IN THE HIGH COURT OF SINDH AT KARACHI

H. C. A. No. 249 of 2018

[**Pakistan State Oil Company Ltd.** *versus* **Pakistan National Shipping Corporation**]

Present:
Mr. Irfan Saadat Khan, J.
Mr. Muhammad Faisal Kamal Alam, J.

Dates of hearing	:	21.08.2020, 26.08.2020, 01.09.2020 and 16.09.2020.
Appellant	:	Pakistan State Oil Company Limited, through M/s. Taha Alizai and Zeeshan Khan, Advocates.
Respondent	:	Pakistan National Shipping Corporation, through Dr. Adeel Abid, Advocate.

JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** Through the present Appeal, Appellant has challenged the Judgment dated 06.07.2018 ("**Impugned Judgment**"), whereby the Award was modified while making it the Rule of the Court and Appellant was directed to pay demurrage charges at the rate of Rs.1.5 Million per day for thirty days together with simple mark up @6% per annum from the date of judgment till realisation.

2. Necessary background of the present case is that Appellant – Pakistan State Oil ("**PSO**") and Respondent – Pakistan National Shipping Corporation ("**PNSC**") have signed a Contract of Affreightment dated 05.10.2012 ["**COA"**] (at page-67 of this Appeal record), *inter alia*, for the shipment of furnace oil and through an Addendum dated 08.01.2013, it was agreed between Appellant and Respondent that the latter will also transport motor gasoline cargoes and low sulphur fuel oil-**LSFO** from the designated ports, to be imported from time to time by the Appellant. One

such shipment of Low Sulphur Fuel Oil ("**LSFO**") was transported and Respondent – PNSC chartered a Vessel 'MT Pacific Pioneer' originally owned by 'Sinokor Maritime Co. Ltd. Seoul, South Korean – the Head Owners. The shipment was made in October 2013 and the quantity of LSFO was 65,529.93 metric tons. After arrival at Karachi Port the cargo could not be discharged as per the schedule (for reasons discussed in the following paragraphs), which resulted in dispute between Respondent-PNSC and Appellant-PSO and was referred for arbitration. Present Respondent filed a claim against Appellant in the arbitration proceeding.

3. The learned Arbitrators were of the view, *inter alia*, that even if cargo was "off specification" the present Appellant had to get it unloaded and then to file claim for damages against the party who was liable for it. Similarly, for the present Respondent, it was observed that claim for damages in the arbitration proceeding was premature due to the fact that claim of the head owner of subject vessel was (still) pending for adjudication before the Arbitrators at London and present Respondent can initiate fresh arbitration proceeding in the event the London arbitration proceeding filed by the Head Owner is decided against the present Respondent, with regard to payment of demurrage. The Award was filed in the Court and it was registered as Suit No.1809 of 2015. Both, present Appellant and Respondent had filed their respective objections to the Award and after hearing them, the Impugned Judgment was handed down.

4. Mr. Taha Alizai along with Mr. Zeeshan Khan, Advocates representing the Appellant have argued that after service of Notice of Readiness to discharge the cargo which was received on 18.11.2013 by the Appellant, that is, after eight days when the vessel arrived at Karachi Outer Anchorage, requisite test was done as required under various directions of Hydrocarbon Development Institute of Pakistan ("**HDIP**"). Test result was

that cargo/LSFO was found to be off specification as per the standard prescribed by the Ministry of Petroleum and Natural Resources. Learned counsel has referred to the letters dated 12.09.2002 and 12.03.2002, Standard Operating Procedure ("**SOP**") and correspondence of 13.02.2007 issued by Oil Company Advisory Committee ("**OCAC**") and letter of OGRA dated 20.04.2007 and 12.10.2007, to substantiate his arguments. In this backdrop, legal team of Appellant argued, that later on Appellant sent an email of 22.11.2013 to Respondent, wherein the above situation was highlighted. It is argued that in effect it was a ***force majeure*** event and due to the report of off specification, the cargo could not be discharged within the specified time frame. Further submitted, that Respondent being a public sector entity itself, is fully aware of all the above directives and procedures which is further evident from the fact that in case of other shipments, Respondent- PNSC itself preferred different Constitution Petition numbers D-1557 of 2014 and 1824 of 2015 in this Court, seeking directions for discharge of cargo which was also declared as off specification.

