(2014) 04 DEL CK 0249

Delhi High Court

Case No: O.M.P. 773/2013 and I.A. No. 14983/2013

Steel Authority of India Ltd. (Sail)		APPELLANT
	Vs	
Dampskibaselsbaket Norden A/S		RESPONDENT

Date of Decision: April 30, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 28, 34

Citation: (2015) 1 AD 779 : (2014) 2 ARBLR 242 : (2014) 211 DLT 324

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: A.K. Ganguli, Sr. Advocate, Ms. Monika Garg and Mr. George Varghese, Advocate for the Appellant; Prashant S. Pratap, Sr. Advocate, Mr. O.P. Gaggar and Mr. Aditya Gaggar, Advocate for the Respondent

Judgement

Vipin Sanghi, J.

The petitioner has filed the present petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for setting aside of the award dated 26/27.2.2013, rendered by a three member arbitral tribunal. Under the award, a sum of USD 417,979.16 along with interest amounting to USD 70,556.34 has been awarded in favour of the respondent herein.

Background facts:

2. Facts of the case are that a Contract of Affreightment (hereinafter referred to as COA) was executed between DAMPSKIBSSELSKABET NORDEN A/S, COPENHAGEN as owner-respondent herein, and Steel Authority of India Ltd. (SAIL) as charterer-petitioner herein, on 03.03.2008, whereby a cargo of 3x 50,000 MT, more or less 5%, coking coal in bulk was to be loaded from Newport News or Norfolk, Virginia, USA for discharge at Vishakhapatnam, Paradip and Haldia. Pursuant to the COA, the respondent owner was required to nominate vessels for three shipments. Two of such nominated vessels were MV Nord Fighter and MV Navios Kypros.

3. As agreed in the said contract, MV Nord Fighter was loaded at Newport News, Virginia, USA with 51544.726 MT coal-with cargo quantity of 25,189 MT to be discharged at Vishakhapatnam, and balance quantity of 26,355.73 MT to be discharged at Haldia. It arrived at the port of Vishakhapatnam on 12.05.2008 and notice of readiness (NOR) was given on 12.05.2008 at 9.45 hours. The vessel berthed at GCB berth in Vishakhapatnam on 17.05.2008 at 1700 hours, and commenced discharging at 1830 hours. The vessel had arrived at the said port with a non functional crane (crane no. 3), fitted with a grab, which was under repair and made available/ready only on 20.05.2008 at 2200 hours. Completing discharge at Vishakhapatnam port on 21.05.2008 at 03.45 hrs, the vessel then sailed to Haldia to discharge the balance cargo quantity. The discharge at Haldia was completed on 24.05.2008 at 2140 hrs. The petitioner, accepting the NOR from the time when all the 4 cranes with 4 grabs were made available in operational condition, i.e. 20.05.2008, as opposed to the time when it was tendered by the respondent on 12.05.2008, calculated the lay time accordingly. As per petitioner''s calculations, the despatch amount earned by it was USD 97,395.83, and so, it made a payment of USD 461,300.74 to the respondent towards balance freight, after taking into account the load port demurrage and discharge port despatch so calculated. The respondent, on the other hand, calculated the lay time on basis of the NOR tendered by it on arrival of the vessel at Vishakhapatnam on 12.05.2008. Thus, disputing the deduction of the said despatch amount, it claimed an additional amount of USD 312,104.16.

4. Similarly, the other vessel MV Navios Kypros was loaded at Newport News, Virginia, USA with 53731.008 MT coal-with cargo quantity of 25743 MT to be discharged at Vishakhapatnam, and the balance quantity of 27988.008 MT to be discharged at Haldia. On arrival at Vishakhapatnam port, the vessel gave the NOR on 28.07.2008 at 1400 hrs. It berthed on 31.07.2008 at 11.30 hrs, and commenced discharging at 15.30 hrs, which was completed on 02.08.2008 at 2130 hrs. While discharging at the said port, crane no. 2 suffered a breakdown on 01.08.2008, which could not be repaired even until the completion of the discharge operation at the said port. Thereafter, the vessel sailed to the second port of discharge, i.e. Haldia, with a non functional crane fitted with a grab. It arrived at the port of Haldia on 04.08.2008 and NOR was given at 1900 hours. It berthed on 05.08.2008 at 02.30 hrs, and commenced discharging at 04.15 hrs. The discharge at Haldia was completed on 09.08.2008 at 1000 hrs. Pertinently, the non functional crane was repaired and made functional only on 08.08.2008 at 1250 hours. The petitioner, accepting the NOR for the second discharge port from the time when all the 4 cranes with 4 grabs were made available in operational condition at Haldia, i.e. 08.08.2008, calculated the lay time accordingly. As per petitioner''s calculations, the despatch amount earned by it at discharge port was USD 43,291.67, and so, it remitted USD 866,536.14 to the respondent towards balance freight, after adjusting load port demurrage and discharge port despatch. The respondent, on the other hand,

calculated the lay time on basis of the NOR tendered by it on arrival of the vessel at Haldia on 04.08.2008. Thus, disputing the deduction of the discharge port despatch, it claimed an additional amount of USD 105,875.00.

5. In view of the said disputes, the respondent invoked arbitration. In terms of clause 60 of the COA, a three member arbitral tribunal was duly constituted. There being no dispute in regard to the facts, but only with regard to the interpretation of the clauses of the COA-particularly laytime calculations, the dispute was, thus, encapsulated by the tribunal as follows:

The owners have given pro rata reduction in calculation of laytime used after commencement of the discharge, taking into consideration the relevant period of breakdown of the discharging cranes relying on clause 40 read with clause 43 & 44. The charterers on the other hand hold the view that the NOR served on arrival is invalid because, right after berthing, one or the other cranes was not working under clause 35. The respondents have not preferred any counter claim but deducted their despatch claim for both the vessels at the discharge port from the demurrage claim of the owners and paid only the net demurrage. Their calculations are based on the interpretation of clause 35 which, inter-alia, states that the vessel should be ready in all respects at the time of serving the NOR. They have treated the earlier NOR as invalid and treated it valid only when all the cranes were working.

It may be noted that ''respondent'' in the aforementioned extract of the impugned award refers to the petitioner herein.

6. The tribunal upheld the owner''s stand, and vide the impugned award dated 26/27.2.2013, awarded a sum of USD 417,979.16 along with interest amounting to USD 70,556.34 in favour of the owner/respondent herein, which is presently challenged by the charterer/petitioner herein.

7. Before proceeding further, it would be expedient to extract the relevant portions of the relevant clauses of the COA, which read as follows:

1. Cargo/quantity

(a) 3x 50,000 MT/5% more or less at Owners'' option Coking Coal in bulk through geared and grabbed handymax vessels subject 12.5 M available water arrival draft at first discharge port.

Grabless vessels also workable with ship owners to provide required capacity grabs at discharge ports as per usual transchart terms and following grabless clause to apply:

The owners shall be fully responsible to provide minimum 4 numbers of working grabs meeting the specifications/requirements as per clause 43 and 44 of this COA within 2 hours of berthing of the vessel at each of the discharge ports. In case the owners fail to provide the grabs as stated above, the Notice of Readiness shall be

accepted only from the time minimum 4 grabs are actually fitted on the vessel in working condition and all waiting time from vessel arrival at port to the time minimum 4 grabs are provided shall be on Owners'' account only...

