* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 04.12.2018
Date of Decision :28.02.2019

\+ O.M.P. (COMM) 196/2018 & I.A. Nos.6150/2018, 9997-98/2018

NOBLE CHARTERING INC ..... Petitioner

Through: Mr.V.K. Ramabhadran, Sr. Adv. with Mr.Jayesh Ashar, Mr.Bomi Patel, Mr.Dhaval Mehrotra and Mr.Sudhanshu Sikka, Advs.

versus

STEEL AUTHORITY OF INDIA LTD. ..... Respondent

Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Santosh Kumar, Mr.Manav Gill and Ms.Bhabna Das, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition has been filed by the petitioner challenging the Arbitral Award dated 27.12.2017 passed by the Sole Arbitrator in Case No. 2 adjudicating the disputes that had arisen between the parties in relation to the Contract of Affreightment dated 27.07.2010 executed between the parties.

2. The Sole Arbitrator by way of the Impugned Award, while rejecting the claims filed by the petitioner, has allowed the Counter Claim of the respondent for a sum of USD 862,500.00 with interest at the rate of 3% from the date of the payment of the freight by the respondent for the two shipments where the petitioner was found in default and till the date of the Award. The Sole Arbitrator has further directed that incase the petitioner fails to make the payment of the awarded amount within a

period of three months from the date of the Award, the petitioner shall pay interest at the rate of 9% per annum on the amount awarded together with interest.

3. As stated above, the disputes between the parties arose in relation to the Contract for Affreightment dated 27.07.2010 (hereinafter referred to as the 'COA'). In terms of Clause 1(a) of the COA, the respondent, as charterers, had agreed to ship 10,00,000 MT 5% more or less at Charterers' option of coking coal. The shipment period was agreed as two years from October, 2010 to September 2012, extendable by three months at charterer's option which was to be declared latest by 30.06.2012. The shipment was to be evenly spread throughout the period on pro-rata basis.

4. The respondent had declared a total of fourteen Stems / shipments to the petitioner, the details whereof are mentioned hereinbelow:-

SI.	*Vessel Name / Not nominated by Noble*	*Laydays*	*Quantity Declared*	*Sailing Date*
1.	*AVOCA Substitute / OF MILAGRO*	*20-30 Oct 2010*	*75,000 MT*	*26 Oct 2010*
2.	*MAHATIS S/O AOM MILENA*	*20-30 Dec 2010*	*75,000 MT*	*31 Dec 2010*
3.	*S NICOLE S/O*	*18-28 Feb*	*75,000 MT*	*16 Feb*

	GH FORTUNE	*2011*		*2011*
4.	*MEDI SENTOSA S/O BELMONTE*	*10-20 April 2011*	*75,000 MT*	*17 Apr 2011*
5.	*AMALIA S/O BELMONTE*	*10-20 June 2011*	*75,000 MT*	*08 Jul 2011*
6.	*KM HONG KONG S/O HONG DIA*	*20-30 Oct 2011*	*75,000 MT*	*24 Oct 2011*
7.	*Not Nominate by Claimant*	*10-20 Nov 2011*	*75,000 MT*	*No sailing*
8.	*Not Nominated by Claimant*	*5-14 Dec 2011*	*75,000 MT*	*No sailing*
9.	*Not Nominated by Claimant*	*1-10 Feb 2012*	*75,000 MT*	*No sailing*
10.	*Not Nominated by Claimant*	*1-10 Mar 2012*	*75,000 MT*	*No sailing*
11.	*DIAMANTINA*	*30-9 May 2012*	*75,000 MT*	*2 May 2012*
12.	*KEA S/O PINNACLE BLISS*	*15-25 June 2012*	*75,000 MT*	*24 Jun 2012*
13.	*BELLEMAR S/O HONG SHENG*	*15-25 July 2012*	*75,000 MT*	*29 Jul 2012*

14.	*NAVIOS MARCO POLO S/O KEA*	*10-20 Sep 2012*	*75,000 MT*	*20 Sep 2012*

5. The above table would show that six Stems had been declared by the respondent between the periods October 2010 to October 2011. There is no dispute between the parties in relation thereto. Between the periods November, 2011 to March, 2012 the respondent declared another four Stems, however, the same were not performed by the petitioner. From May, 2012 to September, 2012 the respondent declared another four Stems that were also duly performed by the petitioner.

