

MANU/MH/1510/2011

IN THE HIGH COURT OF BOMBAY

Arbitration Petition No. 543 of 2009

Decided On: 25.11.2011

Appellants: **Starlite Lighting Ltd.**

Vs.

Respondent: **The Shipping Corporation of India Limited**

Hon'ble Judges/Coram:

Anoop V. Mohta, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. Gaurav Joshi with Mr. Saurabh Kulkarni i/by M/s. C.R. Naidu & Co.

For Respondents/Defendant: Mr. Ashish Kamat i/by M/s. A. Mehta Laljee & Co.

Case Note:

Arbitration - Limitation - Non-joinder of necessary party - Arbitrator Tribunal passed Award by holding that claim of claimants was not barred by law of limitation and also held that Customs Authorities were not necessary party - Hence this Petition - Whether, Petition could be dismissed for non-joinder of necessary party - Held, period in question was from 29 June 1999 to 12/14 December 1999 - Petitioners paid a part amount Rs 15 lacs on 9 December 1999 towards CBC liabilities - Further, by a letter dated 3 May 2000 Petitioners had also acknowledged its liability with a request for waiver - This undisputed fact of request for waiver read with part payment receipt/acknowledgment was sufficient to reject objection - Thus, Arbitrator was right in holding that claim was not barred by law of limitation - Further, considering nature of agreement and dispute between parties and as clearance of goods from container was obligation of Petitioners, detention of goods, that itself could not be reason to bring in Customs Department, in lis between parties - Hence, there was no reason to interfere with reasoning given by Arbitrator by holding that Customs Authorities were not necessary party - Therefore, Petition could not be dismissed for non-joinder of parties - Arbitration Petition dismissed.

Arbitration - Novation of contract - Doctrine of Legitimate expectation - Section 62 of Contract Act, 1872 - Whether, defense of novation of contract and Estoppel/Doctrine of legitimate expectation as raised by Respondents was rightly rejected - Held, letter dated 9 December 1999, clearly showed that waiver issue was pending - Payment of Rs. 15 lacs, as a part payment, could not be treated and accepted as full and final payment towards liability so raised - Pendency of regular application itself showed that there was no novation as accepted and intended at least by Respondents at any point of time - Section 62 of Act contemplated that any novation or recession and alteration of contract could be done only with agreement of both parties - It could not be unilateral - Arbitrator had considered oral as well as documentary evidence on record and provided detailed reasoning while rejecting issue of novation - Therefore, objection with regard to novation of contract was rightly rejected by Arbitrator and reasoning with

regard to point of novation of contract itself sufficient to reject objection based upon Doctrine of legitimate expectation - Arbitration Petition dismissed. Arbitration - Legitimacy of Detention charges - Whether, claimants were entitled to recover a sum towards container detention charges, based upon undisputed period of detention and applicable tariff and its arithmetical calculations and computation of detention charges - Held, Arbitrator based upon undisputed facts of period of detention from 29 June 1999 to 14 December 1999 and charges applicable for detention as per IPBC Tariff which were part and parcel of statement of claim and agreement between parties, arithmetically calculated detention charges - Bill of lading and relationship between parties based upon terms and conditions which were relevant factors, Arbitrator had considered - Thus, claim so awarded by Arbitrator was towards balance payment as per demand made - Therefore, it could not be stated exorbitant and based on no material - Hence, there was no perversity of any kind need no interference with regard to Award of detention charges - Arbitration Petition dismissed. Arbitration - Reasonable interest - Section 34 of Arbitration and Conciliation Act, 1996 - Whether, awarded interest at rate of 10% p.a and further interest at rate of 14.25% p.a from date of Award till date of realization awarded by Arbitrator was justified - Held, considering Section 31 of Act and market practice granted, reasonable interest granted at rate of 10% p.a. from 1st March 2000 up to date of Award - Grant of interest at rate of 14.25% p.a from date of Award till date of payment was a commercial transaction - Thus, interest and rate of interest so awarded could not be stated exorbitant and beyond scope and power of Arbitrator and contrary to any clause of agreement - Therefore, there was no need of interference in Arbitrator award - Arbitration Petition dismissed. Ratio Decidendi"Party, who makes false allegations, does not come with clear hands and same shall not be entitled to equitable relief."

JUDGMENT

Anoop V. Mohta, J.

1. The Petitioners original Defendants have challenged an Award dated 4 April 2009 passed by the sole Arbitrator appointed by consent of the parties in Summons for Judgment No. 630 of 2003 in Summary Suit No. 330 of 2003 by invoking Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act).

