IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.03.2021

\+ **O.M.P. (COMM) 188/2020**

INDIAN OIL CORPORATION LTD. ..... Petitioner

versus

THE GREAT EASTERN SHIPPING CO. LTD. & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ramabhadran V., Senior Advocate with Mr Shashwat Goel, Advocate.

For the Respondents : Mr Amitava Majumdar, Mr Arvind Kumar Gutpa, Mr Rishabh Saxena, Mr Prashant Bhardwaj and Mr Rishi Bhardwaj, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Indian Oil Corporation Ltd. (hereafter 'IOCL') is a Public Sector Undertaking engaged in the business of import, distribution and sale of petroleum and other ancillary products. It has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 16.04.2012 (hereafter 'the impugned award') made by an Arbitral Tribunal comprising of three members. The Arbitration was conducted

under the aegis of the Indian Council of Arbitration (Respondent No. 2) and in accordance with the Maritime Arbitration Rules of the Indian Council of Arbitration. By the impugned award, the Arbitral Tribunal had rejected IOCL's claim as barred by limitation.

2. IOCL contends that the impugned award is patently illegal, as the Arbitral Tribunal could not have denied the benefit of Section 14 of the Limitation Act, 1963 (hereafter the 'Limitation Act') to IOCL. IOCL claims that its claim was within the period of limitation as the period spent by it in pursuing its claim as a counter claim before another Arbitral Tribunal, ought to have been excluded in terms of Section 14 of the Limitation Act.

3. Respondent No. 1, The Great Eastern Shipping Co. Ltd. (hereafter 'GESCO'), disputes the aforesaid contention. According to GESCO, IOCL had not acted with due diligence. IOCL had claimed an amount of ₹1,09,86,726/- as a counter claim in the arbitral proceedings instituted by GESCO in respect of another contract. GESCO had contested the same on the ground that the Arbitral Tribunal, constituted in that matter (hereafter referred to as the 'First Arbitral Tribunal'), did not have the jurisdiction to entertain IOCL's counter claim. However, despite GESCO pointing out that the First Arbitral Tribunal lacked the jurisdiction to decide IOCL's counter claim, IOCL did not take the necessary steps for commencing arbitral proceedings or for the appointment of an Arbitrator to adjudicate its claim. It continued to press its counter claim before the First Arbitral Tribunal, which IOCL knew, or ought to have known, did not have the jurisdiction to decide

the same. Second, it is submitted that even if it is ignored that the First Arbitral Tribunal did not have jurisdiction to entertain IOCL's claim, it could not have done so as the claim was barred by limitation as on the date when such counter claim was filed before the First Arbitral Tribunal.

4. The controversy arising in this case is confined to examining whether the impugned award suffers from any patent illegality which warrants interference under Section 34(2A) of the A&C Act.

Factual Matrix

5. The parties had entered into a Contract of Affreightment dated 12.05.2006 (hereafter 'COA-2006'). In terms of COA-2006, GESCO agreed to provide a vessel to IOCL for carriage of crude oil from the Middle East, Red Sea Port to the West Coast or East Coast of India, for a duration of one year from June, 2006 to May, 2007. The term was extendable by a further period of three months at the option of the Charterers (IOCL). IOCL agreed to provide two Laycans for "*two Suezmax parcels*" for each month. It was agreed that each parcel would be a minimum of 132,000 MT.

6. IOCL was required to advise GESCO about the Laycans for the following month latest by the 20th day of each month. GESCO agreed to accept the Laycans without any deviation and was obliged to arrange for suitable tonnage and ensure that the cargo is lifted from the ports as per IOCL's schedule. GESCO agreed to nominate a suitable vessel for the same, at least fifteen days in advance of the commencement of first day

of the Laycan or within three days of IOCL's intimation of the Laycan's, whichever is later. It was also agreed that in case the owner (GESCO) fails to nominate a suitable vessel and/or the nominated vessel misses the Laycan or the nominated vessel is not accepted by the suppliers/terminals, GESCO would substitute the vessel. It was agreed that if GESCO failed to substitute the vessel as agreed, IOCL would be entitled to in-chartering another vessel and the additional cost (freight and demurrage) would be recoverable from GESCO.