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3. Type of vessels

Vessels owned/managed/time chartered/operated or otherwise controlled by DAMPSKIBSSELSKABET NORDEN A/S, COPENHAGEN preferably less than 15 years of age, having minimum 4x25 tons cranes and minimum 4x10 CBM garbs and having minimum discharge capacity of 12,000 MT per day. Grabs must be fully automatic which do not require any manual labour during operations. Owners to ensure each performing handymax vessel to be suitable to a cargo of 3 x 50,000 MT, more or less 5%,

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21. Upon arrival of the vessel at the outer anchorage or at the pilot station of the load port, whether the vessel in free pratique or not and in berth or not, provided the vessel is in all respects ready to load, Master of the vessel shall serve on the suppliers or their agents, the notice of readiness of the vessel to load cargo...If the vessel whether in free pratique or not is found by the shippers not to be ready in any other respect to load after its berthing, the specific grounds on which the vessel is found not to be ready to load shall be recorded...In such an event, the lay time shall not be deemed to have commenced until the vessel is in fact ready to load in all respects.....

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35. Time counting provision:

At each discharging port, even if at second discharge port vessel arrives on demurrage, time to count 24 hours after Notice of readiness is served on arrival of the vessel within port limits at each port of discharge and whether in berth or not and free pratique and ready in all respects to discharge the cargo. If turn time of 24 hours expires on Saturday afternoon, laytime will commence at 8.00 hours on first working day."

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40. In the event of breakdown of gears/cranes and other equipment of the vessel by reason of disablement or insufficient power etc, the period of such insufficiency shall not count as laytime.

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43. Charterers guarantee to discharge the cargo at the average rate of 10,000 metric tons Vizag/Paradip, 12,000 metric tons Haldia, basis 5 hatches (served by minimum

4 cranes all minimum 25 tons each with minimum 10 CBM grabs) and pro rata if less, per weather working day of 24 consecutive hours, Sundays and holidays included (SHINC) provision to be applicable after commencement of laytime."

44. Owners guarantee that vessel has minimum 4 number of cranes each of capacity minimum 25 tons and minimum 4 number of grabs each of minimum 10 cubic meters capacity with cycle time of 4 minutes and serving all hatches and accordingly the minimum capacity to discharge is 12,000 tons per day of 24 consecutive hours. Owners also guarantee that vessel has fully automatic grabs...A joint survey shall be conducted in order to ascertain the particulars of cranes and grabs as above. In the case of any deficiency, the surveyors'' report shall be binding on the Owners and Charterers and the rate of discharge shall be reduced proportionately...

45. Demurrage/Despatch rate at the load/discharge ports shall be US$ 60,000/30,000 per day or pro rata....

(Emphasis supplied)

Petitioner''s submissions:

8. Mr. A.K. Ganguly, learned senior counsel for the petitioner, submits that the tribunal ignored the express terms of the COA and the usages of the trade applicable to the transaction, and consequently, arrived at the erroneous conclusion that the NORs in question were valid-thereby triggering the running of laytime.

9. Mr. A.K. Ganguly submits that contrary to the well-recognized principle of construction of a contract that a contract must be read as a whole and each clause should be harmoniously construed in order to ascertain the true meaning of its several clauses (Reference is made to the judgment of the Supreme Court in Bank of India and Another Vs. K. Mohandas and Others,), the tribunal ignored the mandate of clause 1-the governing clause of COA read with clause 3, while interpreting clause 35-the time counting provision for the discharge port.

10. He submits that under clause 1(a), it was imperative for the owner to provide a minimum of 4 working grabs within 2 hours of berthing of the vessel at each of the discharge ports, and if the owner failed to provide the same, the NOR could be accepted only from the time minimum 4 grabs were actually fitted on the vessel in working condition and all the waiting time from vessel''s arrival at port, to the time minimum 4 grabs were provided, was to be on owner''s account only. Since a grab is fitted onto a crane, if the crane is non functional, the grab attached thereto is also non functional. In as much, as, one of the cranes in both the vessels, i.e. crane no. 3 in MV Nord Fighter and crane no. 2 in MV Navios Kypros, were non functional when MV Nord Fighter arrived at the port of discharge at Vishakhapatnam, and MV Navios Kypros arrived at Haldia respectively, the requirement of providing ''minimum 4 numbers of working grabs'' within 2 hours of berthing of the respective vessels at the respective ports was not fulfilled. In this context, he places reliance on the award

made in the matter titled Re Pacific Basin IHX (UK) Vs. Steel Authority of India Ltd. (M.V. Ken Gallant), wherein the arbitral tribunal of the Indian Council of Arbitration, dealing with a clause similar to clause 1(a) herein, had concluded that since the owner therein had failed to provide a minimum of 4 working grabs within 2 hours of berthing of the vessel at the disport, the notice of readiness could be accepted only when all 4 grabs started working.

11. Mr. A.K. Ganguly submits that under clause 35, one of the conditions precedent for issuance of NOR is that the vessel should be ''ready in all respects to discharge the cargo''. The words ''ready in all respects'', in ordinary sense of shipping business, mean that in addition to legal readiness, the vessel must also be in a state of physical readiness in regard to cargo spaces, and all proper equipment/gear necessary for operations such that the equipment/gear is capable of discharging whole of the cargo when the notice of readiness is tendered. He places reliance on the decision in Unifert International SAL v. Panous Shipping Co. Inc. (The Virginia M), (1989) 1 LLR 60, wherein it was observed that the ship-to be ready in all respects, would mean that it is able to discharge not just some of the cargo, but whole of the cargo that is the subject matter of the charter party, and the requirement of readiness is not satisfied by merely being ready to start discharging some of the cargo. He submits that clause 3 along with clauses 40, 43 and 44 clearly demonstrate that it was of prime importance that the vessel provided minimum 4 functional cranes with minimum 4 working grabs of particular specifications/capacity and, the discharge rate, and accordingly, the laytime was fixed on that basis. He submits that subsequent repair of the non-functional crane would not validate the NOR so tendered, because readiness is a preliminary fact which must exist before giving of a notice of readiness, i.e. vessel must be ready-at the time the notice is given, and not at a time in future [Reference is made to Compania de Naviera Nedelka S.A. vs. Tradax Internacional The Tres Flores, (1973) 2 LLR 247(The ''Tres Flores'')].

