



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM. APPEAL NO. 555 OF 2019
IN
COMM. ARBITRATION PETITION NO. 13 OF 2015

Madgavkar Salvage, a partnership firm
under the provisions of the Partnership
Act, 1932 and having its office at
Nizari Bhawan, Menzes Braganza Road,
Panaji, Goa

... Appellant
(Org. Petitioner)

V/s.

Bergen Offshore Logistics Pte. Ltd.
having its office at 31 Cantonment Road,
Singapore 089747 c/o Sical Logistics Ltd.,
having its registered office at South India
House, 73, Armenian Street, Chennai, Tamil
Nadu 600001 and an office at Rajgir
Chambers, Room No.11-15, 12/14 Shahid
Bhagat Singh Road, Fort, Mumbai- 400023

... Respondent
(Org. Respondent)

Mr. Ashwin Shanker a/w Mr. Bimal Rajshekhar & Ms. Ridhi Nyati
for the Appellant.

None for the Respondent.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

RESERVED ON : 21st AUGUST, 2023

PRONOUNCED ON : 30th NOVEMBER, 2023

JUDGMENT: (PER ARIF S. DOCTOR, J.)

1. The present Appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") and impugns an order dated 11th January 2019, by which the Petition filed by the Appellant under Section 34 of the Arbitration Act was dismissed. At the outset we must note that despite due service, none appeared on behalf of the Respondent. It was thus that we have heard Mr. Shanker learned counsel for the Appellant and have also ourselves perused the record of the proceedings in this Appeal.

2. Before dealing with the submissions made and the respective grounds on which the Impugned Order has been assailed, it is useful to set out the following facts, basis the submissions made and as also borne out from the record viz.

- i. The Appellant is engaged in the business of marine salvage. The Respondent is engaged in the business of offshore logistics including dredging and is the owner of a dredging vessel known as "*Sical Portofino*" ("the said Vessel"). Sometime in the month of October/November 2009 the said vessel was required to be salvaged. It was

thus on 7th November 2009 that the Appellant and the Respondent entered into a Salvage Agreement ("the said Contract"). The said Contract was on a "no cure no pay" basis. The relevant clauses of the said contract are as follows viz.,

SALVAGE AGREEMENT "NO CURE - NO PAY" (PART I)	
1. Place and date Goa dated 07th November 2009	6. Place and manner of delivery [cl.2] Delivery afloat at / near Sanghipuram Port in sufficient draft of water in a stable upright floating condition with trim not exceeding 0.5m
7. Time Period [cl. 1 (a)] 30 (thirty) continuous weather working days including mobilization	8. Extension of time [cl. 1(b)] 15 (fifteen) continuous weather working days
9. Nature of services [cl. 3] Re-floatation of stranded dredger and delivery in stable, upright floating condition, with trim not exceeding 0.5m.	10. Remuneration [cl.4] Amount- Rs.7,50,00,000/-* Service Tax-Rs. 77,25,000/- *(@10.3%) ----- TOTAL - Rs.8,27,25,000/-* Rupees Eight Crores Twenty Seven Lakhs Twenty Five Thousand Only). Subject to additional Clause 15.
12. Security [cl.5] Irrevocable Bank Guarantee for Rs.8,27,25,000/- or in lieu a Letter of Undertaking by the Insurer and Maritime Lien on Dredger.	14. [Idle time charges [cl.12] Rs. 25,00,000/- per day (Rupees twenty five lakhs only) per day
15. Safe keeping charges [cl.2] Rs.25,00,000/- per day (Rupees twenty five lakhs only) per day.	

SALVAGE AGREEMENT (PART II)	
<p>3. NATURE OF SERVICES: The services as indicated in Box 9 shall be provided by the Salvor and accepted by the Owners on "NO CURE NO PAY" basis.</p>	<p>5. SECURITY: The Owners shall provide security in favour of the Salvor, as indicated in Box 12. for the full salvage remuneration within 10 days of the signing of this agreement. The Salvor shall be free to invoke/encash the security if the remuneration indicated in Box 10 is not paid within the stipulated period.</p>
<p>7. OWNERS DUTIES: The Owners, their servants and agents shall cooperate fully with the Salvor in and about the salvage including obtaining entry to the place of salvage or such other places as may be necessary, or if applicable the place of safety to which the salvaged property is to be taken. The Owners shall ensure that the Salvors shall have a free hand to carry out the salvage operations without any interference whatsoever from any prior contractors that may have been appointed by the Owners for any operations connected with the salvage of the dredger. The Owners shall permit the Salvors to make reasonable use of their vessel's gears, chains, winches, render boat appurtenances and the accommodation spaces during and for the purposes of salvage operations, free of charge. The Owners shall pay all the Port, Customs, and other Govt. and local</p>	<p>12. IDLE TIME CHARGES: The Owners shall pay the Salvor idle time charges at the rate indicated in Box 14. for any idle time that may occur after commencement of the salvage, for the fault of the Owner or their servants, agents and assigns.</p>

