(2014) 03 BOM CK 0110

Bombay High Court

Case No: Appeal Lodg No. 162 of 2013 in Arbitration Petition No. 489 of 2012

SKS Logistics Ltd.		APPELLANT
	Vs	
Fairmacs Shipping and Transport Services Pvt. Ltd.		RESPONDENT

Date of Decision: March 12, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34

Citation: (2014) 3 ARBLR 395 : (2014) 4 BomCR 529

Hon'ble Judges: S.J. Vazifdar, J; B.P. Colabawalla, J

Bench: Division Bench

Advocate: Shailesh Shah, assisted with Mr. D. Banerjee and Mr. H.N. Thakore and Ms. Jyoti Ghag, instructed by Thakore Jariwalla and Associates, for the Appellant; Rahul Narichania, a/w Mr. V.N. Sunilkumar and Mr. Sandeep Sreekumar and Ms. Smita Jha, instructed by Mulla and Mulla and C.B.C. and Caroe, for the Respondent

Final Decision: Dismissed

Judgement

B.P. Colabawalla, J.

In the present appeal exception is taken to the order of the learned single Judge dated 25th February 2013 dismissing the Arbitration Petition filed u/s 34 of the Arbitration and Conciliation Act, 1996("the Act") challenging the Award dated 2nd December 2011 (and subsequently corrected on 13.01.2012) passed by the arbitral tribunal, under which the appellant was inter alia directed to pay a sum of Rs. 52,54,046.34 to the respondent together with costs of Rs. 30,00,000/-. The appellant herein was the original respondent in the arbitration and the respondent herein was the original claimant. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and was at the relevant time the owner of a vessel "M.V. Royal Pisces" (said vessel). The respondent company carries on business of transporting and shipping goods. By and under a fixture note dated 22nd June 2007, the appellant gave its vessel on hire to the respondent. The said deal was brokered

through a common broker of the parties known as M/s. Sealine International. Under the said fixture note, the said vessel was chartered for a period of six months, and at the respondent''s option, for two further periods of three months each. The Laycan period was 1st July 2007-5th July 2007, subject to all statutory surveys being completed. It would be important to mention here that Laycan is the period during which the ship owner must tender the notice of readiness to the charterer that the ship has arrived at the port of loading and is ready to load. It is an admitted position that the said vessel was not delivered between the period 1st July 2007-5th July 2007. According to the respondent, the appellant kept on promising the delivery of the vessel and ultimately by addendum No. 1, the Laycan period was extended from 9th October 2007 to 13th October 2007. The charter period was curtailed to 70 +/-5 days with a further extension of three months. The addendum No. 1 also provided that the charterers (respondent herein) were to re-deliver the vessel at Port Blair on or before 25th December 2007 for conducting the special surveys which would take about 10 to 15 days. The owners (appellant herein) of the said vessel were to give prior notice of 15/10/07 days for release of the vessel. Even though addendum No. 1 was admittedly entered into in December 2007, the vessel was delivered to the appellant on 13th October 2007 which was during the extended Laycan period.

2. The respondent re-delivered the vessel to the appellant on 22nd December 2007 at Port Blair. The appellant knew that the vessel was required to go for special surveys and that this process would take at least 10 to 15 days. Yet, the appellant immediately entered into another addendum No. 2 dated 22nd December 2007, by which the said vessel was again given to the respondent for a charter period of three months and ten days. The appellant billed the respondent and took charter hire in advance for the period 22nd December 2007 to 6th January 2008. The respondent was loading a cargo of 4,200 MTs of cement at Kakinada purchased by it from one Zuari Cement Ltd., for onward sale to its consignees/buyers. However, due to non-validity of the vessel''s certificates she was waiting in the port for 20 days from 29th December, 2007 to 19th January, 2008. The said vessel was held up in Kakinada with the cement cargo on board, until the appellant was able to obtain valid certificates.

