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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of decision*: 16.06.2021**

\+ O.M.P. (COMM) 14/2018 and IA No.6246/2020

BRIDGE MARINE LTD. ……Petitioner

Through Mr. Prashant S. Pratap, Senior Advocate with Mr. O.P. Gaggar and Mr. Aditya Gabbar, Advocate

versus

INDIAN OIL CORPORATION LIMITED …..Respondent

Through Mr. V.K. Ramabhadran, Senior Advocate with
Mr. Shashwat Goel, Advocate

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed by Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as **'the Act'**) assailing the Majority award passed by the Arbitral Tribunal (hereinafter referred to as '**the Tribunal'**) dated 08.08.2017 and for a declaration that the Minority award dated 21.08.2017 is binding between the parties. *Pendente lite* and future interest at the prevalent commercial rate is also sought on the amount claimed by the Petitioner. Petitioner was the claimant before the Arbitral Tribunal while the Respondent herein was the defending Respondent.

2. Brief and necessitous facts germane for deciding the controversy arising in the present petition as set out in the petition are that Petitioner is a Company incorporated in Liberia and owner of the vessel *M.T. Cosmic Jewel* (hereinafter referred to as '**the vessel**'). Respondent is a Government Company carrying on business of import, refining and sale of crude oil and other petroleum products. Respondent charters tanker vessels from time to time for import of crude oil.

3. A Charter Party agreement dated 02.12.2013 was entered into between the Respondent, as Charterer and Petitioner as owner of the vessel *M.T. Cosmic Jewel*, for carriage of crude oil cargo, from Yoho and Bonga ports in Nigeria to the port at Vadinar, India.

4. After loading at the port of Yoho, the vessel was instructed by the Respondent on 17.12.2013, to proceed to load the balance cargo at the port of Bonga. Accordingly, vessel arrived at Forcados Pilot Station (hereinafter referred to as **'Forcados'**) on 18.12.2013 and waited for inward clearance to proceed to Bonga. As no berth was available at Bonga and since the cargo was not ready for loading, inward clearance was not granted at Forcados and the vessel was made to wait from 18.12.2013 until 02.01.2014.

5. The Master gave notice to the Respondent on 18.12.2013 intimating that the vessel was awaiting clearance at Forcados to proceed to Bonga Terminal (hereinafter referred to as '**Bonga**'). On 19.12.2013, vessel agent informed the Petitioner that another vessel *M.T. Cosgreat Lake* was scheduled to load on 19.12.2013 and the vessel of the Petitioner was not in the terminal loading programme. This message was copied to the Respondent. On 20.12.2013, Master issued a letter of

protest for the delay in inward clearance / berthing instructions.

6. On 24.12.2013, vessel agent informed that the vessel had been rescheduled for handling between 29.12.2013 and 30.12.2013 as the Bonga Terminal had shut down for a month on account of maintenance and *M.T. Cosgreat Lake* was the first vessel loaded after the operations resumed. The message was copied to the Respondent. On 28.12.2013, the agent informed that terminal was still boosting cargo and the vessel was expected to be cleared on 01.01.2014. This message was also copied to the Respondent, but there was no response.

7. Eventually when both berth and cargo were available, inward clearance was granted on 02.01.2014, upon which the vessel proceeded to Bonga for loading and tendered Notice of Readiness (hereinafter referred to as '**NOR**'). A Letter of Protest was lodged by the Master on 02.01.2014 against delay in granting clearance and detaining the vessel from 18.12.2013 to 02.01.2014. The vessel thereafter arrived at Bonga anchorage and berthed on 03.01.2014.

8. NOR could not be tendered prior to 02.01.2014 because the vessel was not an 'arrived ship' and was at Forcados and not at any customary anchorage at Bonga or Bonga as required under Clause 6 of Charter Party. As such valid NOR could only be tendered once inward clearance was received and vessel proceeded to Bonga anchorage.

9. As the vessel had waited at Forcados for a period of 15.5 days, Petitioner claimed demurrage at the rate of USD 45,000.00 per day, the agreed rate under the Charter Party and an amount of USD 669,725.58 towards detention charges for 15.5 days, the period for which the vessel was awaiting inward port clearance at Forcados, for loading at Bonga.

Correspondence thereafter ensued between the parties. On 03.08.2015, Petitioner submitted Laytime Statement to the Charterers showing demurrage and detention charges aggregating to US $ 707,142.76 and a legal notice was sent on 25.09.2015, claiming the said amount.

10. On 23.12.2015, Respondent denied its liability to pay and disputes were referred to Arbitration in accordance with the Arbitration Agreement contained in Rider Clause 29 of the Charter Party. Arbitration was conducted under the Rules of Indian Council of Arbitration. Each party appointed an Arbitrator and the two Arbitrators appointed a third Arbitrator. It is an undisputed fact that pending arbitration, Respondent settled the demurrage claim of the Petitioner and the only dispute that remained was in regard to the claim for detention of the vessel at Forcados.

11. During arbitration, no oral evidence was led and with the consent of the parties the matter proceeded on the basis of the documents filed by the respective parties. The Tribunal by a Majority award dated 08.08.2017, rejected the claim of the Petitioner in entirety while the Minority award dated 21.08.2017 upheld the entire claim of the Petitioner.

12. Aptly encapsulated, the case of the Petitioner before the Tribunal was that the vessel was detained from 18.12.2013 to 02.01.2014 due to breach or fault of the Charterers in not making the berth or cargo available so that the vessel could proceed to the port at Bonga or customary anchorage and tender a valid NOR. Petitioner was thus entitled to damages for detention.

13. Stand of the Respondent, pithily put, was that the vessel had become an 'arrived ship' when it reached Forcados, which was the customary anchorage under Clause 6 of Charter Party and was required to tender a valid NOR, in order to trigger the Charterers's obligation to provide berth. There was no pre-condition in the Charter Party which prevented the Petitioner from tendering the NOR. Since the Petitioner failed to issue NOR at Forcados, after the arrival of the vessel, it was not entitled to seek damages for the alleged detention.

14. The Majority Tribunal concluded that: (a) Petitioner was required to tender a valid NOR to the Charterers when the vessel arrived at Forcados, so as to trigger the Charterers's obligation to provide berth; (b) there was no pre-condition in the Charter Party for obtaining inward port clearance prior to tendering the NOR; (c) Forcados was the area where ships usually waited before proceeding to Bonga terminal and therefore the vessel of the Petitioner became an 'arrived ship' at Forcados; (d) vessel did not tender NOR at Forcados of its own volition and must suffer consequences; and (e) in the absence of NOR during the alleged detention period, on becoming an 'arrived ship', Charterers's obligation to provide berth was not triggered and consequently no liability could be fastened to pay detention damages.

15. The Minority award was in favour of the Petitioner, allowing its claim in entirety. At this stage, I may refer to the findings of the Minority award as learned Senior Counsel for the Petitioner had underscored the findings returned therein and vehemently canvassed that the same be upheld. The Minority award held that it was the Charterers' obligation to provide Berth and cargo for loading. Vessel was not

granted inward clearance to proceed to Bonga on account of non-allocation of berth by the Respondent, resulting in detention of the vessel at Forcados for 15.5 days and preventing her from becoming an 'arrived ship' for tendering NOR. Respondent is thus liable to compensate the vessel owner for delay and detention by payment of damages. Accordingly, the Minority Tribunal awarded to the Petitioner a sum of US $ 669,725.58 towards damages for detention along with *pendente lite* interest at the rate of 6% p.a. with effect from 09.06.2014 till the date of the award and future interest at the same rate till realization of the amount.

16. The Majority award is assailed by the Petitioner before this Court in the present petition. Eloquently and strenously articulated contentions of the Learned Senior Counsels for the parties are encapsulated hereinafter.

