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

% ***Judgment Pronounced on: 23.10.2024***

\+ **FAO(OS) (COMM) 38/2020**

PEC LIMITED ..... Appellant

versus

ADM ASIA PACIFIC TRADING PTE. LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Kaustubh Sinha and Ms. Surbhi Mehta, Advs.

For the Respondents : Mr. Arpit Dwivedi, Mr. Vijay Nair and Ms. Sakshi Kapoor, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE TARA VITASTA GANJU

JUDGMENT

TARA VITASTA GANJU, J.:

1. This Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the "Arbitration Act"] is directed against judgement dated 13.07.2016 in O.M.P. 1102/2014 [hereinafter referred to as the "Impugned Judgement"]. By the Impugned Judgment, the learned Single Judge dismissed the petition filed by Appellant under Section 34 of the Arbitration Act, challenging the Arbitral Award dated 28.05.2014 [hereinafter referred to as "Arbitral Award"] passed by the Arbitral Tribunal in the favour of the Respondent.

2. The Impugned Judgment upheld the Arbitral Award in its entirety. Although the Appeal originally challenged the entire Award, a Coordinate Bench of this Court, in its order dated 17.02.2020, noted that the Appellant had chosen to limit the Appeal. The only ground that the Appellant has raised, is the turning down of the plea of the Appellant that the Charter Party Agreement dated 24.06.2008 executed between the Respondent and the owner of the subject ship [hereinafter referred to as the "Charter Party Agreement"] ought to be read into the contract governing the parties for the purposes of determining demurrage.

3. Briefly, the facts are that the Appellant issued a tender on 18.07.2008 for the import of 100,000 Metric Ton (MT) of Canadian Yellow Peas. The Respondent submitted a bid to supply 40,000 MT (+/- 10%). After negotiations, the Appellant awarded two Contracts dated 30.07.2008 to the Respondent for the supply of 20,000 MT (+/- 10%) each, totalling 40,000 MT (+/- 10%) on a Cost Insurance and Freight (C&F) Free Out basis, with discharge ports at Vishakhapatnam (Vizag) and Kolkata, using one vessel [hereinafter referred to as "the Contract"]. The shipping period was set for September to October 2008.

4. The Appellant, as the buyer/importer, was responsible for discharging the cargo at the Indian ports, while the Respondent, as the seller/supplier, was responsible for shipping the cargo to India. The Respondent loaded 42,000 MT of cargo on the vessel, which arrived in Vishakhapatnam on 14.10.2008, discharged half of the cargo at Vizag, and then sailed for Kolkata on 21.10.2008, arriving on 22.10.2008, to complete the discharge. The laytime commenced on 23.10.2008 at 1700 hours, and discharge was completed on 22.11.2008 at 0115 hours.

5. Disputes arose between the parties regarding the calculation of laytime and Demurrage. After the lapse of two months on 23.01.2009, the Respondent emailed the Appellant, demanding USD 4,20,312 as Demurrage. The Appellant, on 31.03.2009, disputed this claim, arguing that based on the laytime calculation sheet, they were actually owed dispatch fees of USD 17,100.69. On the same day, 31.03.2009, the Respondent sent another email revising their demurrage claim to USD 4,16,822.92 for a period of 16 days, 16 hours, and 09 minutes.

6. The Respondent then proceeded to send out legal notices dated 08.06.2011 stating since the Appellant did not discharge cargo within the stipulated time, it was liable to pay damages at the agreed rate of USD 25,000/- per day for 16 days, 16 hours and 09 minutes amounting to USD 4,16,822.92. This demand was revised on 20.10.2011 to USD 420,312.50 arising out of the two Contracts. The notices also set out that a failure to make such payment would result in invocation of Arbitration by the Respondent.

7. Consequently, the Respondent invoked arbitration on 14.11.2011. The Arbitral Tribunal framed four issues in the matter:

(i) Whether the claim was barred by limitation;

(ii) Whether the claimant/Respondent is entitled to the claimed amount;

(iii) Whether the Appellant is entitled to the Counter-Claim;

(iv) Interest, at what rate and from what date.

7.1 The plea of limitation was not pressed by the Appellant and was dropped at the time of final arguments. To calculate the entitlement of the

Claimant/Respondent, the Arbitral Tribunal considered the following; (i) Lay time commencement at Vizag; (ii) Rate of discharge at Vizag and Kolkata; and (iii) When the lay time commenced at Kolkata.

