S.H.HADAP

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.942 OF 2009

Steel Authority of India Limited,
Central Marketing Organization T & S Dept.,
Ispat Bhawan,
40, Jawaharlal Nehru Road,
Kolkata.

And also:
Registered office at Ispat Bhawan,
Lodhi Road, New Delhi. .. Petitioner

V/s

M/s.Mercator Lines Limited,
Having its office at Suite 83-87,
Mittal Tower, B-Wing,
Nariman Point, Mumbai 400 021. .. Respondent

Mr.Vishal Sheth with Mr.Y.C.Naidu and Mr.N.P.Dalvi i/by M/s.C.R.Naidu & Co.for petitioner.
Mr.Sunip Sen with Mr.Shivkumar Iyer and Mr.Amitava Majumdar i/by Bose & Mitra & Co.for Respondent.

CORAM: N.M.JAMDAR, J.

Judgment Reserved on : 4th December 2012
Judgment Pronounced on : 21st December, 2012

JUDGMENT:

By this Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner challenges

the Award passed by the sole Arbitrator dated 14th May 2009. By the impugned Award the Arbitrator has directed the petitioner to pay an amount of Rs.89,62,656/- towards the claim of the Respondent and an amount of Rs.85,000/- towards half of the arbitration costs.

2. The petitioner - Steel Authority of India Limited (SAIL) is a company incorporated under the Companies Act, having its office at Kolkata and the registered office at New Delhi. The petitioner is in the business of production of iron and steel, and for transportation of cargo it takes vessels on charter. The Respondent - Mercator Lines Limited (Mercator) is a company incorporated under the Companies Act having its registered office in Mumbai. Respondent owns several vessels and it is in the business of letting the vessels on charter for freight at sea.

3. The dispute between the parties is regarding the payment of demurrage charges to be paid by the petitioner to the Respondent. According to the Respondent the petitioner did not discharge the cargo within the stipulated period and is liable to pay demurrage charges to the Respondent. While it is the case of the petitioner that the discharge was delayed due to the reasons beyond control of the petitioner, and if this period is to be excluded then the petitioner is entitled to an incentive, and since the amount of incentive is much more than the demurrage claimed by the Respondent, the petitioner in fact is entitled to receive monies from the Respondent.

4. On 19th May, 2005 an agreement was executed between the petitioner and the Respondent for shipment of Cargo of 5 lakhs MT (5% more or less at Charterer's option). The cargo was to be shifted in parcels of 65-70000 MT (5% more or less at Owner's option) from Queensland, Australia for discharge at the ports of Vishakhapatnam/Paradip/Haldia in India. The agreement was on Voyage Charter basis.

5. Before the facts of the case are dealt with further, it is necessary to note the nature of contract between the parties. The contract was a voyage charter. There are several modes of taking a vessel on hire and the Voyage Charter is one of them. Voyage Charter is an agreement for carriage of full cargo, not for a period of time but for a voyage between two specified ports with charges fixed as per the tonnage of cargo loaded. Under the Voyage Charter the owner of the vessel is interested in expeditious completion of the voyage. Certain grace period given to the Charterer for loading and discharge of the cargo. If the voyage exceeds beyond the stipulated period the owner is put to loss as the vessel then cannot be let out on hire to other Charterers. Thus for speedy completion of voyage the owner provides both, an incentive as well as a deterrent. If the Charterer is not able to load and discharge the cargo within the grace period, the Charterer has to pay penalty to the owner in the form of demurrage. On the other hand if the Charterer is able to complete the loading and discharge before the grace period and frees the ship before the period agreed under charter, the owner rewards the Charterer by paying an incentive, termed as dispatch. The dispatch is payable both at the

time of loading as well as discharge. The agreement may contain, as in the present one, that the loading and discharge of cargo will be done by the Charterer's agent and the port authorities will be paid by the owner. When the vessel arrives in the port territory and is ready to discharge, the owner intimates the charterer by an advance notice so that the charterer can arrange for discharge of the cargo. The intimation is called Notice of Readiness. The liability of the charterer to unload the cargo begins when the notice of readiness is received. Within this period certain agreed rate of cargo has to be discharged. This is called laytime. The parties may agree that in certain contingencies the period which has started running when the notice of readiness is received, will be suspended. Barring these exceptions agreed between the parties the settled norm under the Voyage Charter is that the time period for discharge of cargo begins to run from the time the notice of readiness is received, subject to the conditions specifically agreed. The disputes normally arises under Voyage Charter as to whether the time period in which the Charterer could not load/discharge the cargo, should be excluded or not. Clauses dealing with such exclusions are also fairly settled in the shipping trade and their meaning and purport are generally commonly understood.