CONTENTIONS OF THE PETITIONER

17. Majority Arbitrators misconducted themselves and violated principles of natural justice by taking into account several documents which were not on record till the date of final hearing and were filed as enclosures to written arguments, after the proceedings closed for passing the award. There was no reference to these documents either in the pleadings or in the final arguments. Respondent's counsel had during the arguments, on 12.05.2017, sought permission to file some additional documents, which was objected to by the Petitioner as no new evidence or document could be taken once the proceedings had concluded. Much to the surprise of the Petitioner, Respondent filed several additional

documents along with written submissions on 10.06.2017, with copy to the Petitioner, who registered its protest by a letter dated 23.06.2017, sent through the advocate. Nevertheless, the Majority Arbitrators took the documents into consideration in making the award, without even affording an opportunity to the Petitioner to respond thereto or refute the documents and/or the contents thereof. The Majority award contravenes fundamental policy of Indian law and is in conflict with the most basic notions of morality and justice and thus infringes the provisions of Section 34(2)(a)(iii) and Section 34(2)(b)(ii) read with Explanation-1 thereto and Section 18 of the Act.

18. The additional documents were NORs purportedly tendered by some other vessels from Forcados, filed by the Respondent, in order to support its plea that Petitioner was required to tender a valid NOR at Forcados. The documents were accepted and considered by the Tribunal overlooking the fact that it was never the case of the Respondent that other vessels chartered by the Respondent had tendered valid NORs at Forcados and the same were accepted as valid, so as to commence Laytime at Forcados. Petitioner's objections to the acceptance of the said documents were arbitrarily rejected on the ground that arbitration proceedings are summary in nature and provisions of CPC and Evidence Act do not apply, which is palpably erroneous and renders the award patently illegal, contrary to Fundamental Policy of Indian Law and judicial approach.

19. It is settled law and also clearly borne out from Clause 6 of the Charter Party that in the event the ship is not in port or at the customary anchorage in port, then she is not considered an 'arrived ship' for the

purpose of tender of NOR and thus any NOR tendered will not be legal and valid. In the present case, admittedly the vessel was not at Bonga or the customary anchorage at Bonga, but was at Forcados. Consequently, no valid NOR could be given and the Majority award is wrong and contrary to law in taking the view that the vessel could have given NOR at Forcados.

20. It is also a settled legal position that it is the Respondent as the Charterer who is obliged to provide berth where the vessel can load and also provide cargo ready for loading. The obligation to provide a berth 'reachable on arrival' is set out in Clause 9 and for the purpose of triggering this obligation, vessel must have 'arrived' at a place from where it cannot proceed further unless berth is made available. Whatever be the reason, if the Respondent was unable to provide a berth or cargo as a result of which the vessel was not granted inward clearance to proceed further to the port for berthing and loading, Respondent was in breach and thus liable for delay and detention of the vessel.

21. Admittedly, neither berth nor cargo was ready when the vessel arrived at Forcados and consequently the vessel was not granted inward clearance to proceed to Bonga and tender a valid NOR. Thus under the Charter Party, the delay was entirely due to breach and fault of the Respondent and it is liable to pay compensation to the Petitioner by way of detention charges, as claimed.

22. The Majority award failed to appreciate the difference between an 'arrived ship' for the purpose of tender of NOR under Clause 6 and a vessel that has 'arrived' or 'arrival' of the vessel for the purpose of triggering the Respondent's obligation under Clause 9, to provide berth

reachable on arrival. The term 'arrival' in Clause 9 means the physical arrival of the vessel at the point, whether within or outside the port, at which point the Charterers had to nominate a berth. The arrival of the vessel at Forcados was sufficient to trigger the Charterers's obligation under Clause 9, which it failed to fulfill from 18.12.2013 to 02.01.2014. Charter Party is a standard form of agreement and there is no conflict between Clauses 6 and 9 requiring harmonious construction, as erroneously done by the Majority award. Both the clauses have been interpreted by the English Courts in several decisions and the contrary view taken by the Majority Tribunal in the Award vitiates the same, being contrary to Fundamental Policy of Indian Law.

23. It was never the case of the Respondent in its written statement of defence or during the hearing before the Tribunal that Forcados was a customary anchorage for Bonga and that it was usual for vessels to give NOR upon arrival at Forcados, for commencement of Laytime. Had this been pleaded, Petitioner would have had the chance to lead evidence to controvert and refute the same. In fact conscious of the fact that this was an incorrect stand in law, Respondent deliberately chose to raise it for the first time through documents enclosed with written submissions.

24. Majority award has arrived at a wholly incorrect finding that there was no pre-condition or restriction on the Master to fulfill before giving NOR from Forcados, thereby ignoring the clear stipulation in Clause 6 that the vessel must have 'arrived' at the customary anchorage at each port of loading or discharge for the Master to give NOR. Therefore, becoming an 'arrived ship' was a precondition for issuing NOR. Clearly the vessel was prevented from entering Bonga or customary anchorage at

Bonga due to the fault of the Respondent in making the berth available, consequently preventing the vessel from becoming an 'arrived ship'.

25. Majority Tribunal has completely misconstrued, misread and misunderstood the pleadings of the Petitioner, particularly paragraph 6(f) of the Statement of Claim. Majority award incorrectly holds that it is an admitted position that customary anchorage for Bonga terminal is Forcados Pilot Station on the basis of the Petitioner's pleaded case. This was, however, never the Petitioner's pleaded case. Infact it was nobody's case that Forcados is the customary anchorage for Bonga. Forcados and Bonga are not the same. This is evident from the documents on record that the vessel after obtaining inward clearance at Forcados on 02.01.2014 proceeded to Bonga and waited near Bonga terminal until Berthing (mooring) on 03.01.2014. Thus, a serious error has crept in holding that Forcados is the customary anchorage at Bonga on the basis of an alleged admission, which is non-existent and not borne out from the record.

26. Majority Tribunal failed to appreciate that letters of protests were issued to the Terminal by the Petitioner to protect the position and interest of the owner and the Charterers, and all correspondences were addressed and/or copied to the Respondent who was fully aware of the fact situation and yet took no steps to ensure that the berth and cargo are made available and inward clearance is given without any delay. At no stage did the Respondent raise an issue of failure to tender NOR during the detention period, as they were cognizant of the legal position that no NOR could be validly tendered at Forcados.

27. It is a binding and enduring principle of law that when a vessel is

unable to tender a valid NOR due to breach or fault on the part of the Charterers in failing to provide berth or cargo as per the Charter Party, enabling the vessel to proceed to a port/customary anchorage and become an 'arrived ship', the Charterers are liable to pay damages for the entire detention period. Reliance was placed on the following judgments:-

(a) Samuel Crawford Hogarth vs. Cory Brothers & Co. Ltd. **(1926) Volume 25 Lloyds Law Reports page 464**.

(b) Sociedad Carga Oceanica S.A. vs. Idolinoele Vertriebsgesellschaft m.b.H ['**Angelos Lusis**'] **Queen's Bench Division (Commercial Court), June 18 and 19, 1964**, **Lloyd's List Law Reports (1964) Vol. 2 page 28**

(c) Inca Compania Naviera S.A. and Commercial and Maritime Enterprises Evanghelos P. Nomikos S.A. vs. Mofinol, INC. ['**President Brand**'] **Queen's Bench Division, Commercial Court, July 6 and 7, 1967**, **Lloyd's List Law Reports (1967) Vol. 2 page 338**,

(d) Shipping Developments Corporation S.A. vs. V/O Sojuzneftexport, Lloyd's Law Reports ['**Delian Spirit**'] **(1971) Vol. 1 page 506**.

28. It is the Charterers' obligation under a Charter Party to make a berth available to the vessel which she can reach without delay. There may be occasions when delay occurs in procurement of a berth by a Charterer, owing to a variety of reasons. In the case of Angelos Lusis (supra), vessel was not permitted to enter port as berth was not available due to congestion though cargo was ready for loading. In the President

Brand (supra), vessel could not proceed to the port on account of draught due to shortage of water and had to wait until sufficient water depth was available to enter the port. In Samuel Crawford Hogarth (supra)**,** the Charterers could not make the berth available as the cargo was not ready for loading. However, in each of the three cases, since the shipowners were not at fault, they were held entitled to claim damages for detention, despite the failure of the vessel to proceed to the port or berth and tender a valid NOR.

