# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 1809 of 2015**

**Pakistan National Shipping Corporation ---------- Plaintiff**

**Versus**

**Pakistan State Oil Company Limited ---------- Defendant**

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| **Date of hearing:** | **12.04.2018.** |
| **Date of judgment:** | **06.07.2018.** |
| **Plaintiff:** | **Through Mr. Shaiq Usmani Advocate.** |
| **Defendant:** | **Through Mr. Taha Alizai along with Mr. Zeeshan Khan Advocates.** |

## J U D G M E N T

**Muhammad Junaid Ghaffar, J.** This is a Suit pursuant to an Arbitration Award presented in this Court on 23.09.2015 and through this order the objections filed under Section 33 of the Arbitration Act, 1940 on behalf of the Plaintiff as well as Defendant are being decided.

2. It appears that Plaintiff entered into a Contract of Affreightment ("**COA**") dated 5.10.2012 with the Defendant for carriage of 3 million Metric Tons of Furnace Oil from designated ports to Karachi and through addendum dated 24.12.2012 the Plaintiff also agreed to carry Low Sulpher Fuel Oil (LSFO). In October 2013 a vessel "MT Pacific Pioneer" was chartered from the Head Owners to carry cargo of LSFO from Malaysia to Karachi and accordingly on 27.10.2013 the Vessel arrived at load Port in Malaysia and served notice of Readiness and after loading 65,529.923 Metric Tons, Bill of Lading was issued by master of the Vessel and the said Vessel arrived at Karachi's outer

anchorage on 10.11.2013. However, as stated, inspite of notice of Readiness on 10.11.2013 it was delayed for berthing and was berthed after 8 days and once again, it was shifted to outer anchorage on 19.11.2013. The Defendant's case appears to be that cargo was off-specification i.e. not being the same as originally loaded, alleging that it had deteriorated and contaminated during the voyage. After hectic efforts and persuasion from the Head Owners of the Vessel, at last the Vessel was berthed at Karachi Port on 15.12.2013 and discharge was completed on 17.12.2013. The Plaintiff lodged claim as per COA and parties agreed for Arbitration by nominating one Arbitrator each. The Arbitrators settled six issues and answered the same in the following manner:-

| Issue No. | Issue | Answer |
|---|---|---|
| 1. | Whether the Claimant is entitle to invoke the Arbitron clause of Contract of Affreightment (COA) having earlier filed Const. Petitions No. SOSS/2013 and 16/2014 before the Hon'ble High Court of Sindh? | Affirmative |
| 2. | Whether under COA and the law i.e. OGRA AND MP&NR'S policies /directives, the "Respondent could discharge the cargo upon its arrival at the discharge port despite it being off specification"? | Affirmative |
| 3. | Whether even otherwise, the Respondent No. 1 was unable to discharge the Cargo due to force majeure event as per Clause 12 of the COA? | Negative |
| 4. | Whether the Vessel "MT Pacific Pioneer" chartered by the Claimant was suitably equipped for transportation of the cargo that it carried under the COA? | Affirmative |
| 5. | Whether the Claimant is entitled to the sums claimed in respect of demurrages and additional berthing charges? | Claim premature |
| 6. | What should the Award be? | No Decision about payment |

3. Against these findings of the Arbitrators both the parties have filed their respective objections.

4. Learned Counsel for the Plaintiff has at the very outset raised an objection of limitation in respect of the objections filed by the Defendant inasmuch as according to the learned Counsel the Award was presented in Court on 21.9.2015 and Article 158 of the Limitation Act provides a period of 30 days for filing of objections, and according to the bailiff report the notice was admittedly served upon the Defendant on 1.12.2015 whereas, they have filed their objections on 20.01.2016; hence, the same are hopelessly time barred. Per learned Counsel even if it is presumed that limitation was expiring during winter vacations of this Court, at the most the objections could have been filed on the first opening day but even that was not done. He has further contended that though as per diary of the Additional Registrar, after Defendant's appearance some more time was granted; however, per learned Counsel, the Additional Registrar is not a Court and therefore, he cannot enlarge the limitation. As to the merits of the Award, learned Counsel has contended that matter was referred to Arbitrators to decide the claim of the Plaintiff in respect of payment of demurrage charges pursuant to the Contract which already specifies the quantum of such charges, and therefore, once they answered the issues in favour of the Plaintiff, it was incumbent upon them to award such quantum of demurrage charges. According to the learned Counsel the learned Arbitrators have deferred the determination of the quantum on the ground that some Arbitration is pending between Plaintiff and the Head Owners for such delay in berthing of the Vessel, and therefore, no final Award can be passed. Per learned Counsel such finding is erroneous