7.2 The Appellant contended that since there was no Charter Party Agreement in existence, no demurrage rates were agreed. This contention was rejected by the Arbitral Tribunal. It held that being a C&F contract, the Charter Party Agreement was signed between the Respondent and the Ship owner to which the Appellant was not privy.

7.3 The second contention was that Clause 16 of Annexure-II of the Contract refers to the Charter Party Agreement and, thus, all terms of the Charter Party Agreement also form part of the Contract. This argument has also been agitated before this Court in the present Appeal as well.

7.4 The Arbitral Tribunal rejected this contention of the Appellant and held that there was no question of the Charter Party Agreement being incorporated as a part of the Contract. It was held that the role of the Appellant was limited to discharge the Cargo once the Vessel arrived at the nominated port.

7.5 The Arbitral Tribunal while relying on judgement of the Coordinate Bench in ***MMTC Ltd. v. International Commodities Export Corporation of New York***[1] which upheld the judgment of a Single Judge of this Court in ***MMTC Limited v. International Commodities Export Corporation of New York***[2], concluded that Clause 16 of Annexure-II of the Contract cited charter party to provide for pre-estimate of damages. It was held that there

[1] 2013 SCC OnLine Del 832
[2] 2012 SCC OnLine Del 2374

was no scope of incorporation of the Charter Party Agreement, by such a clause. The Arbitral Tribunal held that allowing such incorporation would lead to contradictory terms between the Contract and Charter Party Agreement.

7.6 The plea of the Appellant that Clause 16 of the Contract: Force Majeure, extends to the Contract was also rejected by the Arbitral Tribunal since it did not find any valid notice or certificate as was required under such Clause referring to a strike during the discharge operations at the ports.

8. After examining the pleadings, the Arbitral Tribunal reached a conclusion that the Contract provides for a fixed pre-determined rate of demurrage. It further held that neither the Appellant nor the Respondent's time sheet calculates the time correctly and, since there was no dispute amongst the parties regarding the total laytime allowed, the Arbitral Tribunal re-worked the lay time calculations and calculated the demurrage incurred at the discharge ports of Vizag and Kolkata at an average rate of discharge of 4000 MTs per weather working day [PWWD]. The re-worked time sheet was attached as an Annexure to the Award.

8.1 On the entitlement of the Counter-Claim, the Arbitral Tribunal held that new arguments were introduced by the Appellant which were not tenable including that:

(i) There was no agreed demurrage rate under the Contract;

(ii) The Appellant was entitled to the defences contained within the Charter Party Agreement; and

(iii) Demurrage does not accrue during the period of strike citing

the Force Majeure Clause of the Contract.

9. Thus, Arbitral Tribunal comprising three members passed a unanimous Award on 28.05.2014, holding that the Respondent was entitled to demurrage for 15 days, 16 hours, and 9 minutes. The Tribunal awarded USD 391,823 in demurrage to the Respondent, along with 5% interest from 15.11.2011 until the date of final payment. The Arbitral Tribunal held that in terms of the Counter-Claim of the Appellant as per the reworked lay time calculations, it was the Respondent who was entitled to a demurrage claim. Thus, the Counter-Claim of the Appellant was dismissed.

10. Aggrieved by the Arbitral Award, the Appellant filed a Petition under Section 34 of the Arbitration Act. The Appellant expanded its arguments in the Petition to claim that the Arbitral Tribunal failed to recognize the Charter Party Agreement as a crucial part of the overall Contract, affecting not just the owner but also the importer, the Appellant. Notices of Readiness given at Vizag and Kolkata explicitly mentioned that they were subject to the Charter Party Agreement, indicating that laytime should be calculated strictly according to the Charter Party Agreement, which all parties, including the Appellant, the Respondent, and the ship owner had signed.

10.1 Additionally, it was urged by the Appellant that the Contract between the Appellant and the Respondent specifically references the charter party in Clause 16 of Annexure-II of Contract, which states that any demurrage beyond the agreed time will be calculated as per the charter party, up to a maximum of USD 25,000/-. Therefore, the Charter Party

Agreement is the principal Contract that would be the basis for awarding damages, and since the ship owners have not claimed any amount on account of the strike days, it implies exemptions.