29. In the case of Delian Spirit (supra), Lord Denning construed the meaning and connotation of the expression 'on her arrival' as follows:-

> *"That clause puts an obligation on the charterers (on arrival of the vessel) to "indicate" a place which the vessel can reach so as to discharge her cargo. The words "on her arrival" at the port do not mean that she is to be an "arrived ship" in the technical sense of being within the commercial area of the port. All that is necessary is that she should have arrived off the port ready to proceed to a berth. The clause is put in so as to protect the owner when the ship arrives off the port – when she is ready to come in to discharge – and save him from having to wait outside to his loss".*

30. The judgments relied upon by the Petitioner before the Tribunal were squarely applicable to the present case but the Majority Tribunal failed to consider the principles of law enunciated therein and the Majority Award is liable to be set aside being contrary to fundamental policy of Indian Law. Even if not binding, the judgments have a strong persuasive value dealing directly with the issue in controversy in the present case and there was no cogent reason for the Majority Tribunal to have disregarded them.

31. Majority Tribunal has erroneously placed reliance on the judgment in case of E.L. Oldendorff & Co. G.m.b.H. vs. Tradax Export S.A. ['**Johanna Oldendorff**'] **Lloyd's Law Reports (1973) Vol. 2 page 285** which deals with a case of 'arrived ship' and not 'reachable on her arrival' where the latter connotes physical arrival, whether within or outside the port, triggering the Charterers' obligation to procure a berth to which the vessel can proceed. *Per contra*, 'arrived ship' is when a vessel is at customary anchorage within the port as required under Clause 6 for purpose of tendering NOR. The judgment is thus not relevant as it was not the case of the Petitioner that the vessel was an 'arrived ship' i.e. arrived at the customary anchorage for Bonga.

32. Reliance placed by the Majority Tribunal on the judgment in the case of Federal Commerce and Navigation Co. Ltd. vs. Tradax Export S.A. ['**Maratha Envoy**'] **Lloyd's Law Reports (1977) Vol. 2 page 301**, is also misplaced as in the said case, vessel was not an 'arrived ship' since she was not within the port but at a waiting place which in the facts of the said case was outside port limits. In that fact situation, it was held that where the waiting place is outside the port limits, risk of delay is on the shipowner but if it is within the port limits, then it is on the Charterer. Significantly, there existed no clause similar to Clause 9 in the said case, with 'reachable on her arrival' provision that obliged the Charterer to make a berth available when the ship arrived, within or outside of the port. In the absence of such a clause, the risk of delay fell on the owner and hence the case is distinguishable on facts.

33. The Minority Award has correctly appreciated Clauses 6 and 9 of the Charter Party including the judgments in Angelos Lusis (supra) and

President Brand (supra). Minority Tribunal has placed reliance and rightly so on the judgment in the case of Nereide S.p.A. di Navigazione vs. Bulk Oil International Ltd. ['**Laura Prima**'] **(1982) Lloyd's Law Reports Vol. 1 page 1** wherein a provision in the Charter Party similar to Clause 9 in the present case, came up for consideration and the House of Lords held that the phrase 'reachable on arrival' means precisely what it says i.e. if a berth cannot be reached on arrival, warranty is broken, unless there is some protecting exception and the word 'arrival' can only be seen in the popular or common sense and not as 'arrived ship' for purpose of NOR under Clause 6. The Minority award has held the Petitioner entitled to damages for detention after holding that the Charterers were in breach of two obligations: (a) to provide a berth reachable on arrival; and (b) to ensure that cargo was ready for loading, once the vessel had arrived at Forcados, triggering the obligation of the Charterers under Clause 9 of the Charter Party. No infirmity can be found in the findings and conclusions arrived at by the Minority Tribunal.

CONTENTIONS OF THE RESPONDENT

34. The present proceedings are governed by Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the '**Amendment Act, 2015**') which has come into force with effect from 23.10.2015 and therefore the provisions of Section 34 as amended by the Amendment Act, 2015 shall apply. The amended provisions of the Act have been considered threadbare by the Supreme Court in Ssangyong Engineering and Construction Company Ltd. vs. National Highways

Authority of India **(2019) 15 SCC 131** and it has been held that the expression, 'Public Policy of India' whether in Section 34 or Section 48 of the Act, would now mean 'Fundamental Policy of Indian Law' as understood in the case of Renusagar Power Co. Ltd. vs. General Electric Co., **1994 Supp (1) SCC 644**, wherein it was held that enforcement of a foreign award would be contrary to 'Public Policy', if such enforcement is contrary to: (a) Fundamental Policy of Indian Law; (b) Interest of India; and (c) Justice or Morality, *albeit*, challenge on the ground that the award is against 'interest of India' now stands deleted. In the guise of breach of fundamental policy of Indian law, party is not entitled to have review on merits of the disputes. The Supreme Court further held that any challenge to the award on the construction of the terms of a contract is primarily the domain of the Arbitrator, unless the Arbitrator construes the contract in a manner that the view is not even a possible view, and would now fall under the newly added ground 'patent illegality' under Section 34(2A) of the Act in respect of purely domestic awards in India. Ground of 'patent illegality' is no longer a ground to challenge an award arising out of International Commercial Arbitration. Therefore, any challenge to an award in respect of interpretation of contractual clauses by the Tribunal would now be only under Section 34(2A) which is not available in case of an award in International Commercial Arbitration.

35. After the judgment of the Supreme Court in Ssangyong (supra), a decision of the Arbitral Tribunal which is perverse, is no longer a ground for challenge under 'Public Policy of India', though it would certainly amount to 'patent illegality'. Finding based on no evidence or in ignorance of vital evidence would be perverse. A finding based on

documents taken behind the back of the parties would qualify as decision based on no evidence and would have to be characterized as perverse. Since perversity is no longer a ground under 'Public Policy of India', this ground is no longer available to assail an award arising out of International Commercial Arbitration. The arguments of the Petitioner are primarily focused on alleged mis-construction / mis-interpretation of the clauses of the Charter Party. In view of the judgment in Ssangyong (supra) and Associate Builders vs. Delhi Development Authority **(2015) 3 SCC 49**, it is no longer open to the Petitioner to challenge the impugned award on these grounds.

36. Majority award passed by the Tribunal is a cogently reasoned one, after considering all submissions, evidence and documents. It is a trite law that the scope of interference by Courts under Section 34 of the Act is limited and a Court cannot adjudicate the findings of the Arbitrators as an Appellate Court. The Arbitrator is an ultimate master of quantity and quality of evidence and even an Award based on little evidence, which may not measure up in quality to a trained legal mind, cannot be set aside by re-appreciating evidence. Once the view of the Arbitrator is a plausible view, it is not for the Court to substitute the view only because another view is possible as held by the Supreme Court in Associate Builders (supra) and Sutlej Construction Ltd. vs. State (UT of Chandigarh) **(2018) 1 SCC 718**.

37. The allegation of the Petitioner that certain documents were filed by the Respondent along with the written submissions, resulting in violation of principles of natural justice, is without any basis. Counsel for the Petitioner vide his letter dated 23.06.2017 acknowledged receipt

of the written submissions along with additional documents, however, chose to object to the documents being taken on record, without commenting on the merits of the documents. The award was signed by the Majority Arbitrators on 08.08.2017 and the dissenting award on 21.08.2017. Thus the Petitioner had more than 40 days to comment on the documents but elected to remain silent. Violation of principles of natural justice should result in some real prejudice to the party as held by the Supreme Court in the case of Sohan Lal Gupta (dead) through LRs and Ors. vs. Asha Devi Gupta (Smt.) and Ors. **(2003) 7 SCC 492**. Without prejudice, the ultimate conclusion of the Tribunal in para 11.3 of the award will nevertheless remain undisturbed with or without the said documents, and thus no prejudice has been caused to the Petitioner. Reliance in this regard was placed on the judgement of the Supreme Court in the case of State of Gujarat and Ors. vs. Utility Users' Welfare Association and Ors. **(2018) 6 SCC 21**.