3. Therefore, the respondent took the said vessel on hire from 13th October 2007 and re-delivered the same to the appellant on 26th January 2008 at Port Blair. During the said period, the said vessel made a total of three voyages:

4. In view of the fact that the said vessel (i) was not delivered as per the Laycan period mentioned in the fixture note dated 22nd June 2007 and which was delivered only on 13th October 2007; and (ii) in December, 2007 was delayed by 20 days in sailing out of Kakinada, disputes arose between the appellant and the respondent. Accordingly, in the month of March 2008, the respondent invoked arbitration and claimed several sums under different heads from the appellant.

5. Both the parties led evidence, documentary as well as oral, before the arbitral tribunal. After considering the entire evidence on record as well as hearing both the parties, the arbitral tribunal passed the Award dated 2nd December 2011 which was subsequently corrected on 13.01.2012.

6. Before the arbitral tribunal, the respondent made 7 claims in all. Given below is a chart of the claims made by the respondent and the amount awarded against each claim by the arbitral tribunal:

7. The disputes that formed the subject matter of the arbitration, related only to voyage No. 1 & voyage No. 3. Claim Nos. I, II & III related to voyage No. 1 and Claim Nos. IV, V, VI & VII related to voyage No. 3.

8. The arbitral tribunal only granted claim Nos. I, II, IV & VII as indicated above. The balance claims were rejected. The respondent (original claimant) hasn''t challenged the award, and hence the rejection of claim Nos. III, V & VI have attained finality.

9. Mr. Shah, the learned senior counsel appearing for the appellant submitted more or less the same contentions that were urged before the arbitral tribunal. They are as follows:-

The first three claims i.e. claim No. I (loss of interest), claim No. II (storage cost) claim No. III (increase in the price of cement) were based on the vessel not being delivered between 1st July to 5th July 2007 and having instead been delivered only in October 2007. Under the fixture note dated 22nd June 2007 the Laycan period was subject to all statutory surveys being completed. It had been made clear to the respondent that the vessel was undergoing repairs and could only sail after all statutory surveys were completed. If the ship was not delivered within the Laycan period, the only right which the respondent could have was to cancel fixture note. The respondent had the option of cancelling the charter if the ship arrived after the second date. The respondent (charterer) was not obliged to commence loading, even if the ship arrived earlier, until the first of the dates mentioned in the Laycan. Once the parties entered into addendum No. 1, there was a novation and all rights under the original contract (fixture note) came to an end as they were not reserved under the new contract. The respondent having agreed to an extension for taking delivery of the vessel from July 2007 to October 2007 had given up the claim that arises out of the delay. The respondent had waived its claim and was estopped by making any claim in view of the fact that they had entered into addendum No. 1 without reserving their rights to claim any damages. The learned counsel further submitted that when there is a written contract (namely addendum No. 1 to the fixture note dated 22nd June, 2007), there cannot be any oral or written communication reserving the right to claim damages. On the aforesaid grounds, Mr. Shah contended that at least insofar as claim Nos. I and II are concerned, the Award was vitiated and ought to have been set aside by the learned single Judge.

10. We find that the aforesaid arguments are not well founded. As correctly held by the arbitral tribunal, when the fixture note was entered into, the appellant, being the owner of the vessel, had advised the respondent that the vessel was undergoing minor repairs and would be delivered to the appellants within the Laycan period 1st July, 2007 to 5th July 2007. The arbitral tribunal after perusing the evidence led before it, came to the conclusion that the appellant kept on giving false assurances to deliver the vessel to the respondent. The correspondence on record clearly goes to show that the respondent had reserved their rights to claim damages from the appellant. In fact by a letter dated 18th September 2007, the appellant was clearly informed by the respondent that if the vessel is not delivered by 19th September 2007, they would not accept the vessel and would hold the appellant liable for all losses. By their letter dated 19th September 2007, the appellant inter-alia stated that they are looking for an amicable settlement to maintain business relations. The arbitral tribunal, in our view, has rightly rejected the contention on behalf of the appellant that merely because the right to claim damages was not stipulated/mentioned in addendum No. 1, it did not survive. In our view, the right to claim damages can be reserved by correspondence or by an oral communication and the same would survive, unless given up. It would depend on the facts and circumstances of each case. In the present case, the respondent had, at all stages, made it clear that they would be claiming losses caused to them.
11. Further one of the respondent''s witness deposed that the respondent had reserved their rights to claim losses. There was no cross-examination on this aspect. It is therefore clear that the aforesaid arguments of the learned counsel for the appellant hold no substance and are rejected. The arbitral tribunal as well as the learned single Judge have given detailed reasons dealing with the aforesaid arguments and we find no reason to take a different view.

