

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

+ **CS(OS) No.2524A/1995 & IA No.515/1996**

**Date of Decision: January 08, 2010**

M/S. SCANDIA SHIPBROKERING & AGENCY LTD.

.....Plaintiff

Through: Mr.Prashant Pratap and  
Mr. O.P.Gaggar, Advocates.

VERSUS

MMTC LIMITED

.....Defendant

Through: Mr.C.M.Oberoi, Advocate.

% **CORAM:**  
**HON'BLE MS. JUSTICE ARUNA SURESH**

- (1) Whether reporters of local paper may be allowed to see the judgment? Yes
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest? Yes

## **J U D G M E N T**

### **ARUNA SURESH, J.**

1. Umpire Capt.D.K. Verma filed his Award dated 17<sup>th</sup> August, 1995, for making it a Rule of the Court. Notice of filing of the award was served upon both the parties. Defendant MMTC Limited filed its objections to the award. These objections have been controverted by the claimant/plaintiff with the prayer to make the award a Rule of the Court.

2. In brief, the facts of this case are that on 18<sup>th</sup> July, 1990, defendant MMTC Limited entered into a Charter Party Contract with the plaintiff as owners of the Motor Vessel *Kopalnia Szombierki* (hereinafter referred to as the 'Vessel') for carrying a cargo of Rock Sulphate in bulk from the Port of Aqaba (Jordan) to the Port of Haldia (Calcutta). Vessel arrived at Aqaba for loading of cargo on 22<sup>nd</sup> July, 1990 and loading of cargo was completed on 24<sup>th</sup> July, 1990. Vessel arrived at Sandheads on 9<sup>th</sup> August, 1990. The Vessel waited at Sandheads from 9<sup>th</sup> August, 1990 to 27<sup>th</sup> August, 1990, on account of congestion at Haldia Port and no berth being available. It tendered a Notice of Readiness. The Pilot was granted free pratique and the Vessel berthed at Haldia Port on 27<sup>th</sup> August, 1990. Since total time allowed for discharge expired, the Vessel was on demurrage since after 7<sup>th</sup> September, 1990. Discharge was completed on 23<sup>rd</sup> September, 1990. Plaintiff claimed demurrage for 385 hours aggregating to US\$ 72,187.50; balance freight and demurrage claim of US\$ 94,548.67 was sent by the defendant to the plaintiff on 26<sup>th</sup> December, 1990. Defendant claimed dispatch at the Port of loading and

accepted demurrage at discharge Port only for 1 day 2 hours 27 minutes and made payment of US\$ 26,827.06 towards balance freight.

3. Consequently, a dispute arose *inter se* the parties within the meaning of Arbitration Clause 46 in the Charter Party Contract. Plaintiff appointed Capt.S.M.Beri as its Arbitrator on 13<sup>th</sup> May, 1993. Respondent appointed Mr. Suraj Prakash as its Arbitrator on 20<sup>th</sup> August, 1993. On 9<sup>th</sup> November, 1994, both the Arbitrators appointed Capt.D.K.Verma as an Umpire. Arbitrators entered into reference and adjudicated upon the claim of the plaintiff. Arbitrator Capt.S.M.Beri made his award on 6<sup>th</sup> April, 1995, whereas Arbitrator Mr.Suraj Prakash made his award on 29<sup>th</sup> April, 1995. Since both the Arbitrators disagreed and made their separate Awards, Arbitrator S.M.Beri wrote a letter dated 26<sup>th</sup> April, 1995 to the Umpire, Capt.Verma, informing him that he should enter into reference as the Arbitrators had disagreed. As requested by the Umpire, defendant deposited Rs.20,000/- towards Umpire's fees and expenses on 14<sup>th</sup> June, 1995 and plaintiff deposited has shared fees and expenses on 23<sup>rd</sup> June, 1995. Umpire

gave notices to the parties on 27<sup>th</sup> June, 1995, that he had received the deposited amount and had entered upon the reference as an Umpire on 23<sup>rd</sup> June, 1995 and would make his award within two months. Umpire published his award on 17<sup>th</sup> August, 1995 directing the defendant to pay the plaintiff a sum of US\$ 62,971.51 together with interest @ 12% per annum from 25<sup>th</sup> April, 1991, on account of demurrage at the Port of discharge after allowing a set-off in the sum of US\$ 8,718.25 towards dispatch at the Port of Haldia. Capt.D.K.Verma filed his award in the Court on 1<sup>st</sup> November, 1995 to make it a Rule of the Court.