12. Mr. A.K. Ganguly submits that the tribunal has misconstrued clauses 40, 43 & 44-failing to appreciate that the said clauses are attracted only after the laytime has duly commenced in terms of clause 35 pursuant to a valid NOR. He submits that the breakdown contemplated in clause 40 is an eventuality that may occur during the course of loading/discharge operation, and not the one existing at the time of tendering of NOR. Moreover, the COA uses the words ''pro-rata'' or ''proportional'' with respect to deficiency in discharge under clauses 43 & 44 in contradistinction with the phrase ''period of such insufficiency'' with respect to breakdown of a crane under clause 40. These words used in clause 40 mean that the whole period during which a crane is non functional should not count as laytime. The tribunal has misconstrued the words ''such period'' to conclude that "... what is not to be counted as laytime is only to extent of insufficiency, but certainly not as a whole." Further, clauses 43&44 have nothing to do with the readiness of the vessel in all respects, or with damage/breakdown of the equipment fitted on the vessel-be it before arrival at

port of discharge or during the process of discharge. Clause 43 deals only with the consequences of the unavailability of the stipulated number of hatches. Similarly, clause 44 is only an enabling provision with respect to conducting a joint survey of the vessel after its arrival to ascertain compliance of the vessel''s gear with the stipulated capacity to discharge. If on inspection it is discovered by the surveyors that the equipment, though functional, are deficient in their capacity, then the discharge rate is to be proportionately reduced. Pertinently, clause 44 itself pre-supposes availability of minimum number of 4 cranes with a minimum number of 4 grabs in working condition while entering the port of discharge, and the consequences provided thereunder would ensue only when the specification/capacity of the said equipment is not as stipulated in the COA.

13. Mr. A.K. Ganguly submits that in any event, and without prejudice to the aforesaid submissions, since the vessel arrived with only 3 working cranes instead of stipulated 4 number of functional cranes, the petitioner was entitled to a pro rata reduction in the demurrage for the period during which the vessel was waiting for a berth because even if the vessel had berthed, the discharge rate would have been 75% only.

14. Mr. A.K. Ganguly submits that the view taken by the tribunal cannot be considered to be a plausible view, as no reasonable person could have arrived at the said view on a plain interpretation of the contractual clauses. He submits that the award passed by the tribunal being violative of section 28 of the Act, suffers from a patent illegality and is liable to be set aside in view of the decision of the supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

Respondent''s Submissions:

15. Per contra, Mr. Prashant S. Pratap, the learned senior counsel for the respondent, emphasising on the observation made by the tribunal that "there are no disputes in regard to facts, and that the dispute is only in regard to the interpretation of the clauses of the Contract of Affreightment", submits that it is settled position of law that interpretation of a contract is a matter which falls within the jurisdiction of the Arbitral Tribunal, and the court would refrain from interfering with the award, unless it is totally perverse or based on wrong proposition of law. In the event two views are possible, and the view taken by the arbitrator is a plausible view - though not the only correct view, Court would not substitute its own view in place of that of the arbitrator. u/s 34, the Court would not interfere with a reasoned award, where the reasons given are not, per se, irrational but have a rational nexus with the conclusions arrived at by the Arbitral Tribunal. In this regard, he places reliance on the following cases: M.P. Housing Board Vs. Progressive Writers and Publishers, ; Sudarsan Trading Co. Vs. Government of Kerala and Another, ; U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd., ; Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, .

16. Mr. Pratap submits that the words "ready in all respects to discharge the cargo" in clause 35 mean exactly what they say, i.e. the vessel is in a position to discharge the cargo. It does not mean that the vessel is ready to discharge the cargo at a particular rate, or within a particular time, and it is sufficient if the vessel is capable of discharging. Only if none of the cranes is in working condition, would the vessel be considered as not ready to discharge cargo at all, and the NOR, be invalid.

17. Mr. Pratap submits that clause 1(a) is applicable only to a grabless vessel, whereas both the vessels in question were not grabless. Similarly, the award in M.V. Ken Gallant, as relied upon by the petitioner, pertains to a grabless vessel, and thus, is not applicable to the present case. On the contrary, clause 1(a) indicates that even a grabless vessel, which is not ready at all to discharge the cargo unless and until grabs are fitted on berthing, is nevertheless entitled to tender a valid NOR, commence laytime on arrival, and claim demurrage for all the waiting period during which the charterer is unable to provide a berth, if subsequently-within two hours of berthing, it provides the required grabs.

18. Next, Mr. Pratap submits that whenever the parties intended that the NOR should not be considered as valid, or laytime should not commence, they have specifically provided so-for instance, in clause 21, which expressly provides that if the vessel is found not to be ready in every respect to load (other than free pratique) after its berthing, the laytime shall not be deemed to have commenced until it is, in fact, ready to load in all respects. However, there is no such provision with respect to commencement of laytime at the discharge port under clause 35.

19. Mr. Pratap submits that even though under the COA, the owner was responsible to provide minimum 4 cranes/grabs of specific description, performance of this obligation was not a condition precedent to the issuance of the NOR under clause 35, and so, non-fulfillment thereof does not affect the validity of the NOR or the commencement of laytime thereafter. The possibility of breakdown of cranes, or they being not available, or being not of the required lifting capacity, either at the time of tender of NOR, or at any subsequent point of time, was in contemplation of both the parties, and by providing for the consequences of such contingencies under clauses 40, 43 & 44, parties have contracted out of the required state of readiness (with respect to the said equipment) at the time of giving of NOR, which may have been invalid on account of the aforesaid eventualities had the said clauses not been there in the COA. In this context, he places reliance on the Jay Ganesh, (1994) 2 LLR 362 and the Linardos, (1994) 1 LLR 28. Relying on the said cases, he further submits that it makes no difference-for application of clause 40, whether the breakdown was at the time of tender of NOR, or it occurred after berthing/during discharge operation.

20. Mr. Pratap submits that clause 40, read with clauses 43&44, shows that in event of breakdown of a crane, time would count on basis of the other 3 cranes only, i.e. laytime would stand proportionately reduced. He submits that the interpretation

sought to be placed on clause 40 by the petitioner amounts to saying that for the period of breakdown of a crane, the laytime does not count at all, even though the petitioner commenced discharge of cargo with the other available cranes and derived benefit therefrom. He submits that under clauses 40, 43 & 44, as a consequence of the eventualities envisaged thereunder, the discharge rate would be reduced, or the period of the breakdown would be excluded from counting of laytime during discharge, as the case may be, based on the rationale that pursuant to the said events, the vessel would not be in a position to discharge the cargo either at the rate provided or, within the laytime agreed. Consequently, the charterer is duly compensated by extra time, and suffers no prejudice if a crane was not working or was suffering a breakdown. It would be absurd to say that consequence of breakdown of a crane under clause 40 is that laytime does not count at all after tender of NOR, when on the other hand, under clauses 43 & 44, consequence of non availability of a crane, or a crane being of deficient capacity, is only a proportionate reduction in discharge rate while laytime counts after tender of NOR.

21. Mr. Pratap submits that since there is no provision in the COA for pro-rata reduction in demurrage payable for pre-berthing period, merely because one of the cranes on the vessel was defective, the tribunal could not have made any such allowance de hors the contract, and so, it had rightly rejected the petitioner''s submission in this regard. Besides, it was agreed by the parties that full claim of that party would be upheld whose interpretation was found to be correct by the tribunal. The petitioner had neither claimed such pro-rata reduction in the rate of demurrage in its calculation, nor had it disputed respondent''s calculation on the ground that it was entitled to such a reduction. Petitioner did not even claim damages for the alleged breach of undertaking by the owner to provide a certain number of functional cranes on the vessel. He submits that otherwise also, the delay in waiting for a berth at anchorage is entirely attributable to the charterer - in its failure to provide a berth on arrival. Therefore, exclusion from laytime on account of the said breakdown can only be provided subsequent to berthing and commencement of discharge operation, because it is only then that the discharge is delayed/affected as a result of the breakdown, and for which appropriate exclusion of time has been duly provided by the respondent-owner in its laytime calculations.