5. In the second limb of his arguments, learned counsel for the Appellant has submitted that the Impugned Judgment is a result of misinterpretation of Section 15 of the Arbitration Act, 1940 ("**the Said Act**"), because, the learned Single Bench cannot act as a Court of Appeal while hearing the objections on the Award rendered by the Arbitrators and substitute its own view. It is averred that when in the Impugned Judgment, present Appellant is directed to pay demurrages at the rate of Rs.1.5 Million per day for a total number of thirty days with a simple markup of six percent per annum from the date of Impugned Judgment till realization of the amount, then by no stretch of imagination, it can be termed as modification, but substitution of findings given in the Award by the Court itself and that too by overlooking the undisputed documentary evidence;

that learned Single Bench did not properly consider a material fact that an arbitration proceeding was / is pending between the above Head Owner and Respondent – PNSC, *inter alia*, with regard to monetary claim and if Respondent succeeds in the above proceeding, then its claim here against the present Appellant is bound to be rejected; the *force majeure* factor was neither properly appreciated by the learned Arbitrators nor the learned Single Bench, *particularly*, the finding in the Impugned Judgment is contrary to record, when it is held that present Appellant accepted the cargo subsequently and in this regard no supporting material has been brought on record. To augment his arguments, following reported decisions are cited_

i. 1980 S C M R page-469,
[***Shahul Hamid*** *versus* ***Tahir Ali***];

ii. P L D 2014 Lahore page-424,
[***Fauji Foundation through General Manager (Engineering)*** *versus* ***Messrs Chanan Din and Sons through Attorney and others***];

iii. P L D 2004 Lahore 404,
[***Sh. Saleem Ali*** *versus* ***Sh. Akhtar Ali and 7 others***];

iv. 2018 S C M R page-662
[***Gerry's International (Pvt.) Ltd.*** *versus* ***Aeroflot Russian International Airlines***] – **Gerry's Case**;

v. 1991 M L D page-422
[***Government of N.-W.F.P. through Secretary Forests, Peshawar and 4 others*** *versus* ***Azizur Rehman***];

vi. 2009 S C M R page-29,
[***Umar Din through L.Rs.*** *versus* ***Mst. Shakeela Bibi and others***];

vii. 2002 S C M R page-1903,
[***Messrs Tribal Friends Co.*** *versus* ***Province of Balochistan***];

viii. 2016 M L D page-897
[***Messrs Trading Corporation of Pakistan Ltd.*** *versus* ***Messrs General Industrial Machines***];

ix. AIR 1981 Calcutta page-341,
[***Union of India*** *versus* ***Badridas Kedia***];

x. P L D 2011 Islamabad page-43,
[***National Highway Authority through General Manager Construction*** *versus* ***Messrs Hakas (Private) Limited through Managing Director***];

xi. AIR 1961 Supreme Court page-823,
[***Messrs. Basant Lal Banarsi Lal*** *versus* ***Bansi Lal Dagdulal***]

xii. 2013 C L D page-1451,
[***Messrs. Sadat Business Group Ltd.*** *versus* ***Federation of Pakistan through Secretary and another***];

xiii. 2002 WL 499014 (High Court of Justice Chancery Division),
[***Euro Brokers Holdings Limited*** *versus* ***Monecore (London) Limited***];

xiv. 2016 C L D page-1833
[***Atlas Cables (Pvt.) Limited*** *versus* ***Islamabad Electric Supply Company Limited and another***]; and

xv. 1991 S C M R page-1443,
[***Muhammad Ismail through his Legal Heirs and others*** *versus* ***Ghulam Haider and 3 others***].