4. Mr. C.M.Oberoi, learned counsel appearing for the objector/defendant has argued that the Umpire has mis-conducted himself in utter disregard to the Arbitration Agreement contained in Clause 46 of the Charter Party Contract, and provisions of the Arbitration Act, 1940 (hereinafter referred to as the 'Act') and in violation of the well settled principles of law and natural justice. It is argued that Umpire, who pronounced the award did not sit in the arbitration proceedings held by the Arbitral Tribunal. The Umpire was not empowered to

write any award in absence of an agreement specially when dispute between the two Arbitrators was regarding the issue of a reasoned award, which is apparent from the letter dated 20<sup>th</sup> May, 1995, written by Arbitrator Mr. Suraj Prakash to Capt.Beri, the other Arbitrator.

5. It is further argued that the Umpire did not hold any hearing nor issued any notice of hearing to the parties and none appeared on behalf of the defendant before the Umpire and it is not known whether the plaintiff's Advocate communicated with or appeared before the said Umpire. It is emphasized that Umpire mis-conducted himself, as he did not give any opportunity of hearing to the defendant nor did he issue any notice of hearing and acted in violation of principles of natural justice and provisions of Schedule I Para 4 to the Act.

6. Mr. Prashant Pratap, learned counsel appearing for the plaintiff has argued that the two Arbitrators had issued notices to the parties dated 26<sup>th</sup> April, 1995 and 20<sup>th</sup> May, 1995 respectively, that they had differed and had referred the dispute to the Umpire.

He further argued that despite the Umpire having issued the notice dated 27<sup>th</sup> June, 1995, informing the parties that he had entered upon reference, defendant did not move any application before the Umpire for an oral hearing and, therefore, under these circumstances, their conduct indicated that they waived their right of oral hearing. It is further argued that oral hearing before an Umpire is not a *sine-qua-non* of the principles of natural justice. After coming to know that Arbitrators had disagreed and Umpire had entered into reference, it was for the defendant to make an application seeking oral hearing. The counsel emphasized that defendant deposited the fees with the Umpire on 14<sup>th</sup> June, 1995 with no request for an oral hearing and it seemed that defendant understood that the Umpire would make his award based on the pleadings, documents and evidence adduced before the Arbitrators, record of which was handed over to him. It is further argued that no prejudice of any nature has been caused to the defendant on account of alleged failure on the part of the Umpire to grant any opportunity of oral hearing or in not issuing any notice for the hearing, further defendant has

not stated what prejudice has been caused to them and, therefore, it cannot be said that Umpire mis-conducted himself in utter violation of the Charter Party Contract, and the provisions of the Act and violated the principles of natural justice.

7. Clause 46 of the Charter Party Contract provides for arbitration in the following manner:-

*“All disputes arising under this charter shall be settled in India in accordance with the provisions of the Arbitration Act, 1940 of India, each party appointing an Arbitrator from out of the panel of Arbitrators maintained by the Indian Council of Arbitration, New Delhi and the two Arbitrators appointing an Umpire whose decision, in the event of disagreement between the Arbitrators shall be final and binding upon both parties hereto. The Arbitrators and the Umpire shall be commercial men.”*

8. Thus, it is clear that as per this Clause, each party was required to appoint an Arbitrator from out of the panel of the Arbitrators maintained by the Indian Council of Arbitration, New Delhi, and the two Arbitrators appointing an Umpire, whose decision, in the event of disagreement between the Arbitrators, would be final and binding. The Arbitrators and the Umpire had to be

commercial men. In accordance with this Clause, when a dispute arose between the parties regarding payment of demurrage and freight charges, plaintiff appointed Capt.S.M.Beri and defendant appointed Mr.Suraj Prakash as their Arbitrators. Both the Arbitrators, vide letter dated 9<sup>th</sup> November, 1994, appointed Capt.D.K.Verma as an Umpire, informing him that as per the Arbitration Clause, in the event of a disagreement between the Arbitrators, they would refer the matter to him. The fact remains that Arbitrators disagreed with each other and gave separate awards.