10.2 The Respondent argued that the Petition should be dismissed as it fails to establish any ground for review of the Arbitral Award under Section 34(2) of the Arbitration Act. It was contended that the Appellant was attempting to have the Court re-examine evidence and facts already decided by the Arbitral Tribunal, which is impermissible under Section 34 of the Arbitration Act. Reliance was placed on ***Associate Builders v. Delhi Development Authority***[3], to emphasize the limited scope of Section 34 petitions.

10.3 The Respondent further asserted that many claims about engine problems, labour strikes, and political disturbances were not pleaded before the Arbitral Tribunal and were only introduced during arguments. The Appellant has failed to prove Force Majeure events or provide the required evidence like certificates from the Chamber of Commerce for the alleged strikes.

11. The learned Single Judge has found that the Arbitral Tribunal had dealt with all the contentions of the parties. It was held that the Appellant had failed to establish the force majeure event and that political disturbance could not be considered as a strike for the purposes of this Contract. The learned Single Judge held that the Contract has been correctly interpreted and the view taken by the Arbitral Tribunal is a plausible view and it is settled law that the Court will not interfere under

[3] (2015) 3 SCC 49

Section 34 of the Arbitration Act and substitute its reasoning with the reasoning of an Arbitral Tribunal. Relying on the ***Steel Authority of India Limited v. Gupta Brother Steel Tubes Ltd.***[4] case, the learned Single Judge held that an error relatable to an interpretation of the Contract is not an error amenable to correction as it is not an error on the face of the Award.

11.1 The learned Single Judge also held that the judgment of the Coordinate Bench of this Court in the ***MMTC*** case has interpreted a similar clause holding that it provided for a pre-estimate of damages payable as demurrage which is referred to in paragraph 3 of the Arbitral Award and that the Arbitral Tribunal had rightly interpreted such clause in terms of the ***MMTC*** case. The period of lay time has been agreed by the Appellant to be ten days. Since the cargo was loaded in more than four hatches and the same is not a disputed fact, the contention of the Appellant cannot be considered, when the clause is unambiguous. The learned Single Judge thus held that the Arbitral Tribunal had not acted arbitrarily, irrationally or independently of the Contract nor was the Award passed *sans* jurisdiction and thus dismissed the objections filed under Section 34 of the Arbitration Act by the Appellant. This led to the filing of the present Appeal.

12. As stated above, the Appellant had on 17.02.2020, restricted its Appeal to the single issue that the Charter Party Agreement executed between the Respondent and the owner of the Ship is to be read into the Contract governing the party for determining demurrage and the terms in such Charter Party Agreement is deemed to be incorporated by reference

[4] (2009) 10 SCC 63

into the Contract.

13. Learned Counsel for the Appellant has contended that the charter party is an inherent part of the clause on demurrage, and thus, any adjudication on demurrage would be incomplete without reference to the terms of the charter party. The Arbitral Tribunal failed to consider this point while adjudicating the ground of unjust enrichment and consequently rendered its adjudication as *non-est*.

13.1 It was further contended that no compensation could have been awarded to the Respondent without it satisfying the Court of the actual damages suffered, which needed to be based on proof of loss. Reliance was placed on the Supreme Court judgment in ***Kailash Nath Associates v. DDA & Anr.***[5]

13.2 The Appellant further contested that the ship owner has exempted the Respondent, from paying any Demurrages, and as such this benefit should flow to the Appellant, else it will amount unjust enrichment to the Respondent. It was averred that the Arbitral Tribunal wrongly relied on the Contract by holding that it provided for a pre-determined rate of demurrages.

13.3 The Appellant also relied upon the Impugned Order to contend that the learned Single Judge had by an Order dated 25.08.2015 called for an Affidavit to be filed by the Respondent stating on oath whether any demurrage was paid to the ship owners for delay in discharging the cargo in India. The Affidavit was filed by one Mr. Shailesh Kanani, the

[5] (2015) 4 SCC 136

constituted attorney of the Respondent, stated that a sum of USD 3,10,777.78 was paid by the Respondents to the owners of the ship on 02.01.2009 towards demurrage due to the owners. The payment was made by banking channels. Thus, it was contended that the affidavit was only filed during the proceedings before the learned Single Judge and thus this exercise could have been undertaken before the Arbitral Tribunal as well to prove the actual loss caused to the Respondent but it was not done, instead a sum of USD 391,823 along with interest @ 5% was wrongly awarded by the Arbitral Award to the Respondent.