6. By the e-mail dated 25.09.2012, the respondent sought to terminate the COA relying upon the "Default Clause", that is, Clause 62 of the COA. This e-mail is of some relevance to the disputes raised between the parties and is therefore reproduced hereinbelow:-

> *"From: Jasmina SAIL*
> *Sent: Tuesday, September 25, 2012 5:31 PM*
> *To: Sh. T.R Krishnan*
> *Cc: CCC Transchart; col@hub.nic.in; MANAS; PRC SAIL*
> *Subject: Noble - SAIL COA dtd. 27/7/2010*
>
> *To Transchart*
>
> *Subject: Agreement dated 27.7.2010 (Contract of Affreightment) (COA) for transportation/shipping of Imported Coal from USA during October 2010 to September, 2012 through TRANSCHART.*
>
> *Please refer to the Subject COA and various correspondence and discussions with regard to the continuation or to deal*

otherwise with the said COA and declaration of stems there under.

Reference may be made to different events and circumstances adversely affecting the subject agreement which does –not need any further elaboration.

The M/S Noble Chartering Inc. vide their correspondence and actions defaulted in performing their obligations under the subject agreement stated imposing extraneous demands and conditions which were all beyond the scope of the subject agreement. SAIL in the compelling circumstances of transporting the material from the Load Port and avoid delays therein accommodated the unreasonable demands on a few.. asions but the said firm tried to impose unreasonable and impracticable conditions which all were beyond the subject.

Notwithstanding the above facts, the subject agreement continued to be honoured on account of SAILS positive approach of cooperation. However, as it may not be out of place to mention, during the performance under the above COA on various occasions, the provisions of the COA, were breached, which inter-alia include substitution of vessels, refusal to give nomination of vessels etc. All these caused substantial harassment and problems to SAIL besides losses which it had to suffer.

Going by the above facts, it leaves no doubt about the positive intentions of the SAIL as charterer which led to continuation of the COA under the aegis of TRANSCHART, in spite of hostile conditions and attitude on Owners part.

Finally therefore please be informed that, SAIL is left with no option but to state that the subject agreement yd terminated under the 'Default Clause' and the subject COA stood terminated.

Therefore there is no alternative but to treat the contract as rescinded. However, reserving our right to claim compensation / damages caused for the breach committed by Owners.

For Steel Authority of India Ltd.

(Jasmina Maiti
Copy to M/S
Noble through
their brokers for
information."

7. The petitioner, by its e-mail dated 28.09.2012 disputed that the petitioner was in breach of the COA, while also claiming that various general allegations of breach had been made in the said e-mail against the petitioner without giving full details thereof. The contents of the e-mail are relevant and are reproduced hereinbelow:-

"We refer to your e-mail of 25th September, 5:31 p.m. regarding the COA dated 27th July 2010.

In your e-mail, you have made various general allegations against Noble Chartering Inc. in respect of their Conformance under the COA. You have alleged that Noble are in breach of their obligations under the COA and as a result of these alleged breaches, you are purporting to terminate the COA.

Noble do not accept that they have acted in breach of the above COA at any time, and the allegations made by SAIL in their e-mail of 25th September are denied in the strongest terms. Noble call on SAIL to provide gull details of the alleged breaches by Noble under the COA.

It is Noble's position that it is SAIL who are in breach of their obligations under the COA in that SAIL have failed to declare three outstanding stems which would ensure that the contractual quantity under the COA was performed.

Noble are not prepared to accept any purported termination of the COA by SAIL. Noble insist that SAIL perform their obligations under the COA by nominating the outstanding three

stems so that the COA can be fully performed. Noble require SAIL to respond by return.

It is clear to Noble that the only reason that SAIL have failed to perform the remaining stems under the COA is because the charter market has fallen and, in breach of their contractual obligations, SAIL have chosen to charter in alternative cheaper tonnage to meet their requirements rather than comply with their COA obligations.

Noble wish to make it clear that, if SAIL do not comply with their contractual obligations under the COA and if SAIL do not respond constructively to this message, Noble will be entitled to treat SAIL as being in repudiatory breach of the COA in which event, Noble will accept SAIL's repudiatory breach and claim damages in accordance with the terms of the COA. The amount of such claim would clearly be substantial, and Noble will also seek a full recovery in respect of interest and legal costs. Aside from commencing arbitration as per COA, Noble will also take appropriate legal action against SAIL's assets in order to obtain security.

Noble look forward to receiving SAIL's prompt response. Meantime all Noble's rights are fully reserved."

8. The respondent did not respond to the above e-mail.

9. The petitioner, through their solicitors addressed further e-mails dated 26.10.2012, 13.11.2012 and 07.12.2012 calling upon the respondent to withdraw the termination notice. Again there was no response from the respondent.

10. Finally, by the e-mail/fax dated 12.12.2012 the petitioner terminated the COA contending as under:-

"We refer to our fax/email to you, the Steel Authority of India Ltd ("SAIL"), of 7 December 2012, calling on you to withdraw your wrongful termination of the COA dated 27 July 2010 (the

"CON'), and to confirm that you would comply with your obligations under the COA by 5.00pm Indian time on Tuesday 11 December 2012. You have failed to respond, whether to us or to our clients.