38. Without prejudice to the aforesaid objections, the Majority award correctly rejects the claim for damages based on the admission of the Petitioner in the Statement of Claim that Forcados was the customary anchorage for Bonga as well as the law laid down by the House of Lords in Johanna Oldendorff (supra). Tribunal rightly held that the Master of the vessel ought to have issued NOR under the provisions of Clause 6 of the Charter Party, when the vessel reached Forcados. In the absence of an NOR, Petitioner has been unable to establish that it was ready to carry the cargo before the date of NOR i.e. 02.01.2014. Clause 6 of the Charter Party mandates that upon arrival at 'customary anchorage' at the port of loading or discharge, Master shall give to the Charterer notice that the

vessel is ready to load or discharge cargo, berth or no berth. There is thus no merit in the contention that the Petitioner was awaiting inward clearance for tendering NOR, which was delayed due to failure of the Charterer in allocating the berth. The obligation to procure a berth 'reachable on arrival' would be triggered only after the issuance of NOR, upon arrival at the customary anchorage of the load port i.e. Forcados, based on a harmonious reading of Clauses 6 and 9 of the Charter Party.

39. In the normal course, laytime and demurrage incur after issuance of NOR for which it is necessary that: (a) ship becomes an 'arrived ship' for the purpose of Clause 6; (b) a valid NOR is tendered; and (c) the ship is 'ready' for cargo. In the present case, it is uncontested that NOR was issued only on 02.01.2014 even though the ship was at Forcados from 18.12.2013 onwards. Petitioner was unable to prove that valid NOR could not be tendered in the absence of inward clearance and no evidence was brought on record to establish that the communication with Bonga terminal could only be via Radio contact. Clause 6 envisages issuance of NOR upon arrival at customary anchorage and Petitioner unambiguously pleaded that ships loading at Bonga are required to report first at Forcados and usually wait at the said station.

40. In order to evaluate the case of the Petitioner, the Tribunal was required to determine whether or not the vessel was an 'arrived ship' at Forcados. If it was not an 'arrived ship', no NOR could have been issued. If it was an 'arrived ship', the NOR was required to be issued. In this regard judgement of the House of Lords in the Johanna Oldendorff (supra), was placed before the Majority Tribunal, wherein it was held that if the ship is at the usual waiting place within the port, it can

generally be assumed that she is there fully at the Charterer's disposal. Before a ship can be said to have 'arrived' at a port she must, if she cannot immediately proceed to a berth, have reached a position within the port where she is at the immediate and effective disposition of the Charterer.

41. Whether or not Forcados is the 'customary anchorage' of Bonga is a question of fact. Had the Petitioner wanted to make a positive assertion to that effect, it needed to be pleaded and proved. Instead the Petitioner in para 6(f) of the Statement of Claim pleaded that Forcados was the place where ships waited before proceeding to Bonga and was as far as a ship could go before a berth was occupied. Based on this admission, the Majority Tribunal found as a matter of fact that Forcados was the customary anchorage for Bonga and relying on the judgement in Johanna Oldendorff (supra) held in para 11.4 that the vessel was an 'arrived ship' when it arrived at Forcados. The decision of the House of Lords in Johanna Oldendorff (supra) was subsequently affirmed by the House of Lords in Maratha Envoy (supra). Being a finding of fact by the Majority Tribunal it is not amenable to interference by this Court.

42. Even assuming *arguendo*, that there is any merit in the contention that the vessel was outside the port limits, Petitioner's claim is not tenable under law as propounded in Maratha Envoy (supra), wherein it was held that in case the ship is outside the port limit, the risk lies on the shipowner.

43. The judgments in Angelos Lusis (supra) and President Brand (supra), relied upon by the Petitioner do not further the case of the Petitioner and the Tribunal has rightly distinguished them. In Angelos

Lusis (supra), it was conceded by both the parties that the ship was not an 'arrived ship' at Constantza, based on the 'Parker Test', laid down in 1961 by House of Lords in the case of Sociedad Financiera de Bienses Raices S.A. vs. Agrimpex Hungarian Trading Co. for Agricultural Products ['**The Aello**'] **(1960) Vol. 1 Llyod's Law Reporter 623**. President Brand (supra), was a 'berth-charter' case and the ship could not be berthed. Thus applying the Parker Test it was held that she was not an 'arrived ship'. In the present case, Clause 6 of the Charter Party clearly provides that NOR could be issued, on arriving at the customary anchorage, berth or no berth. The significant factual differences make an impact on the applicability of the judgements and more importantly, the two judgments were delivered when the law laid down in The Aello (supra) was being followed. The Aello (supra) which propounded the 'Parker Test' was itself overruled by the House of Lords in Johanna Oldendorff (supra), giving a wider interpretation to the expression 'arrived ship' and evolving what is known as the 'Reid Test', after its author in the House of Lords.

44. Petitioner failed to establish its prime contention that NOR could be issued only via Radio contact and that too after receipt of inward clearance to the port of Bonga. Not a single document was placed on record to substantiate the claim and bare assertion in the pleadings cannot further the case of the Petitioner.

45. The judgments in Angelos Lusis (supra) and President Brand (supra) are inapplicable as the Petitioner was unable to give any cogent reason of its failure to tender NOR at Forcados, particularly when Clause 6 of Charter Party provided that NOR was required to be issued at the

customary anchorage, 'berth or no berth'. Petitioner had categorically pleaded in the Statement of Claim that Forcados Pilot Station was where ships usually waited before proceeding to Bonga and this was as far as the vessel could go in the absence of a berth, which the vessel would ultimately occupy or reach.

46. It was strenuously contended on behalf of the Petitioner that Majority Tribunal has misconstrued Clauses 6 and 9 and has failed to understand the fine difference between an 'arrived ship' for the purpose of tender of NOR under Clause 6 and a vessel that has 'arrived' or 'arrival' of the vessel for purpose of triggering the Charterers' obligation under Clause 9 to provide a berth reachable on arrival. The contention is wholly untenable before this Court in a petition filed under Section 34 of the Act. Firstly, this Court is not sitting as an Appellate Court and secondly, construction of the contractual clauses is the domain of the Arbitrator and unless the view is not even a possible view, it is not open to interference. After the judgement of the Supreme Court in Ssangyong (supra), the ground that an Arbitral Tribunal has erroneously construed a contractual clause is clearly not available to the Petitioner to assail the impugned award arising in an International Commercial Arbitration.

47. I have heard the learned Senior Counsels for the parties and given careful cogitation to their rival contentions.

48. Before proceeding to adjudicate the contentious issues raised by the respective parties, it is imperative to emphasize that the present petition deals with an award passed in International Commercial Arbitration as defined in Section 2(1)(f) of the Act. The limitations and contours of the power of a Court exercising jurisdiction in a challenge to

an Arbitral Award are well defined under Section 34 of the Act as amended by the Amendment Act, 2015. The Supreme Court in the landmark judgment in Ssangyong (supra) has clearly delineated the parameters on which the Courts can interfere in an Arbitral Award. One of the amendments carried out in Section 34 of the Act is insertion of Sub-section (2A) which provides an additional ground of 'patent illegality' for setting aside an award arising out of purely domestic arbitration and clearly excludes the same as a ground of challenge in International Commercial Arbitration. It is thus clear that the Amendment treats Domestic Arbitration and International Commercial Arbitration having seat in India differently for the purpose of challenge under Section 34 of the Act. The Amendment was pursuant to recommendations of the 246th Report of the Law Commission of India, aimed at reducing interventions of Courts in Arbitral awards. In view thereof, scope of interference in an award in an International Commercial Arbitration is extremely narrow and restricted.

49. Under Section 34(2)(b)(ii) of the Act, an Arbitral Award may be set aside if it is in conflict with the 'Public Policy of India'. One of the earliest cases of the Supreme Court, where the term 'Public Policy of India', which includes the expression 'Fundamental Policy of Indian Law', was interpreted by the Supreme Court in the year 1993, is the case of Renusagar (supra), where the Supreme Court held that an award in violation of provisions of Foreign Exchange Regulation Act, 1973 (FERA) being a Statute enacted to safeguard National economic interest shall be contrary to public policy of India. Equally, disregarding orders passed by the Superior Courts in India could also be violation of

fundamental policy of Indian Law *albeit* contravention of statute simpliciter would not attract the bar of public policy.