22. Mr. Pratap submits that the interpretation placed by the tribunal on the relevant clauses of the COA is in accordance with the express terms of the COA and usages of the shipping trade. In any event, it is a plausible view and interpretation of the COA. Therefore, in view of the settled legal position and the aforesaid submissions, the court would not be justified in interfering with the award of the tribunal in the present proceedings.

23. Lastly, Mr. Pratap submits that the impugned award is a unanimous award, rendered by a tribunal comprising of three expert arbitrators, who have

considerable knowledge and experience in shipping matters. Thus, as observed by the Supreme court in the case of Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, , every endeavour shall be made to uphold the award of the skilled persons that the parties themselves have selected to decide the dispute between them.

Discussion & Decision:

24. At the very outset, I may clarify that this court, while hearing objections to an arbitral award, does not sit in appeal over the findings returned by the tribunal. If the findings are premised on a probable interpretation of the contractual clauses-though not the only interpretation, and are not perverse or based on a wrong proposition of law, the court would not interfere with the award. The submissions of the parties need to be examined in the light of the above well settled principles of judicial review of an arbitral award u/s 34 of the Act laid down by the Supreme court in a catena of decisions, including Saw Pipes (supra).

25. Interpreting the expression ''ready in all respects to discharge the cargo '' in clause 35 (the time counting provision)-as a condition precedent for tendering of NOR, the tribunal concluded that it was nowhere stated in the clause that the vessel should be ready to discharge cargo at the discharge rate provided in the charter party. Thus, even if the vessel arrived with a defective crane, it would be ready to discharge cargo, though not at the stipulated rate. It concluded that clause 35 does not state that all the cranes should be available for discharge, nor does it state that if a crane was not working, the NOR would be invalid. Therefore, as long as the vessel can discharge-not necessarily at the same rate as provided in the charter party, 24 hours after service of NOR, time starts under clause 35. However, different consequences would follow, if the vessel arrives with all the cranes being defective, such that it was totally unable to discharge the cargo. Further, it concluded that although the description of the vessel in the COA stipulated minimum of 4 cranes/4 grabs of particular specifications, and there was an undertaking by the owner to provide the said gear, the charter party also provided the consequences of the breach of that undertaking. While dealing with consequences of breakdown of a crane, the tribunal concluded that there is no express clause in the COA providing that laytime is not to commence in the event of breakdown of a crane. Under clause 40, if there is a breakdown of a crane, then time-only to the extent of such breakdown, would be excluded from laytime. Under clause 43, if the vessel comes with a hatch lesser than the stipulated number of 5 hatches, then discharge rate would be reduced straightaway for the unavailable hatch. Under clause 44, if there is deficiency in the particulars/specifications of the gear, then there is a proportional reduction in the stipulated discharge rate. But, none of the said clauses contemplate that the breakdown of a crane would affect the validity of the NOR or commencement of laytime under clause 35. Therefore, on a harmonious construction of the various relevant clauses of the COA, the tribunal concluded that

the consequence of breakdown of a crane, as provided in the contract, would be a proportional reduction in laytime during the period of such breakdown.

26. The petitioner strenuously relies on clause 1(a)-specifically para 3 thereof, which stipulates that NOR shall be accepted only from the time minimum 4 grabs are actually fitted on the vessel in working condition.

27. The words ''following grabless clause to apply:'' in para 2 of clause 1(a) make it abundantly clear that the said stipulation applies only to a ''grabless'' vessel. It has never been disputed by the petitioner that the vessels in question are both ''geared and grabbed handymax vessels''. Therefore, reliance on the relevant part of the said clause is misconceived. As such, petitioner''s reliance on the award passed in M.V. Ken Gallant also fails, because the tribunal therein was dealing with a grabless vessel, and the issue therein did not pertain to interpretation of various clauses of the contract as in the present case, but to applicability of a clause-similar to clause 1(a) para 3 herein.

28. While examining the requirement of readiness under clause 35, the tribunal has observed that "the clause nowhere says that the vessel should be ready to discharge cargo at the discharge rate provided in the charter party." According to the tribunal, clause 35 clearly means that "24 hrs after service of NOR time starts, whether the vessel is in berth or not -as long as the vessel can discharge, but not necessarily that it can discharge at the same rate as provided in the charter party.". Clause 35 simply uses the words ''ready in all respects to discharge the cargo''. Therefore, the aforestated interpretation of clause 35 by the tribunal seems to be a reasonable and probable interpretation, when one keeps in view the principle of interpretation that a term of a contract should be given its plain and ordinary meaning, as an average reasonable person in the trade would understand it. It was not for the tribunal, nor is it for the court, to add words to a term of the contract, or read into it something which is not manifest in the express language of the term. I, therefore, see no error in tribunal''s observation that "Clause 35 does not say that all cranes should be available for discharge nor does it say, as said in clause 1, that if any crane is not working the NOR is not valid.

29. Petitioner''s reliance on the VIRGINIA M to assert that the vessel cannot be said to be ready in all respect to discharge, because it cannot discharge at the stipulated rate, is misplaced. Every judicial decision has to be seen in the context of the facts and circumstances in which it was rendered. In the VIRGINIA M, the NOR was given by the owner, when the vessel-consuming about 20 tons per day fresh water (to feed her boilers and provide the steam necessary to run her auxiliaries), had only 15 tons of fresh water remaining on board. Consequently, at the time of tendering of the NOR, the state of the vessel was such that although the discharge could have commenced, but the vessel was not in a position to ensure continuous/uninterrupted discharge of whole of the relevant cargo. The arbitrators upheld the validity of the NOR on the ground that the vessel, at the time of the said

NOR, was in a position to commence discharge, though length of time for which it could sustain discharge was uncertain. The court of appeal, disagreeing with the arbitrators, held that readiness to load/discharge refers to readiness to load/discharge the whole of the relevant cargo. Further, it observed that it would be absurd and wholly unbusinesslike, to say that laytime must be treated as starting, even though, within a matter of minutes or hours of its doing so, laytime is interrupted owing to the incapacity of the ship to continue discharge. However, in the present case, notwithstanding the breakdown of a crane, whole of the cargo-which is the subject matter of the COA, could be discharged using the other three functional cranes. Breakdown of one/two cranes would not stop the discharge, but merely reduce the rate of discharge-for which adequate provision has been made in the COA. In this context, the tribunal has rightly observed that "If a vessel were to arrive with all cranes defective so that it is not totally able to discharge cargo, certainly different consequences may follow."

30. The petitioner stresses that the owner guaranteed to provide minimum 4 number of functional cranes and grabs of particular specifications, and clauses 1(a), 3, 40, 43 & 44 reinforce that it was fundamental for the validity of NOR, and commencement of laytime, that the said obligation was fulfilled.