and in violation of the Contract itself as this has no nexus with the International Arbitration pending between Plaintiff and the Head Owners of the Vessel. According to the learned Counsel Section 74 of the Contract Act has been invoked in disallowing the claim; however, the same is not applicable and is based on incorrect consideration of the provisions of law and Contract as according to the learned Counsel, the dispute between the parties was initially that whether under clause "F" of the COA due to refusal of the Defendant to discharge the Cargo the Plaintiff was entitled for demurrage charges or not. He has contended that once it was agreed upon that demurrage shall be payable at the fixed rate of Rs.1.5 million per day pro-rata, there could not be any exception in awarding the quantum of demurrage, after the issues were answered in favour of the Plaintiff. Per learned Counsel the Arbitration Tribunal also erred in law and failed to appreciate that it is not a Court of law which could refuse to give a finding or to give a decision with a view of doing substantial justice, but must give answer to all issues raised before it either in the affirmative or negative and they cannot keep pending the award of demurrage or make it dependent on some International Arbitration which has got nothing to do with the Defendant. According to the learned Counsel admittedly the delay was caused due to the refusal of the Defendant in offloading the cargo on the ground that it was off-specification and thereafter, they accepted the Cargo in the same condition; hence, the Defendant was liable to pay the agreed charges for demurrages. According to the learned Counsel the agreement in respect of demurrage charges on per day basis cannot be equated or regarded as liquidated damages, hence, Section 74 of the Contract Act is not applicable. Per learned Counsel it was simplicitor charges for detention of the Vessel, whereby, it was prevented from

proceeding for another voyage, and was more akin to the kind of hire charges determined by the market forces. He has further contended that the learned Arbitrators were bound to determine the reasonable compensation to be paid to the Plaintiff as per COA instead of leaving it to the time when the International Arbitration is concluded. Finally, per learned Counsel either the Award be remanded to the learned Arbitrators without setting it aside with directions to pass a necessary Award in respect of demurrage charges, or in the alternative since one of the Arbitrator is no more alive, this Court is fully competent to award such demurrage as per the agreement between the parties. In support he has relied upon ***Messrs Shafi Corporation Ltd. V. Government of Pakistan through D.G. Defence Purchase (PLD 1994 Karachi 127), Messrs Shafi Corporation Ltd. V. Government of Pakistan through D.G. Defence Purchase (PLD 1981 Karachi 730), Bhola Nath Mallick V. Mahadev Mallick (AIR (39) 1952 Calcutta 226), Province of Punjab V. Sufi Muhammad Yousuf (NLR 1990 AC 765), The Thal Development Authority V. Nisar Ahmed Qureshi (PLD 1962 (W.P.) Lahore 830), Haji Amir Bux V. Sono Khan (PLD 1979 Karachi 45), J.F.C. Golaher V. Samad Khan (1993 MLD 726), Rachna Traders V. Government of Pakistan (PLJ 1974 Karachi 217), Muhammad Lal V. Abdul Quddus (PLJ 1975 Quetta 209), M/s Alhaj Muhammad Keramat Ali & Co. Ltd. V. M/s Amin Jute Mills, Ltd. Chittagong (PLD 1961 Dacca 452), Messrs Trading Corporation of Pakistan V. Messrs General Industrial machines (2016 MLD 897), K.B. Khalilor Rahman v. Bijoy Renjan Kanungoe and others (PLD 1963 Dacca 269, Messrs Tribal Friends Co. v. Province of Balochistan (2002 SCMR 1903), Messrs Trading Corporation of Pakistan Ltd. V. Messrs General Industrial Machines (2016 MLD 897), Rachna***