50. In Associate Builders (supra), the Supreme Court reaffirmed the concept of fundamental policy of Indian Law as explained in Renusagar (supra) as well as three juristic principles viz. judicial approach, natural justice and absence of perversity or irrationality, as explained in ONGC vs. Western Geco International Ltd. **(2014) 9 SCC 263**, thereby expanding the scope of interference by the Courts. The 256th Law Commission, however, made recommendations which were aimed at narrow construction of the term fundamental policy of Indian Law, leading to an amendment in the Act in 2015, as aforementioned. After an in-depth and detailed analysis of the earlier judgments and recommendations of the Law Commission, the Supreme Court in Ssyanyong (supra), held as follows :-

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco , as explained in paras 28 and 29 of Associate Builders , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of*

challenge of an award, as is contained in para 30 of Associate Builders.

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36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.

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38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. ***The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to***

take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

xxx *xxx* *xxx*

42. ***Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.***

xxx *xxx* *xxx*

44. In Renusagar, this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same."

(emphasis supplied)

51. In Ssangyong (supra), the Supreme Court noted that in Renusagar (supra), the Supreme Court delineated the scope of enquiry of grounds under Sections 34 and 48 of the Act (equivalent to grounds under Section 7 of the Foreign Awards Act, 1961) after referring to the New

York Convention. Para 45 of the judgment in Ssangyong (supra) refers to relevant paras in Renusagar (supra), which are extracted hereunder for the sake of completeness and ready reference:-

> *"34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of Clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of Clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of Clause (1) and sub-clauses (a) and (b) of Clause (2) of Article V postulates a challenge to the award on merits.*
>
> *35. Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation, has expressed the view:*
>
> > *'It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits*

of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.' (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

> *'The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.'*

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

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65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the

public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental

policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

52. A Co-ordinate Bench of this Court in Cruz City 1 Mauritius Holdings vs. Unitech Limited **(2017) 239 DLT 649**, following the decision in Renusagar (supra), elaborated on the connotation of the expression 'fundamental policy' as the basic and substratal rationale, values and principles which form the bedrock of laws in our country. Though in the context of a Foreign Award, the observations of the Bench are extremely relevant even in the realm of International Commercial Arbitration and are to the following effect:-

"97. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

98. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression "fundamental policy of Indian law" is considered as a reference to a provision of the Indian statue, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to

enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

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108. Having held that a simpliciter violation of any particular provision of FEMA cannot be considered synonymous to offending the fundamental policy of Indian law, it would also be apposite to mention that enforcement of a foreign award will invariably involve considerations relating to exchange control. The remittance of foreign exchange in favour of a foreign party seeking enforcement of a foreign award may require permissions from the Reserve Bank of India. There may also be a question whether the initial agreement pursuant to which a foreign award has been rendered required any express permission from RBI. However, as indicated earlier, the policy under FEMA is to permit all transactions albeit subject to reasonable restrictions in the interest of conserving and managing foreign exchange. India has not accepted full capital account convertibility as yet. Thus, there are transactions for which permission may not be forthcoming. Whereas certain transactions are permitted under FEMA and regulations made thereunder without any further permissions; other transactions may require express permission from the RBI. However, these considerations can be addressed by ensuring that no funds are remitted outside the country in enforcement of a foreign award, without the necessary permissions from the Reserve Bank of India. This would adequately address the issue of public interest and the concerns relating to foreign exchange management, which FEMA seeks to address.

109. As discussed hereinbefore, this Court while considering the question whether to decline enforcement of a foreign award on the ground of public policy, is also required to consider the nature of the policy that is alleged to have been contravened. The approach that this Court would bear is one that favours enforcement of a foreign award and if the public policy considerations can be addressed without declining recognition of the foreign award, the Court would lean towards such a course."

53. Be it noted that the reasoning of the Coordinate Bench of this Court commended itself to the Supreme Court in Vijay Karia vs. Prysmian Cavi E Sistemi SRL **(2020) 11 SCC 1**, where in the context of another statute viz. Foreign Exchange Management Act, 1999 (FEMA), the Supreme Court reiterating the principles laid down in Renusagar (supra) and affirming the reasoning in Cruz City (supra) held as follows:-

"88. This reasoning commends itself to us. First and foremost, FEMA — unlike FERA — refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India may be obtained post facto if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award

directs that such shares be sold at a sum less than the market value, Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. ***Further, even if Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground."***

(emphasis supplied)

54. From the conspectus of the above judgments, it is clear that the scope of interference in the award impugned before this Court is extremely narrow. The expression 'Public Policy of India' referred to in Section 34(2)(b)(ii) of the Act would mean and connote Fundamental Policy of Indian Law as explained in Renusagar (supra) and Ssangyong (supra). An award in International Commercial Arbitration is impervious to jural interference on the ground of 'patent illegality' in sub-Section (2A) of Section 34 of the Act. Relevant would it be to note that any challenge to an award in respect of interpretation or construction of a contractual provision by an Arbitral Tribunal falls under 'patent illegality' and is thus no longer a ground to challenge an award arising out of an International Commercial Arbitration as categorically

propounded by the Supreme Court in Ssangyong (supra). Likewise, grounds of perversity which includes findings based on no evidence or in ignorance of vital evidence would fall under the ground of 'patent illegality' and only domestic awards other than awards in International Commercial Arbitration can be assailed on this ground.

55. The issue that pronouncedly emanates for consideration before this Court is whether the Petitioner is entitled to damages for detention, and after hearing the parties, in the opinion of this Court, the answer would really lie in the interpretation of the expression 'arrived ship'.

56. Before embarking to decide the vexed issue, it would be useful and relevant to refer to some settled principles under Maritime Law as well as judicial precedents on the same which would elucidate and explicate the concept of 'Laytime', 'demurrage', 'Notice of Readiness', etc. and provide the necessary context to my decision on the issue.

57. Under Maritime Law, after the vessel sets sail and gives Notice of Readiness at the agreed destination, Laytime commences in accordance with the provisions of the Charter Party and once the Laytime expires, demurrage period commences, entitling the shipowner to a special compensation for any delay or excess time resulting in loss. Two principles are clearly discernible with respect to the starting of the Laytime. Firstly, the vessel must reach the agreed destination and must become an 'arrived ship' at the port of loading or discharge as stipulated in the Charter Party. Secondly, the vessel must be ready in all respects to load or discharge and must tender a Notice of Readiness confirming her arrival and readiness. The expression, 'arrived' would also take colour from the nature of the charter i.e. whether the charter is a 'berth-charter'

or a 'port-charter'. In case of a berth-charter, a vessel will be considered as 'arrived' only when she reaches the nominated or specified berth and only thereafter can an NOR be tendered. Until then, the vessel would be treated as being in loading or carrying voyage with no obligation upon the Charterers. In this kind of Charter, even when the vessel is unable to berth on account of the berth being occupied, the Charterers will bear no liability. However, after the vessel berths, the risk of delays beyond the said point would be on the Charterers.

58. While the position under the berth-charter is not so complex, however, in the case of port-charter, it is far more convoluted, where the Charter Party provides a named port as a destination and the Charterer is required to nominate a berth. In such cases, it is extremely relevant to determine as to when the ship becomes an 'arrived ship' to enable her to tender a Notice of Readiness. If one was to refer to the pandect comprising of English cases, some of the earliest decisions under a Port-Charter Party go back to over a 100 years, perhaps one of the first being the decision in Leonis Steamship Co. Ltd. vs. Rank Ltd. **(1908) 1 K.B. 499**. However, as the commercial practices in shipping underwent transitions, the answers given in the said judgment were no longer reflective of the positions under the standard form of Voyage Charter Parties. In succession, three cases were decided by the House of Lords being The Aello (supra), Johanna Oldendorff (supra) and Maratha Envoy (supra).