14. The Respondent, on the other hand, has contended that the Arbitral Tribunal comprising of two retired judges of this Court and a technical member has adequately dealt with all contentions of the Appellant including the contention on demurrage and that Courts have to be circumspect while exercising jurisdiction to set aside or modify the Arbitral Award. Reliance is placed on ***State Trading Corporation of India v. Helm Dungemittel Gmbh & Anr.***[6]***, Sutlej Construction Limited v. Union Territory of Chandigarh***[7] and ***Haryana Tourism Limited v. Kandhari Beverages Limited***[8] to state that a reasoned Award which has interpreted a Contract should not be interfered with by this Court.

14.1 The Respondent further contended that the Appellant is attempting to enjoy the advantages of a position while disavowing its attendant liabilities. The Appellant, in its Statement of Defence, initially denied any liability for demurrage but later sought dispatch money under Clause 16

[6] 2018 SCC OnLine Del 9334
[7] (2018) 1 SCC 718
[8] (2022) 3 SCC 237

of Annexure – II of the Contract at half the demurrage rate, i.e., USD 12,500 per day. The Appellant's own Statement of Defence references this claim, emphasizing that the vessel discharged cargo well within the available laytime, thus entitling them to dispatch money. However, Clause 16 of Annexure – II of the Contract also stipulates a demurrage rate, which the Appellant contests cannot be awarded, without proving any actual loss, contrary to their claim for dispatch at half the demurrage rate.

14.2 The Respondent averred that the Appellant's argument that the Charter Party Agreement should influence the interpretation of Clause 16 of Annexure – II of the Contract is unavailing. Clause 19 of the Charter Party Agreement provided the Charter Party's demurrage rate at USD 55,000 while the Respondent has been awarded at the Contract rate which is lower. Thus, it is beneficial to the Appellant as demurrage was calculated based on a lower value. It was averred that these issues were not raised in the pleadings but were introduced only during arguments before the Arbitral Tribunal, which considered it and rejected them. The Arbitral Tribunal's decision was supported by the ***MMTC*** case which holds that proving actual loss is unnecessary when a pre-fixed demurrage rate is agreed upon by the parties.

14.3 Lastly, it was contended that the Appellant's attempt to re-agitate the interpretation of the Contract clauses, both before the learned Single Judge and now before this Court, exceeds the scope of an appeal under Section 37 of the Arbitration Act. The Arbitral Tribunal's interpretation, affirmed by the learned Single Judge, was reasoned and consistent with legal precedents. The present appeal appears to be an effort to re-argue and reinterpret the contractual terms, which does not warrant interference

under the limited purview of Section 37 of Arbitration Act.

15. As stated above, the limited issue which requires adjudication in the present Appeal is whether the terms governing in the Charter Party Agreement ought to be read into the Contract between the parties for the purposes of award of demurrage.

16. It is necessary to set out certain undisputed facts in the matter:

(i) The Respondent/Claimant in its claim filed before the Arbitral Tribunal claimed demurrage under Clause 16 of Annexure-II of the Contract at half the demurrage rate of USD 12,500 per day totalling to USD 4,16,822.92 (for 16 days 16 hours and 9 minutes). The Appellant on the other hand disputed the claim for dispatch money and stated that it is entitled to payment for a sum of USD 30,712. During arguments before the Arbitral Tribunal, an oral plea was raised by the Appellant that the demurrage is required to be paid in terms of the Charter Party Agreement. This oral plea was rejected by the Arbitral Tribunal.

(ii) The Arbitral Tribunal found that the demurrage claim is required to be governed in terms of the Contract executed between the parties at Clause 16 of Annexure II of the Contract where the rate of up to a maximum of USD 25,000 per day or pro rata rate for any part of the day, was fixed.

(iii) Clause 19 of the Charter Party Agreement dealing with demurrage charges provides for a higher rate of USD 55,000 per day as the rate of demurrage.

(iv) Both the Arbitral Tribunal and the learned Single Judge of this

Court relied on the judgment of a Coordinate Bench of this Court in ***MMTC*** case to hold that where the rate of demurrage was already agreed upon between the parties, there was no requirement of proving actual loss.

17. The Appellant has contended that the Charter Party Agreement is an inherent part of the clause on demurrage and could not be ignored and an adjudication on demurrage in absence of the Charter Party Agreement is not correct. In addition, it is stated by the Appellant that the notice of readiness mentions the word *'charter party'* hence the Charter Party Agreement is to be considered.