<p><i>duties. Taxes and charges as may be applicable on the property to be salvaged, and shall reimburse the Salvor for any payments of such nature made by him. The Owners shall promptly and with due dispatch accept delivery of the salvaged property from the Salvor.</i></p>	
<p><i>14. DISPUTES: In case of any disputes, the same shall be referred to arbitration in accordance with the provisions of the Indian Arbitration Act 1996, in Mumbai, India. The arbitrators shall be commercial persons with knowledge of maritime matters.</i></p>	

ii. It is not in dispute that the Respondent, on the date on which the said Contract was entered into, did not furnish the security as contemplated in clause 5 of Part II of the said Contract to the Appellant but made payment of a sum of Rupees Forty Lakhs. It is not in dispute that thereafter certain email correspondence ensued between the parties by which the Appellant called upon the Respondent to *inter alia* furnish the said security, despite which, the Respondent did not furnish the said security.

iii. Since the Respondent did not furnish the said security, the Appellant by its email dated 1st December 2009 terminated the said contract and reserved its right to claim idle time charges. The Appellant by an email dated 5th December 2009 once again wrote to the Respondent calling upon the Respondent to *inter alia* furnish the said security. The relevant portion of the email dated 5th December 2009 is as follows, viz.

"Kindly therefore note that, if we do not receive the payment guarantee in the approved draft, by monday 7th december, and Pandian is not shifted out immediately, we shall stop all further work and shall demobilise at your cost risk and expense, and treat the agreement as wrongfully terminated by you by virtue of your failure to meet your obligations under the agreement."

iv. It is not in dispute that the Respondent thereafter furnished the payment guarantee to the Appellant. The Appellant thus by an email dated 7th December, 2009 *inter alia* informed the Respondent as follows viz.,

"Dear Capt. Pandey,

We refer to the above salvage and to our several discussions on the above subject, with your Director Mr. Sanjiv Noronha and Mr. Tony Fernandez, wherein both your Director Mr.

Sanjiv Noronha and Mr. Tony Fernandez have assured us that they will ensure that UIIC remits the full salvage remuneration to us directly and that money will not be remitted to Norsea Global Offshore Pte. Ltd., after completion of the salvage operation.

We have after due deliberation decided to re-commence the salvage operations in full swing.

We are accordingly mobilizing Spud barge along with backhoe dredger Maldar-XII tomorrow around 4:00 p.m. (due to tidal restrictions) so as to reach site by 9th night / 10th early morning.

We are also simultaneously mobilizing tug Ferrari from Mumbai today so as to reach Goa by 9th morning so as to commence tow of our crane barge from Goa by 9th evening and reach the salvage site by 15th December 2009.

We are confident that with the mobilization of backhoe dredger and our crane barge we shall be able to complete the salvage operations and deliver the vessel to you by end of the month.

We look forward to your complete co-operation.

We also request you to kindly shift Mr. Pandian from your dredger so as to ensure that operations run smoothly and there are no unnecessary confrontation between our salvage master and Mr. Pandian.

We also request you to kindly send us a copy of the original letter of guarantee. Kindly also address a letter to UIIC as per the enclosed draft and send us a copy of the same duly acknowledged by UIIC."

v. Thereafter, it is not in dispute that the salvage work was successfully completed by the Appellant and a certificate dated 22nd December, 2009 was issued by the Appellant recording the successful completion of salvage

work. The Appellant accordingly issued an invoice of the same date for Rs.8,04,25,000/- payable towards salvage charges. The said amount was duly paid to the Appellant for which the Appellant on 11th January 2010 issued a receipt.

vi. The Appellant for the first time on 13th January 2010 issued an invoice for an amount of Rs.7,72,10,000/- claiming idle time charges for the period between 17th November and 9th December, 2009.

vii. The Appellant, then filed an Admiralty suit for recovery of *inter alia* idle time charges of Rs. 7,72,10,000/-. The parties by consent agreed to refer the said Suit to Arbitration. The Appellant, being the Claimant in the Arbitration filed its Statement of Claim, and the Respondent filed its Statement of Defence and also a Counter Claim. Based on the pleadings, the following issues were framed for determination by the Arbitral Tribunal, viz.