6. Certain clauses of the present agreement need to be noticed. Clause 3 specified that the vessel should have minimum discharge capacity of 8000 MT per day. Clause 9 provided that for acts of God and such other situations, the owners were not answerable, so also the charterer was not answerable for negligence or default or error in judgment of Trimmers or Stevedores employed in

loading or discharging the cargo. As per Clause 34 Notice of Readiness was to be given by the shipowners at the port of discharge. The addresses of the petitioners at all three ports viz.Visakhapatnam, Paradip and Haldia for service of notice were specified. Clause 35 provided for time counting provision. As per clause 35 time for discharge of cargo would commence 24 hours after Notice of Readiness was served, on arrival of the vessel within the port limits at port of discharge. Certain periods of time were to be excluded if the Notice of Readiness was given in the beginning of a weekend. Under clause 35 the time would start running for discharge of cargo after 24 hours, subject to certain timings. Clauses 36, 37, 38, 39 and 40 provided for contingencies where the period for discharge would stop running. In clause 42 it was provided that in case of war, rebellion, tumult, political disturbances, insurrections, lockouts, strike, riots, epidemics, intervention of sanitary customs and/or other constituted authorities and any other causes beyond the control of the charterer, the time lost at the discharge port was not to be counted and the period would stop running. As per clause 43 of the Charter party, daily discharge of 7000 MT at 24 hours working day was stipulated, which was subsequently agreed at 8000 MT. Clause 45 specified for Demurrage and Dispatch. As per Clause 50 the vessel was to be consigned to the Charterer's agents at loading and discharging ports with owners paying and bearing all the port charges. Clause 60 provided for Arbitration clause which stated that the Arbitrator will be a commercial man. Clause 61 provided for 'Force Majeure clause'. Some of the relevant clauses are reproduced in later part of the judgment.

7. As per the agreement, vessel MV Prem Poorva was assigned for the voyage. Vessel was loaded with 67996 MT of cargo at Hay Point, Queensland, Australia, and sailed on 9th October 2005. The vessel completed discharge at 2nd port at Haldia on 22nd November 2005. Between these dates certain events occurred which have led to the dispute between the parties.

8. The vessel arrived at Visakhapatanam on 28th October 2005 and left the port limits on 12th November 2005 and arrived at Haldia. As far as the exact timings of the movement of the ship between 28th October, 2005 and 13th November 2005, they are recorded by the parties in their Statement of Facts and these are admitted. When the the vessel arrived at Visakhapatanam on 28th October 2005 there was a waiting period from that date till berthing on 4th November 2005. The vessel discharged cargo till 6th November 2005 when it was pulled out on 6th November 2005, and it was reberthed on 12th November 2005. Further there was a waiting period at Haldia between 14th November 2005 and 18th November 2005.

9. The dispute between the parties arose as the petitioner exceeded the time limit allocated to it for discharge of cargo and consequently, the Respondent asked for demurrage charges. The occurrence of events itself are not in dispute but the reason for the events is the dispute between the parties. Since the petitioner did not pay the amount of demurrage charges, freight and amount towards currency fluctuation, the Respondent invoked arbitration

clause contained in the agreement dated 19th April 2008 by making a reference to the Indian Council for Arbitration, New Delhi.

10. The Indian Council for Arbitration forwarded three names of Arbitrators to the petitioner and the petitioner gave consent for Mr.H.M.Singh to be appointed as a sole Arbitrator. The Respondent filed its statement of claim on 24th June 2008 and the petitioner filed its reply and counter claim on 24th October 2008. The Respondent filed its rejoinder and defence to counter claim on 27th January 2009.

11. The claim of the Respondent before the Arbitrator was towards demurrage for Rs.86,95,866/- and towards currency fluctuation for Rs.18,19,485/-. The Respondent gave credit to the petitioner for load port dispatch of Rs.1,49,600 and therefore the final claim of the Respondent was of Rs.89,62,656/-. The petitioner contested the claim of demurrage charges on the ground that the vessel underperformed and since on arrival some of the cranes were not functioning and the vessel was pulled out by the Port Authorities, no liability arose pursuant to the Notice of Readiness. The petitioner also claimed Dispatch of Rs.2,66,078/- and further claim of Rs.25,00,000/- towards the breach of Charter Party Agreement and after adjusting the amount towards freight disbursement, the petitioner set up the counter claim for Rs.3,27,678/-.