31. Undoubtedly, the contractual clauses should be read in conjunction with one another. No clause can be read and interpreted in isolation. I concur with the petitioner that while interpreting the words ''ready in all respects to discharge'' in clause 35, the effect of other relevant clauses 1(a), 3, 40, 43 & 44 cannot be ignored.

32. However, as aforediscussed, reliance on clause 1(a) does not aid the petitioner''s case. On the contrary, the tribunal has observed that "This clause is extremely important because it shows that, where the laytime is not to be commenced, the charter party clause specifically provides for the same. There is no such clear cut clause in the COA providing for the breakdown of crane.". This observation of the tribunal draws further strength from the distinction pointed out by the respondent in the language used in clauses 21 and 35.

33. Clause 1(a), para 3 expressly states that for a grabless vessel the effect of non-availability of working grabs within 2 hours of berthing is that-irrespective of the fact that discharge could be undertaken only after berthing, waiting time at anchorage(pre berthing time) is on owner''s account, i.e. as if laytime did not commence till grabs are actually fitted. Similarly, clause 21 expressly states that pursuant to service of NOR, if vessel is found to be not ready after berthing, the laytime does not commence at all, till the vessel is ready in all respects to load.

34. Perusal of the said clauses shows that wherever the parties intended to provide that NOR/commencement of laytime be interdicted as a result of a certain event, they expressly provided for the same. Pertinently, there is no such similar provision with respect to commencement of laytime at the discharge port in clause 35 as in

clause 1(a) read with clause 21. Had it been the intention of the parties that under clause 35, the vessel be considered not ready to discharge on account of a breakdown or deficiency in a crane, or the NOR so given be considered invalid, or that laytime was not to commence on happening of the said contingency, they could have expressly provided for the same, especially when such a contingency was well within their contemplation. Therefore, in view of the settled principle of interpretation of a contract that whatever is omitted is understood to be excluded (expressio unius est exclusio alterius), the aforesaid interpretation by the tribunal seems to be a reasonable and plausible view.

35. Also, the tribunal was of the view that the descriptions of the vessels provided in the COA were "indicative" as the vessels had not yet been identified at the time of entering into the COA. Further, dealing with petitioner''s contention with respect to owner''s obligation under the COA to provide stipulated gear, the tribunal observed that "If the undertaking is to come with a certain number of cranes, there is no dispute that the vessel came with the said number of cranes; and if there was one/two cranes which were broken down, the consequences also have been provided in the charter party as we have held herein." It is not the petitioner''s case that the nominated vessels in question did not conform to the said description of providing minimum 4 number of cranes and grabs, or one of the required 4 cranes was never available for discharge throughout the discharge operation at a port. COA does provide for effect of contingencies of breakdown of a crane/unavailability of 5 hatches/reduced lifting capacity under clauses 40, 43 & 44 respectively. Once again, in view of the said clauses, this seems to be a probable interpretation.

36. The tribunal concluded that the contingencies envisaged under the said clauses do not invalidate the NOR, nor do they stop the commencement of laytime, and the consequence provided under the COA is limited to exclusion from laytime or proportional reduction in discharge rate, based on the rationale that "In a COA, which is free in and free out, a charterer/receiver cannot expect a vessel to be laid at their disposal, for loading or discharge, for an indefinite period. Therefore, at the time of entering into the contract, a time called "laytime" is made available to the C/R, to load or discharge the cargo. This is by providing a discharge rate. A discharge rate cannot be fixed in isolation and, in order to maintain that discharge rate, the ship owner has to make certain conditions available to the charterer and one such condition is the provision of cranes. Therefore, if the owners are unable to provide those requirements, the discharge rate is reduced proportionately, viz. proportional to the time during which the owners do not provide the agreed facility... Commencement of laytime is entirely different matter altogether; and that is why the clause relating to commencement of laytime is different from the clause relating to reduction or adjustment of the rate of discharge.

37. Perusal of the COA shows that clause 35 is the only clause governing commencement of laytime at the discharge port, and, as discussed above, it is not

qualified by any words to say that the laytime is not to commence on account of a particular contingency. Pertinently, petitioner has not pointed out any provision in the entire COA which contemplates availability of minimum 4 number of functional cranes/grabs as the prerequisite for issue or acceptance of a NOR under clause 35.

38. I accept the petitioner''s submission that clause 40, specifically dealing with the consequence of breakdown of a crane, comes into play only after laytime has already commenced. But, the petitioner falters in saying that in the instant case laytime did not commence because at time of giving of the NOR, one of the cranes was non-functional.

39. In the Linardos, the court was faced with the issue of validity of NOR given, and the consequent laytime commencement at the loading port. The vessel gave NOR on Oct. 4. The vessel berthed on Oct 7. Marine surveyor failed her for loading, because of water and rust in her hatches. The vessel was eventually accepted as ready on Oct 8. The Charterers disputed the validity of the NOR-the vessel not, in truth, being ready to load in all respects at the time of notice, because it had failed to get marine surveyor''s certificate of fitness which was a pre-condition for tender of a valid NOR. The material provisions of charter party were:

Clause 4 (lines 67/68)

Time commencing, subject always to the undermentioned provisos, 18 hours after Notice of Readiness has been given by the master certifying the vessel has arrived and is in all respects ready to load, whether in berth or not...

(lines 75 to 78) Anytime lost subsequently by vessel not fulfilling requirements for Free Pratique or readiness to load in all respects, including Marine Surveyor''s Certificate...or for any other reason for which the vessel was responsible, shall NOT count as notice time or as time allowed for loading.

Clause 24: [in typescript]

RBCT Regulations to apply to this Charter Party

Clause 25: [in typescript]

In the event of vessel having to wait for berth at load/discharge port due to congestion, then notice of readiness maybe tendered by cable or telex or off of the port whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not.

Examining the validity of notice of readiness, Colman J., inter-alia, observed:

In approaching the construction of cl. 4 and 25 and cl. 24, the incorporation clause, one must not lose sight of the fact, although in general a valid notice of readiness cannot be given unless and until the vessel is in truth ready to load, it is always open to the parties to ameliorate the black or white effect of this principle by express

provisions to the contrary, as recognized by Lord Justice Roskill in The Tres Flores.... In my view, the words of cl. 4 contemplate that subsequently to the giving of notice of readiness the loading of the vessel will be delayed. They further contemplate the causes of such delay may be failure to obtain free pratique or unreadiness to load in all respects or other reasons for which the vessel is responsible.

Upholding the validity of the notice of readiness by the vessel, court further held:

The natural meaning of lines 75 to 78 in the commercial setting is as a matter of construction inconsistent with the normal requirement that notice of readiness can validly be given only when the vessel is in all respects physically ready to load. Accordingly, the effect of cl. 4 is to contract out of the normal rule requiring that the vessel must be ready at the time of the giving of the notice.

Consequently, if a vessel was obliged to wait for an available berth and gave notice of readiness to load in accordance with cl. 25 when in fact it''s holds were unclean and therefore unready, notice time would begin to run at the outset: but if and to the extent that the vessel''s unreadiness delayed cargo operations when a birth became available the running of time would be interrupted untill the vessel was accepted as ready. The rejection of the holds after the vessel got into berth would not in such a case deprive owners of the benefit of time lost at the anchorage, but merely of subsequent loss of time at the berth. If it were not for line 75 to 78, owners whose vessel, having given notice of readiness at the anchorage, then had to wait for a period of several days or even weeks because no berth was available, was found on getting into berth to need one final washing of one or more of a cargo spaces, perhaps only a few hours work, could lose the benefit of all time lost at the anchorage. The printed form of this charter party avoids that very commercially-unbalanced result.

