply the Corporation should have informed the Contractor on arrival of the rake/wagons as per Cl.4(c) of NIT and that no such information or notice was given. The Corporation unloaded the cargo from the railway wagons at railhead and that at the relevant time there was heavy rain and the Claimant had no arrangements to cover the goods. According to the Contractor the survey at the railhead was conducted by the insurance company and not by the Claimant and nor by the Contractor. The Contractor further argued that his liability was ex-wagons only and not beyond that. The Contractor also stated that the Bill of Lading quantity (11667.867) was fully accounted for by the quantity standardized in bags (11368.005) and cyclone loss as per survey report (309.862). The Contractor further stated the committee reports relied upon by the Claimant also confirm receipt of the material booked.

3(ii) I find the claim to be devoid of substance. Cl.4(c) relied upon by the corporation states that in case of receipt of short weight bags at destination, the Contractor shall be informed of the same on arrival of rakes/wagons at railhead and that Contractor shall bear the cost for re-standardization of short weight stock at the destination. The statement of shortages filed by the Corporation alludes to railway shortages. Out of the total shortage of 193.940 mts, the standardization loss in short and cut/torn bags included in the claim statement is just about 5.090 mts. The Contractor is required to deliver of material at the destination as per RR railway receipts (RRS). The cargo was despatched by rail on “said to contain” basis railway receipts as per practice. Cl. 4(a) of NIT states that the Contractor shall endeavour to obtain clear RRS. There is no complaint that the Contractor failed to do this. This committee reports referred to above, testify to the fact that the wagons on arrival at the railheads were seal-intact. The committee reports also, at least in the case of Basti, testify that there was heavy rain when the goods were lying in the open. There was no covered railway rain when the goods were lying in the open. There was no covered railway sheds. The Corporation did apply to the authorities for a shortage survey but the request was declined as no liability is accepted for claim for shortages in seal-intact wagons. I also find the Contractor right on his contention that under the contract his liability was ex-wagon basis and not afterwords.”

Accordingly, objections against dismissal of the counter-claim of the petitioner under this head is also rejected.

9. The last issue which has been urged by the counsel for the petitioner and which is liable to be partly accepted, is with respect to the rate of interest as

awarded by the Arbitrator. The Arbitrator has awarded interest at the rate of 18 % per annum simple from the date of the Award till the date of payment. Ordinarily, I would have reduced the rate of interest to 9% per annum simple, but, I note that the Arbitrator has not given any interest either for the pre-reference period or the pendent- lite period. Accordingly, in the facts and circumstances of the case, I therefore reduce the interest from 18% per annum to 12% per annum simple. In case, the payment under Award and as per this judgment is made within the period of 90 days from today then the rate of interest would be 12%. In case, however, the payment is not made within 90 days from today, the rate of interest will continue to be 18% per annum.

10. For the sake of completeness, I must note that certain more claims were sought to be urged by the counsel for the petitioner, however, on finding during the course of arguments that the conclusions of the Arbitrator were not such which could really effectively be challenged, hence not much stress was or could be laid by the counsel for the petitioner as regards such claims as decided by the Award.

11. With the above observations, objection petition is dismissed except the part of variation with respect to rate of interest. The parties are left to bear their own costs.

VALMIKI J.MEHTA, J

January 08, 2010/ib