12. The Arbitrator held that the petitioner did not prove that it

suffered any handicap for the alleged under-performance and the reasons set up by the petitioner for not unloading the cargo in the specified time period because the vessel was pulled out by the port authorities due to failure of the cranes, was an untenable ground. The Arbitrator found that the phrase in clause 42(h) of the agreement "causes beyond the control" on which reliance was placed by the petitioner has is to be read in conjunction with other sub-clauses appearing in the clause. The Arbitrator also found that the claim of the petitioner that during one period on account of poor performance of the cranes the port authorities pulled out the vessel, is not borne out by the record. The reasons given for another period, such as congestion at the port cannot be a ground to exclude the period. The Arbitrator found that the claim towards the currency fluctuation was justified. Accordingly Arbitrator granted the claim of the Respondent and rejected counter claim of the petitioner. The sole Arbitrator by his award dated 14th May 2009 awarded the sum of Rs.89,62,656/- to the Respondent alongwith 50% of Rs.1,70,000/- viz.Rs.85,000/- towards the costs. Petitioner has filed this Arbitration Petition under Section 34 of the Act challenging the Award dated 14th May 2009.

13. I have heard Mr.Mr.Vishal Sheth, learned counsel for petitioner and Mr.Mr.Sunip Sen, learned counsel for Respondent. The learned counsel for the parties have also circulated their notes of arguments.

14. Mr.Vishal Sheth, learned counsel on behalf of the petitioner contended;

(a) As the present charter was Voyage Charter the concept of free laytime, dispatch and demurrage would come into play. The connotations of these concepts are settled under the Maritime Law.

(b) Three periods viz.(a) 28th October 2005 to 4th November 2005; (b) 6th November 2005 to 12th November 2005 and (c) 14th November 2005 to 18th November 2005 need to be excluded from the calculations as the reasons because of which the cargo could not be discharged were beyond the control of the petitioner. More particularly the period between 6th November 2005 and 12th November 2005 when the vessel was forcibly shifted out of the port by the Visakhapatanam Port Authorities, as it falls under clause 42(h) of the Charter Party Agreement, being a reason beyond the control of the petitioner.

(c) The finding of the arbitrator that the petitioner will not be entitled to benefit of clause 42(h) since the petitioner did not prove that the vessel was shifted out by the port authorities due to poor performance, was not the relevant criteria for consideration.

(d) The Arbitrator has not considered that in the statement of facts the Respondent-owner of the ship had endorsed that the vessel was shifted out by the port authorities, and once this fact was admitted, the case for exception under clause

42(h) of the Charter Party was made out.

(e) The fact that the vessel was shifted out by the port authorities from 6th November 2005 to 12th November 2005 was an admitted position and even though the petitioner may not have succeeded in showing that there was poor performance of the vessel, that factor became irrelevant once there was an action by the port authorities over which the petitioner had no control.

(f) The Arbitrator has laid emphasis on finding out whether the vessel under-performed as alleged by the petitioner, when that fact was irrelevant as once it was an admitted position that the port authorities shifted the vessel forcibly, a ground for exception was made out.

(g) Clause 42 of the Charter Party lays down the general exceptions operating independently and in different situations than the clauses 36 to 41 which are specific exclusions. If the clause 42(h) is to be read in ejusdem - generis, then it strengthens the case of the petitioner as all the exceptions set out in clause 42 deal with the situation over which the petitioner can have no control. Clause 42(f) provided for exclusion on the ground of action of the constituent authority and there can be no doubt that the port is a constituent authority.

(h) If the period between 6th November 2005 and 12th

November 2005 is excluded then the petitioner is not only not required to pay the demurrage charges but is in fact entitled to dispatch of Rs.2,66,072/- as claimed in the counter claim.

(i) The Arbitrator has disregarded the pleadings and the admitted position on record. The Arbitrator has completely mis-understood the contract between the parties and based its finding on irrelevant considerations.