17.1 The Respondent, on the other hand, states that the Appellant was the buyer of the product and a buyer has nothing to do with the terms of the Charter Party Agreement under a C&F Contract and is not involved in its negotiations either. It was further contended that the demurrage rate under the Contract is lesser than the rate under the Charter Party Agreement.

18. The record shows that two Notices of Readiness were sent, one dated 14.10.2008 *qua* the Visakhapatnam Port and other dated 22.10.2008 *qua* the Kolkata Port. Both these notices state that the ship has arrived and is ready to discharge cargo in terms of the charter party. The notices only state that the terms of the Charter Party Agreement are to be complied with, as can be seen from the extract below:

> *"*
>
> ***14.10.2008***
>
> *TO: M/S.SARAT CHATTERJEE & CO.(VSP) PVT.LTD.*
> *AS RECEIVER AGENTS*
> *TO M/S.PEC LTD*
>
> *Dear Sirs,*

SUB:MV, "TU QIANG" NOTICE OF READINESS

Please be notified that M.V."TU OJANG" under our agency, having arrived at 2118 HRS on 14.10.2008 at Visakhapatnam Port ***limits to Discharge 21,000 METRIC TONNES of CANADIAN WHOLE YELLOW PEAS IN BULK on your principal's account is ready in all respects to commence discharging under terms and conditions of the relative Charter Party or Contract or Fixture Note, and any addenda thereto.***
Lay time to commence and count as per terms, conditions, provisions and exceptions of ***the relative Charter Party/Fixture Note or Contract and any addenda thereto.*** *Kindly return six copies of this Notice of Readiness duly accepted by you.*

Thanking you and assuring you of our best cooperation at all times…"

"Port: KOLKATA

Date:22.10.2008

TO ALL CONCERN PARTIES
To: B GHOSE & CO PVT LTD.
Cc: SM LINE PTE LTD:

Notice of Readiness
M/V: TU QIANG

This is to advise you that the above named vessel has arrived at KOLKATA pilot station at 1700LT hours on 22ND Oct. 2008 ***and she is in all respects ready to discharge her cargo in accordance with the terms and condition of the relative Charter Party****…"*

[Emphasis is ours]

18.1 Undisputably, there is no reference in the above notices to the Contract. The notice dated 14.10.2008 is issued by shipping agent and is addressed to the "receiver" agent of the Appellant. This document cannot be considered as forming part of the Contract between the Appellant and the Respondent. In any event, it makes no reference to the Respondent.

19. Charter party is a maritime contract between a ship owner and 'charterer' for the carriage of cargo or for the lease of the ship itself. The terms and conditions of the charter/carriage form part of a charter party agreement. It is independent and distinct from the contract between the

cargo owner (supplier) and its buyer. Various clauses of Annexure-II of the Contract refer to the term 'charter party'. The reference there however, is not with respect to the demurrage or discharge – which is contained in Clause 16 of Annexure-II of the Contract alone.

19.1 For a better understanding of the clause on demurrage in the Contract, it is apposite to set out Clause 16 (Annexure-II) of the Contract which is extracted below:

> *"The cargo to be discharged at an average rate of 4000 MT for Vishakhapatnam and/ or Kolkata Port Per Weather Day (PWWD) of 24 consecutive hours based on minimum number of four hatches or prorata. Each hatch must have one gear/crane. Sundays and Holidays excepted, even if used.* ***If detained longer, receiver to pay demurrage as per charter party, maximum upto USD 25,000/- per weather working day and on prorata for any part of the day. Despatch money, if any, shall be paid by the Seller to Receiver at half the demurrage rate for all the time saved.*** *Lay time at discharge port shall commence 24 hours after notice of readiness has been received in writing by Fax or cable by the receiver on all working days from Monday to Friday between 1000 hours to 1700 hours, provided Fax message was not garbled."*
>
> [Emphasis is ours]

20. A Coordinate Bench of this Court in ***MMTC*** case, while dealing with a plea *qua* demurrage with a similar clause which specified a maximum demurrage of USD 4,000/- per day had held that where a pre-estimate of damages is specified in a Contract between the parties and the parties agreed that demurrages would be calculated at such rate, the same would be the agreed rate. It was held that if the compensation set out in the Contract is a genuine pre-estimate of loss which the parties knew of at the time of executing the Contract, there is no question of proving actual loss nor is the party required to lead evidence. It further held that for the provision to come into play for a higher rate of Demurrage, prior approval

of parties would be required which was not taken. The pre-estimate of loss was set out and needed no modification. The extract below is relevant:

> *"15. The second limb of the submission of the learned counsel for the appellant flowed from the manner of computation of the demurrage. The arbitral tribunal calculated demurrage taking into consideration clause (26), which reads as under:*
>
> > ***"26. The sellers shall pay to the Buyers despatch money and Buyers to pay to the Sellers' demurrage money at the rate and in the currency as mentioned in the Charter Party per day and pro-rata the part of day for all time saved in discharging. Demurrage/despatch rate will be as per Charter Party but not exceeding US£ 4000/- 2000 A.T.S. per day****. In case such rates are higher, prior approval of the Buyers should be obtained."*
>
> *16. It was once again urged before us, as urged before the learned Single Judge, that clause 26 only provided an upper ceiling limit of US dollars 4,000 and that the actual value of the loss was never calculated and proved as was required to be done by the respondent.* ***Learned counsel referred to Maula Bux v. Union of India; (1969) 2 SCC 554 to advance the submission that actual loss or damage has to be proved. Such pre-estimates could only apply if there was inability to assess compensation which was not so in the present case. He has also referred to the judgment in Oil and Natural Gas Corporation Limited v. SAW Pipes Limited; (2003) 5 SCC 705 to contend that the intention of the parties is to be gathered from the words used in the agreement and if they are unambiguous it would be difficult to gather their intention different from the language used in the agreement.*** *Further compensation under Sections 73 & 74 of the Indian Contract Act, 1872 has to be reasonable except as to the maximum ceiling stipulated.* ***Thus, if the compensation named in the award is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for loss suffered. On the other hand, if the compensation named in the contract is a genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence and prove actual loss suffered by him.***
>
> *17. On the other hand, learned senior counsel for the respondent drew attention of the court to the* ***Charter Party Agreement of the*** *respondent which itself* ***provided for a demurrage of US dollars 4,500****. However, under the agreement the amount of demurrage payable by the appellant to the respondent was less than that at US dollars 4,000 per day.* ***Not only that, the question of proving the demurrage would have arisen if***

> ***it was to exceed US dollars 4,000 for which in fact prior approval of the buyer/appellant was to be obtained.*** *It was also emphasized that this aspect was not even urged before the tribunal by the appellant and the liquidated damages provided in clause 26 were a genuine pre-estimate of losses to be suffered by the respondent (an aspect noticed in para 8 of the impugned order). Learned counsel for the appellant could not dispute this position before us though he stated that it formed a part of the written submission filed before the learned single Judge.*
>
> ***xxx***
>
> *19. We are in complete agreement with the submission of the learned counsel for the respondent on all the aspects, the findings in the impugned order being also to the similar effect. It is obvious from the reading of clause 26 that the same provides for pre-estimate of damages of US dollars 4,000 per day.* ***The provision which would come into play if a claim for a higher amount was laid by the respondent is also incorporated in that clause, which would require prior approval of the appellant.*** *It is in that context that the clause reads as the demurrage not to exceed US dollars 4,000 per day. This is certainly a plausible view of the clause if not the only view and the two learned arbitrators have come to a unanimous conclusion including the expert.*
>
> *20. We are also of the view that* ***this is how the parties have understood the contract as would be apparent from the lay day statement of the appellant itself calculated at the same rate, but for a lesser period.*** *Learned senior counsel for the respondent was, thus, right in contending that the only issue was the quantum and not the liability or the rate of calculation."*
>
> [Emphasis is ours]

21. We agree with the submissions of the Respondent that even if the argument of the Appellant is taken into consideration, the demurrage due to the Respondent would in fact be higher since the Contract provides for a higher rate of USD 55,000 per day. Clause 19 of the Charter Party Agreement is reproduced below:

> *"19. Demurrage at loading and/or discharge ports, if incurred, to be* ***paid at the rate of USD 55,000 per day or pro rata for part of a day and shall be paid by Charterers in respect of loading port(s)*** *and by Charterers/ Receivers in respect of discharging port(s). Despatch money to be paid by Owners at half the demurrage rate for all laytime saved at loading and/or discharge ports. Demurrage to be mutually agreed between the owners and charterers together with owner's*

declaration of final quantity…"

[Emphasis is ours]

22. Thus, if the clause of the Charter Party Agreement was taken into consideration, the entitlement of the Respondent would be more than double of what was awarded. Thus, the submission made by the Appellant does not achieve any purpose.