***Traders (Plaintiffs) v. Govt. of Pakistan (Defendants) (P.L.J. 1974 Kar. 217), Continental Construction Co. Ltd., Petitioner v. Stage of Madhya Pradesh, Respondent (AIR 1988 Supreme Court 1166), A. Qutubuddin Khan v. Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268), Director City Circle GEPCO Ltd. And others v. Shahid Mir and others (PLD 2013 Supreme Court 403).***

5. On the other hand, learned Counsel for the Defendant while responding to the objection of limitation has contended that they are within time inasmuch as after service of notice on 1.12.2015 the Additional Registrar vide his diary dated 22.12.2015 made an endorsement that notice of Award issued on 10.12.2015 returned duly served and objections be filed within 30 days; hence, the objections filed on 20.01.2016 are well within time from the period given by the Additional Registrar. Per learned Counsel if the learned Additional Registrar acted without some lawful authority as contended, the Defendant must not be penalized as it is a settled law that an act of Court shall not prejudice any of the parties. In support he has relied upon ***Ghulam Hassan V. Jamshaid Ali and others (2001 SCMR 1001), T.D.C.P. V. Moderate Builders (2005 YLR 1269), Awnar Ahmed V. Waqar Ahmed and 8 others (PLD 2015 Sindh 326), Commissioner Inland Revenue (Legal Division), LTU Islamabad V. Messrs Geofizyka Krakow Pakistan Ltd. (2017 SCMR 140).*** He has further contended that since Plaintiff has also filed its objections, therefore, the conduct of the Plaintiff itself merits consideration in respect of the objection of the Defendant and the Award be completely set-aside and sent back to the Arbitrators by this Court. As to the merits of the case, learned Counsel has contended that the cargo

brought by the Vessel was not according to the specification and directions of the Ministry of Petroleum as well as Oil and Gas Regulatory Authority and therefore, it was delayed. He has further contended that the Defendant being bound by the Government directives had acted accordingly and cannot be held liable of any delay and demurrage charges. According to the learned Counsel there is a dispute between the Plaintiff and the Owner of the Vessel pending in International Arbitration, and therefore, it would not be justified to grant any demurrage charges to the Plaintiff until the International Arbitration is finally decided. Learned Counsel has further contended that the matter falls within Force Majeure as per Clause 12A of COA, whereas, the Award itself is not based on correct finding and the learned Arbitrators have misconducted themselves in ignoring the directions of the Government and implementation of the same. Learned Counsel has also contended that proprietary demands setting aside of the Award as a whole as the Plaintiff itself seeks its remand and therefore, it is a fit case to allow the objections of the Defendant. Per learned Counsel the Plaintiff claims for remand of the Award under Section 12 of the Arbitration Act which is not justified, as on the one hand objections have been filed under Section 30 & 33 of the Act ibid alleging misconduct, and on the other, remand is being sought; hence the stance of the Plaintiff is blowing hot and cold at the same time. In support he has relied upon ***A. Qutubuddin Khan V. Chec Millwala Dredging Co. (Pvt.) Limited (2014 SCMR 1268), Allah Buksh Gabole V. Mst. Razia Begum (PLD 1960 W.P. Karachi 455), Messrs Tribal Friends Co. V. Province of Balochistan (2002 SCMR 1903), Balawal Khan V. Captain Muhammad Alam Khan and others (PLD 1956***

***Lahore 494) and Prof. Shaukat Hussain V. Sarfraz Hussain and 10 others (PLD 1989 Quetta 89).***

6. I have heard both the learned Counsel and perused the record. As to the objections of the learned Counsel for the Plaintiff regarding limitation; firstly, I may observe that since the objections have been filed by both parties in this matter against the Award, therefore, it would not be justifiable to dismiss the objections of Defendant on the ground of limitation; secondly, so also for the reason that the Additional Registrar himself granted 30 days' time to the Defendant on 22.12.2015 and the objection are well within time from such date, and for that the Defendant must not be penalized. Though the learned Counsel for the Plaintiff may be justified in saying that he had no authority to enlarge the limitation as Article 158 of the Limitation Act stipulates otherwise, however, at the same time one must not lose sight of the fact that an act of the Court must not prejudice the rights and interest of any of the parties before it. Reliance may be placed on the case of ***Khyber Tractors (Private) Limited*** (**PLD 2005 SC 842**), ***Ghulam Haider v Mst Raj Bharri*** (**PLD 1988 SC 20**) and ***Commissioner Inland Revenue (Legal Division), LTU Islamabad V. Messrs Geofizyka Krakow Pakistan Ltd. (2017 SCMR 140).*** Therefore, in view of the peculiar facts and circumstances of this case wherein, both the parties have come before this Court by filing their objections, I am of the view that delay, if any, must be condoned; hence, the objection regarding limitation in filing of the objections by the Defendant is hereby overruled.