To recap, on 25 September 2012 you wrote to our clients, Noble Chartering Inc ("Noble"), purporting to terminate the COA on the grounds that Noble were in breach of the COA. You did not specify with any particularity how Noble were said to be in breach of the COA and such allegations as were made were so vague as to disclose no identifiable allegation of breach. There was in fact no basis for asserting that Noble were in breach of the COA and Noble deny that they were in any way in breach. The reason relied on by you for terminating the COA was therefore without substance, and the purported termination on the basis of that incorrect assertion was therefore wrongful.

Noble responded to your purported notice of termination on 28 September 2012, and we have written to you on Noble's behalf on three further occasions: 26 October 2012, 13 November 2012 and 7 December 2012. In each of these messages, it has been explained to you that your purported termination was wrongful and you have been invited to perform the COA. You have therefore been provided with ample opportunity to withdraw your wrongful termination.

You have failed to respond to any of those messages and have failed to take any steps towards performance of the COA.

Your wrongful termination of the COA, your failure to take any steps towards performance of the COA despite demands that you comply with your obligations, and your conduct since you sent your message of 25 September 2012, each separately and cumulatively constitutes a repudiatory breach/renunciation of the COA. Noble hereby accepts your repudiation/renunciation of the COA, bringing the COA to an end.

As a result of Noble's termination of the COA, you are liable to Noble for any and all losses they have suffered as a result of your repudiation/renunciation. Details of these losses will be

provided to you shortly along with a demand for payment of the sums due. If you fail to pay following this demand, Noble will commence arbitration to recover the sums due to them without delay, and reserve the right to take all/any steps necessary in any appropriate jurisdiction to secure and/or recover the sums due, including interest and legal costs, without further notice."

11. The petitioner thereafter invoked Arbitration Agreement claiming damages from the respondent based on the alleged outstanding balance cargo of 238,803 MT under the COA alleging that the termination of the Agreement by the respondent vide its e-mail dated 25.09.2012 was illegal.

12. The respondent, on the other hand, while refuting the claim of the petitioner, raised a Counter Claim alleging that the petitioner was in default of performing four Stems between the period November, 2011 to March, 2012; out of which it was liable to pay damages for Stems declared with laycan of 10-20 November, 2011 and 5-14 December 2011, as spot rates for these stems were more than the COA rates.

13. The Arbitral Tribunal by its Impugned Award has rejected the submission of the respondent that the COA was not a binding Agreement between the parties. The Sole Arbitrator has further held that the respondent was not entitled to terminate the Agreement under Clause 62 of the COA, however, at the same time has held that the termination of the Agreement by the respondent was valid inasmuch as the petitioner was in default of performance of four Stems declared by the respondent and thereby committed repudiatory breach of the Agreement. The Sole Arbitrator, therefore, awarded damages in favour of the respondent and against the petitioner for the two laycans mentioned hereinabove.

14. The Arbitrator also rejected the claim of the petitioner that the period of the Agreement, based on an oral understanding between the parties and as recorded by the petitioner in its e-mail dated 05.01.2012, had been extended till September, 2013. The Arbitrator further held that the Stems were not declared by the respondent on a 'Fairly Evenly Spread' basis but at the same time, the petitioner having accepted those Stems, cannot make a grievance of respondent's declaration of Stems.

15. As noted above, the Sole Arbitrator has held that the respondent was not entitled to terminate the Agreement under Clause 62 of the COA. In reaching this conclusion, the Sole Arbitrator has held that if Clause 62 is to be read as providing for termination for convenience or without cause, the same would be vulnerable to being declared void under Section 23, 28 and 73 of the Indian Contract Act, 1872. The Arbitrator, thereafter, held that Clause 62 is intended to enable the respondent to declare the contract to be at an end when it is helpless in performing the contract.

16. Though the respondent has not challenged the above finding, I must note that by a separate order passed today in OMP(COMM) 225/2018 ***Steel Authority of India Ltd. v. Nobel Chartering Inc***., I have held that the above finding of the Arbitrator in relation to another similarly worded clause in another Contract between the same parties, cannot be sustained and is liable to be set aside.

17. The Arbitrator has thereafter considered whether the petitioner was in breach of the Agreement in refusing to nominate vessel(s) in respect of four stems declared by the respondent between November, 2011 to

March, 2012 and if so, to what effect. The Arbitrator has answered this issue in the affirmative and against the petitioner.