12. The learned counsel next submitted that the damages awarded under claim No. I were extremely remote, and therefore, could not have been awarded by the arbitral tribunal.

13. We find that the same argument was made before the arbitral tribunal which has been discussed in great detail from paragraph Nos. 28 to 31 of the Award. After a detailed reasoning, the arbitral tribunal came to a finding that it would not be in the contemplation of the parties that the cargo (namely cement) purchased by the respondent from one Gujarat Sidhee Cement would be purchased by borrowing monies from a bank. The arbitral tribunal, however, held that once the appellant was put to notice that the cargo had been purchased, it would be in the contemplation of the parties that delay in delivery of the goods would result in a delay in recovering the price paid for the cargo. It would, therefore, be in the contemplation of businessmen that delay in recovery of the price means loss of opportunity to reuse this money or in any case, loss by way of interest which would be earned if this money was invested. In view of this, the arbitral tribunal only

awarded a sum of Rs. 4,08,428/- against claim No. I. Remoteness of damage is a mixed question of fact and law. The arbitral tribunal is the final arbiter of the facts before it. Therefore, on the issue of remoteness of damage we find that the view taken by the arbitral tribunal is a possible one. It is not absurd or unsustainable. We find absolutely no infirmity in the Award with reference to the aforesaid claim, and therefore, find no reason to interfere, either with the impugned Award or the order passed by the learned single Judge.

14. Claim No. II was made on the basis that due to the delay in the delivery of the vessel, (from July 2007 to October, 2007) the respondent was unable to take delivery of the cargo of cement which it had purchased from Gujarat Sidhee Cement. As a result thereof, Gujrat Sidhee Cement was constrained to store the cargo in its warehouse pending clearance by the respondent. The said Gujarat Sidhee Cement after giving the respondent ten free days, debited the account of the respondent towards storage charges for the cargo at the rate of Rs. 4 per MT. per day for the entire cargo of 4,200 MT. Thus, according to the respondent, with effect from 1st August 2007 till 15th October 2007 i.e. 76 days, the respondent''s account was debited to the extent of Rs. 12,76,800/- which was claimed in the arbitration. The findings, with reference to the aforesaid claim, are given in paragraph Nos. 33 to 35 of the impugned Award. The arbitral tribunal came to a finding that the Gujarat Sidhee Cement gave to the respondent the facility of lifting the 4200 MT of cement on or before 15th September 2007. The arbitral tribunal, therefore rightly came to the conclusion that the storage charges as claimed by the respondent could be only from 15th September 2007 to 15th October 2007 (31 days), and accordingly, awarded only a sum of Rs. 5,03,812/- against the aforesaid claim. We find that all the arguments made on behalf of the appellant being the arguments based on facts, and dealt with in detail by the arbitral tribunal, require no interference. In these circumstances, the learned Judge was justified in rejecting the contentions of the appellant in this regard.