7. As to the merits of the case, it appears that the learned Arbitrators after a threadbare examination of the entire evidence have in fact come to the conclusion that the Plaintiff has made out its case. They have answered the issues in favour of the Plaintiff and against the Defendant. Whereas, on the other hand, learned Counsel for the Defendant has though made an attempt to justify that such finding and reasoning of the learned Arbitrators falls within misconduct and therefore, it must be set-aside. However, I am not inclined to agree with such proposition put forth by the learned Counsel for the Defendant. There is a plethora of case law to the effect that the Court must not look into to point out defects in the Arbitration Award as it is a matter of choice and convenience between the parties to agree upon Arbitration. It is the prerogative and consent of the parties to such matters and therefore, once they agree upon taking their dispute to Arbitration, then ordinarily (barring certain exceptions which are not present in this case) the decision so reached must not be interfered with.

8. Insofar as the conduct of the Arbitrators and their appreciation of the evidence and passing of the Award is concerned, it is a settled proposition of law that while hearing objections to the Award, the Court, could not sit in appeal on the Award which has been passed after recording of evidence led by both the parties. Even otherwise, on perusal of the Award, I am of the opinion that the issues raised on behalf of the Defendant have been dealt with appropriately by the learned Arbitrators and there appears to be no valid or justifiable ground to upset the findings recorded by the learned Arbitrators. In this regard reliance may be placed on the case reported in **PLD 2011 SC 506** (***Federation of Pakistan through Secretary, Ministry of Food,***

***Islamabad and others vs. Messrs Joint Venture Kocks K.G/Rist)*** wherein it has been held that:-

> "Heard. While considering the objections under sections 30 & 33 of the Arbitration Act, 1940 the court is not supposed to sit as a court of appeal and fish for the latent errors in the Arbitration proceedings or the award. The Arbitration is a forum of the parties' own choice and is competent to resolve the issues of law and the fact between them, which opinion/decision should not be lightly interfered by the court while deciding the objection thereto, until a clear and definite case within the purview of the section noted above is made out, inasmuch as the error of law or fact in relation to the proceedings or the award is floating on the surface, which cannot be ignored and if left outstanding shall cause grave injustice or violate any express provision of law or the law laid down by the superior courts, or that the arbitrator has misconducted thereof. Obviously if there is a blatant and grave error of fact such as misreading and non-reading or clear violation of law, the interference may be justified by the courts. But for the appraisal and appreciation of the evidence, the courts should not indulge into rowing probe to dig out an error and interfere in the award on the reasoning that a different conclusion of fact could possibly be drawn. (See Premier Insurance Company and others v. Attock Textile Mills Ltd. PLD 2006 Lahore 534)"

9. Similarly a learned Single Judge of this Court while dealing with the same issue as to whether the award of an Arbitrator can be upset by a Court while hearing the objections filed under sections 30 and 33 of the Arbitration Act 1940, in the case reported as **1999 YLR 1213** ***(Haji Abdul Hameed & Co. Vs. Insurance Company of North America)*** has observed that in so far as the law on the subject is concerned, it is now well settled that the Court in which the award is filed ought not to launch into an exercise of re-appraisement of the evidence or to set itself up as an Appellant Court and that it should only interfere with the award when there is an error on the face of award. The learned Single Judge after having fortified itself with the law laid down by the Hon'ble Supreme Court in the case of ***Joint Venture KG/RIST V/s Federation of Pakistan*** reported as **PLD 1996 SC 108** went a step further and observed as follows:-