18. The Arbitrator has held that the real reason for the petitioner for not accepting the four stems was because the petitioner wanted to compel and coerce the respondent to provide shipment under the COA dated 20.08.2008. In reaching the said conclusion, the Arbitrator has placed reliance on the answers given by Mr.Jagmeet Makkar (CW-1) in his cross-examination as also certain e-mails exchanged between the parties.

19. The learned senior counsel for the petitioner has challenged the above finding by placing reliance on the e-mail dated 05.10.2011 by which the respondent declared the stems with laycan 10-20 November, 2011. The petitioner by its reply dated 07.10.2011 had called upon the respondent to adhere to the "Fairly Evenly Spread" principle while declaring the laycan under the COA. The respondent by its e-mail dated 01.11.2011 declared the stems afresh with laycan 05-14 December, 2011. The same was duly accepted by the petitioner by its return mail dated 01.11.2011. The learned senior counsel for the petitioner submits that, therefore, the petitioner could not have been held to be in default in relation to this particular Stem. The above submission of the petitioner is also relevant as the Arbitrator has also awarded damages for the said stems in favour of the respondent.

20. The learned senior counsel for the petitioner further submits that the plea of the petitioner that the respondent must also declare Stems under the COA dated 20.08.2008 had been found to be genuine by the respondent and, infact, the parties entered into an Addendum laying down schedule for the further declaration of Stems under the COA(s).

Therefore, the petitioner has been wrongly held by the Arbitrator to be in breach of COA dated 27.07.2010.

21. The learned senior counsel for the respondent, on the other hand submits that the Arbitrator has rightly concluded that the real reason for the petitioner not nominating the vessels was its insistence that the respondent should declare the stems under COA dated 20.08.2008. This being a finding on fact, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

22. While I appreciate the limitation on the power of this Court under Section 34 of the Act, at the same time a reading of the e-mail dated 01.11.2011 addressed by the respondent to the petitioner would show that the respondent agreed to the refusal of the petitioner to nominate a vessel for the laycan 10-20 November, 2011 on the ground of the same not being in accordance with the principle of Fairly Evenly Spread. I may only quote the said e-mail as under:

> *"From: aco2*
> *To: westward@vsnl.com*
> *Cc: S Chandrasekaran ; V K Sharma*
> *Sent: Tuesday, November 01, 2011 4:32 PM*
> *Subject: RE: NOBLE/SAIL COA DTD 27.07.10 – EX-USEC CHOPTION US GULF – RQST FOR NOMINATION*
>
> *To M/S WESTWARD – MR SURENDER VERMA*
> *FM TR KRISHNAN TRANSCHART NEW DELHI*
> *RE: NOBLE/SAIL COA DTD 27.07.210 – EX-USEC CHOPTION US GULF*
>
> *REF ABV COA. THIS CONNECTION REF OWNRS LAST MSG WHEN THEY EXPRESSED THEIR INABILITY TO NOMINATE A VSL IN NOV'11 ANGAINST THE DECLARED STEM 10-2011.2011 AS ACCORDING TO THEM, IT IS DUE*

ONLY DURING DEC'11. ACCORDINGLY RQST TAKE UP WITH OWNERS TO NOMINATE A SUITABLE P'MAX VSL FOR A QTY OF 75 TMT 5% MOLOO 5LK C. COAL IN LAYCAN 05-14TH DEC., 2011 EX-NEWPORT NEWS (DTA COAL TRMNL) LATEST BY COB 1ST HRS ON 03.11.11. PLS INTIMATE OWNERS TO ENSURE THE NOMINATION IS MADE IN THE ABV ORIGINAL CONRIMED STEM LAYCAN ONLY AND NOT IN DEFERRED LAYCAN AND ALSO TO AVOID FREQUENT CHANGE OF PERFORMING VSL. MATTER MOST URGENT. RGDS

TRANSCHART
T.R. KRISHNAN"

(Emphasis Supplied)

23. The respondent, therefore having accepted the contention of the petitioner that the stem with laycan 10-20 November, 2011 was not in conformity with the "Fairly Evenly Spread" principle and having declared a fresh laycan of 5-14 December, 2011, cannot thereafter be heard to claim that the petitioner had committed a default/breach of the COA by not nominating the vessel for laycan 10-20 November, 2011. The Arbitrator in the Impugned Award has not considered the above e-mail.

24. In ***Associate Builders v. DDA***, (2015) 3 SCC 49, the Supreme Court while cautioning the Courts exercising powers under Section 34 of the Act, has held as under:

*"**29.** It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

xxxxx

> ***31.*** *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or*
>
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
>
> *(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
>
> *xxxxxx*
>
> ***34.*** *It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."*

25. The above finding, however, may not have been sufficient to set aside the Award that has held that the petitioner was in breach of the COA by not nominating vessels for another three stems, but for other peculiar factors in the case.