2. The relevant events and dates are as under:

The Petitioners entered into a contract with Philip Lighting B.V., Netherlands to purchase the machines for manufacture of Compact Fluorescent lamps (CFL). The machines shipped in 13 containers under a Bill of Lading. The documents/Bill of lading are endorsed/negotiated by the United Western Bank, Pune.

3. On 24 June 1999, the vessel with the containers arrived at Port Nhava Sheva. Each of the said containers were discharged and moved by the Respondents from the ship side container Freight Station to the Central Warehousing Corporation, Nhava Sheva, Navi Mumbai. There was delay which caused detention of the containers.

4. On 7 September 1999, Mr. Arvind Bharati, a representative of the Petitioners met Capt. Tiwai and Mr. D.B. Kadam and two other officers of the Respondents, request

for 60% waiver of detention charges. A Letter dated 6 September 1999 was handed over to the said officer with an endorsement stating that 15 days additional free time be given to the Petitioners to clear the cargo. The request for the was rejected. On 11 September 1999, the customs authorities levied penalty of Rs. 75 lakhs and a fine of Rs. 10 lakhs on the consignment imported by the Petitioners. The Appellant appealed again the same.

5. On 3 December 1999, based on the above, the Respondent's agent handed over 4 calculation sheets reflecting the due and payable aggregate amount of Rs. 75,20,014/, towards detention charges. In the meanwhile, the Petitioners were called upon to pay Rs. 15 lakhs towards the detention charges to issue Delivery Order; and a blank cheque as security. Between 11 December 1999 to 13 December 1999 the containers transported by road from Navi Mumbai. The same were destuffed at the Petitioners' premises at Satpur, Nashik. Between 12 December 1999 to 14 December 1999 the empty containers were returned to the Respondents at the nominated place within 15 days.

6. On 1 March 2000, the Petitioners received a letter from J.M. Baxi & Co that 50% of the detention charges were waived and adjusting the sum of Rs. 15 lakhs as already deposited, demanded the additional amount of Rs. 24,82,040/.

7. On 3 May 2000, the Petitioners by a letter addressed to the Respondents set out in detail, the facts and circumstances under which the blank cheque was issued.

8. On 27 September 2000, the Petitioners through their Advocates letter bearing No. CRN/773/2000 replied and pointed out that the claim of Respondent was not tenable.

9. On 4 December 2002, the Respondents filed a Summary Suit No. 330 of 2003 against the Petitioners praying for a decree in the sum of Rs. 24,82,040/.

10. On 19 August 2004, pending the hearing of the suit the Appeal filed by the Petitioners before CESTAT was allowed.

11. On 4 July 2005, the learned Judge, by consent, referred the dispute for arbitration.

12. The Arbitrator proceeded with the arbitration. The claimants/original Plaintiffs filed Statement of Claim dated 4 October 2005 for a sum of Rs. 24,82,040/and interest thereon claiming it to be the detention charges accrued on 13 containers from 20 June 1999 till 14 December 1999, the Respondents filed its written statement cum counter claim dated 7 December 2005. As recorded, there was no counter claim raised by the Respondents. The rejoinder dated 15 February 2006 is filed by the claimants.

13. The Arbitrator, after framing seven issues and after hearing both the parties, has passed the impugned Award by holding that :

(a) the claim of the claimants is not barred by the law of limitation.

(b) the Customs Authorities are not necessary party. Therefore, the claim petition cannot be dismissed for nonjoinder of necessary party.

(c) the defence of novation of contract as raised by the Respondents

is rejected.

(d) the issue of Estoppel/Doctrine of legitimate expectation as raised by the Respondents are rejected.

(e) in conclusion, the Arbitrator held that the claimants are entitled to recover a sum of Rs. 24,82,040/towards the container detention charges, based upon undisputed period of detention and the applicable tariff and its arithmetical calculations and the computation of the detention charges.

(f) the Arbitrator, in view of Section 31 of the Arbitration Act, awarded interest at the rate of 10% p.a. From 1 March 2000 upto the date of the Award and further interest at the rate of 14.25% p.a from the date of Award till the date of realisation.

(g) the cost is also awarded of Rs. 1,00,000/payable to the claimants by the Respondents.

Re: (a)

14. There is no dispute that the period in question was from 29 June 1999 to 12/14 December 1999. The Petitioners original Respondents paid a part amount Rs. 15 lacs on 9 December 1999 towards the CBC liabilities. By a letter dated 3 May 2000 they have also acknowledged its liability with a request for waiver. This undisputed fact of request for waiver read with the part payment receipt/acknowledgment, in my view, is sufficient to reject the objection. The Arbitrator, therefore, is right in holding that claim is not barred by the law of limitation.