15. As stated earlier, claim Nos. IV and VII arose out of voyage No. 3. Claim No. IV was made on account of the vessel sitting in port Kakinada for 20 days due to non-validity of the vessel''s certificates. It is the case of the respondent that it had purchased cargo from Zuari Cements Ltd. for onward sale to its consignees/buyers. The vessel owned by the appellant was loading the cargo at Kakinada and she was waiting in the port for 20 days from 29th December 2007 to 19th January 2008 due to non validity of the vessel''s certificate. Due to the aforesaid delay, the respondent''s consignees suspected that the cargo may have suffered damage or may have otherwise been affected being stored for so long in the hold of the said vessel. Accordingly, the respondent''s consignees insisted on a laboratory test to ascertain the condition of the cargo before taking any decision whether to reject the same or otherwise. In view thereof, on arrival of the vessel at Port Blair, the respondent had to discharge the cargo and store it in a warehouse pending the receipt of the laboratory results. It is in view of the aforesaid, that claim IV had been

made for (i) transportation costs from the port to the warehouse; (ii) warehousing charges; and (iii) transportation cost from the warehouse to the consignee. On account of the aforesaid, the respondent made a claim of a sum of Rs. 23,09,202/- which was subsequently reduced to Rs. 22,57,245/-.

16. Mr. Shah submitted that by virtue of clause 7 of addendum no. 1, the said ship had to undertake special surveys for about 10 to 15 days. He submitted that clause 5 of addendum no. 2 provides that all other terms and conditions of addendum no. 1 were to apply and that the respondent having taken the ship with this knowledge could make no claim.

17. It is to be noted that an identical argument was made before the arbitral tribunal which has been dealt with in paragraph 38 of the impugned Award. We are in full agreement with the reasoning given by the arbitral tribunal and especially on the interpretation of clause 7 of addendum no. 1 read with clause 5 of addendum no. 2. In the facts of the present case, the appellant received back the ship on 22nd December 2007. If the ship had to go for special surveys, the appellant should not have entered into a fresh addendum no. 2 on the very same date and given back the vessel to the respondent for a further period of three months & 10 days. It is also pertinent to note that the appellant billed and took in advance hire charges for the period 22nd December 2007 to 6th January 2008 and the evidence of the appellant''s witness discloses that the surveys were not carried out because if they were to be undertaken, the appellant would not be able to earn any money during the said period. This effectively means that the appellant wanted the special surveys to be done on its own vessel during the time when the said vessel was already chartered out to the respondent. We, therefore, find that the claim made by the respondent and awarded by the arbitral tribunal was fully justified. In any event, all the findings with reference to the above claim being findings of fact and construction of the clauses being a possible view, require no interference. Therefore the learned single Judge made no error in rejecting the arguments made on behalf of the appellant.

18. Claim No. VII was in respect of ROB (Fuel remaining on board bunkers) and excess charter hire paid till 5th February 2008. It is the case of the respondent that it had paid charter hire to the appellant up to 5th February 2008. The said vessel was admittedly re-delivered to the appellant on 26th January 2008 at 11.00 hrs. It is the case of the respondent that it was, therefore, liable to pay charter hire up to 5th February 2008 less the period when the vessel was off-hired. The respondent further claimed that the costs of bunkers during the period the vessel was off-hire was to the account of the appellant.

19. There is no dispute that between 22nd December 2007 to 24th December 2007 the vessel was off-hire for 1.225 days and from 29th December 2007 to 19th January 2008, for a period of 20.91 days. Thereafter, the vessel was re-delivered to the appellant on 26th January 2008 even though the charter hire had been paid up to of 5th February 2008. It was in these circumstances, that the above claim was made.

20. Mr. Shah contended that no material had been produced before the arbitral tribunal to show that the hire charges were paid up to 5th February 2008. He, therefore, contended that claim No. VII was awarded without any evidence.

21. The aforesaid argument is contrary to the record. Claim No. VII has been dealt with by the arbitral tribunal in paragraphs 41 to 44 of the impugned award. The arbitral tribunal has referred to certain statement of accounts produced by both parties. The arbitral tribunal, after noting the arguments made on behalf of the appellant, came to a finding that as far as this claim was concerned, it was a pure question of working out of accounts. In fact, the arbitral tribunal had asked the learned counsel appearing for both parties to sit together and work out the exact figure. Despite the fact that the respondent''s representative waited for over an hour for the purposes of reconciling the accounts, the appellant''s representative did not turn up nor did the appellant have the courtesy to inform the respondent''s representative that he was not coming. In view thereof, the arbitral tribunal came to a finding that the appellant knew that on a working out of the figures they would have to pay the respondent. After perusing the accounts produced by both parties the arbitral tribunal came to the conclusion that a sum of Rs. 41,26,561/- was payable by the appellant to the respondent. The arbitral tribunal held that the fact that the aforesaid amount was payable, was also borne out by the fact that no reply was sent by the appellant to the two fax dated 29.01.2008 and the Notice dated 26.03.2008 claiming these amounts from the appellant. In view thereof, the arbitral tribunal held that the said sum was payable to the respondent.