26. While no quarrel can be found to the finding of the Sole Arbitrator that the COA(s) dated 20.08.2008 and 27.07.2010 cannot be confused or interlinked with each other and merely because the respondent is allegedly in breach of COA dated 20.08.2008, it would not be justified for the petitioner to deliberately act in breach of COA dated 27.07.2010, at the same time, in my view, such breach by the petitioner cannot justify the termination of the Agreement by the respondent.

27. As noted above, the petitioner has been held in breach of the Agreement for refusing to nominate vessel(s) in respect of four stems

declared by the respondent between November 2011 to March 2012. Admittedly, after these four stems, the respondent declared another four stems in April-May, 2012, June, 2012, July, 2012 and September, 2012. If the petitioner was already in breach of the Agreement, which the respondent thought would entitle the respondent to terminate the Agreement, it was for the respondent to show why it continued with the Agreement and declared these four stems after the alleged breach of the Agreement by the petitioner, especially when there is no allegation of breach in relation to these subsequently declared stems.

28. Further, Clause 1(d) of the COA provides for the consequence of the petitioner's failure to nominate a vessel in the required laydays. Clause 1(d) of the COA is reproduced hereinunder:

> *"**1. CARGO/QUANTITY:***
> *xxxxxx*
>
> *(d) COA shall be quantity based and Owners to complete their quantity within the shipment, period as per stems declared by charterers. In case owners are unable to nominate vessel in the required laydays the quantity may be covered by charterers on spot loss and the difference in it, if any, including any other cost/consequences shall be to the account of Owners."*

29. The respondent neither gave a notice claiming such damages from the petitioner nor terminated the Agreement relying upon the abovementioned alleged breach of the COA by the petitioner, instead, the respondent declared four further stems after the date of the alleged breach. The Arbitrator in his Impugned Award has failed to consider this conduct of the respondent.

30. On the other hand, the Arbitrator has held that even Clause 1(d) of COA would not apply to the facts of the case as there was a deliberate refusal by the petitioner to perform the Agreement with the petitioner demanding that the respondent must declare stems under the COA dated 20.08.2008.

31. Though, it may be correct that in case of repeated breach by the contracting party, the innocent party may not only claim damages for the said breach, but may also terminate the Agreement, at the same time, in the facts of the present case, the respondent had clearly not exercised this right. On the other hand, the fact of declaring four further stems, subsequent to the breach, would show that the respondent had signified its acquiescence in the continuation of the Agreement.

32. In any case, the effect of declaration of the four subsequent stems was a relevant factor to be considered by the Arbitrator and the Arbitrator having not considered the same, the Award cannot be sustained.

33. It is further important to note that while the petitioner was claiming that the respondent should declare stems under the COA dated 20.08.2008, the petitioner by its e-mail dated 05.01.2012 had also asserted that the parties had entered into an addendum whereby not only the period of the COA(s) had been extended till 30.09.2013 but also the manner of declaration of further stems had been agreed to between the parties. Though, the Arbitrator has held that the parties did not proceed on the basis of said addendum, the correspondence in this regard would show that the respondent was, in fact, favourably considering the plea of the petitioner that the declaration of further stems should be made keeping in mind the COA dated 20.08.2008 as well. This is evident from

email dated 12.01.2012 addressed by Mr. P Ray Chaudhury of the respondent to the petitioner, which has been quoted by the Arbitrator as under:

> *"The proposal for extension of the COAs is being processed for seeking internal approvals in line with the discussions held with Noble. This may take some more time and we seek owners understanding in the matter".*

34. Though, no fault can be found with the finding of the Arbitrator that merely because of exchange of email dated 05.01.2012, a binding addendum between the parties cannot be said to have come into existence and, in fact, the parties continued to perform their respective obligations thereafter based on the original COA(s), at the same time, the above exchange of emails would also show that the respondent did not terminate the Agreement due to breach of the petitioner in nominating vessels for the four stems between the period November, 2011 to March, 2012. This again is a vital piece of evidence, which the Arbitrator failed to appreciate.

35. I may here note that though the learned senior counsel for the petitioner has vehemently argued that an addendum as recorded in the email dated 05.01.2012 addressed by the petitioner to the respondent was in fact arrived at between the parties, I am unable to agree with the said submission.