9. Resultantly, vide communication dated 25<sup>th</sup> April, 1995, Capt.S.M.Beri, Arbitrator of the plaintiff informed Umpire D.K.Verma that the two Arbitrators in the matter of dispute *inter se* the parties had disagreed and he sent the original award annexed to the said letter, with a request to the Umpire to issue his award at the earliest. Copies of this letter were sent to Sh.Suraj Prakash, Arbitrator of the defendant, to the defendant company as well as to the counsel for the plaintiff. Sh.Suraj Prakash, Arbitrator for the defendant sent a communication dated 20<sup>th</sup> May, 1995, to Capt.S.M.Beri,

Arbitrator of the plaintiff informing that he had already submitted his award dated 29<sup>th</sup> April, 1995, to Umpire Capt.D.K.Verma for his information and issue of final award on the basis of two different awards given by both of them. He had also sent copies of his communication to the Umpire, to counsel for the plaintiff as well as to the defendant. There is no dispute that the defendant was communicated disagreement between the two Arbitrators.

10. One of the objections raised by the defendant is that none of the Arbitrators supplied it the copies of their respective awards. This objection is nullified from the fact that Capt.S.M.Beri, Arbitrator for the plaintiff had sent a copy of his award along with the communication. True that, Sh.Suraj Prakash, Arbitrator for the defendant, did not supply the copy of his award to the parties stating that it was not a joint agreed award by the Arbitrators. The defendant could have asked from the Arbitrator to supply them a copy, when he failed to do so. In any case, this has not prejudiced the case of the defendant in any manner.

11. It is emphasized by learned counsel for the defendant that the Arbitration Clause envisages only one reference. The Umpire and the Arbitrators were required to sit in the said reference. However, the arbitration proceedings were conducted by the two Arbitrators without involvement of the Umpire, who never participated in the arbitration proceedings and, therefore, the entire arbitration proceedings stood vitiated as the two Arbitrators acted contrary to the Arbitration Clause without involving the Umpire. It is highlighted that the two Arbitrators made their awards on different dates and communicated the same to the Umpire. These submissions are devoid of any merits.

12. The term 'Umpire' has not been defined in the Arbitration Act. In case of Arbitrators not agreeing in an award, the matters in dispute is to be decided by the third person, who is called an 'Umpire'. Therefore, 'Umpire, means a third person, who is to decide a controversy of the question, submitted to the Arbitrators, in case of their disagreement. The Umpire's authority commences when Arbitrators are unable to agree. The Umpire, even if he sits in the proceedings conducted by

the Arbitral Tribunal, can hear the evidence and arguments advanced before them, but, cannot interfere in the proceedings, as he is not a Chairman of the Board of Arbitrators. Even though an Umpire may have heard whole of the evidence and followed the proceedings before the Arbitrators, he cannot, on entering the reference, pronounce his award forthwith without giving the parties further opportunity to make their submissions before him, unless, of course, the terms of the reference permit him to do so. He must hear the parties afresh, and deliver the award only if the parties have nothing further to submit. 'Entering on the reference' in Paragraph 4 of Schedule I does not mean 'proceed to give the award'. Thus, it is clear that for an Umpire to make his award, it is not a pre-condition that he must sit in the Arbitral Proceedings conducted by the Arbitrators after entering into reference.

13. Schedule I Para 4 of the Act reads as under:-

*"4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall*

*forthwith enter on the reference in lieu of the arbitrators.”*

14. In his book ‘Law of Arbitration’, Author Sh.S.D.Singh, dealing with Section 30 of the Act has analyzed the hearing before an Umpire in Note 30 at page 372, which is of relevance for proper adjudication of settling down the controversy raised by the defendant that Umpire mis-conducted himself and acted in utter violation of the principles of law laid down in the Act.