Dealing with the contention of the charterer, that lines 75 to 78 pertained to loss of time due to events occurring after the giving of notice of readiness, the court observed:

There is however, nothing in the words which confines the unreadiness to load to such as is attributable to events which occur after the giving of notice of readiness or to such as did not exist at the time when the notice was given. It is the loss of time, not the events giving rise to such loss of time, which lines 75 to 78 exclude from counting as notice time or lay time if that loss occurred after the notice of readiness was given... Lines 75 to 78 thus contemplate loss of time due to the common occurrence of a marine surveyor declaring the holds unfit after the master has already presented what on the face of it is a perfectly valid notice of readiness...I do not accept the argument that line 75 to 78 should be construed as confined to loss of time due to events occurring after the giving of notice of readiness because the common law rule is that valid notice of readiness can be given only if the vessel is indeed ready. The express reference to the marine surveyor''s certificate clearly

contemplates a failure to obtain a confirmation of master''s certification of readiness and that could normally be expected to arise by reason of condition of vessel which existed at the time of giving of notice of readiness. The contention that such reference was intended to be confined to after events is, in my judgment is entirely unrealistic.

40. Similar view was taken by Colman J, in the Jay Ganesh, following his earlier decision in the Linardos. The vessel gave notice of readiness at the loading port on August 10/11, but due to congestion, she berthed on September 7. She failed the inspection due to infestation and was declared unfit to load the cargo of rice. On Sep 9, she was declared fit and the loading commenced a day after. The issue before the court was whether the NOR given was a nullity, because the vessel''s holds were then infested so that the time did not commence until the commencement of loading, or whether, the notice was valid so as to start the running of laytime, subject to deduction of all the time lost until she was, infact, ready to load. The deduction was in respect of the period of about two and a half days from berthing, to being ready to load. The material provisions of charter party were:

8(b) At loading port before tendering notice of readiness, the Owners and the Masters shall ensure that all holds of the vessel are clean, dry and free from smell and in all respects suitable to receive the cargo to the shippers''/charterers'' satisfaction.

9(e) If after berthing the vessel is found not to be ready in all respects to load/discharge, the actual time lost until the vessel is in fact ready to load/discharge (including customs clearance and free pratique, if applicable) shall not count as laytime or as time on demurrage.

Dealing with charterers contention that clause 8(b) identified a state of readiness, which was a condition precedent to the valid notice of readiness, the court, inter-alia, observed:

It is one thing to impose on owners a duty as to the state of the vessel before giving notice of readiness, but it does not follow that the performance of that duty is a condition precedent to the validity of the notice that it has been performed. The Tres Flore, sup., makes it clear that the parties can contract out what would otherwise be the invalidity of the notice of the readiness. In my judgment, by the very specific provision of cl. 9 (e) they have done exactly that here.

The overall effect of 8 and 9 is accordingly that this form of charter party requires that charter must pay for waiting time at the anchorage when they have not provided a berth, but that if the vessel then causes delay after arrival in berth because she was not in truth then ready to load and discharge, that loss of time is to be borne by the owners. This is an entirely logical division of risk of delay between the parties.

(Emphasis supplied)

Dealing with the contention of the charterers that effect should be given to cl. 8(b) by construing cl. 9 (e) in such a manner that the unreadiness found was confined to that attributable to events occurring after the giving of notice of readiness and before berthing, the court observed:

..It is no less commercially unrealistic in this case than it was in the linardos to distinguish between delay caused by unreadiness attributable to events existing when the notice was given and delay caused by subsequent events. In both cases the purpose of the clause is to make the owners pay for the loss because the master, albeit innocently, gave notice that his vessel was ready when in truth it was not and to make the charters to pay for delay caused by their failure to provide a berth.

Thus, the court upheld the view of the arbitrator that if the master gave notice of readiness from the anchorage-in the belief that the vessel was physically ready to load when, in truth, she was not, a valid notice had been given, and laytime started to run with reference to that notice. If after berthing, she was found to be physically not ready to load, the time actually lost-until she was so ready, did not count as laytime.

41. Although the facts of the present case are not identical to the aforediscussed cases, but the reasoning and the principle enunciated therein, i.e. with respect to contracting out of any requirement for notice of readiness, is fairly applicable here. In the said cases, certain preconditions for tendering of notice of readiness were expressly mentioned in the contract itself, still the contracting out clauses therein were construed in the aforesaid manner by the courts and given effect to, so as to hold the NOR to be valid. Unlike the said cases, in the instant case, there is no express clause in the COA showing that the availability of 4 working cranes of stipulated capacity is a pre-condition for tendering of NOR under clause 35. Nevertheless, the fact that the COA provides for the consequences of the breakdown/deficiency in the discharge capacity of a crane, shows that parties contemplated that there could be such a contingency, and so, attached specific consequences thereto. Thus, in any event-even assuming that availability of 4 working cranes of specific capacity was a prerequisite for issuing of NOR, clause 40 read with clause 44 demonstrates the intention of the parties to contract out of the said requirement. Therefore, the above decisions in the Linardos and the Jay Ganesh also establish that the view taken by the tribunal is a plausible and reasonable view in the context of similar contractual clauses.

42. There is nothing in the language used in clause 40 to suggest that ''breakdown'' envisaged under clause 40 does not cover a breakdown at the time of NOR, but is confined to a breakdown during discharge operation only. Moreover, in view of the aforediscussed cases, it is immaterial whether the breakdown occurred subsequent

to NOR or it existed at time of issuance of NOR.

43. The interpretation sought to be placed by the petitioner on the words ''period of such insufficiency'' in clause 40, to say that whole period during which a crane is in operational shall be excluded from the time of the NOR such that laytime commences only after the crane is repaired, not only seems to be commercially unreasonable, but also inconsistent with the scheme of the COA.

44. The tribunal, interpreting clauses 43 and 44, has explained as to when the discharge rate is to be wholly reduced straightaway and when it has to be a proportional reduction. The tribunal observed that "The vessel is supposed to have 5 hatches and if it comes only with 4 hatches, there would be a pro-rata 20% deduction. Therefore, deduction is pro-rata, viz. something which can be calculated exactly on a calculable factor. This is why, in clause 43, the expression used is "prorata", because, if one hatch is not available, the discharge rate is reduced straightaway. As against which, in the case of any deficiency in the crane, the discharge rate is not reduced straightaway but to the extent of time during which there was a breakdown, and not that the discharge rate is wholly reduced. That is why a different expression is used." Explaining the rationale behind the proportional reduction in the discharge rate, the tribunal observed that a time called ''laytime'' is made available to the charterer to load or discharge the cargo, by providing a discharge rate. The discharge rate is fixed, based on certain conditions. Since charterers ability to discharge at the stipulated rate depends on fulfilment of the obligation on part of the owner to provide the agreed gear of particular specification/capacity, failure on part of the owner to fulfil the said requirements results into proportional reduction in the discharge rate, viz. proportional to the time during which the owner does not provide the agreed facility/gear. The tribunal has, therefore, harmoniously construed clause 40 with clauses 43 & 44 to conclude that the consequence of breakdown of a crane would be a proportional reduction in laytime during the breakdown period.