> "It may be added here that invariably the parties after Arbitration ends embroil themselves in protracted litigation mostly at the instance of the one against whom the award is given usually to avoid payment. Consequently, the entire purpose of Arbitration is lost which is to give opportunity to the parties to settle their disputes quickly in a commercial manner without being hamstrung due to intricacies of Court procedures. Consequently, in my view it is incumbent upon the Courts to strictly follow the rule laid down in the above Supreme Court judgment and interfere with the award only in case the error is apparent on the face of the award. To illustrate, I would go to the extent of saying that the error in the award should be so manifest that a person with even a rudimentary knowledge of law should be able to perceive it, since Arbitration ought to be essentially commercial in nature. In so far as this case is concerned I find that let alone there being any error on the face of award I find that the award is well-reasoned and the deductions arrived at by the learned umpire are logical and, hence ought to be endorsed. I, therefore, find no merit in the objections raised by the plaintiff and, therefore, direct that this award dated 28.01.1994 be made rule of the Court and accordingly this is disposed of alongwith the application under Section 33 read with section 30 of the Arbitration Act".

10. In the case reported as **Gerry's International (Pvt.) Limited v Aeroflot Russian International Airlines (2018 SCMR 662)**, the Hon'ble Supreme Court recently, after tracing out the entire history and case law on the interpretation of Sections 30 & 33 of the Arbitration Act, 1940, and so also the powers of the Court in interfering with the Awards passed in Arbitration proceedings, has once again reiterated the same principle that Courts normally do not sit in appeal against the award; it had no power to re-examine and reappraise the entire evidence to hold that the conclusion drawn by the Arbitrator was wrong or needs to be substituted on the ground that another view is also possible, whereas, it could only confine itself to an error apparent on the face of the award, or determine the misconduct of the Arbitrators in the course of Arbitration proceedings. The Court has further elucidated the following principles which read as under;

8. The principles which emerge from the analysis of above case-law can be summarized as under:-

(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.

(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.

(3) The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.

(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.

(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.

(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.

(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.

(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.

(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.

(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.

(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.

(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.

(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.

(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.

(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.

(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.

(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.

(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.

(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.

(27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of

> duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.
> (28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.
> (29) some of the examples of the term "misconduct" are:
> (i) if the arbitrator or umpire fails to decide all the matters which were referred to him;
> (ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;
> (iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and
> (iv) if there has been irregularity in the proceedings.
> (30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator.

11. Insofar as the present case is concerned, no such error of fact and law is discernable from a bare reading of the award, as it is trite law that error must be apparent on the face of the award and not by reference to other material including the evidence before the Arbitrator(s), whereas, on the contrary, all the issues so raised by the parties have been eloquently dealt with and attended to with reasoned findings, which do not warrant any interference by this Court on the touchstone of the exception as laid down by the Hon'ble Supreme Court and other Courts of the country. It has not been controverted with any supporting material or reasons as to why the same cargo was belatedly accepted by the Defendant after having refused the same on its arrival initially, whereas, the ground that it was not according to the Government's specifications and restrictions, is also devoid of merits as it has been accepted in same condition. The argument that they could not have gone against the Government directions, is also of no force on

the same plane. And notwithstanding, this is not a matter of consideration for the plaintiff's grievance at least.

12. After having come to the conclusion that the Award must not be set aside at least to the extent of the claim of the Defendant now I would like to deal with the issue so raised on behalf of the Plaintiff and that is the quantum of the Award itself. It appears that parties as per clause 7(f) (Lay-time & Demurrage) of the COA had agreed that payment of demurrage charges would be at the rate of Rs. 1.5 million per day basis. Admittedly, the delay has occurred and demurrage charges are payable but at the same time the learned Arbitrators by relying upon Section 74 of the Contract Act as well as pendency of some International Arbitration between the Plaintiff and the Head Owners of the Vessel, have thought it appropriate to observe that such claim is premature. To that extent I am not in agreement with the observations of the learned Arbitrators as the learned Arbitrators are not a Court of law to do any kind of substantial justice as observed by them. They are there to Arbitrate and give their Award either in the affirmative or in negative. They must pass an order to that effect as they are not Arbitrators to keep the matters pending and must not pass award which is unclear and consequential in nature. If that be the case, then no Arbitration is needed. Insofar as the pendency of the proceedings in the International Arbitration is concerned, admittedly the Defendant has no concern or claim in those proceedings. It is between the Plaintiff and the Head Owners of the Vessel who is claiming demurrage charges / damages / detention from the Plaintiff for having unlawfully delayed and withheld the Vessel from future business opportunities. I had specifically confronted the learned Counsel for Defendant that whether the