15. Note 30 of Section 30 of the Act reads as follows:-

***“30. Hearing before an umpire. It is legal misconduct on the part of an umpire to decide a case without giving notice to the parties or hearing their comments on the evidence. He must hear the evidence of the parties and their witnesses, if application be made to him by either party to do so, notwithstanding that the same evidence has already been adduced before the arbitrators. The umpire is not justified in the face of an objection by either party, in taking any part of the evidence from the notes of the arbitrators unless there are special provisions in the submission permitted him to do so. If it is necessary for the justice of the case that the umpire should personally hear the witnesses and application is made to him for that purpose, he is***

*not justified in refusing to hear them. If the umpire refused to hear evidence even when requested by the parties to do so, the award would be bad for misconduct.*

*An objection on the ground that the umpire has not reheard the evidence may, however, be waived by the conduct of the parties; and the fact that the parties seeking to impeach the award made no application to the umpire for rehearing the evidence, will generally operate as a waiver by conduct.*

*An umpire may, however, take part in the deliberation before the arbitrators, and may sit with them and consider the matters referred. If an award is made by the arbitrator unanimously, it would not be bad merely because the umpire took part in the deliberation.*

*But, though the umpire may sit with the arbitrators, and hear the evidence and arguments advance before them, he cannot interfere in the proceedings before them for he is not a sarpanch or a chairman of the Board of Arbitrators. But if an umpire while sitting with the arbitrators during the hearing of evidence puts a few questions to the witnesses to clear certain points or takes some part in the discussions as to how the documents are to be exhibited, there is no misconduct involved.*

*Even though an umpire may have heard the whole of the evidence and followed the proceedings before the arbitrators, he cannot, on entering*

*on the reference, pronounce his award forthwith without giving the parties further opportunity to make their submissions before him, unless, of course, the terms of the reference permit him to do so. 'Entering on the reference' in Paragraph 4 of Schedule I does not mean 'proceed to give the award'. He must hear the parties afresh, and deliver the award only if the parties have nothing further to submit."*

16. It may be noticed from Para 4 of the First Schedule to the Act that the Umpire enters on the reference 'in lieu of the Arbitrators'. Condition No.6 also indicates that the Act does not contemplate any distinction with regard to the conduct of proceedings by the Arbitrator or the Umpire. It is an undeniable fact that on reference of the matter to the Umpire, the Arbitrators become *functus officio*. Thereafter the Umpire takes upon himself the exclusive authority of determining the disputes and in doing so, he takes place of Arbitrator, as the expression 'in lieu of Arbitrators' conveys. In other words, unless there is an agreement to the contrary, it is crystal clear that there is no continuation of the proceedings before the Umpire and the process of arbitration has to start *de novo* before him as he takes the role of primary and exclusive authority to decide.

17. An Umpire, in view of provisions of First Schedule, is bound to observe the rules ensuring fair-play and justice and improvise the procedure in conformity with the principles of natural justice just as the Arbitrators are bound to do. It is the duty of an Umpire to afford a reasonable opportunity to the parties concerned. At the same time, it is also true that the principles of natural justice vary according to the requirements of the case and whether in a particular case, it is incumbent on the part of the Umpire to record the evidence and to hold an oral enquiry is a matter which may depend on the nature and complexion of the case. However, at least, an Umpire is expected to put the parties on notice and afford them an opportunity of hearing. Of course, if in the course of hearing, the parties do not ask for oral evidence to be recorded or other procedures to be followed, an Umpire may be justified in giving the award. The Umpire cannot refuse to hear the witness again and if on request of a party he fails to do so, the award would be bad for misconduct. This legal principle is, however, qualified by the principles of waiver by conduct of parties.

18. The defendant participated in the arbitration proceedings and made no application to the Umpire for re-hearing the evidence. The Umpire had addressed a communication dated 27<sup>th</sup> June, 1995, to the parties as well as counsel for the plaintiff indicating that defendant MMTC had deposited a sum of Rs.20,000/- towards his fees and expenses on 14<sup>th</sup> June, 1995 whereas the plaintiff has deposited Rs.20,000/- for the same on 23<sup>rd</sup> June, 1995.

19. Last paragraph of this communication reads as follows:-

*“ Parties are informed that I have commenced my adjudication as an Umpire in the above matter on 23<sup>rd</sup> June, 1995 and within two months from now my Award will be published and parties will be informed.”*

Copies of this communication were sent to both the Arbitrators, appointed by the respective parties.