Re: (b)

15. Considering the nature of agreement and dispute between the parties and as the clearance of goods from the container was the obligation of the Petitioners, the detention of goods, if any, by the Customs, that itself cannot be the reason to bring in the Customs Department, in the lis between the parties. The clarification asked for if not provided by the Respondents because of unavailability of Philip's NV., the Respondent's vendor and as the Customs Department were concerned with the goods and not with the containers and as this position remained undisputed, I see there is no reason to interfere with the reasoning given by the Arbitrator by holding that the Customs Authorities are not necessary party and, therefore claim No. 2 cannot be dismissed for the nonjoinder of parties. The Petitioners cannot claim benefits of its own lapses and/or defaults. The Petitioners, in a given case, could have stored the goods in any other place and/or Bombay Warehouse inside the port premises. The obligation of the Respondents/claimants being a shipping company was concerned with the carriage of goods and not the clearance of goods.

Re: (c)

16. The objection with regard to the novation of contract is rightly rejected by the Arbitrator. The letter dated 9 December 1999, as referred above, clearly shows that the waiver issue was pending. The payment of Rs. 15 lacs, as a part payment, cannot be treated and/or accepted as full and final payment towards the liability so raised. The pendency of regular application itself shows that there was no novation as accepted and/or intended at least by the Respondents at any point of time. Section 62 of the Contract Act, 1872 contemplates that any novation or recession and/or alteration of contract can be done only with the agreement of both the parties. It cannot be unilateral. The aspect of execution of bond in favour of the Respondents by

the Petitioners that undertaking to pay detention charges as per the Rules is also an additional factor which goes against the Petitioners and so also the fact of issuance of blank cheques. The subsequent request for higher waiver by letter dated 23 March 2000 and 3 March 2000 supports the case of the Respondents. The Petitioners failed to discharge its burden as mere assertions was not enough. The learned Arbitrator has considered oral as well as documentary evidence on record and provided detailed reasoning while rejecting the issue of novation.

Re: (d)

17. The reasoning given by the learned Arbitrator with regard to the issue of Doctrine of estoppel and legitimate expectation also need no interference. There is no contra material placed on record to justify the same. Mere allegations and assertions are not sufficient. I am inclined to observe that the reasoning with regard to the point of novation of contract itself sufficient to reject the objection based upon this Doctrine. This Doctrine requires specific pleading as well as supporting evidence. It is not a pure question of law specifically when objections were based upon the disputed questions of facts. The invocation of Doctrine of Waiver, as referred above by the Petitioners, itself destroy the case and the objection revolving around the Doctrine e of estoppel and legitimate expectation.

Re: (e)

18. The Arbitrator based upon the undisputed facts of the period of detention from 29 June 1999 to 14 December 1999 and the charges applicable for detention as per the IPBC Tariff which are part and parcel of statement of claim and the agreement between the parties, arithmetically calculated the detention charges. The challenge was basically to the entitlement of no amount, but at the same stroke, the fact of their part payment and application for waiver from time to time, which was not granted, is also basic factor to award the amount of Rs. 24,82,040/towards the detention charges, in my view, need no interference.

The bill of lading and relationship between the parties based upon the terms and conditions which are relevant factors, the Arbitrator has considered. The claim so awarded by the Arbitrator was towards the balance payment as per the demand made, therefore, cannot be stated to be exorbitant and/or based on no material. Therefore, considering overall view of the matter and the reasoning so provided based upon the clear interpretation of the commercial agreement between the parties and as the Award is well within the frame work of law and the record and as there is no perversity of any kind need no interference, even with regard to the Award of detention charges.

Re: (f)

19. The learned Arbitrator, after considering Section 31 of the Arbitration Act and the market practice granted, the reasonable interest at the rate of 10% p.a. from 1 March 2000 upto the date of the Award. The grant of interest at the rate of 14.25% p.a from the date of Award till date of payment being commercial transaction, in my view, also need no interference. The interest and the rate of interest so awarded cannot be stated to be exorbitant and/or beyond the scope and power of the Arbitrator and/or contrary to the any clause of the agree ment.

Re: (g)

20. Taking overall view of the matter, the award of cost of Rs. 1,00,000 also need no

20. Taking overall view of the matter, the award of cost of Rs. 1 lac also need no interference.

21. In the result, the Arbitration Petition is dismissed. There shall be no order as to costs.

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