36. The e-mail dated 05.01.2012 addressed by Mr.Jagmeet Makkar to Mr. P Ray Chaudhury of the respondent itself seeks a confirmation from the respondent to the alleged agreed terms. The relevant extract from the e-mail is as under:

> *"We refer to our pleasant meeting on 22nd December in your office in Kolkata followed by further discussions between SAIL and us in Delhi on the 29th December. In view of our long term association and good cooperation between the Steel Authority of India and Noble Chartering, we have agreed to your request for an extension to the duration of the COAs in line with our discussions. We are pleased to recapitulate the agreement in the form of an addendum, as follows, for your confirmation."*
>
> *(emphasis supplied)*

37. Mr. P Ray Chaudhury in his e-mail dated 12.01.2012 as reproduced hereinabove, had clearly stated that the addendum as alleged by the petitioner was merely a proposal which required internal approvals. The Arbitrator has also relied upon other contemporaneous correspondence exchanged between the parties and also answers given by Mr. Makkar during his cross examination to conclude that no binding addendum came into existence by the above exchange of e-mails. I do not find any reason to disagree with the said finding.

38. Returning to the question of termination of the Agreement, the e-mail dated 25.09.2012 by which the respondent sought to terminate the Agreement, has been reproduced hereinabove. A reading of the e-mail would show that while the respondent has alleged breach of the COA by the petitioner, it sought to terminate the Agreement by relying upon the "Default Clause", that is, Clause 62 of the Agreement which reads as under:

> *"62. Default*
>
> *Should Suppliers/Charterers fail to provide materials for shipment or to ship the materials by the time or times agreed upon or should Suppliers/Charterers in any manner or otherwise, fail to perform the contract or should a Receiver be appointed on its assets or make or enter into any arrangements*

or composition with creditors or suspend payments (or being a company should enter into liquidation either compulsory or voluntary), the Suppliers/Charterers shall be entitled to declare the contract as at an end without any liabilities on either side."

39. The petitioner by its e-mail dated 28.09.2012 not only denied and disputed that they were in breach of the COA, but also called upon the respondent to give particulars of such breach. The respondent, however, chose not to respond to the e-mail.

40. The petitioner again, through their solicitor addressed e-mails dated 26.10.2012, 13.11.2012 and 07.12.2012, reiterating petitioner's contention and called upon the respondent to withdraw the termination notice. These e-mails were necessary to be considered by the Arbitrator as the respondent never responded to the said emails or even alleged that it had terminated the Agreement because the petitioner had failed to perform the four stems mentioned hereinabove. The Arbitrator failed to consider the said e-mails and upheld the termination of the COA by the respondent by holding as under:

"161. The aforesaid answers given by Mr. Jagmeet Makkar (CW1) and the emails noted above, leave no manner of doubt that the Claimant deliberately failed to provide the vessels for the stems to be declared by the Respondent. This clearly left the Respondent in a helpless situation. Therefore, in my opinion, the Respondent was fully justified in terminating the COA through email dated 25.09.2012. It is true that under Clause 1 (d) the Respondent would be entitled to cover the laydays by chartering the vessels in the Spot Market and the difference in freight, if any, including any other cost/consequences shall be to the account of Owners. However, the aforesaid Clause would apply in cases where the Owner is unable to nominate the vessel for bonafide reasons and not in a case of deliberate refusal. The circumstances in which the Claimant has refused to

nominate the vessels would clearly constitute deliberate breach of the COA. Therefore Issue No. 7 is answered accordingly.

162. Whilst it is true that Claimant and the Respondent have entered into numerous contracts for transport of Coal from different countries to India, the COA no. 1 dated 20.08.2008 and COA no. 2 dated 27.07.2010 cannot be confused or interlinked with each other. Merely, because the Respondent is allegedly in breach of COA no. 1 dated 28.08.2008, it would not justify the Claimant to deliberately act in breach of COA no. 2 dated 27.07.2010. It must be remembered that rights and responsibilities of both the parties under both the contracts are not co-extensive. The Claimant cannot be permitted to claim a breach by the Respondent whilst justifying the same breach committed by itself. I therefore have no hesitation in concluding that the termination of the COA by the Respondent by the email dated 25.09.2012 is legal and valid, and the Claimant was not justified in refusing to nominate a vessel in respect of 4 stems declared by the Respondent between November, 2010 to March, 2012. Issue no.8 is decided accordingly.

163. In view of my observations and conclusion on Issue No.7 it follows that the repudiatory breach communicated by the Claimant to the Respondent is ineffective, having no legal consequences. Issue no.9 is decided accordingly."

41. The Arbitrator in reaching the above conclusion has failed to consider a vital piece of evidence in form of conduct of the parties, especially of the respondent, thereby rendering the Award liable to be set aside on this ground alone.

42. The Arbitrator having held that the Agreement was validly terminated by the respondent, has further awarded damages in favour of the respondent for the failure of the petitioner to nominate vessels for the two laycans, that is, the laycan of 10-20 November, 2011 and 5-14 December, 2011. As discussed hereinabove, the laycan of 10-20

November, 2011 had been shifted to 5-14 December, 2011 and therefore, it could not be said that the petitioner was in breach of the COA in not nominating a vessel for this laycan.