"1. *Whether the Claimants prove they have live Claim(s) against the Respondents (especially in the light of and*

despite the issue of pre-receipt dated 11th January 2010 and the subsequent receipt of Rs.8,04,25,000 from the underwriters of the salvaged vessel) and that the Claimants are not estopped from raising any further claims against the Respondents under the salvage contract?

- 2. Whether the claims made are de hors the contract and if so, whether this Tribunal has jurisdiction to hear and decide any of the claim(s)? And if the Tribunal has the jurisdiction, which of the claims can be entertained by this Tribunal?*
- 3. Whether the Claim or any part of it is barred by waiver, estoppels, acquiescence and/or principles analogous thereto?*
- 4. Whether the Claimants received the sum of Rs 8,27,50,000/- in full and final settlement of all claims under this contract?*
- 5. Whether Clause 5 in Part II of the Salvage Agreement was varied by the Claimants' acceptance of the Respondents' offer by their letter dated 7th November 2009 and subsequent receipt by the Claimants of Rs.40 lakhs in terms thereof?*
- 6. Whether the Claimant could have legitimately stopped or slowed down the salvage services for want of receipt of security after having agreed to commence salvage services on receipt of Rs.40 Lakhs?*
- 7. If it is held that salvage work was started before receipt of security, then had the Claimants discharged the Respondents from obligation to furnish security?*
- 8. Whether the Salvage period commenced upon receipt by the Claimants of the letter of Payment Guarantee on 9th December 2009 or at any point earlier in time? And if so, when?*
- 9. Whether the Claimants are entitled to any "idle time charges" and if so at what rate? More particularly, whether the Claimants are entitled to any idle time charges (and if so, to how much of the time in each case) on account of:*

- a. *Interference / sabotage by earlier contractor?*
 - b. *Stoppage of work by GMB?*
 - c. *Non issue of payment guarantee within the stipulated period?*
10. *Whether the idle time charges of Rs. 25 lakhs per day as stated in Box 14 and Clause 12 of the Salvage Agreement be permitted to be re-opened?*
 11. *Whether the claimants were required to obtain GMB Permission for mobilizing SALVIJ and Maldar XII?*
 12. *What relief, if any?*
 13. *Interest and / or costs – if any?"*

viii. By an Arbitral Award dated 18th April 2015, the Arbitral Tribunal dismissed both the Claim as also the Counter Claim. The Appellant challenged the Arbitral Award by filing a Petition under Section 34 of the Arbitration Act. The said Petition came to be dismissed by the Impugned Order. The Respondent on the other hand, did not challenge the Arbitral Award. It is in the context of the aforesaid facts that the Appellant has filed the present Appeal.

3. Mr. Shanker, learned counsel appearing on behalf of the Appellant submitted that the Arbitral Award was bad in law for four reasons, (i) that the Arbitral Award made reference to

Section 55 of the Indian Contract Act, 1872 ("Contract Act") despite the fact that it was understood between the parties that Section 55 of the Contract Act would not apply (ii) that the Respondent had not pleaded waiver despite which the Arbitral Tribunal had concluded that the Appellant had waived its right to claim idle time charges (iii) that the Arbitral Award contained contrary findings, and (iv) that the only basis for rejecting the claim for liquidated damages was that there was an error in calculation of the same.

4. Mr. Shanker in support of his first contention invited our attention to the written submissions filed by the parties and pointed out therefrom that both parties were *ad idem* that time was not of the essence of the contract. Basis this he submitted that the parties had agreed that Section 55 of the Contract Act would not be applicable. Mr. Shanker then placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Union of India vs. Ibrahim Uddin and Another***¹ to submit that a decision which was based on grounds outside the pleadings was bad in law. Basis this he submitted that the Arbitral Tribunal had gravely erred placing reliance upon Section 55 of the Contract Act when

1 (2012) 8 SCC 148

parties themselves were ad idem that time was not of the essence of the contract. He therefore submitted that the Arbitral Award was in violation of the provisions of Section 34 (2) (a-iv) of the Arbitration Act.