(j) Though the interference under section 34 of the Act is limited, this Court and the Apex court has held in the cases where Arbitrators findings are perverse, contrary to the contract and in non-consideration with the admitted facts, the award needs to be set aside. Following cases are relied upon in support of the this proposition;

i) Sikkim Subha Associates V/s.State of Sikkim, AIR 2001 SC 2062,

ii) ONGC V/s. Saw Pipes Limited, AIR 2003 SC 2629,

iii) Jagmohan Singh Gujaral V/s.Satish Sabnis, 2004 (1) BCR 307,

iv) Arbitration Petition No.1283 of 2010 decided on 28th March 2011 in the matter of Sahyadri Earthmovers V/s.L & T Finance Limited,

15. Mr.Sunip Sen, learned counsel on behalf of the Respondent contended;

(a) The terms and conditions of the present Charter need to be noticed. The present Charter provides for FIO ie. Free In and Out, meaning that the loading and discharge of cargo will be of free of risk to the vessel and the loading and discharge were to be the obligations of the petitioner, as set out in clause 46 of the Charter Party. Further, as provided in clause 50 of the Charter Party, the Charterer's (petitioner's) agent will handle loading and discharge of cargo at the ports. Thus, the Respondent shipowners had no control over the loading and discharge of cargo and berthing of vessel.

(b) The parties had agreed in the Charter that the time limit would be set for loading and discharging the cargo by providing a laytime, which was 7000 MT (subsequently 8000 MT) per day. Any time excess of this stipulated laytime was to be compensated by the petitioner by paying the demurrage charges. The laytime started 24 hours after tendering the notice of readiness and it would stop subject to the conditions and specific exclusions laid down in the Charter Party Agreement.

(c) The vessel berthed on 4th November 2005, started discharging the cargo at 03.20 hours and by 06.00 hours on 5th November 2005 had discharged 11,050 MT, inspite of one crane being out of order. Thus the vehicle performed much above the stipulated rate.

(d) The brake down of crane and mal-functioning of other machineries and their consequences are anticipated and provided for in the Charter Party. The credit has been given to the petitioner and in fact inspite of mal-functioning of the crane, the vessel performed higher than the agreed rate.

(e) It was the petitioner who wanted to accommodate its own other vessels and therefore started creating a case for non payment of demurrage charges.

(f) Petitioner has not produced any record nor any letters to show that the port authorities shifted the vessel forcibly for the reason stated by it.

(g) The Charter Party specifically provided for time counting provision and clause 42 is a general exception, which speaks situations such as acts of war etc. Whenever specific exclusion is to be provided, the parties have agreed to such contingencies and in the absence of such contingencies the main agreement about the time counting provision, will continue to apply.

(h) That the port authorities forcibly shifted the vessel and that alone was a good enough ground for excluding the time irrespective of any other fact to be proved, was not the case of the petitioner before the Arbitrator.

(i) The pleadings of the petitioner will have to be read as a

whole in which there is a specific case that the vessel was shifted out by the port authorities because of the poor performance of the vessel. The case being argued in the petition was never argued before the Arbitrator.

(j) There is no admission by the master in the statement of facts and the said comment has to be understood in the context of allegations made by the petitioner.

(k) The Arbitrator has considered the case and the facts on record and has come to the conclusion that the vehicle did not under-performed as alleged, and the petitioner did not produce any document, and therefore, according to the learned counsel for the Respondent, the award of the Arbitrator is correct.

(l) In a petition under section 34 of the Act there cannot be re-assessment of facts and it is to be considered whether the view of the Arbitrator was a possible view.

(m) Reliance is placed on -

(i) Commentary by John Schofield, M.A.,on Laytime and Demurrage,

(ii) decision of Kings Bench Division in Thorman V/s.Dowgate Steamship Company Limited-(1910) 1 K.B.410,

(iii) decision of the Queens Bench Division (Commercial Court) in the case of Cero Navigation Corporation

V/s.Jean Lion & CIE - (2000) I LLoyds Law Reports 292,

(iv) decision of the Court of Appeal in Ellis Shipping Corporation V/s.VOEST Alpine Intertrading – (1992) Vol.2, LLoyds Law Reports 109.

16. As far as loading of cargo in Australia is concerned, there is no dispute between the parties that the cargo was loaded before the stipulated time and the petitioner was entitled to Load Point Dispatch and accordingly such dispatch is already been given to the petitioner.

17. Thus the dispute between the parties is regarding three periods at the ports of discharge. They are -

(a) 28th October 2005 to 4th November 2005;

(b) 6th November 2005 to 12th November 2005 and

(c) 14th November 2005 to 18th November 2005.