7. GESCO nominated its vessel M.T. Prem Prachi for loading crude oil from Rastanura on 11.04.2007 and the nomination of the said vessel was accepted by IOCL.

8. IOCL claims that it found that the vessel in question (M.T. Prem Prachi) was progressively delayed and therefore, was likely to miss the Laycan. IOCL by an email dated 03.04.2007 informed GESCO that vessel in question had not even berthed at Vizag and would miss her Laycan by a large margin.

9. IOCL claims that GESCO was required to immediately substitute the vessel (M.T. Prem Prachi) for the Laycan. But, GESCO failed to do so. According to IOCL, this constituted breach of the obligations under COA-2006. IOCL, thus, made arrangements for a substitute vessel for lifting crude oil from Ras Tanura on 11.04.2007. It claims that it put GESCO to notice that all additional cost including the lighterage cost at disport would be recovered from GESCO.

10. IOCL claims that by a fax/email dated 25.05.2007, it informed GESCO that it had resorted to in-chartering of vessel (M.T. Tataki) for lifting of the parcel from Rastanura. The cargo was lightered at Vizag and discharged at CPCL. IOCL claimed that the additional expenditure incurred by it amounted to ₹1,09,86,726/- and called upon GESCO to remit the same immediately, failing which, it would be recovered from its bills. GESCO sent an email dated 07.07.2007 disputing IOCL's claim.

11. According to GESCO, there was no default on its part and it was not obliged to substitute a vessel till it had missed the Laycan. GESCO claims that at the material time, it believed that M.T. Prem Prachi would reach the port at the given time. It further claims that IOCL's action was pre-mature and it is not liable for the said additional cost of ₹1,09,86,726/- incurred by IOCL.

12. IOCL and GESCO entered into another Contract of Affreightment on 03.01.2007 (hereafter 'COA-2007') whereby it agreed to provide two vessels, M.T. United Gallant and M.T. Ocean Opal, for lifting crude oil from various ports.

13. Disputes arose between the parties in connection with COA – 2007. The said disputes related to payment of demurrages in respect of the two vessels:

> (a) M.T. United Gallant which reported for loading at Basrah Oil Terminal on 24.02.2007 and completed the loading on 08.03.2007. It arrived at the discharge port on

Chennai on 21.03.2007 and completed the discharge on 24.03.2007; and

(b) M.T. Ocean Opal which reported for loading at Basrah Oil Terminal on 20.04.2007 and completed loading on 25.04.2007. This vessel arrived at the port of discharge on 10.05.2007 and completed the discharge on 13.05.2007.

14. The parties, after an exchange of correspondence, agreed that USD 3,39,790.27 was payable as demurrages in respect of M.T. United Gallant and USD 1,28,234.16 was payable as demurrages in respect of M.T. Ocean Opal. However, while making the final payment, IOCL deducted an amount of ₹1,09,86,726/- being its claim in respect of an alleged breach of obligations on the part of GESCO under COA- 2006.

15. By an email dated 21.08.2007, IOCL informed GESCO about remittance made in connection with COA-2007 indicating that it had deducted a sum of ₹1,09,86,726/- from the amounts payable to GESCO. GESCO responded to the same by a communication dated 30.08.2007, disputing IOCL's claim.

16. Thereafter, by a notice dated 07.04.2010, GESCO invoked the Arbitration Clause under COA-2007, *inter alia*, claiming that IOCL had wrongfully deducted the sum of ₹1,09,86,726/-.

17. GESCO nominated its Arbitrator and IOCL also nominated its Arbitrator. Both the nominated Arbitrators nominated a third Arbitrator and the First Arbitral Tribunal was constituted.

18. GESCO filed its Statement of Claim before the First Arbitral Tribunal in respect of its claim under COA-2007. IOCL filed its Statement of Defence and counter claim before the Arbitral Tribunal on 28.10.2010. IOCL's counter claim related to the alleged breach of COA-2006 on the part of GESCO

19. GESCO filed its rejoinder to the Statement of Defence as well as response to the counter claims before the Arbitral Tribunal on 23.12.2010, *inter alia*, pointing out that IOCL's claim for damages in respect of non-performance of vessel M.T. Prem Prachi was not a subject matter that fell within the scope of COA-2007. It pointed out that the First Arbitral Tribunal had been constituted in terms of Clause 29 of COA- 2007 and in terms of the said Clause, the jurisdiction of the First Arbitral Tribunal was confined to disputes arising under COA-2007 and did not extend to disputes relating to any other agreement.