23. The Appellant has contended that the payment of demurrage charges made by the Appellant to the Respondent has resulted in the Respondent unjustly enriching himself. As stated in paragraph 13.3 above, the Respondent paid a sum of USD 3,10,777.78 to the owners of the ship on 02.01.2009 towards demurrage due. Thus, there is no unjust enrichment which has arisen in the present case. The plea taken by the Appellant that no affidavits were called for by the Arbitral Tribunal as was done by the learned Single Judge, is also without merit. The Arbitral Tribunal directed the payment in terms of Clause 16 (Annexure – II) of the Contract. In any event, once the affidavits were called for by the learned Single Judge, which show payment of demurrage to the ship owners, this issue also no longer survives.

24. The Appellant's contention that since the Arbitral Tribunal limited its adjudication to the clause(s) under the Contract and did not examine the Charter Party Agreement thus the award is *non-est*, is without any merit. The law for reference by incorporation of a contract is well settled. The reference of a document or another contract does not mean its automatic incorporation therein. If, a party intended only to adopt specific portions or part(s) of referred documents, the same would be set out in such contract, however, if the parties intend to incorporate the other

document in its entirety, such a reference will also be contained in the original contract.

25. The two applicable documents in the present case, are the Contracts (including Annexure-II) and the Charter Party Agreement. Clause 8(2) of the Contract is termed as *"Shipment"* and sets out that the detailed terms and conditions of the shipment are mentioned at Annexure-II. Annexure-II contains 18 Clauses and is titled *"Terms of Shipment on C&F Free Out Basis"* and contains clauses with reference to the type of Vessel, its ownership, berthing and such similar details, including discharge of Cargo and the port of discharge. There is no reference in either the Contract or the Annexure-II to the fact that the terms contained in the Charter Party Agreement shall form part of the Contract or shipping conditions.

25.1 The Charter Party Agreement, as stated above is executed between the Ship Owner and the Respondent and contains all relevant details of the contract of carriage. The Charter Party Agreement includes an *"Additional Clauses"* as well and runs into about 80 Clauses and Sub-clauses in all. There is no reference to the Contract/Annexure-II of the Contract at any place in the Charter Party Agreement either.

26. The Supreme Court in ***Himalaya House Co. Ltd., Bombay v. The Chief Controlling Revenue Authority***[9] has held that before the terms and conditions of an agreement can be said to be incorporated into another document, the intention of the parties with regard to the incorporation must clearly be reflected. The relevant extract is reproduced below:

> *"10. For the purpose of this case, we shall proceed on the assumption, without deciding, that the charging words in Article 23 of the Stamp*

[9] (1972) 1 SCC 726

> *Act "where the amount or value of the consideration for such conveyance as set forth therein" do not mean that the Revenue must have regard only to what the parties to the instruments have elected to state the consideration to be, but the duty must be assessed upon the amount or value of the consideration for the transfer as disclosed upon an examination of the terms of the instrument as a whole. The only reference to those persons in the Deed of Assignment is in the* ***We are of the opinion that the learned Chief Justice and Naik, J., were not justified in holding that the Deed of Assignment incorporates into itself the various agreements entered into between Uttamchand and the persons to whom he assigned flats, offices and shops. preamble wherein it is stated "****AND WHEREAS the Assignor having erected a building known as Himalaya House on the said piece of land had granted to certain persons the right to occupy flats, offices and shops in the said building AND WHEREAS the Assignee Company has been formed for the better administration of the said building and for the protection of the interests of the persons occupying the flats, offices and shops therein".* ***These clauses merely refer to the earlier transactions. They do not incorporate into the Assignment Deed the earlier agreements with the persons referred therein. Mere reference to some earlier transactions in a document does not amount to an incorporation in that document, of the terms and conditions relating thereto. From the language used in the Assignment Deed, it is not possible to come to the conclusion that the terms and conditions of the earlier transactions have been made a part of that Deed.*** *Further barring one particular agreement, other agreements were not before the Court. Therefore, it is not possible to know what the terms and conditions of those agreements were.* ***Before the terms and conditions of an agreement can be said to have been incorporated into another document, the same must clearly show that the parties thereto intended to incorporate them. No such intention is available in this case.****"*
>
> [Emphasis is ours]

27. As stated above, no Clause reflecting such intention of the parties is available in the Contract/Annexure-II thereto. The Appellant has not been able to show us any such Clause or document. In view of the aforegoing discussions, this Court finds that there is no infirmity in the Impugned Judgment.