43. The learned senior counsel for the petitioner has submitted that though the respondent had produced two Agreements dated 20.10.2011 and 14.11.2011 executed by the respondent with a third party in support of its claim of damages, the same could not have been relied upon as the freight mentioned therein was subject to be reduced by a certain amount depending upon the load rate. Even the quantity to be shipped could be reduced at Owner's option by 5%. He submits that in absence of the Bill of Lading and the proof of actual payment being made by the respondent, such claim could not have been granted in favour of the respondent.

44. On the other hand, the learned senior counsel for the respondent submits that the petitioner had taken no such plea in its defence to the Counter Claim. In the reply filed to the Counter Claim before the Arbitrator, the only plea taken by the petitioner was in the following words:-

> *"(3) Further and in any event, it is denied that the Respondent has correctly quantified its loss. In particular:*
>
> > *(i) It is denied that the spot market freight rate (net of commission) was US$44 or US$41.5 per mt as alleged. The Respondent is put to proof as to the correct market freight rate.*
> >
> > *(ii) It is denied that the Claimant would have lifted 75,000 mt of cargo as alleged. Given the market conditions prevailing at the dates of the alleged breaches, the Claimant would have exercised its option to lift 95%*

of 75,000 mt, i.e. 71,250 mt. The Respondent's damages should be calculated accordingly."

45. The Arbitrator has discussed the quantification of such damages and has held as under:

"171. In view of the provisions contained in Clause 1 (d) of the Case 2 Agreement, on the deliberate refusal of the Claimant to nominate the vessels for the stems declared, the Respondent is entitled to charter the vessels on spot basis. The Respondent would therefore, be entitled to recover the difference in freight, if any, including any other cost/ consequences from the owners. In view of the aforesaid clear provision, it would not be necessary for the Respondent to establish its entitlement to the damages caused by the refusal of the Claimant to nominate the vessels. It is a matter of record that Claimant refused to nominate the vessels in respect of the stems declared on 5th October, 2011 and 1st November, 2011. The Respondent, therefore, had to make alternative arrangements for transporting the shipments from Australia to India, at a rate higher than the rate agreed in the Case 2 Agreement. The details of the expenses incurred by the Respondents are as under:

"(a) USD 525,000 towards the shipment of 75,00 MT through spot market @ USD 44 per MT as against the agreement rate of USD 37 per MT (75,00 MT X USD 7) on the refusal by the Claimant to nominate the shipment for the laycan 10-20th November, 2011 with interest of 7% p.a. from the date of payment of the freight by SAIL until payment by Claimant.

(b) USD 337,500 towards the shipment of 75,000 MT through spot market @ USD 41.5 per MT as against the agreement rate of USD 37 per MT (75,000 MT X USD 4.5) on the refusal by the Claimant to nominate the shipment for the laycan 5-14th December, 2011 with interest @ 7% p.a. from the date of payment of freight by SAIL until payment by Claimant."

172. As regard, the rate at which the Respondent had shipped the cargo, the rate of 44/ MT and 41.5/ MT is evident from the contracts executed with the Owners, which were produced with the evidence of Ms. Jasmina Maiti as Ex. RW-1 and Ex. RW-2. It is therefore not possible to accept the submission of the Claimant that the Respondent has not proved the freight rate.

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175. I am also not able to accept the submission of the Claimant that the Respondent has not proved the quantum of its Counter-Claim. Ms. Jasmina Maiti in cross-examination has clarified all the questions raised by the Claimant with regard to the quantum of Counter-Claim; with respect to non-raising of the Counter-Claim earlier, proof of payment, the variation on account of quantity, port of discharge, commission etc. She has clearly stated that the calculations have been made on the base rate basis. Therefore I am of the opinion that factors such as the port of discharge, commissions etc. would have no impact on the Counter-Claim (see answers to questions 367, 368, 371).

176. With regard to proof of payment it is to be noted that in the Reply to the Counter-Claim, the Claimant had not disputed the same. However, Ms. Jasmina Maiti was exhaustively cross-examined. In answers to questions no. 354 to 366, she has clarified the entire issue. Similar is the position with regards to the objections regarding port of discharge (see answers to questions 360, 361, 383 and 384). With regard to commission again it is to be noted that the issue was not raised in the Reply to the Counter-Claim. However in the cross-examination the issue was raised and answered (see answers to questions 390 & 391). Similarly, with regard to quantity in the Reply to the Counter-Claim, the Claimant has stated that it would have exercised its option to lift 5% less of 75,000 MT i.e. 71,500 MT and therefore computation of loss has to be assessed on that basis. However, the issue was again clarified by Ms. Jasmina Maiti in answers to questions no. 392, 396 and 398."