20. The First Arbitral Tribunal noted that the Arbitration Clause (Clause 29) was worded to cover "*all disputes arising under this Charter Party*". The First Arbitral Tribunal was constituted under the said Clause of COA-2007 and thus, its jurisdiction was confined to the dispute under COA- 2007. Before the First Arbitral Tribunal, it was conceded by IOCL that COA-2007 did not include any clause that entitled IOCL to withhold payments against claims relating to any other contract.

21. The First Arbitral Tribunal held that it had no jurisdiction to entertain IOCL's claim for damages arising in connection with COA-

2006. Accordingly, on 28.03.2011, it rendered an arbitral award (hereafter 'the First Arbitral Award') in favour of GESCO for a sum of ₹1,09,86,726/- and directed that the same be paid within a period of thirty days. GESCO was also awarded interest at the rate of 9% per annum from the date on which the amount became due, that is, 03.08.2007 till the date of payment/realization. The First Arbitral Award has become final.

22. IOCL claims that it received the First Arbitral Award dated 23.03.2011, on 10.06.2011. Thereafter, IOCL issued an Arbitration Notice on 16.08.2011 for referring the disputes under COA-2006 to Arbitration.

23. The Arbitral Tribunal was constituted in terms of the Arbitration Clause under COA-2006. Before the Arbitral Tribunal, IOCL contended that the period from 07.04.2010, that is, on the date when GESCO commenced arbitration proceedings under COA-2007 till 10.06.2011 being the date on which IOCL received the First Arbitral Award, ought to be excluded as the said period has been spent in *bona fide* and diligent pursuit of its claim before the First Arbitral Tribunal.

24. The Arbitral Tribunal rejected IOCL's claim as barred by limitation. The Arbitral Tribunal noted that the Statement of Claims filed by IOCL did not contain any averment as to the time spent before a wrong forum. IOCL had also not made any plea seeking condonation of delay in its Statement of Claims. The Arbitral Tribunal also noted that IOCL had not furnished any explanation as to how it had proceeded

before a Tribunal constituted under COA-2007 for a claim relating to the vessel M.T. Prem Prachi arising out of COA-2006.

Submissions

25. Mr Ramabhadran, learned Senior Counsel appearing for IOCL submitted that the impugned award is patently illegal, as the Arbitral Tribunal had, without any justification, denied IOCL the benefit of Section 14 of the Limitation Act. He submitted that the case was squarely covered by the decision of the Supreme Court in ***M.P. Steel Corporation v. Commissioner of Central Excise: (2015) 7 SCC 58***. He referred to Paragraph no. 9 of the said decision and submitted that a mere averment that IOCL was pursuing a remedy before another Tribunal, was sufficient to attract the provisions of Section 14 of the Limitation Act.

26. Next, he submitted that the Arbitral Tribunal had rejected IOCL's claim as barred by limitation in view of the reasons as stated in Paragraph nos. 22, 25, 29, 34, 35 and 36 of the impugned award. He submitted that a plain reading of the said paragraphs would indicate that the Arbitral Tribunal was persuaded to hold that IOCL's claim was barred by limitation for the reason that IOCL had made a mistake in proceeding before an incorrect forum and had not taken any corrective steps even after GESCO had pointed out the same in its submissions to the counter claims filed on 23.12.2010. He submitted that an error in approaching an incorrect forum is common in all cases where Section 14 of the Limitation Act is to be applied and therefore, the same cannot

be a ground for excluding the period spent by IOCL pursuing its claims before the First Arbitral Tribunal. He contended that since the Arbitral Tribunal had not applied the correct legal principle, the impugned award is patently illegal and was also liable to be set aside as being contrary to the fundamental policy of Indian Law as held in ***ONGC Ltd. v. Saw Pipes Ltd.: (2003) 5 SCC 705*** and ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***.