5. Mr. Shanker then submitted that waiver must be expressly pleaded which the Respondent had not. In support of his contention that waiver must be specifically pleaded and proved, he placed reliance upon a judgment of the Hon'ble Supreme Court in the case of *M/s. Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Others*². Mr. Shanker then invited our attention to the communication dated 7th December 2009 and pointed out therefrom that nowhere did the same state that the Appellant had waived the claim for idle time charges. He also invited our attention to the correspondence which preceded the communication dated 7th December 2009 and pointed out therefrom that the Appellant had infact specifically stated that the Respondent was liable for payment of late charges/idle time charges. Basis this he submitted that it could not be contented that the Appellant had waived and/or given up its claim for idle time charges. He thus submitted that in present case, despite the

² (1979) 2 SCC 409

fact that the Respondent had not pleaded waiver the Arbitral Tribunal had rejected the Appellant's claim for idle time/late charges by holding that the Appellant had waived its right to such a claim.

6. Mr. Shanker then in support of his contention that the Arbitral Award contained findings contrary to the contract/understanding between the parties, first invited our attention to the Statement of Defence and pointed out that despite the fact that it was common ground that the obligation to obtain the requisite permissions from the authorities was that of the Respondent, the Arbitral Award recorded as follows viz.

"15.5.3. The very fact that in the first instance, the Claimants applied for the requisite permissions and only upon the GMB insisting that the applications be made by the Respondents themselves, did they (the Claimants) ask the Respondents to do so, establishes that the Claimants considered it their obligation to get the requisite permissions. Thus, neither party seems to have been aware that GMB would require the Respondents themselves to make the applications and would not entertain such applications from the Salvors. In view of this, I do not think the liability for the loss, if any, can be foisted on the Respondents – particularly in view of the written requirement that they were to be responsible only for the costs in this regard and if any such costs are incurred by the Claimants, they would be obliged to reimburse the latter."

He submitted that the Arbitral Award in addition to this was also replete with other inconsistent and contrary findings. He pointed

out that the Arbitral Tribunal had, on the one hand, held that all the claims of the Appellant were alive and that no claims had been waived despite which fact the Arbitral Tribunal had disallowed the Appellant's claim for idle time charges. Basis this he submitted that the Arbitral Award was bad in law and thus liable to be set aside.

7. Mr. Shanker then pointed out from the Arbitral Award that the only basis on which the claim for liquidated damages had been rejected, was because the Arbitral Tribunal had found that there existed no computation/quantification of the said amount. He submitted that therefore the claim for liquidated damages was not rejected on the ground that the Appellants were not entitled to the same, but only because the same was not adequately computed. He submitted that since the amount of Rupees Twenty-Five Lakhs per day was the agreed genuine pre estimate of liquidated damages as fixed under the contract, the question of quantification of the same did not arise.

8. We have heard Mr. Shanker, Learned Counsel for the Appellant, considered the judgements upon which reliance was placed, as also perused the Impugned Order and find that the

present Appeal deserves to be dismissed for the following reasons, viz.

A. At the outset, we must note that the entire challenge before us and the submissions made by Learned Counsel for the Appellant were only qua the Arbitral Award and not the Impugned Order. Thus, what the Learned Counsel for the Appellant has essentially called upon us to do is to effectively re-examine the Arbitral Award. We find that such a course of action is not open to us. The Hon'ble Supreme Court has, in the case of ***MMTC Ltd. Vs. Vedanta Ltd.***³, held that a Court in an Appeal while exercising jurisdiction under Section 37 of the Arbitration Act, cannot undertake an independent assessment of the Arbitral Award. Hence, for us to countenance a challenge to the Arbitral Award de hors the Impugned Order would be in the teeth of the law laid down by the Hon'ble Supreme Court. It was incumbent upon the Learned Counsel for the Appellant to have pointed out from the Impugned Order how the same was in any manner bad in law, which in our view the Learned Counsel for the Appellant has failed to do. Additionally, it is now well settled that the scope of Appeal under Section 37 of the Arbitration Act in examining an

³ (2019) 4 SCC 163

order refusing to set aside an Arbitral Award is all the more circumscribed. The Hon'ble Supreme Court has in the case of *UHL Power Company Limited Vs. State of Himachal Pradesh*⁴ held as follows;

"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed...."

Thus the present Appeal must therefore fail on this ground alone.