45. A contract should be construed in a commercially reasonable manner-the presumption being that the parties would not have intended an uncommercial or unreasonable result. If petitioner''s interpretation were to be accepted, it would mean that even though, after tendering of NOR, the vessel has berthed and commenced discharge with the other 3 functional cranes, laytime is not to count with regard to the other three functional cranes as well, unless and until the fourth crane is repaired. Such an interpretation does not seem to be reasonable from the owner''s point of view.

46. Also, the said interpretation sought to be placed by the petitioner on clause 40 does not harmonise with petitioner''s own interpretation of clause 44. According to the petitioner, when a vessel arrives with the requisite number of cranes and grabs, but on survey it is found that one of the cranes, though functional, is deficient in capacity, the discharge rate would be a proportionately reduced to the extent of the

deficiency of the said crane. In view of the said interpretation of clause 44, it is difficult to accept that under clause 40, if a crane is temporarily non-functional, the whole period of breakdown does not count, i.e. it does not count in respect of the other functional cranes also that the petitioner uses/is capable of using for discharge.

47. In view of the aforesaid discussion, I see no error in the conclusion arrived at by the tribunal, with respect to the effect of clauses 1(a), 40, 43 & 44 vis-�-vis the validity of NOR under clause 35, that "..none of these clauses can be interpreted to mean that, if there is a breakdown of crane, NOR is not valid and that the time will not commence till the crane is set right; and all that it would happen is that the laytime would be proportionately reduced during the breakdown period.

48. Therefore, on the aspect of the validity of NOR, it is apparent from the award that the tribunal has applied its mind to arrive at a well reasoned conclusion, based on harmonious construction of all the relevant clauses of the COA. Interpretation of contractual terms being a matter within the domain of the arbitrator, there is limited scope of judicial intervention. Even if the interpretation adopted by the tribunal is not the only correct view, it being a plausible view without any patent illegality in the conclusions drawn by the tribunal, it is beyond the scope of jurisdiction of this court u/s 34 of the Act to interfere with the award on this aspect.

49. Coming to the alternate submission of the petitioner on pro-rata reduction of demurrage to the extent of breakdown of a crane for the corresponding pre-berthing period, I may note that there is no express clause in the contract providing for such a pro-rata reduction of demurrage. The demurrage clause in the COA is unqualified. However, the objection in substance turns on the interpretation of clause 40, i.e. whether the effect of clause 40(excluding the period of breakdown from laytime) operates for the pre-berthing period as well, or is confined to the post-berthing period only.

50. Under a voyage charter party (which was the case in hand), time is of essence, and there is always a risk of delay-most common cause of delay being non availability of berth due to congestion at ports. It is for the parties to allocate that risk among themselves under different circumstances. Maritime adventure contemplated by a voyage charter can be analysed in four stages (1) the loading voyage (2) the loading operation (3) the carrying voyage and (4) the discharging operation. Laytime is the time for which the charterer is entitled to use the vessel in loading or discharging operation, in consideration of a stipulated freight. Laytime does not start until the vessel has completed the preceding loading voyage or carrying voyage and has become an arrived ship. Once started, it runs continuously subject to certain exclusions provided under the charter party itself. Charter party could be a berth or port charter, as agreed by the parties. Under a berth charter, the vessel does not complete the loading or the carrying voyage until the vessel reaches the designated berth. So, any time spent waiting for the berth to become available

serves only to prolong the voyage stage and, in the absence of express provision to the contrary, any loss occasioned to the ship owner by reason of the delay falls on him alone. On the other hand, under a port charter, the voyage stage is completed upon arrival of the vessel at a usual waiting place within the limits of the port. If, because of congestion, the charterer cannot designate a berth to which she can proceed immediately, laytime nevertheless starts to run against the charterer. In the case of a port charter, it is only when the carrying vessel is compelled to wait her turn at a place outside the limits of the port that the time spent in waiting for a berth would operate to prolong the voyage stage, and to cast the loss so occasioned upon the shoulders of the ship owner. Since time is of essence in a voyage charter, if the charterer identifies such ports where there is a risk of delay in loading or unloading cargo owing to congestion, it makes more commercial sense that, irrespective of whether it be a berth charter or a port charter, the charterer should assume the financial burden of that risk and compensate the ship owner in the event of delay resulting from congestion at ports. This seems to be the purpose for incorporating in charter parties clauses like "Time lost in waiting for berth to count as laytime", "Time to count....wibon/wipon " etc. [See: Aldebaran Compania Maritima S.A. Panama v Aussenhandel A.G. Zsrich (the Darrah), [1976] 3 W.L.R. 320; Oldendorff (E.L.) & Co. G.m.b.H. v. Tradax Export S.A. (The Johanna Oldendorff), [1973] 3 W.L.R. 382; Bulk Transport Group Shipping Co. Ltd. v. Seacrystal Shipping Ltd. (the Kyzikos), [1988] 3 W.L.R. 858].The principle to be applied for working out the financial consequences of delay in berthing due to congestion at a port in context of such Time lost'' clauses was enunciated by the House of Lords in the Darrah.

51. In the Darrah, the House of Lords was posed with the question of applicability of certain laytime exceptions to the period when the vessel was waiting for a berth. The material provisions of the charter party were:

Clause 4: Time to commence at 2 p.m. if notice of readiness to discharge given before noon. Time lost in waiting for berth to count as laytime.

Clause 20: Cargo to be discharged by receivers at their risk and expense at the rate of 625 metric tons per weather working day of 24 consecutive hours, Fridays and holidays excepted.

Clause 21: At discharging port, time from noon Thursday or noon on the day before a legal holiday until 8 a.m. the next working day not to count, even if used.

52. The Darrah was chartered under a port charter party. The ship, upon reaching a usual waiting place within the limits of the port of Tripoli, gave notice of readiness to discharge at 2 p.m. on January 2. Laytime started to run at 8 a.m. on January 3. Due to congestion, she could not berth till January 9 at 8 a.m., when she began discharging immediately. Discharge was completed on January 24. The Ship owners claimed demurrage based on a calculation-which treated as laytime the whole of the

six days that had elapsed while the Darrah was waiting for a berth, despite the fact that they included two non-working days, a Friday and a legal holiday, and the period from noon on the day before each. Thus, the dispute pertained to the application of clauses 20 and 21 of the charter party during the period when the vessel was waiting for berth.

53. Expounding the principle for working out the financial consequences of delay in berthing due to congestion, the House of Lords held that in the computation of the time lost in waiting for berth, the ship must be treated as if she were in fact in berth, and all such periods which would have been left out in the computation of permitted laytime used up-if she had actually been in berth, were to be excluded in the computation of such ''time lost''. The conclusion was premised on the rationale that a ship owner should not gain a greater advantage from his ship being kept waiting for a berth, than he would get from her being kept at her berth. Although the House of Lords was dealing with a port charter in the Durrah, the aforesaid proposition was rendered in context of both-berth charter party, and port charter party.