27. Next, he submitted that the Arbitral Tribunal had placed undue weightage on the fact that GESCO had filed a response to its counter claims on 23.12.2010 contesting IOCL's counter claims on the ground of jurisdiction. He submitted that the same is not relevant and in terms of the decision of the Supreme Court in ***Associate Builders*** (*supra*), the impugned order was liable to be set aside as based on irrelevant considerations.

28. Mr Amitava Majumdar, learned counsel appearing for GESCO countered the aforesaid submissions. He submitted that the cause of action in the present case had arisen on 30.08.2007 and IOCL had filed its counter claim before the First Arbitral Tribunal on 28.10.2010, which was beyond the period of three years from the date of cause of action. He submitted that, thus, in any event IOCL's claim was barred by limitation. He also referred to the decision of the Supreme Court in ***State of Goa v. Praveen Enterprises: (2012) 12 SCC 581*** and submitted that in case of a counter claim, the period of limitation would stop running on the date when the counter claim is filed.

Reasons and Conclusion

29. At the outset, it is necessary to note that it is conceded that the First Arbitral Tribunal did not have any jurisdiction to entertain IOCL's counter claim for damages under COA-2006. The First Arbitral Tribunal had pointedly asked IOCL's counsel whether there was any provision in COA-2006 or COA-2007, which permitted interchange of the said contracts. This was in the context of ascertaining whether IOCL could claim any amount due under COA-2006 in connection with disputes under COA-2007. IOCL's response was in the negative. This was noted by the First Arbitral Tribunal in the first Arbitral Award as under:

> "Respondents Counsel was specifically asked by the Tribunal whether there is any clause/provision in the two COAs which permits inter-change between the two contracts and the answer was 'NO'."

30. Even before this Court, Mr Rambhadran did not suggest that the First Arbitral Tribunal had the jurisdiction to entertain IOCL's subject claim.

31. It is also admitted that IOCL had not issued any notice invoking Arbitration in respect of its subject claim – claim of damages for alleged breach of COA-2006 on the part of GESCO – prior to its filing the counter claim before the First Appellate Tribunal. Concededly, the cause of action in the case had arisen on 30.08.2007, when GESCO disputed IOCL's adjustment of ₹1,09,86,726/- from the amounts payable under COA-2007. IOCL filed its counter claim before the First Arbitral Tribunal on 28.10.2010, which was beyond the period of three

years from the date on which the cause of action had arisen. The Arbitral Tribunal had noted this in Paragraph no. 24 of the impugned award.

32. In ***State of Goa v. Praveen Enterprises*** (*supra*), the Supreme Court had authoritatively held as under:

> "20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(*b*) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made applicable to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of "institution" insofar as counterclaim is concerned. There is, therefore, no need to provide a date of "commencement" as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."

33. It is not disputed that applying the aforesaid principle, IOCL's claim for damages under COA-2006 was time barred as on the date when it filed its counter claims before the First Arbitral Tribunal. In this

view, the question whether the benefit of Section 14 of the Limitation Act ought to be extended to IOCL in respect of its claim is not relevant.

34. Mr Ramabhadran did not dispute the above. He, however, submitted that since the decision in the case of ***State of Goa v. Praveen Enterprises*** (*supra*) was rendered after the impugned award was delivered, the same may not be applicable. The said contention is unmerited. The Supreme Court had merely explained the law in ***State of Goa v. Praveen Enterprises*** (*supra*); the said decision cannot be construed as a change in law to be applied prospectively.

35. The fact that IOCL's counter claim before the First Arbitral Tribunal was filed beyond the period of three years from the date of cause of action is noted in Paragraph no. 24 of the impugned award. However, this is not stated to be one of the reasons as mentioned in Paragraph no. 37 of the impugned award. The said paragraph only mentions the reasons as stated in paragraphs nos. 22, 25, 29, 34, 35 and 36 of the impugned Award.

36. However, paragraph no. 22 of the impugned award cannot be read in isolation. It merely records that the period of three years would expire on 29.08.2010. Paragraph no. 23 mentions the invocation of Arbitration under COA–2007 and the fact that IOCL had filed its counter claim on 28.10.2010. The following paragraph (paragraph no. 24) expressly records that by that time IOCL "*had exceeded the limitation period even before the wrong forum – the limitation period have not expired on 29.08.2010*".