18. As far as period (a) at Visakhapatanam is concerned, the case of the petitioner before the Arbitrator was that the vessel arrived with more than 12.5 meters of draft which was breach of the Charter and because of this breach, the petitioner lost an opportunity to nominate Paradip as a port of discharge. The Arbitrator held that if the petitioner wanted to nominate Paradip as port of discharge they should have informed the Respondent. Then the onus would have shifted on the Respondent. But the petitioner did not communicate this fact to the Respondent. The Arbitrator found that this ground was raised only during the arbitration.

19. As far as period (c) at Haldia is concerned, the delay in waiting was due to congestion at the port. The Arbitrator found that the vessels which were waiting ahead of 'Prem-Poorva' were vessels chartered by the petitioner and the congestion and the consequent delay was because of the vessels of the petitioner itself. The Arbitrator rejected the contention of the petitioner that this period needs to be excluded.

20. As far as above two periods viz. (a) and (c) i.e.28th October 2005 to 4th November 2005 at Visakhapatanam and 14th November 2005 to 18th November 2005 at Haldia are concerned, the findings of the arbitrator are not seriously challenged by the learned counsel for the petitioner during the course of the arguments, except by stating that the said findings are perverse. Even otherwise the findings of the Arbitrator in respect of the above two periods are correct. The Arbitrator considered the facts on record and found that the petitioner was not entitled to contend that they were entitled to get these periods excluded. There is no reason to interfere with the findings of the Arbitrator in respect of the treatment of these two periods.

21. The main controversy is regarding the period (b) i.e. between 6th November 2005 to 12th November 2005 at Visakhapatanam. The fact that the vessel was shifted out of the port and it re-berthed on 12th November 2005, is not in dispute. The dispute is to how this happened and whether incident falls within clause 42(h) of the Charter Party Agreement. At this juncture it will be

necessary to reproduce the clauses 34 to 42 of the Charter Party Agreement:

> 34. "Notice of readyness at the port of discharge to be served by Shipowners during normal office hours i.e.9.30 a.m.to 4.30 p.m.on working days (Mondays to Friday) and 9.30 a.m.to 12.00 noon on Saturday to Port Officers of Charterers as per details given below …….. "
>
> 35. "Time Counting Provisions: At discharging port time to count 24 hours after Notice of Readiness is served on arrival of the vessel within port limits at port of discharge and weather in berth or not and in free pratique and ready in all respect to discharge the cargo. If turn time of 24 hours expires on Saturday afternoon, laytime will commence at 08.00 hours on 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 Charter Party holiday and 8 a.m.on the first working day thereafter, even if used, unless the vessel is already on demurrage.
>
> If the vessel is ordered to Haldia and is unable to give notice of readiness by reason of congestion at Haldia, time shall commence to count 24 hours after notice of vessel's arrival off sandheads has been given by radio to charterers or their agents and received by them during ordinary office hrs. Whilst waiting off sandheads sundays, C/P Holidays and saturdays after 12 noon until 8 A.M.Monday not to count unless vessel is on demurrage. Time used n proceeding from sandheads to Holdia not to count."
>
> 36. "Non weather working days declared by port authorities and rain period if reported in SOF shall not be counted as laytime, even if discharge operations are continued for some part of day unless vessel is already on demurrage."
>
> 37. "Steaming time from anchorage to berth on arrival of vessel at load/discharge port not to count, even if vessel is already on demurrage."

38. "Charterers/Shippers have the option to load/discharge vessel at a second safe birth, in which, case, time used in shifting not to count as laytime and shifting expenses to be for Owners account even if vessel already on demurrage."

39. "Cost of opening and closing of hatches, gangway placement, grab fixing to be for Owners account and time used not to count as laytime even if vessel already on demurrage."

40. "In the even of breakdown of gears/cranes and other equipments of the vessel by reason of disablement or insufficient power, etc., the period of such inefficiency shall not count as laytime."

41. "Owners/Master/their Agents shall allow representatives of Inspecting Agency nominated by Shippers/Charterers on board to carry out draft survey and to inspect/supervise at all stages of loading/storage/ discharging of cargo at loading/discharging ports. Time used for survey/check at load/discharge ports to be for Owners account even if vessel already on demurrage."