6. On the other hand, Dr. Adeel Abid, Advocate, for Respondent has supported the Impugned Judgment. He has argued that when all the issues were decided in favour of present Respondent (PNSC) then the Arbitrators should have awarded the demurrage as well, as envisaged in Clause 7 of COA, but they did not, therefore, the said portion of Award was modified in the Impugned Judgment by granting demurrage (as already mentioned above). Appellant did not serve any notice about *force majeure* event, as per Clause 12 of COA, thus, Appellant is responsible for the delay caused in discharging the cargo and was rightly directed to pay demurrage to Respondent; that the pending arbitration proceeding in United Kingdom at London is an independent proceeding, in which admittedly the present Appellant is not a party, thus any decision / award given in the foreign proceeding will not affect the subject proceeding, which was concluded between Appellant and Respondent and finally the Impugned Judgment was passed. That Respondent Carrier was not responsible, if the cargo was tested as off specification (as alleged), because even if this is correct, then Appellant can file an independent claim against the seller of the cargo, because the vessel that shipped the subject cargo was seaworthy and there was no other complaint about it. It is argued that stance of Appellant is self-contradictory, because initially it was stated that subject cargo was off specification, but fact of the matter is, eventually Ministry of Petroleum and

Natural Resources conveyed its view that Appellant may take a decision in view of its agreement with power sector companies. Undisputedly, the subject LSFO (cargo) was unloaded and later provided to one of customers of Appellant. That letter of 22.11.2013 addressed to Respondent by Appellant, has not pleaded the ***force majeure*** as required and thus the Appellant was not absolved from its obligation to get the cargo discharged within the specified time frame, in order to avoid payment of demurrage. Further submitted that the learned Arbitrators in view of the undisputed evidence brought on record and the issues, which were decided in favour of present Respondent, should not have held that demurrage claim was pre-mature just because an independent foreign arbitration proceeding was pending between present Respondent and Head Owners of the Vessel. Learned Arbitrators also erred that a fresh claim may be preferred by the Respondent after decision of afore-referred foreign arbitration. This illegality in the Award was corrected by the learned Single Bench in its Impugned Judgment, for which Section 15 of the Said Act is quite clear, so also number of reported decisions on this very point of law. Learned counsel for Respondent has relied upon the following case law in support of his arguments_

i. P L D 2015 Sindh page-134,
[***Talaat Inayatullah Khan and another*** *versus* ***Dr. Anis Ahmad Sheikh***];

ii. 2016 C L D page-1790,
[***Hashwani Hotels Limited through Senior Manager*** *versus* ***Sindh Insurance Tribunal, Karachi***];

iii. 2003 Y L R page-2494,
[***Water and Power Development Authority through Chairman and another*** *versus* ***Messrs. Ice Pak International Consulting Engineers of Pakistan through Chairman and another***];

iv. 1999 Y L R page-1213,
[***Haji Abdul Hameed & Co.*** *versus* ***Insurance Company of North America and other***];

v. 1984 S C M R page-597,
[***Ashfaq Ali Qureshi*** *versus* ***Municipal Corporation, Multan and another***];

vi. P L D 2011 Supreme Court page-506,
[***Federation of Pakistan through Secretary, Ministry of Food, Islamabad and other*** *versus* ***Messrs. Joint Venture Kocks K.G./RIST***];

vii. AIR 1973 Supreme Court page-683,
[***The Upper Ganges Valley Electricity Supply Co. Ltd.,*** *versus* ***The U. P. Electricity Board***];

viii. H.C.A. No.239 of 1999 [unreported],
[***M/S. Gerry's International (Pvt.) Ltd.*** *versus* ***Aero Flot, A Russian International Airlines***];

ix. 1983 C L C page-2006,
[***The Trustees of Port of Karachi*** *versus* ***Ghulam Abbas***];

x. 2018 S C M R page-662,
[***Gerry's International (Pvt.) Ltd.*** *versus* ***Aeroflot Russian International Airlines***]

xi. P L D 1998 Karachi page-79,
[***Turner Morrison Garahams Group of Companies, London*** *versus* ***Rice Export Corporation Pakistan Ltd.***];