Defendant is willing to undertake that if the International Award is given against the Plaintiff, would they be willing to compensate the Plaintiff accordingly, to which the learned Counsel answered in the *negative*. Therefore, merely on the ground that some International Arbitration is pending and in expectation that Plaintiff would be successful, claim which is otherwise justifiable, must not be withheld or denied. The learned Arbitrators have specifically drawn an inference that the Plaintiff is entitled and the delay was on the part of the Defendant then there was no justifiable reason not to award damages or demurrage charges. As to applicability of Section 74 of the Contract Act it may be observed that parties by themselves in the COA had agreed that as to what will be the quantum of demurrage charges. It is not the case of any liquidated damages as misunderstood by the learned Arbitrators. The parties agreed by themselves quantifying the amount of demurrage and once delay has occurred and demurrage was payable then invoking provisions of Section 74 of the Contract Act does not seems to be lawful. It would come into field only if the quantum had not been specified in the Agreement itself, and then perhaps there could have been a case to apply Section 74 ibid, but not in given facts as above. I am of the view that the Agreement in question is clear, unambiguous and specific.

13. Now the moot question left to be answered is that whether the Award is to be remitted to the learned Arbitrators with directions to determine the actual quantum of demurrage charges as agreed or this Court can exercise jurisdiction in terms of Section 15 or 16 of the Arbitration Act, 1940, and determine the said quantum on its own. It is a fact that one of the learned Arbitrators is no more alive, and remitting

the award will entail two situations. Either the surviving Arbitrator be directed to determine the quantum, which in that case might cause prejudice to one of the parties, as admittedly both of them had nominated one Arbitrator each. In the second situation, one of the parties be directed to nominate a new Arbitrator in place of the deceased; but then again it would not be appropriate as the said newly nominated person would have no clue about the Award itself as it has been passed by someone else. This in my view will also not be justifiable. The other option left is to determine the quantum by myself on the basis of agreed terms in COA. It is but necessary as well for the reason that the idea behind resorting to Arbitration is to have the matters decided expeditiously without going through the rigors of the Court process, which on a comparative basis is always lagging behind and slow viz. a viz. Arbitration. The argument of the learned Counsel for the Defendant that since objections have been filed by the Plaintiff as well, therefore, this is a fit case for setting aside the Award is not justifiable in the given facts. The result of traversing on this path would in fact result in denial of justice, as after so much of delay in final settlement of dispute through Arbitration proceedings, is no good thing to resort to for the Courts. Finality of proceedings should be the foremost consideration and every effort is to be made to achieve the same. Similarly, resort to Section 16 (remit the award) will also be of no use, nor the facts so warrant; hence this Court must modify the award in terms of Section 15 ibid, as it is a case wherein such jurisdiction must be exercised to avoid any further delay as well as the cause of dispensing justice forthwith and keeping in view the fact the issue has arisen out of Arbitration proceedings. This Court must not remain oblivious of the fact that such delays would do not good to the justice

system and this Court feels obligated to draw upon the powers adumbrated in Section 15(b) of the Arbitration Act, 1940, and must modify the award. And this modification does not in any manner alter or changed the award, as it is already discussed hereinabove, that such award must be maintained, even otherwise. In somewhat similar facts in the cases reported as **Electronic Enterprises v Union of India (AIR 2000 Delhi 55)** the Court has exercised similar powers to modify the award. In the case reported as **The Upper Ganges Valley Electricity Supply Co. Ltd., v The U.P. Electricity Board (AIR 1973 SC 683)**, the Indian Supreme Court has observed as under which in my view is relevant for the present purposes.