42. "At the discharge port, time lost by reason of all or any of following causes shall not to be counted as discharge time unless vessel is already on demurrage;

a) War, Rebellion, Tumult, Political Disturbances, Insurrections;

b) Lockouts, Strike, Riots, Civil Commotions;

c) Epidemics, Quarantines, Landslips, Floods, Frost or Snow, Bore Tides,Bad weather,

d) Stoppage of work whether partial or general by workmen, Longshoremen, Tugboat men or other hands essential to the working of the vessel or discharge of cargo from the vessel;

e) Accident at the Wharf;

f) Intervention of Sanitary customs and /or other constituted authorities;

g) Stoppages whether partial or total on Rivers and Canals;

h) Any other causes beyond control of the Charterers."

22. The above mentioned clauses, shorn of technical jargon, are that when the vessel would arrive at the port of discharge, the Respondent will give notice to the petitioner for discharge of the cargo. It will be the responsibility of the petitioner to get the cargo discharged and the period will start 24 hours after the receipt of notice and 7000 MT (8000 MT) per day cargo would be discharged whether in berth or not. The parties had agreed for certain exceptions contained in clauses 36 to 39 which would not count towards the lay time. The parties also agreed that in certain cases such as war, rebellion etc. the lay time will not be counted. Thus if due to any of these reasons the cargo could not be discharged, then the petitioner will not be liable to pay demurrage charges.

23. The case of the petitioner before the Arbitrator as to why this period needs to be excluded is to be found in paragraph 5, 12 and 14 of the reply, which read as under:

5. "The vessel berthed on 4.11.2005 and started discharge. However, the Claimant failed to discharge the Cargo as per the port authorities' norms and thereby the performance of the said vessel was declared as poor by the port authorities. It is further submitted that the discharge of the cargo was also hindered due to the breakdown of the one

of the cranes. **Therefore** on 7.11.2005 the vessel was shifted to the roads by the port authority as it failed to perform satisfactorily. The said action by the port authority was beyond the control of the Respondents and therefore the Respondent was not liable for the time loss for discharging the cargo and it was specifically submitted that the same wold not be counted as a lay time. Therefore in terms of Clause 42 (h) of COA, the period during which the vessel was at the roads was to be deducted from the lay time."

12. "Para under reply is a matter of record. However, it is submitted that due to the poor performance of the vessel as per the norms of port authorities as well as due to the breakdown of the crane of the vessel, the vessel was sent at the roads on 7.11.2005 and was reberthed again only on 12,11,2005, it is submitted that the said period between 7.11.2005 and 12.11.2005 is not to be calculated as a laytime as it was due to the poor performance of the vessel. It is the port authority who decides to send the vessel at the roads on a particular vessel not performing as per the existing norms of the Port. Moreover the characters had no control over the said event and as such the sending of the vessels at the roads is covered under clause 42(H) of the Charter Party Agreement. Therefore, the said period cannot be counted for calculating demurrage."

14. "The Claimant's laytime calculations for disports are wrong and hence denied. It is submitted that at the discharge port Vizag, one of the cranes was under break-down for a long duration because of which the vessel's performance got seriously affected and thereby delayed the berthing of waiting vessels. Taking into the consideration the delay in discharging/unloading, the vessel was shifted to the roads by Port Authorities on 07.11.05. The vessel was brought back to the berth on 12.11.05. Vide letter dt.5.11.2005 & 9.11.2005 the Respondent informed the claimant that the vessel may be shifted from the berth due to poor performance in discharging the goods. Further it was also informed that all losses including the consequential losses were to be borne by the claimant. Copy of the letters dated 5.11.05 & 9.11.05 and the SOF of Vizag are annexed as

Annexure R-3 (Colly.). Therefore in terms of Clause 42 (h) of the CPA, the period of the vessel's stay at the roads was deducted from the laytime. Clause 42 (h) is reproduced herein below:

> At the discharge port, time lost by reason of all or any of following causes shall not to be counted as discharge time unless vessel is already on demurrage;
> .....
> (h) Any other causes beyond control of the Charterers."
> (emphasis supplied)

24. The case of the petitioner before the Arbitrator has to be considered in total. The petitioner had alleged that the vessel under-performed at Visakhapatanam because of brake down of one of the cranes and it was shifted out. Both the cause and effect of non performance of vessel was pleaded as a composite bundle of facts before the Arbitrator. The case in unequivocal terms before the Arbitrator was that due to unsatisfactory performance of a crane the port authorities shifted the vessel.