xii. P L D 1968 Dacca page-937,
[***Province of East Pakistan*** *versus* ***Messrs Abdul Halim Nezamuddin***];

xiii. P L D 1965 Supreme Court page-505,
[***Messrs A. Z. Company*** *versus* ***Messrs S. Maula Bukhsh Muhammad Bashir***];

xiv. 1982 S C M R page-1127,
[***Indus Valley Construction Company Ltd.*** *versus* ***Cementation Intrafor Ltd.***];

xv. P L D 1965 (W. P.) Karachi page-224,
[***Naqi Hanna Khabbaz and others*** *versus* ***Messrs Dalmia Cement Ltd.***];

xvi. P L D 1959 (W. P.) Karachi page-269,
[***Messrs Muhammad Steamship Co., Limited*** *versus* ***Messrs Abdul Aziz Ali Mohammed***];

xvii. 1992 S C M R page-19,
[***House Building Finance Corporation*** *versus* ***Shahinshah Humayun Cooperative House Building Society and others***];

xviii. 2016 Bombay High Court (Online) 10023
[***Ultratech Cement Ltd.*** *versus* ***Sunfield Resources Pvt. Ltd, on 21 December, 2016***]

7. Arguments heard and record perused.

8. The gist of the case law cited by the Appellant's Legal Team is that the contents of a document determine its nature and not its title or caption (this has been cited to augment his arguments that the email dated

22.11.2013 from Appellant to Respondent, wherein reasons are mentioned for not discharging the subject cargo, was in fact a *force majeure* notice); object to insert *force majeure* clause in an agreement is to save the performing party from the consequence of anything over which the said party has no control; there can be no estoppel against Statute, and a point of law can be pleaded at any stage, being the inalienable right; legal misconduct is explained in the Judicial sense, which means that Arbitrator has failed to perform his essential duty resulting in substantial miscarriage of justice between the parties. Uncertain Award was to be remitted to the Arbitrators for a fresh arbitration [in support of his arguments, that if learned Court disagreed with the conclusion of Arbitration Tribunal, that findings given in the Award under challenge was tentative in nature, then Learned Court should have remitted the Award instead of passing the impugned decision]. Principles with regard to arbitration proceeding as expounded in **Gerry's case-2018 S C M R page-662** is highlighted, to substantiate the submission that modifying the Award by enhancing the amount was an illegality on the part of learned Single Bench; modification that changed the decision of the Arbitrator is unlawful; an Award not severable in respect of different disputes, is to be set aside; liquidated damages can only be awarded when positive evidence is led by the claimant and actual loss is proved; liquidated damages cannot exceed the amount mentioned in the contract.

Similarly, the crux of the principle laid down by the Honourable Supreme Court in Gerry's case (***ibid***), *inter alia*, is that purpose of incorporating Section 26-A in the Said Act (1940) is to ensure that findings and reasons of Arbitrator is not contradictory to the record, but mere brevity of reasons shall not be a ground for interference in the Award by the Court; it is an established rule that Court cannot re-examine or reappraise the evidence in order to hold that the conclusion reached by the Arbitrator

is wrong, where two views are possible, the Court cannot interfere with the Award by adopting its own interpretation (as learned Advocate for Appellant argued, that demurrage component contained in the Impugned Judgment cannot be sustained in view of the said reported decisions); the Court can only confine itself to find an error apparent on the face of the Award (as Legal Team of Appellant submitted, that replacing the conclusion of learned Arbitrators, which too was erroneous, with its own conclusion by directing the Appellant to pay demurrages of Rs.1.5 Million per day, is violative of the rule laid down in the said reported judgment of the Gerry's Case).