> 25. We are not disposed to hold as contended by the respondent, that if a part of the award be found to be invalid, the entire award should be set aside and remitted back for a fresh decision. The error which has occurred in the award of the Umpire relates to a matter which is distinct and separate from the rest of the award. The part which is invalid being severable from that which is valid, there is no justification for setting aside the entire award.
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> 26. Normally, we would have remitted the award for a decision in the light of our judgment but that is likely to involve undue delay and expense in a dispute which is pending since 1959. Learned counsel for the appellant was agreeable that we should ourselves amend the award. Learned counsel for the respondent demurred but he was unable to indicate any cogent reason why we should not adopt a course which, far from causing any prejudice to the parties, was clearly in the interests of justice.

14. In the case reported as **A.Z. Company v S. Maula Bukhs Muhammad Bashir (PLD 1965 SC 505)**, the Hon'ble Supreme Court had the occasion to consider a somewhat similar argument as raised on behalf of Defendant, that since the plaintiff has also filed its objecitons to the award and this amounts to misconduct as well as having an error on the face of the award; hence, the entire award be set-aside and remanded to the Arbitrators for a decision afresh. However, this contention was repelled. In that case the learned Arbitrator while

making award in favor of the claimant had awarded interest on the amount of damages granted for breach of contract even in respect of the period prior to such award of damages i.e. even prior to the determination of "sum-certain". The Hon'ble Supreme Court was pleased to hold as under;

> The above has been accepted as a general rule since the decision in the case of Hodgkinson v. Fernie ((1857) 3 C B (NS) 189). Later an exception was engrafted on this rule to the effect that when a specific point of law is referred to arbitrator the award cannot be set aside if the arbitrator wrongly decides the point of law. See Government of Kelantan v. Duff Development Company (1923 A C 395); Absalon Limited v. General Western (London) Garden Village Co. (1933 A C 592). Therefore, in order to consider whether there is error of law on the face of the award the Court has to decide whether the question of interest was material in the decision of the matter which had been referred to arbitration or arose incidentally. If the reference was of the former class then the case M would fall within the general rule and the entire award would be set aside. If however, the award of interest was merely consequential and hence a surplusage, then it would not vitiate the entire award.
>
> From the narrative' portion of the award it appears that the reference was with regard to breach of three contracts and the sellers claimed Rs. 23,760 as the difference between the contract price and the market price on due dates. It is therefore, clear that a decision on the question of interest was not material for decision of the matter which had been referred to the arbitration. In other words the portion of the award which gave interest a 6% for the period prior to the award was -merely consequential and had therefore, no effect on the decision of the main issue in the case. Thus the offending portion of the award being separable from the rest of award could be struck off as mere surplusage. It was so held in Boota v. Municipal Committee of Lahore (291 A 168). In the above case the Judicial Committee observed:
>
> > "They see no reason to doubt that the arbitrators came to an honest determination upon the specific matters referred to them, and any faulty direction they may have given in excess of their authority may be treated as null."
>
> Section 15 of the Arbitration Act also empowers the Court to modify or correct an award `where it appears that a part of o the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred.'
>
> In the result I would modify the award by striking off only that portion which relates to the award of Rs. 13,186.80 as interest at 6 % per annum for 9 years 3 months, and affirm the judgment and decree of the Courts below with the above modification.

15. In view of hereinabove facts and circumstances of this case, I am of the view that the Defendant has failed to make out any case which could compel this Court to sustain their objections and accordingly they are dismissed, whereas, as discussed hereinabove and for the fact that one of learned Arbitrators is no more alive, and since the matter has already been delayed, it would not be an equitable exercise to once again refer the matter to surviving Arbitrator, whereas, the Defendant would then be compelled to nomine another Arbitrator and resultantly complications would arise, therefore, I am of the view that this Court is competent enough to modify the Award to that extent and it is so ordered accordingly, entitling the plaintiff to demurrage charges at the rate of Rs.1.5 Million per day as agreed for a total number of 30 days for which the Vessel was admittedly held up / delayed with simple mark-up @ 6% per anum (not on compound basis) from the date of judgment till its realization.

16. Accordingly objections of Defendant are dismissed and the Award is made rule of the Court duly modified as above. Office to prepare decree accordingly.

Dated: 06.07.2018

**J U D G E**

ARSHAD/