20. Thus, it is clear that the Umpire had notified the parties about his having entered into reference on 23<sup>rd</sup> June, 1995. If the defendant was serious in its endeavour that it should get an opportunity to get the

evidence recorded afresh or resubmit the arguments, it could have easily filed an application seeking an opportunity from the Umpire to submit its arguments or to lead additional evidence, if any. After the aforesaid communication, Umpire was not required to specifically call upon the parties to clarify whether they wanted to lead evidence afresh or re-argue the matter. On receipt of this communication, it was for the defendant to make a request to the Umpire to afford it an opportunity to lead evidence afresh or to re-argue the matter. It was only if the Umpire had refused to hear the witness again or re-hear the party on request made to him or he failed to do so, the award would be bad for misconduct.

21. Hence, I do not find any oblique reference to indicate that defendant had any such intention to submit afresh before the Umpire. When the defendant seeking to impeach the award made no application to the Umpire for rehearing of the evidence, the same would generally operate as a 'waiver' by conduct. This objection as raised, is clearly an after thought which arose during the culmination of the proceedings before the Umpire. The defendant did not demand the hearing and at no stage

applied for all or any of the evidence to be recorded afresh. Therefore, under these circumstances, it must be held that the defendant waived its aforesaid right by its conduct. The Umpire was required to make his award within two months of his entering into reference of the matter, which he did in the instant case. Therefore, it cannot be said that Umpire mis-conducted himself and acted against the agreement or the provisions contained in the Act or violated the principles of natural justice.

22. On merits it is argued that the impugned award suffers from errors apparent on the face of the award as Umpire acted wrongfully and illegally in holding that the Vessel rightly tendered the Notice of Readiness on 9<sup>th</sup> August, 1990, which on its face was invalid, ineffectual, illegal and in violation of the contractual provisions contained in Clause 37 of the Charter Party Contract and Vessel could not have been considered in law to be ready in all respects for discharge. It is urged that Umpire acted wrongfully by ignoring the legal requirement and disregarding the fact that the Vessel had been granted final inward entry by Customs only on 27<sup>th</sup> August, 1999; the Umpire erred in appreciating the

documentary evidence when he observed that due to congestion at the Port of Haldia and Clauses 32 and 42 of the Charter Party Contract did not come into effect; the Umpire failed to appreciate the statement of Mr. Jacob, a witnesses for the defendant and his cross-examination correctly.

23. In view of the fact that this Court cannot sit in appeal to decide if the Arbitrator or the Umpire, as the case may be, did not properly appreciate the evidence adduced on record, the challenge to the award on its merits is not sustainable. The Court, in dealing with an application to set aside an award, is not to consider whether the view of the Arbitrator on the evidence is justified. The Arbitrator's adjudication is generally considered as binding between the parties as he is a Tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Sections 30 and 33 of the Act. Therefore, this Court, cannot not sit as a court of appeal; to reappraise the evidence and attempt to come to a different view than arrived at by the Umpire. Merely because this Court on the same set of evidence could possibly come to a

different view would not be a ground to interfere with the award.

24. In ***Arosan Enterprises Ltd. v. Union of India & Anr., (1999) 9 SCC 449***, the Supreme Court categorically laid down that in the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available unless there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event, however, two views are possible on a question of law, the Court would not be justified in interfering with the award of the Arbitrator if the view taken recourse to is a possible view.

25. It is for the Arbitrator to appreciate and assess the evidence of the parties as interpretation of the contract is within the jurisdiction of the Arbitrator. The Court, therefore, has no power to interfere and reappraise the evidence and the terms and conditions of the Contract. There is no scope for the Court to reappraise the matter.

26. In the instant case, the Umpire has applied his mind to the pleadings, evidence adduced before the Arbitrators and the terms and conditions of the contract and has given a well-reasoned award. Hence, there is no reason for this Court to interfere in the impugned award made by the Umpire within the ambit of Sections 30 and 33 of the Act.

27. Therefore, the objection petition, being without any merit is hereby dismissed. The award dated 17<sup>th</sup> August, 1995 is hereby made a Rule of the Court. Decree in terms of the award be prepared.

**ARUNA SURESH  
(JUDGE)**

**JANUARY 08, 2010**

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