9. Précis of the case law relied upon by learned counsel for the Respondents is that under the doctrine of Privity of Contract, a contract cannot confer right or impose obligation on a person not a signatory / party of that contract; failure of an Arbitrator in not giving effect to the terms of contract also constitutes an error apparent on the face of the Award and can be corrected under Section 15 of the Said Act; an Award is to be construed liberally and in accordance with common sense and it should be so read that it can be given effect to and not so that it would nullify the efforts of the Arbitrator appointed by the parties themselves; if remitting Award would involve undue delay and expense, the Court can amend / modify the Award (this was to fortify the arguments of learned counsel for Respondent that the Impugned Judgment has correctly modified the Award, which did not determine the main monetary claim of Respondent merely due to pendency of Foreign Arbitration between above Head Owner of the Vessel and Respondent, wherein, admittedly, present Appellant was not a party). Integrity and impartiality of an Arbitrator should not be an only consideration for not interfering in the award passed by Arbitrator, but an award should be considered in the light of dispute referred for arbitration

and wherein error is apparent that certain clauses in a contract were not properly interpreted, then such error can be modified by the Court; where a part of award can be separable from the rest, then Court can modify the same under Section 15 of the Said Act, instead of remitting the Award to Arbitrator(s). Concept of demurrage is further elaborated, that it is different from general damages and Courts have held, that it would not only be unreasonable but wholly unrealistic and impossible to call upon the respondent (of the reported case) to prove the loss suffered by it. The very purpose of agreeing to the specified amount of demurrage was to avoid litigation and complexity in assessing damages.

10. We may also add that while citing case law, it may be kept in mind that unnecessarily Court should not be burdened with a number of citations expounding an identical rule. Multiple citations can be referred on a point of law when they contain some degree of variation in them and have modified and developed the rule of the proposition, in support of which judicial precedents are cited.

11. Since main issue of payment of demurrage for thirty days is involved, therefore, it is necessary to consider the time period spent from arrival of cargo till its discharge from the above Vessel and the factors which prevented the discharge of cargo within the stipulated time frame. Vessel with subject cargo arrived at the outer anchorage of Karachi Port on 10.11.2013 and Notice of Readiness was given to present Appellant. Vessel was berthed (at Karachi Port) on 18.11.2013; *whereas,* discharge of subject Cargo was completed on 17.12.2013; as per the averment of Respondent, "*.....the Vessel sailed away from Karachi on the same day.*" HDIP conducted the first test of the cargo and the test report was issued on 17.11.2013, which is at page-93 (of the Appeal record). As per this Report, one of the ingredients, viz. Kinematic Viscosity and sulphur was reported

to be on the higher side. More so, due to some technical problems of equipment, few other related tests could not be conducted.

12. The second test Report of HDIP is at page-95, which is of 6.12.2013, that is, after nineteen days from the first test [as stated above]. It is observed in this Report that the product/cargo **does not meet the import specification of Low Sulphur Furnace Oil** for the above performed test. However, for some technical problems in the equipment, some other tests could not be done at that time. It is further mentioned that the joined sampling on board was done in the presence of HDIP, PSO and PNSC representatives (that is, present Appellant and Respondent respectively).

13. Appellant vide its **email (correspondence) dated 22.11.2013** (Annexure 'D' to the Appeal at page-125) informed the Respondent about the afore-referred adverse test report conducted by HDIP for the subject cargo, while cautioning that Respondent would be responsible for all costs and damages. A day later, another letter of 23.11.2013 was addressed by Appellant to the Director General (Oil), Ministry of Petroleum and Natural Resources, Islamabad ("**MP&NR**"), communicating the said Ministry the difficulties faced by the Appellant and the working of HDIP with a request, *inter alia*, to review policy on cargo sampling / testing. **Another missive** dated 06.12.2013 was addressed to the MP&NR, after the subject cargo was last tested by HDIP, as mentioned above and Report dated 06.12.2013 was issued. In this correspondence (Annexure 'F' of the Appeal at page-133), the Appellant requested the MP&NR for a one time waiver from the implication of Federal Government Policy and sought the discharge of subject cargo; as per the Appellant's version, the subject cargo / product in its present form would meet the specification of the designated local customer of the Appellant. After five days, the MP&NR by its correspondence of **11.12.2013** addressed to the Appellant, conveying its

opinion that Appellant can take a decision keeping in view its agreement with power sector companies. Thereafter, as already mentioned in the foregoing paragraph, that subject cargo was discharged on the above date and the Vessel left the Karachi Port.