59. Succinctly put, in a chronology, in Leonis (supra), the view of the House of Lords was that the ship is an 'arrived ship' when she is within the commercial area of the port and even though she may not be in a

position to load or discharge cargo, she should be at the Charterers' disposition. The expression 'commercial area' of a port was held by the House of Lords in The Aello (supra) as an area in which actual loading spot is found and business of loading is carried out and therefore an area where vessels seek to load the cargo. Years later, in 1973, The Aello (supra) was overruled by the House of Lords in Johanna Oldendorff (supra).

60. In Johanna Oldendorff (supra), the question was whether a ship that had set sail for discharge of cargo at Liverpool / Birkenhead could be termed as 'arrived ship' on reaching Mersey Bar Light Vessel and Pilot Station which was at a distance of at least 17 miles from the dock area or the commercial area of the port. The vessel owner, having arrived at Mersey Bar on 02.01.1968, tendered an NOR on 03.01.1968 i.e. within a day of arriving at the Bar Anchorage, though it discharged the cargo 18 days later after berthing at the berth allocated by the Charterer. Shipowner claimed demurrage from the date of issuance of NOR. Dispute arose as to when the vessel had become an 'arrived ship' and was referred to arbitration. The contention of the vessel owners before the House of Lords was that the ship became an arrived ship when she entered at the Bar Anchorage as that was within the port of Liverpool/Birkenhead and was the usual place where vessels lay awaiting a berth, and also the place where she had been directed to proceed to by the Port Authority. The Charterers, on the other hand, contended that the anchorage was 17 miles from the dock area or the commercial area of the port and the ship did not 'arrive' until she proceeded to her unloading berth in the Birkenhead Dock. Speaking for

the House of Lords, Lord Reid laid down the 'Test' as to when a ship could be treated as an 'arrived ship' in the following words:-

> *"On the whole matter I think that it ought to be made clear that the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and that her geographical position is of secondary importance. But for practical purposes it is so much easier to establish that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there fully at the charterer's disposal.*
>
> *I would therefore state what I would hope to be the true legal position in this way. Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer. For as Mr. Justice Donaldson, [1971] 2 Lloyd's Rep. 96 at p. 100 points out:*
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> > *…In this context a delay of two or three hours between the nomination of a berth and the ship reaching it is wholly immaterial because there will be at least this much notice before the berth becomes free…*
>
> *If the ship is waiting at some other place in the port then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharge."*

61. Therefore, the decisive test laid down by the House of Lords, known as the Reid Test is whether the vessel at the relevant point is

immediately and effectively at the disposal of the Charterer i.e. the Charterer can communicate with her as soon as the berth becomes available and from where the vessel can proceed to the berth on receipt of such communication, without delay. Significantly, Lord Reid also held that the vessel is presumed to be effectively at the disposal of the Charterer when anchored at a place where ships usually lie while waiting for the berth at the port. In view of the test so laid down, Johanna Oldendorff (supra) was held to be an 'arrived ship' as the Mersey Bar was within the administrative limit of the port of Liverpool / Birkenhead and a normal anchorage for vessels waiting for berth at the port.

62. It is important to note at this stage two other observations of the House of Lords in 'Johanna Oldendorff (supra)', which are as follows:-

> *"But it was strenuously argued for the charterers that it is not possible to find any better or more practical test than that of Lord Justice Parker. We cannot say that whenever a vessel anchors in the usual waiting area for a port she becomes an arrived ship because there are a great many ports where that area is well outside the port area. Glasgow and Hull are examples in this country and we were told of an American port where the usual waiting area is 50 miles from the loading area of the port. All are agreed that to be an arrived ship the vessel must have come to rest within the port.*
>
> *Then it was argued that the limits of many ports are so indefinite that it would introduce confusion to hold that a ship is an arrived ship on anchoring at a usual waiting place within the port. But I find it difficult to believe that there would, except perhaps in rare cases, be any real difficulty in deciding whether at any particular port the usual waiting place was or was not within the port.* ***The area within which a port authority exercises its various***

> ***powers can hardly be difficult to ascertain. Some powers with regard to pilotage and other matters may extend far beyond the limits of the port. But those which regulate the movements and conduct of ships would seem to afford a good indication. And in many cases the limits of the port are defined by law.*** *In the present case the umpire has found as a fact (par. 19) that the ship was "at the Bar anchorage, within the legal administrative and fiscal areas of Liverpool/Birkenhead."*
>
> (emphasis supplied)

63. Post the decision in Johanna Oldendorff (supra), controversy still remained as to what would be the position when the vessel is waiting at the customary anchorage, which is not within the legal, fiscal and administrative limits/area of a port. The issue was answered by the House of Lords in 1977 in the case of Maratha Envoy (supra). In the said case, Maratha Envoy was chartered for carriage of grain and the cargo was loaded at Chicago. On 01.12.1970, Charterers ordered the ship to proceed to the River Weser and was directed to discharge at Bremen on 04/05.12.1970. Due to draught limitations, the vessel anchored at Weser Lightship. On 08.12.1970, again an attempt was made to reach the port of Brake but due to various reasons, the vessel had to turn back and it tendered the NOR which was rejected. On 10.12.1970, Charterers nominated port of Brake as the discharging port. On 12.12.1970, vessel made another trip but there was no available berth and the vessel turned in the river of the port and NOR was given, which too was rejected. Finally, on 30.12.1970, the vessel was able to berth in the port of Brake and subsequently, raised the claim of demurrage.

64. The shipowners contended that the vessel became an 'arrived ship'

at Brake on 08.12.1970 or 12.12.1970 and the cost of waiting at the Weser Lightship was recoverable as damages for failure to give timely discharging port orders. In rebuttal, the stand of the Charterers was that the vessel did not become an 'arrived ship' before 30.12.1970 and shipowners suffered no damage. The Queen's Bench (Commercial Court) held that although in a commercial or legal sense, vessel was within the port of Brake, when she went off the quay, however, the ship had not 'arrived' on 8th or 12th December, 1970 because the voyage had not ended and the vessel was not in the waiting. The Court of Appeal held that when the vessel dropped anchor at the Weser Lightship and was awaiting a berth, she was an 'arrived ship'.

65. On an appeal by the Charterers, the House of Lords affirmed the decision in Johanna Oldendorff (supra) and observed that it would be doing a grave dis-service to the shipping community if the House were to allow the legal certainty introduced by the Reid Test to be undermined. Relevant paras in Maratha Envoy (supra) are as under:-

> *"My Lords, in E. L. Oldendorff & Co. v. Tradax Export S.A. (The Johanna Oldendorff) [1973] 2 Lloyd's Rep. 285; [1974] A.C. 479, the purpose of this House was to give legal certainty to the way in which the risk of delay from congestion at the discharging port was allocated between charterer and shipowner under a port charter which contained no special clause expressly dealing with the matter. The standard form of charter-party used in The Johanna Oldendorff was also that used in the instant case – the Baltimore berth grain charter-party – although in each case the destination of the carrying voyage was a port, not a berth. The allocation of this risk under this kind of charter-party depends upon when the vessel becomes an "arrived ship" so as to enable laytime to start running and*

demurrage to become payable once laytime has expired. Legal certainty on this subject had been impaired by the earlier decision of this House in The Aello [1960] 1 Llyod's Rep. 623; [1961] A.C. 135, which had laid down a test ("the Parker test") of what was an "arrived ship" under a port charter. The Parker test had in the years that followed turned out in practice to be obscure and difficult to apply to the circumstances of individual cases. So the Johanna Oldendorff was brought up to this House for the specific purpose of re-examining the Parker test with a view to replacing it by one which would provide greater legal certainty……..this House substituted for the Parker test a test which I ventured to describe as the "Reid Test", which in its most summary form is stated by Lord Reid (at pp. 291 and 535) thus:

Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer.

My Lords, I am not aware that in practice the Reid test has proved difficult of application because of any doubt as to whether the usual place where vessels wait their turn for a berth at a particular port lies within the limits of that port or not. Neither in The Johanna Oldendorff nor in the instant case were Counsel able to provide your Lordships with an example from real life. There may be one but if such a port exists it would seem to be too little used to be likely to suffer from congestion. It would be doing a grave disservice to the shipping community if this House were to allow the legal certainty introduced by the Reid test to be undermined."