54. With respect to the effect of ''Time lost in waiting for berth to count as laytime'' clause, Lord Diplock observed that:

In a berth charter the effect of the clauses is to put the ship owner in the same position financially as he would have been if instead of being compelled to wait, his vessel had been able to go straight to her berth and the obligations of the charterer to carry out the loading or discharging operation had started then. In a port charter the clauses are superfluous so far as concerns time spent in waiting in turn within the limits of the port. This counts as laytime anyway; it is laytime. The clauses would however have the same effect as in a berth charter in respect of ports like Hull or Glasgow where the usual waiting place is outside the limits of the port.

55. Considering the operation of clauses providing for exclusions from laytime, vis-a-vis the ''time lost'' clause, Lord Diplock, inter-alia, observed that:

..."Time lost in waiting for berth" in the context of the adventure contemplated by a voyage charter, as it seems to me, must mean the period during which the vessel would have been in berth and at the disposition of the charterer for carrying out the loading or discharging operation, if she had not been prevented by congestion at the port from reaching a berth at which the operation could be carried out. The clauses go on to say that that period is to count as loading time or as discharging time, as the case may be. That means that for the purposes of those provisions of the charter party which deal with the time allowed to load or to discharge the vessel and how it is to be paid for (i.e. laytime and demurrage) the vessel is to be treated as if during that period she were in fact in berth and at the disposition of the charterer for carrying out the loading or discharging operation. So whatever portions of the waiting period would have been taken into account in calculating the permitted laytime used up if the vessel had in fact then been in berth and at the disposition of

the charterer (e.g., weather working days) are to be treated as if they had been available for loading or discharging cargo, and whatever portions of the waiting period would not have been taken into account in that calculation (e.g. Sundays or Fridays and legal holidays and days on which working was prevented by inclement weather) are not to be treated as if they had been available for loading or discharging cargo.

(Emphasis supplied)

56. Similarly, examining the interplay between clauses-similar to clause 20 and 21 and ''time lost'' clause in a Port charter, Viscount Dilhorne, inter-alia, observed that:

...a conflict is avoided if "Time lost in waiting for berth shall count as laytime" is read as meaning no more than that the time lost is to count in the same way as time spent at the discharging berth; in other words, to count as laytime as counted in accordance with clauses 20 and 21 under which only weather working days of 24 consecutive hours and not the excepted periods are to be counted.

(Emphasis supplied)

He further observed that:

So interpreted, the "time lost" provision serves a useful purpose in a berth charter party and does not give an advantage to a shipowner if his ship is kept waiting for a berth over that which he may obtain if the ship is kept at a berth.

57. Lord Russell of Killowen was also of the view that:

If you have a provision such as is found in clause 4 in a berth charter the effect of it is in my opinion simply to start running the period which contains laytime in the narrow (formula) sense but subject to the matters to which that period would have been subject had the ship not waited for a berth. Similarly, if you have such a provision in a port charter and the ship is kept waiting for a berth outside the port limits so as not to be an arrived ship.

(Emphasis supplied)

58. The House of lords overruled the earlier decisions which had laid down that the "time lost" clauses and "laytime" clauses in a berth charter constituted two independent and unrelated codes for computing the amount of permitted laytime that had been used up, and "time lost" code was not subject to any of the exclusions of periods from the reckoning which were applicable to laytime. Explaining the fallacy in the said interpretation rendered in the earlier decisions, Lord Diplock, inter-alia, observed that:

...In the first place, the results of ascribing to the clauses the meaning accepted since 1966 do not make commercial sense; it gives to the ship owner the chance of receiving a bonus dependent upon whether (a) his ship is lucky enough to be kept

waiting for a berth and (b) is so kept waiting during a period which includes time which would not have counted against permitted laytime if the ship had been in berth. In the second place, I do not think that the chance of obtaining such a bonus is likely to have influenced the freight or demurrage rates charged...

(Emphasis supplied)

59. Therefore, the House of Lords in the Darrah has clearly set out the principle that once the time-for loading/discharging operations starts to run against the charterer-irrespective of vessel being in berth, or not, in computing the time used up during the period when the vessel is waiting for a berth-availability of which is delayed due to congestion at the port, the charterer is entitled to exclude all such time which he would have excluded under the contract, had the vessel been in berth at that relevant point of time, because otherwise, it would be more rewarding for the ship to be kept waiting for a berth than not to be kept waiting, which would be completely in dissonance with the commercial purposes of a voyage charter.

60. The aforesaid principle and underlying reasoning is squarely applicable to the instant case. In the present case, clause 35, incorporates the WIBON (whether in berth or not) provision. Effect of the phrase ''whether in berth or not'' herein is that once the vessel arrives within the port limits, it can give NOR(subject to other requirements of clause 35) from the usual waiting place in the port, such that the laytime starts to run even before the vessel reaches the discharging berth-to be nominated by the charterer. Consequently, the risk of subsequent delays, including the risk of delay in berthing, is to borne by the charterer.

61. Clause 40 is one of the clauses in the COA which seeks to transfer the risk of delay on account of breakdown of discharging equipment from the charterer back to the owner. As discussed in the foregoing paragraph, under clause 35, laytime commences at the discharge port irrespective of whether the vessel is in berth, or not. During the time when the vessel is waiting for a berth-with the laytime running, had the vessel not been prevented from reaching its designated berth due to congestion at the port, the petitioner would have been carrying out/capable of carrying out discharge operations at the berth, and then, only 75% of the laytime would have counted on the basis of 3 functional cranes. But, for the pre-berthing period, the respondent has counted used up time at 100% in its laytime calculations, notwithstanding the fact that one of the cranes at the said relevant time was in operational.

62. Pertinently, there are no express words in clause 40 itself to confine its operation to post berthing period only-when actual discharging of cargo can commence, nor does it indicate any intention on the part of the parties to restrict it to such period during which the vessel is alongside the berth.

63. Therefore, applying the principle expounded in the Darrah, pre-berthing period shall be treated at par with the post-berthing period as far as proportional reduction

in laytime on account of breakdown of crane under clause 40, read with clause 44, is concerned. The respondent cannot gain a greater advantage from its vessel being kept waiting for a berth, than it would get from her being kept at her berth, and so, even when the vessel was not alongside berth, the petitioner should have been entitled to a similar reduction on account of breakdown, treating the vessel as if it were in berth.

64. The Tribunal has dealt with the alternate submission of the petitioner in a rather cursory manner. This submission is recorded in para 43 of the impugned Award. The same has been answered by the Tribunal by observing: "The obligation to berth a vessel is that of the charterers. If they demur and do not obtain a berth for a couple of days, the time must count and the reduction of time is only permitted for the time lost in actually discharging the cargo.". In my view, this reasoning does not answer the petitioner''s alternate submission and cannot be said to be even a plausible view. It is an erroneous view.

65. Therefore, the award is set aside to this limited extent, and remitted back to the tribunal for reconsideration of this aspect in light of the principle enunciated by the House of Lords in the Darrah.