The above facts show that present Appellant was constantly co-ordinating with all the concerned parties, including Respondent and the MP&NR, for timely discharge of subject cargo and that is why the Appellant even requested its Ministry (the controlling authority in the matter) to give a waiver, so that the subject cargo although is off specification, but can be sold to local designated power sector customers of Appellant, which permission was ultimately granted by the MP&NR.

The above facts also show that the first test by HDIP was conducted right on the first day when the subject Vessel was berthed and no delay was caused.

14. Now adverting to the second aspect of the case, that why the above cargo could not be discharged within the prescribed time frame of COA. The MP&NR has issued a Policy dated 12.09.2002 (Annexure 'C/3' of the Appeal), *inter alia*, permitting traders to import high speed diesel oil and fuel oil but subject to certain conditions. Second and third conditions of this Policy make it clear that before unloading of the product, it will be tested by HDIP Laboratory at Karachi with further involvement of OCAC. In case of quality dispute, the second retained sample will be tested by HDIP and this second result will be final and binding.

15. Correspondence of 12.03.2003 issued by MP&NR is appended as Annexure 'C/4' with the Appeal. It is addressed to the Oil Marketing Companies, including Appellant, wherein they are put on notice to ensure testing of POL Products in HDIP Laboratory as per Economic Co-ordination Committee ("**ECC**") decision. It means that this decision of

prior testing of POL Products before its unloading was taken at a higher level in the Government. Appellant has also relied upon a SOP for import of fuel oil by Oil Marketing Companies, Traders and Bulk Consumers. This document is filed as Annexure 'C/5' with the Appeal and is of 07.01.2003. This SOP is a comprehensive document for sampling of the product, including, berthing of Vessels carrying POL products. Clause-10 of this SOP is relevant and is reproduced herein below_

> **"***10- OCAC will give the berthing instruction for the vessels of OMCs/Traders/Bulk consumers to FOTCO / KPT which will be subject to receiving the confirmatory report from the HDIP Lab for product quality*.**"**

16. Legal Team of Appellant has placed reliance on another policy guideline of Oil and Gas Regulatory Authority ("**OGRA**"), dated 20.04.2007 (Annexure 'C/7' with the Appeal), which is issued **under Section 21 of the OGRA Ordinance, addressed to Secretary General of OCAC, *inter alia*, enjoining all the importers including the Oil Marketing Companies (which includes present Appellant) to ensure that imported products are tested by HDIP Laboratory at Karachi prior to unloading.** In a subsequent correspondence of 12.10.2007, wherein, the request of OCAC about deletion of mandatory condition for testing before discharge of cargo was turned down, by further reiterating that such policy guidelines should be implemented in 'letter and spirit'. A direction was given in the same correspondence in terms of Section 6(2)(x) of the OGRA Ordinance, to ensure the compliance of the policy guideline and ***"no discharge of tanker should occur without obtaining quality clearance certificate from HDIP ……".***

17. The third interesting aspect of this entire controversy is the litigation instituted by the Respondent itself, in which the latter has challenged the above policy guidelines of Government of Pakistan, in particular, relating

to pre-testing of the cargo before its unloading / discharge. Constitution Petition No. D – 1557 of 2014 was preferred by Respondent, impleading Federation of Pakistan and others including OGRA and the present Appellant. In this petition the same COA and its Addendum are involved and the subject matter of this petition was some subsequent consignment, which was imported by present Appellant through Respondent, from United Arab Emirates. Ultimately, the said petition was disposed of by a consent order dated 01.04.2014, directing that before unloading of the cargo, samples shall be drawn by the Surveyor jointly appointed by the parties. Another Constitution Petition No. D – 1824 of 2015 was again preferred by the present Respondent arraying relevant Respondents including the present Appellant, OGRA and HDIP. In this petition also the same COA and its Addendum were referred to because the consignment in dispute was transported under the same COA and its Addendum. Respondent complained in the said constitution petition that HDIP acted contrary to the Industry Practice and Procedure and did not consider a common phenomenon that '*during the voyage the fuel oil elements settled in the storage tank at different heights depending on the gravity and intensity*' (paragraph-21 of the said constitution petition). Again in this petition the above policy guidelines issued by Authorities were challenged as evident from the prayer clause. Vide order dated 09.04.2015 (at page 209 of the present Appeal) by making reference to the afore-referred earlier Constitution Petition No. D – 1557 of 2014, it was directed that fresh samples would be drawn by the Surveyor and thereafter the cargo would be allowed to be completely unloaded from the tank of Vessel.