46. A reading of the above finding of the Arbitrator would show that the Arbitrator has extensively relied upon the answers given by Ms. Jasmina Maiti, witness of the respondent, in her cross-examination specially to question Nos. 354, 368, 371, 383, 384, 390, 391, 392, 396 and 398.

47. The above being a matter of appreciation of evidence, cannot be interfered with by this Court as if sitting as a Court of appeal. Therefore, the quantification of damages by the Arbitrator insofar as the second declaration with laycan 05-14 December 2011 cannot be faulted.

48. The learned senior counsel for the petitioner further submits that the respondent had terminated the COA relying upon Clause 62 of the same; Clause 62 states that the Contract shall come to an end without any liabilities on either side. He submits that, therefore, respondent cannot claim any damages for any alleged default prior to the termination.

49. I am unable to accept the submission of the learned senior counsel for the petitioner. Clause 62 merely absolves parties of liability to pay damages as a consequence of termination. It, however, is not intended to absolve the parties of any liabilities previously incurred by the parties due to their default.

50. Even otherwise, it was the own case of the petitioner that the respondent could not have terminated the Agreement relying upon Clause 62 of the COA. This plea has been accepted by the Sole Arbitrator. Therefore, the petitioner cannot now be heard to say that the termination being under Clause 62, it was discharged of its liabilities to pay damages for breach committed prior to such termination.

51. The learned senior counsel for the petitioner further contends that the respondent having not raised any claim for damages prior to their termination notice, is deemed to have waived its right to claim such damages. He places reliance on the judgment of the Supreme Court in ***P. Dasa Muni Reddy vs P. Appa Rao,*** (1974) 2 SCC 725.

52. I do not find any merit in the above submission. The petitioner has been unable to point out any document from which it can even remotely be implied that the respondent had waived its right to claim damages for the breach of the COA by the petitioner in not nominating the vessels. On the other hand, the termination letter dated 25.09.2012 specifically stated that the respondent reserves its right to claim compensation/damages for the breach committed by the petitioner.

53. In ***P. Dasa Muni Reddy*** (Supra), the Supreme Court has held that waiver is an intentional relinquishment of a known right or advantage which, except for such waiver, the party would have enjoyed. It is a voluntary surrender of a right. Waiver is consensual in nature. The essential element of waiver is that there must be voluntary and intentional relinquishment of a right. Judged by any of these parameters, I do not find any waiver of the right of the respondent to claim damages for the refusal of the petitioner to nominate vessel for 05-14 December, 2011 stem.

54. The learned senior counsel for the petitioner has further challenged the award of interest by the Arbitrator in favour of the respondent. He submits that as the respondent had failed to produce any document establishing the date of payment of freight, there is no reference date with respect to interest.

55. The Arbitrator in his Impugned Award has directed the payment of interest as under :

> *"(i) The Claimant shall pay to the Respondent a sum of USD 862,500.00 with interest @ 3% from the date of payment of the freight by the Respondent for the 2 shipments till the date of Award, within a period of three months from the date of the Award. In the event of default the amount awarded together with interest shall be paid @of 9% p.a. from the date of the award, till payment."*

56. The Arbitrator has not specified the date of payment of the freight by the respondent to the third party. In fact, the said date could not be ascertained from the submission of the learned senior counsel for the respondent before this Court as well. The Arbitrator has, however, directed that if the petitioner fails to make the payment alongwith interest at the rate of 3% 'from the date of payment of freight by the respondent for the two shipments till the date of Award, within a period of three months' it shall pay the awarded sum together with interest at the rate of 9% per annum from the date of the Award till payment. Therefore, there is differential rate of interest awarded by the Arbitrator, with the enhanced rate of interest being payable by the petitioner on default.

57. As the date of payment of freight by the respondent to the third party is unknown, the petitioner would not be able to calculate the interest payable for the pre and pendente lite period. It would necessarily have to depend on a confirmation of the same by the respondent. It may even want to dispute the date of such payment. Therefore, in the peculiar facts of the present case, the direction to pay interest at a higher rate post award cannot be sustained.

58. In view of the above, the Award insofar as it dismisses the claim of the petitioner and awards damages to the respondent of USD 525,000.00 alongwith interest is set aside. Award of interest at the rate of 9% per annum from the date of the Award till payment is also set aside. The challenge to the Award insofar as damages of USD 337,500.00 with respect to the laycan 5-14 December, 2011 along with interest at the rate of 3% per annum from the date of payment of freight by the respondent for the said laycan till the date of payment by the petitioner is rejected.

59. The petition is partially allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 28, 2019/*rv/vp*