66. A reading of the aforesaid judgment leaves no scintilla of doubt that the decisive test laid down in Johanna Oldendorff (supra) was

accepted to be the correct test, *albeit* it needs to be noted that in the final decision, the House of Lords allowed the appeal by the Charterers in the facts peculiar to the said case. It was conceded by the counsel for the Charterers that the Weser Lightship anchorage was outside the legal, fiscal and administrative limits of the port of Brake. It was 25 miles from the mouth of the river in an area in which none of the Port Authorities of Weser Ports exercised administrative or legal control over the vessels in waiting. In this view, it was held that since the Charterers, shippers and the shipowners, who used the Weser Ports did not regard the waiting area at the Lightship as forming part of any port, the vessel could not be considered as an 'arrived ship' when it anchored at the Weser Lightship anchorage.

67. In this context, I may usefully allude to a decision by a Co-ordinate Bench of this Court in Vishal Exports Overseas Limited vs. Humburg Bulk Carriers, Gmbh, **2012 (128) DRJ 241**, in which one of the issues before the Court was demurrage claimed by the Respondent for the period when the vessel was at the Pilot Station of Umm Qasr. Case of the Petitioner was that the Master of the vessel could not have issued an NOR from the Pilot Station and the 'port' in terms of clause 29 of the Charter Party could only be a legally recognized port and not a Pilot Station, which was at a considerable distance from the port. Petition was filed by the Charterer under Section 34 of the Act challenging an award passed by the Tribunal in favour of the shipowners. The point for consideration before the Tribunal was whether the NOR tendered at Umm Qasr was valid and the Majority award answered the question in the affirmative in favour of the shipowners. The Tribunal based its

decision on the test as to whether sailing had ended and waiting had begun. Factually, the Tribunal found that the NOR was tendered by the vessel when she was at the Pilot Station beyond which she could not proceed and was awaiting berthing instructions.

68. The Court after examining the law and the facts held that the Charter Party in question was a port-charter and Clause 29 provided that the discharge port-time would begin to count 24 hours after the vessel arrived within port limits and tendered NOR, provided the vessel was ready in all respects to discharge, whether in 'berth or not' (WIBON). The Court relied on Rule 22 of VOYLAY Rules, 1993 which define WIBON to mean 'if no loading or discharging berth is available on her arrival, the vessel, on reaching any usual waiting place at or off the port, shall be entitled to tender Notice of Readiness from it and laytime shall commence in accordance with the Charter Party. Laytime or time on demurrage shall cease to count once the berth becomes available and shall resume when the vessel is ready to load or discharge at the berth.'

69. The Court relied on the test formulated by Lord Reid in Johanna Oldendorff (supra) with regard to an 'arrived ship' and observed that in the said case, it was found on fact that the ship was at the Bar anchorage, within the legal, administrative and fiscal areas of the nominated port. The Court observed that while Clause 29 of Charter Party required the vessel to have arrived within the legal port limits of Umm Qasr, it also contained the WIBON clause, thereby anticipating the possibility of unavailability of the berth when the vessel approached the port limit and was made to wait in the usual waiting place for ships. Court also took into account the observations of the House of Lords in Maratha Envoy

(supra) and held as follows :-

> *"41. As already noticed, the above decisions were given at a time when the VOYLAY Rules and the other self-regulatory instruments of trade, referred to earlier, were not operative. There is much clarity on the issue since then. Oldendorff itself recognised that ships may have to wait outside the legal limits of a port and that a ship may be held to have "arrived" when she reaches that usual waiting area. Tradax Exports has reiterated the Reid Test laid down in Oldendorff with the only difference that in Tradax Exports it was conceded by counsel that the place where the ship had dropped anchor, viz., the Weser Lightship was not within the legal limits of the port of Brake.*
>
> *42. In the present case, there appears to be nothing brought on record by the Petitioner to demonstrate that the Pilot Station was not the usual waiting area for ships headed for Umm Qasr. The Petitioner's case is not that on the date the NOR was issued, the vessel had a berth at Umm Qasr where the cargo could have been discharged. On the other hand, the case of the Respondent, which was not rebutted, was that even a pilot was not available to enable the vessel to proceed towards Umm Qasr. The NOR issued by the Master of the vessel as well as the 'Deck Log Book' of the vessel were part of the arbitral record. They bear out the case of the Respondent entirely. There is no illegality whatsoever in the conclusion of the Tribunal that the NOR at Umm Qasr was validly tendered."*

70. In order to appreciate the controversy between the parties, it may bear repetition to encapsulate the respective contentions, luculently placed by the Senior Counsels. Pithily put, the case of the Petitioner is that arrival of the vessel at Forcados was to be considered as 'reachable on arrival' under Clause 9 of Charter Party and triggered the obligation of the Charterers to provide a berth. In the absence of inward clearance

to proceed to Bonga, since the vessel was unable to reach Bonga or the customary anchorage at Bonga, she did not become an 'arrived ship' for the purpose of tendering a valid NOR. The vessel thus remained at Forcados, under detention due to the breach and fault of the Respondent, and the Petitioner is entitled to damages for the detention period.

71. Respondent, on the other hand, adopts a position that the vessel became an 'arrived ship' when it arrived at Forcados as this was the place where waiting ships usually lie before proceeding to Bonga, which is admitted by the Petitioner in the pleadings in the Statement of Claim. Therefore, in terms of the judgment in Johanna Oldendorff (supra), Petitioner was required to tender NOR at Forcados, which the Master failed to do. Charter Party prescribed no pre-condition for tendering NOR, least of all, inward clearance.

72. Having given my thoughtful consideration to the question posed in the present petition and adumbrating to the factual matrix obtaining in the present case as well as the judgments relied upon, this Court is of the view that the impugned Majority award does not call for any interference. As rightly pointed out by learned Senior Counsel for the Respondent, the scope of judicial review and interference in the impugned award is extremely narrow and confined, post-amendment to Section 34 of the Act by the Amendment Act, 2015. The Supreme Court in the judgments rendered in Ssyanyong (supra) and Vijay Karia (supra) has perspicuously laid down the scope and ambit of judicial interference. Be it ingeminated that the restricted interference becomes narrower in an award passed in an International Commercial Arbitration and there is a terse deprecation to Courts interdicting enforcement of such awards.

Therefore, it becomes crucial at this stage to understand the legal challenges posed by the Petitioner to the award and how the same fit into the contours and confines of judicial review delineated by the Supreme Court.

73. Objections put forth by the Petitioner can be cast into two neat compartments viz. interpretation of Clauses 6 and 9 of the Charter Party, including the terms 'customary anchorage', 'arrived ship' and 'reachable on arrival', and failure of the Majority Tribunal to consider and/or erroneous application of the principles of law, enunciated in the judgments placed before it by the Petitioner.

74. The preponderant position evident from the conspectus and exposition of law aforesaid is that under Section 34 (2)(b)(ii) of the Act, an award of the Arbitral Tribunal can be challenged if it is in conflict with the public policy of India. By the Amendment Act, 2015, Explanation-1 was inserted and it was clarified that an award is in conflict with the public policy of India, only if: (a) making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (b) it is in contravention with the fundamental policy of Indian Law; or (c) it is in conflict with the most basic notions of morality and justice. Explanation-2 clarifies that the test as to whether there is contravention with fundamental policy of Indian Law shall not entail a review on merits of the disputes. Sub-Section (2A) was inserted by the same Amendment which provided an additional ground in case of purely domestic awards in India, where the award is vitiated by 'patent illegality' appearing on the face of the award, with a cautious caveat that award shall not be set aside merely on the ground of

erroneous application of law or by re-appreciation of evidence.