37. This Court finds no infirmity with the aforesaid view and the present petition is, thus, unmerited.

38. In view of the above, it is not necessary to examine the other contentions advanced on behalf of IOCL. However, for the sake of completeness, this Court considers it apposite to do so.

39. The Arbitral Tribunal had noted that IOCL was made aware that it was pursuing its claim before the wrong forum (First Arbitral Tribunal) by GESCO in its rejoinder to the counter claim filed on 23.12.2010 (erroneously noted as 20.12.2010). However, IOCL did not invoke arbitration within reasonable time but it had done so on 16.08.2011; that is, after a delay of 239 days. The Arbitral Tribunal reasoned that at least as on 20.12.2010 [*sic* rect. 23.12.2010], IOCL ought to have been aware that it was pursuing its claims before a wrong forum and should have immediately sought condonation of delay and invoked the arbitration under COA-2006.

40. The Tribunal held that IOCL had rendered no explanation as to how it had proceeded before the Arbitral Tribunal constituted under COA-2007. It further reasoned that IOCL was a Public Sector Undertaking and had the requisite expertise for "*chartering of ships, accounting and for legal framework*". Thus, it could not be expected that the legal lapse went unnoticed even after GESCO had objected to withholding of the amount from the payments made under COA-2007, on 30.08.2007. The contention that the aforesaid considerations are irrelevant, is unmerited. A plain reading of the impugned award

indicates that the Arbitral Tribunal was of the view that IOCL had not acted with due diligence. Indisputably, this is one of the aspects to be considered for determining whether provisions of Section 14 of the Limitation Act are applicable.

41. The contention that the decision of the Supreme Court in ***M.P. Steel Corporation v. Commissioner of Central Excise*** (*supra*) is an authority for the proposition that a mere averment that a party was pursuing its remedy before another forum is sufficient to attract provisions of Section 14 of the Limitation Act, is unmerited. It is relevant to note that in the said case, the Supreme Court had also quoted paragraph no. 21 of its earlier decision in ***Consolidated Engg. Enterprises v. Principal Secretary, Irrigation Dept.: (2008) 7 SCC 169***. The said paragraph is set out below:

> "21. "Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:
>
> (*1*) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
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> (*2*) The prior proceeding had been prosecuted with due diligence and in good faith;
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> (*3*) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
>
> (*4*) The earlier proceeding and the latter proceeding must relate to the same matter in issue; and
>
> (*5*) Both the proceedings are in a court."

42. It is seen from the above that the question whether the requirement that a party had prosecuted the proceedings *with due diligence and in good faith*, is a necessary condition for application of Section 14 of the Limitation Act. In the present case, it is apparent that the Arbitral Tribunal doubted that this condition was met as is evident from the its observations that it was not expected that the lapse on the part of IOCL would have gone unnoticed. The fact that GESCO had pointed out that the First Arbitral Tribunal would not have the jurisdiction to entertain the counter claims cannot be stated to be irrelevant. The Arbitral Tribunal had noted the same in the context of ascertaining whether IOCL had pursued its counter claim before the First Arbitral Tribunal in good faith.

43. There is no dispute that provisions of Section 14 would be applicable in respect of claims filed before an Arbitral Tribunal. There is also no cavil as to the principles enunciated by the Supreme Court in ***M.P. Steel Corporation v. Commissioner of Central Excise*** (*supra*). However, the question essentially is whether the said principles would apply in the facts of the present case. This question had been adjudicated by the Arbitral Tribunal. And, this Court cannot supplant its view in place of that of the Arbitral Tribunal.

44. The contention that the impugned award is patently illegal on the face of the record or it violates the fundamental policy of Indian Law, is wholly unmerited. The reliance placed by Mr Ramabhadran on the decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority*** (*supra*) is misplaced. On the Contrary, in that

decision the Supreme Court has authoritatively held that the arbitrator is the final adjudicatory authority for determining questions of fact and the said findings even though may be erroneous, are not amenable to judicial review.

45. This Court, thus, finds no ground to interfere with the impugned award. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MARCH 17, 2021
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