B. In the present case, we must also note that it is not in dispute that the Arbitral Tribunal was constituted in terms of clause 14 of the contract which mandated that the Arbitral Tribunal would comprise of persons having requisite knowledge of maritime matters. A plain reading of the Arbitral Award makes clear that the same is detailed and well-reasoned award rendered by a Tribunal having the requisite knowledge of Maritime matters. The view taken by the Arbitral Tribunal is most certainly a plausible view and within the four corners of the said contract. The Impugned Order is also a detailed and well-reasoned order. The Learned Single Judge has taken into consideration and dealt with all the grounds of challenge raised by the Appellant after

4 (2022) 4 SCC 116

which the Petition filed by the Appellant under Section 34 of the Arbitration Act was dismissed. Thus in our view the Learned Judge has correctly dismissed the Petition filed under Section 34 of the Arbitration Act since the same did not make out any ground for challenge under Section 34 of the Arbitration Act.

C. Even if we were to consider the submissions made on merits, the same in our view are devoid of any merit for the following reasons, viz.

- i. The contention that the Award is bad in law since the parties had agreed that Section 55 of the Contract Act would not apply is plainly incorrect and entirely misconceived. *Firstly*, and as accepted by Learned Counsel for the Appellant, there is no such pleading taken either in the Statement of Claim and/or in the Statement of Defence and Counter Claim. A perusal of the written submissions makes clear that the Respondent had only submitted that time was not of the essence of the contract and nothing more. There is absolutely no submission, much less any concession that

reflects that Section 55 would not apply in its entirety. A perusal of written submissions of the Respondent makes clear that the non-applicability of section 55 is limited only to time not being of the essence of the contract and not on the aspect of waiver. The written submissions infact specifically set out as follows;

"g) The Claimant agreed to re-commence salvage services on 7th December 2009 upon receipt of the LOU/BG without reserving its right to claim Idle Time Charges after it had terminated the Salvage Agreement on 1st December 2009 and claimed Idle Time Charges."

Hence it cannot be suggested that the Respondent had agreed that Section 55 of the Contract Act would not apply insofar as waiver was concerned. Hence, the question of the Arbitral Tribunal having decided beyond the pleadings does not arise. The judgment of the Hon'ble Supreme Court in the case of ***Union of India vs Ibrahim Uddin*** (supra) would therefore be of no assistance to the Appellant. *Secondly*, we find that the Learned Single Judge has in the Impugned Order specifically dealt with this aspect and held as follows, viz.,

"6.....The two findings are clearly on different issues and rendered in different contexts. On the first issue, namely,

whether the claim was alive, the case of the Respondent before the arbitrators was that by reason of receipts both pre and post part-payment of the claim amount, there was a discharge of the Respondent's liability or alternatively, an estoppel on the part of the Petitioner for raising any claim. The arbitrators found that the receipts issued by the Petitioner did not imply its having waived or given up the claim and the claim was very much alive. On the second issue, namely, whether or not the Petitioner's claim was justifiable, the arbitrators came to a conclusion that by reason of the letter of 7 December 2009, the Petitioner could be said to have accepted the performance of the promise of a payment guarantee on the part of the Respondent, though such guarantee was not submitted within the specified time, rendering the contract voidable on account of such failure. The arbitrators held that the Petitioner having accepted such promise at a time other than the agreed time, it could not claim compensation for any loss occasioned by non-performance within the agreed time, unless at the time of the acceptance it had given notice of its intention to do so. The arbitrators found that since this was not done, the effect of acceptance of the performance after the stipulated period did not admit of any claim of compensation on the part of the Petitioner. As I have noted above, there is per se no fault to be found with the conclusion in itself."

Hence, the exclusion of application of Section 55 qua the aspect of waiver was not as a concession that the Arbitral Tribunal would in any manner have been precluded from applying while adjudicating the disputes between the parties on the aspect of entitlement to idle time charges.

- ii. Insofar as the contention of waiver and inconsistent findings are concerned, we note that the Appellant's contention that the Respondent has not pleaded waiver is plainly erroneous. The Respondent has expressly pleaded waiver in the Statement of Defence, infact as a preliminary issue. Thus, the judgment of the Hon'ble Supreme Court in the case of *M/s. Motilal Padampat Sugar Mills Co. Ltd.* (supra) will have no application to the facts of the present case.
- iii. Also, we find that the Appellant's contention that the Arbitral Tribunal erred in not granting liquidated damages on the basis that the Appellant's computation was not correct is also untenable since the Arbitral Tribunal has specifically answered Issue No. 9 & 10 in the Respondent's favour by holding that the Appellant was not entitled to idle time charges. Hence, the Appellant's contention that the same was rejected on the sole ground that the computation was not correct is misconceived.

9. In view of the aforesaid, we find no infirmity with the impugned order which would warrant interference under Section 37 of the Arbitration Act. The Appeal is thus dismissed.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)