22. We find that the arbitral tribunal, after appreciating the evidence on the record has come to a finding that claim No. VII ought to be awarded to the respondent. The arbitral tribunal is the final arbiter on appreciation of the facts as well as the evidence led before it. Those findings are not to be interfered with u/s 34 of the Act unless the same are perverse. The learned single Judge nor the appellate court can sit in appeal and re-appreciate the evidence led before the arbitral tribunal. The findings given by the arbitral tribunal, being purely based on the appreciation of the facts and the evidence led before it, we are not inclined to interfere with the same. In any event, on reading paragraphs 41 to 44 of the award, we find that the arbitral tribunal, after appreciating the evidence, was fully justified in awarding claim No. VII in favour of the respondent. In view thereof, we find that the learned single Judge was right in not interfering with the findings given by the arbitral tribunal.

23. Mr. Shah next submitted that the payment of Rs. 20,62,000/- made by the appellant to the respondent on or about 15th February 2008 was in full and final settlement of all the claims and hence no monies could have been awarded by the arbitral tribunal. He submitted that the entire award was vitiated on this ground alone.

24. This argument is made only to be rejected. There is no writing accompanying the said cheque stating that the said payment was made in full and final settlement. In

fact, the Respondent had repeatedly protested the short payment and the same is reiterated in paragraph 47 of the affidavit of evidence of one Sunil Shete, the director of the Respondent. This evidence has gone unchallenged in cross-examination. It is also unbelievable that if the said payment was made in full and final settlement, the appellant would not have replied to the notice dated 26th March 2008, under which the respondent made claims far in excess of Rs. 20,62,000/-. This argument has been rightly rejected by the arbitral tribunal whilst dealing with the same in paragraph 45 of the award.

25. Mr. Shah lastly submitted that the Appellant had made an application on 26th September 2011 for filing certain additional documents and sought leave of the arbitral tribunal for taking them on record. He submitted that not allowing the Appellant to file the further documents and lead evidence, the award was vitiated on the grounds of breach of principles of natural justice. The arbitral tribunal, by a speaking order, dismissed the application by its order dated 29th September 2011.

26. It is an admitted position that when the said application was made, issues were already framed, the evidence of both parties was closed and the matter was set down for arguments. It is also an admitted position that these documents were always available with the Appellant. Neither in the application, nor in the arguments advanced before the arbitral tribunal any explanation was given as to why these documents could not be produced earlier. Furthermore, the arbitral tribunal has come to a finding that the Appellant was unable to show as to how those documents were relevant to the dispute. In view of the fact, that those documents were always available with the Appellant and could have been produced long before the matter was set down for arguments, we find that the arbitral tribunal was fully justified in rejecting the application of the Appellant. By allowing the said application, the proceedings would have had to be reopened thereby further delaying the resolution of the disputes. In such a scenario, the burden lay on the appellant to show that (i) inspite of due diligence by the appellant, it could not file those documents before the issues were framed and the matter was set down for arguments; and (ii) the documents sought to be produced were relevant for the resolution of the disputes between the parties. The appellant has miserably failed in discharging this burden. In any event this was an aspect for the arbitral tribunal to consider. It did so. We would not be justified in substituting our view for that of the arbitral tribunal even if we would have been inclined to take a different view. The arbitral tribunal was therefore fully justified in rejecting the application to produce additional documents. For all the aforesaid reasons, we find that the appeal has no merit in the same is hereby dismissed. There shall be no order as to costs.