25. The Arbitrator found that the vessel in fact did not under-perform. The Arbitrator found that it was agreed between the parties that the vessel should be capable of discharging 8000 MT per day. As per clause 43 of the Charter party, daily discharge of 7000 MT (8000 MT) at 24 hours working day was stipulated. In fact though the Crane No.3 was under repairs only for two hours on 4th November 2005 and for nine hours on 5th November 2005, the vessel discharged total cargo of 11050 MT on 4th November 2005 and 10560 MT on 5th November 2005. Thus the Arbitrator found that there was no question of vessel under-performing. This

is a finding of fact. The Arbitrator analysed the material on record and came to the conclusion that there was no under-performance of the vessel as alleged. In limited jurisdiction under section 34 this finding cannot be interfered with.

26. The learned counsel for the petitioner has contended that even assuming the vessel did not under-perform, this is irrelevant as it is an admitted position that the vessel was shifted out by the port authorities. The learned counsel for the petitioner heavily relied upon the comment of the Respondent below the statement of facts, which stated that the vessel was forcibly shifted by the port authorities for alleged non-performance. This statement, according to the petitioner, itself entitled the petitioner for benefit of clause 42(h). Firstly, it needs to be considered whether this statement can be considered as an admission. As it is urged by the learned counsel for the Respondent, this comment has to understood in the context of the allegation made by the petitioner in its comment below the statement of facts. The petitioner had asserted that the port authorities shifted the vessel due to poor performance of the vessel. The emphasis of the allegation was on performance of the vessel. In reply thereto, the owner had stated that it was an “alleged non-performance”.

27. Apart from this position, the Arbitrator found that the petitioner did not produce any material to show that there was any communication from the port authorities that the vessel needed to be shifted out. Nor any material is placed on record to demonstrate as to what were the specific port norms in respect of the discharge

of the cargo and what were the exact reasons for shifting the vessel out of the port. The Arbitrator found that in the absence of material on record, it cannot be concluded that the port authorities shifted the vessel because of the non-performance of the vessel. This conclusion of the Arbitrator cannot be faulted with. The petitioner did not place on record any material, norms or any correspondence from the port authorities directing that the vessel be shifted out for non-performance. Nor it is seriously urged that the vessel was shifted by the port authorities for some other reason. That it in any case could not have been done as it was not the case of the petitioner before the Arbitrator.

28. The Arbitrator is not expected to carry on an inquiry beyond the scope of pleadings. The petitioner's pleadings were specific regarding non performance of the vessel, which the Arbitrator found as to be not true. Thus having faced with the findings of fact that the vessel did not under-perform and that there was no material to show that the port authorities shifted the vessel because of non performance, the learned counsel for the petitioner would urge that the Court should now consider only one fact, that the vessel was shifted out by the port authorities. Thus the petitioner now wants to abandon the entire case made out before the Arbitrator and wants to concentrate on only one fact that the vessel was shifted out by the port authorities. According to learned counsel for the petitioner this ground will fall under clause 42(h) of the Charter Party.

29. Clause 42 deals with the general exceptions. It speaks of

grounds such as war, rebellion, lockouts, epidemics, accidents and any other causes beyond control of the Charterer. Such clauses are commonly employed in the Charter Party Agreement. Their ambit and scope has also been widely understood. It is also an established position of law that the phrase 'any other causes beyond the control of the Charterer' is to be read ejusdum generis with clauses preceding it. When certain instances are given preceding the general words such as 'any other cause' then the general words would take colour from the clauses preceding it. In the commentary by John Schofield in Laytime and Demurrage[1], it is noted that in the Charter Party Agreement, when final words of such general clause include the word 'whatsoever' then, the clause 'any other causes beyond the control of Charterer' would be a stand alone clause and ejusdum generis rule will not apply. Since in the present agreement the final word of clause (h) are not 'whatsoever', the ejusdum generis rule would apply and sub clause (h) will take its meaning from the sub clauses preceding it.

30. The examination of sub-clauses (a) to (g) of Clause 42 show that the contingencies provided in the said sub-clauses arise independently of the interplay of relations between the petitioner and the Respondent. Both the cause and the effect leading to these contingencies do not arise from the interplay of relations between the petitioner and the Respondent. In fact, these clauses have no connection with interaction between the parties. The cause which leads to these contingencies does not arise out of any action between the parties.

1 John Schofield, M.A., Laytime and Demurrage, Sixth Edition, Page 221 Para 4.112.

31. Learned counsel for the petitioner has emphasised on clause 42(f) to state that the intervention of the constituted authorities will itself be enough to bring the case under the agreed exceptions, as the port is the constituted authority. Thus it is his contention that once the port authority took an action of shifting of vessel, it was an action of the constituted authority and also a factor beyond control of the petitioner. However, this contingency does not arises independently of the interaction between the parties. Once the petitioner came with a specific case that the cause of intervention by the constituted authority was due to brake down of cranes, the basic case itself was not of unconnected general exception. In the arguments now that the case is sought to be changed to a general exception.