18. Fact of the matter is that the above directives and policy guidelines issued from time to time by MP&NR and OGRA are still in the field, were promulgated, before the date of COA and neither have been struck down by

any judicial order nor modified or repealed by the competent authorities. In view of these policy guidelines and directives issued under statutory authority, it was not possible for Appellant to unload / discharge the subject cargo before it was tested by HDIP and seeking a special permission from its controlling ministry, viz. Ministry of Petroleum and Natural Resources, to unload and sell the subject cargo to one of local customers of Appellant.

19. In view of the above discussion, the Decision of the learned Arbitral Tribunal, which is maintained by the learned Single Bench in the Impugned Judgment, that Appellant should have unloaded the cargo and then filed a claim of damages, besides, above directives / policy guidelines were not mandatory and not communicated to Respondent PNSC, with due deference, are erroneous, contrary to record and cannot be sustained.

20. In the above perspective, the issue of *Force Majeure* is to be analysed. It would be relevant to reproduce the *force majeure* clause of COA herein under_

> “ *CLAUSE 12 – FORCE MAJEURE*
>
> *a) Neither party shall be responsible for any failure to fulfil the obligations imposed on it under this COA if and in so far as and so long as such performance is directly delayed or prevented by any circumstances which are beyond its control and could not have been avoided or mitigated by that party by exercise of due care and diligence such as, acts of God, public enemy, perils of navigation, floods, fire, hostilities, war (declared or undeclared), terrorism, Port Closure, executive or administrative order or acts of either genera) or particular application of any de jure or de facto Government or of any officer or agent purporting to act under any authority or any such Government, request of such officer or agent purporting to so act, impositions of restrictions or regulations by any Government or Government Agency, illegality arising from applicable domestic or foreign laws or regulations, blockage, labour disturbances, strikes, riots, insurrection, epidemics, frost, storms, earthquakes, breakdown or injury to or expropriation, confiscation or requisitioning of material or of producing, manufacturing, selling, loading or discharging facilities.*
>
> *b) The CARRIER assures the COMPANY that in the case of force majeure as aforesaid the CARRIER will nevertheless use its best efforts to maintain supplies in accordance with this COA.*
>
> *c) Should any of the foregoing events occur, the Party claiming that such event has occurred must inform the other Party by notice as*

> *soon as possible but not later than 5 (five) days from the date(s) of any such event(s) and take all steps that are reasonably necessary to mitigate or remove the consequences of the Force Majeure events so that the performance of the Contract proceeds expeditiously.*
>
> *Where such notice of Force Majeure is not served by the Party claiming Force Majeure within the period prescribed herein then that Party's right to claim Force Majeure for that event would stand irrevocably waived.*"

21. Learned counsel for Respondent has argued that no specific notice in terms of Clause 12 of the COA was served upon Respondent by Appellant and hence in terms of sub-clause c of Clause 12, it would be deemed that *force majeure* event was not pressed by the Appellant and rather waived by the latter. In this regard, the finding of the learned Arbitrators is also in affirmative and in favour of Respondent.