28. The scope of interference in an Arbitral Award under Sections 34 and 37 of the Arbitration Act is limited. Amongst the grounds provided in

the Arbitration Act for interference with Arbitral Award is patent illegality, which is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. [See: ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.***[10] ***and MMTC Limited v. Vedanta Limited***[11]].

28.1 The Arbitrator examines the quality and quantity of evidence placed before him when he delivers his Arbitral Award and a view, which is possible on the facts as set forth by the Arbitrator must be relied upon. In the case of ***State of Jharkhand & Ors. v. HSS Integrated Sdn & Anr.***[12], the Supreme Court held that the Arbitral Tribunal is the master of evidence and a finding of fact arrived at by an arbitrator is on an appreciation of the evidence on record, and is not to be scrutinized as if the Court was sitting in appeal.

28.2 In ***Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. & Ors***.[13] the Supreme Court held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinized as if the Court was sitting in appeal. In para 51 of the judgment, it is observed and held as under:

> *"51. Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as Respondent 2 is concerned, it was always ready and willing to perform its contractual obligations, but was prevented*

[10] 2021 SCC OnLine SC 508
[11](2019) 4 SCC 163
[12] (2019) 9 SCC 798
[13] (2018) 3 SCC 133

> *by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is that the appellant had not given the list of locations and, therefore, its submissions that Respondent 2 had adequate lists of locations. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract.* ***These findings of facts which are arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental breach on the part of the appellant in carrying out its obligations, with no fault of Respondent 2 which had*** *invested whopping amount of Rs 163 crores in the project. A perusal of the award reveals that the Tribunal investigated the conduct of the entire transaction between the parties pertaining to the work order, including withholding of DTC locations, allegations and counter-allegations by the parties concerning installed objects. The arbitrators did not focus on a particular breach qua particular number of objects/class of objects. Respondent 2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract and once committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the termination of contract by Respondent 2 was in order and valid.* ***The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinized as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto."***
>
> [Emphasis is ours]

29. In a recent judgment, the Supreme Court in ***Hindustan Construction Co. Ltd. v. NHAI***[14] recapitulated the prevailing view that Courts should not customarily interfere with arbitral awards that are well reasoned, and contain a plausible view. The Supreme Court observed, that judges, by nature, may incline towards using a corrective lens, however, under Section 34 of the Arbitration Act, this corrective lens is inappropriate especially under Section 37 of the Arbitration Act. It was held that the error in interpreting a Contract is considered an error within its jurisdiction.

[14] (2024) 2 SCC 613

Therefore, judicial interference should be avoided unless absolutely necessary, ensuring the arbitrator's decision remains final and binding. The relevant extract of the ***Hindustan Construction*** case reads as follows:

> *"26. The prevailing view about the standard of scrutiny — not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily choose the path of least interference, except when absolutely necessary).* ***By training, inclination and experience, Judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34.*** *So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*
>
> ***27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly…"***
>
> [Emphasis is ours]

30. As stated above, the Arbitral Tribunal applying the principles enunciated in the ***MMTC*** case has passed an award in respect of demurrages/charges payable to the Respondent. The Arbitral Tribunal examined in detail the evidence placed before it by the parties and found that a fixed pre-determined rate to calculate demurrage formed part of the Contract entered into between the Appellant and the Respondent, which included an outer limit for such demurrage as well. The Appellant contended that the demurrage clause should be in terms of a Charter Party

Agreement to which it is not privy. No document was placed on record by the Appellant to show that the terms of the Charter Party Agreement form part of the Contract entered into between the Appellant and the Respondent.

31. In view of the aforesaid discussions, this Court finds no infirmity with the findings of the Arbitral Tribunal which were affirmed by the learned Single Judge, that merit interference by this Court. The Appeal is accordingly dismissed.

TARA VITASTA GANJU, J

VIBHU BAKHRU, J

OCTOBER 23, 2024/r/SA/*g.joshi*