32. When the parties entered into a Voyage Charter, the basic agreement between the parties, and also a trade practice is that the lay time would begin after the notice of readiness was given. Whichever exceptions that were to be specifically provided for, were provided for. If a particular exception was not provided, then the general agreement of continuous running of lay time would apply. In the decisions cited by the Respondent in the case of Cero Navigation[1] and Elise Shipping[2], this position has been made clear.

33. Once the petitioner came with a case that there was fault on

1 (2000) I Lloyds Law Reports 292.
2 (19920 Vol.2, Lloyds Law Reports 109.

the part of the Respondent which led to certain events, the petitioner was claiming exception to the rule of continuous running of lay time. Though it is sought to be urged now that the emphasis was on the action of port authority alone, the entire tenor of pleadings and correspondence would show the basic reason to disown liability of demurrage was the alleged brake down of crane which led to further events. It is during the arguments that the shift is sought to be made from the specific exclusion to the general exclusion.

34. The learned counsel for the Respondent urged that the ground of port authorities shifting the vessel due to alleged non-performance is itself doubtful, as the petitioner wanted to give preference to its other ships, and therefore, it engineered shifting of vessel out of the port. It is submitted that the petitioner wrote to the Respondent on 5th November 2005 stating that the cranes are not working and the petitioner was making out a case for payment of demurrage in advance. However, the submission as regards other vessels cannot be considered as this is not the finding of the Arbitrator.

35. The approach of the Arbitrator cannot be termed as perverse and it is based on strong commercial sense and prudence, being well versed in the practices peculiar to this trade. The view taken by the Arbitrator is a possible point of view. The Arbitrator has considered clauses of the agreement and found that the claim of the petitioner does not fall in any of the clauses. The Arbitrator is entitled to take this view.

36. The arbitration proceedings which are to be carried on by the Arbitrator chosen by the parties, are not to be conducted like the civil suit where manifold alternate defences can be taken. The commercial disputes of such nature are to be resolved by the Arbitrator who applies the relevant trade practices and resolves the disputes as a commercial person would do. In the present case the parties consciously chose a commercial man conversant in the trade as their Arbitrator. If a party comes with a particular case before the Arbitrator and fails to demonstrate certain basic facts, and the Arbitrator using his broad common sense and trade expertise arrives at certain conclusions, then those findings cannot be challenged by creating subtle legal points and introducing a case which was never presented before the Arbitrator.

36. It is observed by the Apex Court in the case of **Rashtriya Ispat Nigam Limited V/s.Dewan Chand Ram Saran,** (2012) 5 SCC 306 as under:

> 43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.
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> 44. The legal position in this behalf has been summarized in paragaph 18 of the judgment of this Court in **Sail** v. **Gupta**

Brother Steel Tubes Ltd. (supra) and which has been referred to above. Similar view has been taken later in **Sumitomo Heavy Industries Limited.** v. **ONGC Limited** reported in 2010 (11) SCC 296 to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf.

45. This paragraph 43 reads as follows: (Sumitomo case)

> "43. ...The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in **Kwality Mfg. Corpn.** v. **Central Warehousing Corpn** - 2009 (5) SCC 142. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."
>
> (emphasis supplied)

37. Thus under section 34 of the Act the scope is to find out that whether the findings of the Arbitrator could be termed as perverse. The petition is not to be treated as an appeal. Nor the case can be considered as Court of first instance. The Arbitrator found that the petitioner was not entitled to claim exceptions on the ground of non performance of vessel and consequent shifting of the vessel by

the port authorities, because both these facts needed to be proved. If the Arbitrator had held that even though the petitioner failed to prove that there was non-performance of the vessel still the petitioner was entitled to exceptions under the general exceptions, then he would have travelled beyond the scope of the pleadings. The Arbitrator has confined himself to the specific case as pleaded by the petitioner. There is nothing wrong with this approach. The Arbitrator who was chosen by the parties was conversent with the trade practices and interpretation of clauses which are commonly found in the Charter Party Agreements.

38. In view of the above discussion, there is no warrant to interfere with the impugned award. Petition is accordingly dismissed.

(N.M.JAMDAR, J.)