22. On the other hand, it is argued on behalf of the Appellant that correspondences exchanged between the parties hereto, which are undisputed and particularly the email of 22.11.2013 (***ibid***), does support the stance of Appellant that *force majeure* event was raised with the Respondent. The *force majeure* clause of COA has been reproduced in the preceding paragraph and is taken into the account. In order to take benefit of this clause, primarily two conditions must exist; ***firstly,*** the performance is delayed or prevented directly by circumstances which are beyond control of any party and could not have been avoided; ***secondly,*** the party invoking the clause should have taken the steps to mitigate the factors which are causing delay by exercising due care and diligence. *Similarly,* the event or one of the events which can constitute a *force majeure* is, ***inter alia***, restrictions or regulations by any Government or Government Agency.

23. From a careful examination of both, the Impugned Judgment as well as the Award, it is apparent that the main determining factor for deciding the case in favour of the Respondent, is/was, that since subject cargo was

subsequently accepted, hence the defence of present Appellant is devoid of merits, so also the plea of Appellant with regard to different directives and policy guidelines issued by the Government. In the Impugned Award, learned Arbitrators have gone to the extent, that since these directives were not made part of subject COA, therefore, present Appellant could not have refused to unload the cargo being reported by HDIP as off-specification. We must state here, that these directives and policy guidelines have been issued in exercise of statutory authority, as discussed in the preceding paragraphs. More so, the present Respondent admittedly itself is questioning these directives and policy guidelines in the afore-mentioned litigation, but hitherto unsuccessfully. Hence, to give a finding on this vital issue, that since these directives were not part of subject COA or the defence setup by present Appellant is devoid of merits (as mentioned in the Impugned Judgment), cannot be sustained, *inter alia*, because, it is not a mandatory legal requirement, that such directives which were issued in exercise of statutory authority, are to be made part of subject COA. **Respondent are fully aware of these directives, as the record shows and has been discussed in the foregoing paragraphs**. Consequently, this defense of Appellant has substance and cannot be overlooked.

24. Undisputed facts as discussed above, in our considered view, fulfil the requirement to invoke *force majeure* clause; because, firstly in view of directives and policy guidelines, the subject cargo was declared off-specification by an independent Government Surveyor, viz. HDIP, thus the cargo could not have been unloaded by Appellant; ***secondly***, the present Appellant did take mitigating steps, by continuously corresponding and coordinating with concerned parties, including present Respondent and the controlling Ministry – MP&NR, for resolution of dispute; ***thirdly,*** the cargo

was discharged, once the request of Appellant to grant one time waiver was approved and communicated by the above Ministry – MP&NR vide its correspondence of 11.12.2013; ***fourthly,*** the defence of present Respondent that no notice specifying the *force majeure* factors was ever given by Appellant, is a misconceived argument, because the correspondence of 23.11.2013 from Appellant to Respondent has highlighted the fact that the cargo has been contaminated and deteriorated during the voyage. In addition to this, Respondent – PNSC has experienced somewhat similar situation in respect of other consignments of Appellant – PSO, which were subject matter of the above referred constitution petitions; thus, the Respondent cannot successfully take this plea, that no specific notice of *force majeure* event was given to Respondent by Appellant. The cited case law (***ibid***) relied upon by the Appellant's Legal Team, that basically the contents of a document determine its nature and not only its title / caption, is applicable to the facts of present case. The claim of Respondent is adversely affected by the force majeure factors and to the facts of present case, Clause 12 of COA [Force Majeure] is applicable.

25. *Similarly*, we also agree with the arguments of learned counsel for Respondent, that pendency of an International Arbitration should not have affected the arbitration proceeding in Pakistan, before the learned Arbitral Tribunal and on the basis of evidence led and record produced, claim of Respondent should have been determined (decided).

26. Summation of the above discussion is that awarding demurrage of Rs.1.5 Million per day, for the period of thirty days with six percent mark up as mentioned in the Impugned Judgment so also the finding of learned Arbitral Tribunal, that present Respondent can file a fresh proceeding after the decision is given in the International Arbitration proceeding at London, are both set aside. Consequently, the claim of

present Respondent for payment of demurrage together with other ancillary reliefs and monetary claim is hereby rejected. In the above terms, this Appeal is accepted.

27. Parties to bear their respective costs.

Judge

Judge

Karachi, dated: 18.11.2020.

Riaz / P.S.