75. In the decision in Ssyanyong (supra), the Supreme Court held that the expression 'Public Policy of India' whether contained in Section 34 or Section 48, would now mean the 'fundamental policy of Indian Law' as explained in paras 18 and 27 of Associate Builders (supra) i.e. relegated to the understanding of the expression in the case of Renusagar (supra). To the extent it is relevant to the present case, in para 27 of Associate Builders (supra), the Supreme Court held as under:-

> *"27. Coming to each of the heads contained in Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."*

76. The Supreme Court further held that the change made in Section 28(3) of the Act by the Amendment Act, 2015 would follow the observations of the Supreme Court in paras 42.3 to 45 in Associate Builders (supra), that construction of terms of a contract is primarily the domain of the Arbitrator, unless the Arbitrator construes the contract in a manner that no fair minded or reasonable person would i.e. the view of the Arbitrator is not even a possible view to take. The challenge to the award under this head would, however, fall under 'patent illegality' under Section 34(2A) of the Act and cannot be sustained in the present case as the impugned award is passed in International Commercial

Arbitration.

77. In view of the above, the challenge by the Petitioner, calling upon this Court to interfere in the interpretation/construction of Clauses 6 and 9 of the Charter Party rendered by the Majority Tribunal cannot be sustained. *Albeit* this is sufficient for this Court to reject the said objection of the Petitioner, however, even otherwise, the harmonious construction made by the Majority Tribunal to the two clauses is not only a possible but a plausible view and cannot be substituted by this Court. In fact this Court need not charter in troubled waters as in the Maritime legal regime, the said clauses have received interpretation in two judgements by the House of Lords and the Petitioner has not been able to furnish any cogent reason to substitute the said interpretation and construction.

78. The Majority Tribunal has carefully examined the bone of contention between the parties viz. interpretation of Clause 6 of the Charter Party and the connotation of an 'arrived ship'. Plain reading of the Clause indicates that the vessel was required to tender the NOR at the customary anchorage at Bonga. Petitioner in para 6(c) of the Statement of Claim had pleaded that all vessels loading at Bonga were required to first report at Forcados for purpose of obtaining inward port clearance and further pleaded in para 6(f) that Forcados is where vessels usually wait before proceeding to Bonga and this was as far as the vessel could go, in the absence of a berth. In order to evaluate the issue of an 'arrived ship' at Forcados, the Tribunal relied on the judgment in Johanna Oldendorff (supra) and the Reid Test formulated therein. It was held by the House of Lords in the said case that a ship becomes an

'arrived ship' when she is within the port and at the immediate and effective disposition of the Charterer, the geographical position being of secondary importance. For practical purposes, if it is established that the ship is at the usual waiting place within the port, it can generally be presumed that she is fully at the Charterer's disposal. Relying on the judgment and the pleading of the Petitioner in paras 6(c) and 6(f) of the Statement of Claim, the Majority Tribunal held that customary anchorage for Bonga was Forcados and the vessel had become an 'arrived ship' at Forcados and ought to have given the NOR. It was also held that there was no condition whatsoever in the Charter Party which stipulated that before tendering NOR, it was essential to obtain inward clearance and failure to issue NOR by the Master of the vessel was on his own volition, for which the Petitioner must suffer consequences. Tribunal disagreed with the stand of the Petitioner that since the vessel was off Forcados, awaiting inward clearance which depended on the availability of the berth at Bonga Terminal, it was not an 'arrived ship' for the purpose of NOR. Tribunal found that the stand was contrary to the contractual provisions of Charter Party and the Reid Test for determining if a ship became an 'arrived ship'. To arrive at the said conclusion, the Majority Tribunal relied on the provisions of Clause 6 of the Charter Party and held that there was a mandate that the Master shall give NOR upon arrival at customary anchorage for the load/discharge port and held as follows:

> *"11.2 The relevant Clause 6 and 9 in part II of the Charter Party provide as follows:*

CLAUSE 6. NOTICE OF READINESS

Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i.e., finished mooring when at sealoading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to Vessel getting into berth after giving Notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime.

Clause 9. SAFE BERTHING-SHIFTING.

The Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer.

It is evident that Clause 6 mandates that the master shall give NOR by letter/telegraph/wireless/telephone upon arrival at customary anchorage at each port of loading /discharge and there is no pre-condition or restriction on the master to fulfil before giving NOR. Clause 17 (Rider clauses) further provides that upon vessel arrival at the customary anchorage for the load port, the master or his representative shall tender to the terminal Notice of Readiness to the vessel to load oil. Admittedly customary anchorage for BONGA Terminal is FORCADOS Pilot Station as the Claimant itself has pleaded that the vessel's arrival at FORCADOS Pilot Station amounted to 'arrival'

under the Charter party. If the vessel had indeed "arrived" at FORCADOS it ought to have given the Notice of Readiness. It is trite law that in the absence of the Notice of Readiness, the Charterer's obligations are not triggered. The Claimant has not placed any material/ document on record to substantiate its assertion that at FORCADOS Pilot Station the NOR could be tendered only by radio after receiving inward clearance.

xxx *xxx* *xxx*

11.11 The Claimant's submission that the moment the vessel was granted inward clearance the vessel became an arrived ship for the purpose of tender of NOR as the vessel could then proceed to Bonga for berthing also cannot be sustained. There is nothing in Clause 6 which provides that NOR cannot be tendered unless inward clearance has been obtained or the vessel has become arrived ships. In the absence of NOR having been tendered, mere arrival at FORCADOS Pilot Station by the vessel and on the basis of exchange of e-mails between the vessel and its agent, copied to the Respondent it cannot be held that the Charterers obligation to provide berth has arisen as the Claimant has not produced any material to show about the vessel's readiness to berth /load when it arrived at FORCADOS.

11.12 The Claimant has relied on the cases of The Angelos Lusis (1964) and The President Brand (1967) to contend that the arrival of the vessel at FORCADOS meant that the vessel had arrived for the purpose of triggering Charterer's obligation under Clause 9 to provide a berth reachable on her arrival and that arrival under Clause 9 means physical arrival of the ship at the point where she has to wait until a berth is made available by the Charterer's and at this point the vessel need not be arrived ship for the purpose of tender of NOR. In our view this argument is self-contradictory. The Claimant's own pleading is that FORCADOS Pilot Station is where vessels usually wait before proceedings to BONGA

and this was as far as the vessel could go in the absence of a berth. Clause 6 of the Charter Party provides that upon arrival at customary anchorage at the port, the Master shall give Charterer NOR by letter/telegraph/wireless that the vessel is ready to load, berth or no berth. There appears to be no apparent reason/ justification that the vessel could not give NOR from FORCADOS. Clauses 6 and 9 are to be read harmoniously. Charterer's obligation under Clause 9 to provide a berth 'reachable on arrival of vessel' will be triggered once vessel has given its NOR under clause 6 and there was no bar or pre-condition in clause 6 which prevented the vessel to give NOR once it arrived at FORCADOS.

11.13 In view of the above, WE FIND AND HOLD that the clause 6 and Clause 9 have to be read together to give harmonious interpretation to the Charter Party and therefore. in order to trigger the charterer's obligations to provide berth reachable on vessel's arrival, the vessel must have tendered NOR upon arrival at the customary anchorage of the load port i.e. FORCADOS."

(emphasis supplied)

79. The Tribunal accepted the stand of the Respondent predicated on the observations in Johanna Oldendorff (supra) and held as follows:

"11.4 To support its contention that the vessel had become arrived ship when it arrived at FORCADOS Pilot Station, the Respondent relied upon the judgement "The Johanna Oldendorff (reported at (1973) Vol.2 Lloyd's Law Reports page 285) which also states the "Reid Test" (at Page 291) for arrived ship. The relevant para at page 291 states as under :

"On the whole matter I think that it ought to be made clear that the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of

the Charterer and that her geographical position is of secondary importance. But for practical purposes it is so much easier to establish that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there fully at charterer's disposal.

I would therefore state what I would hope to be the true legal position in this way. Before a ship can be said to have arrived at a port she must, if she cannot immediately proceed to a berth, have reached a position within the port where she is at the immediate and effective disposition of the Charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the Charterer."

Thus the vessel had become an arrived ship when it arrived at FORCADOS Pilot Station as this was the place where admittedly waiting ships usually lie within the BONGA Terminal. The pleaded case of the Claimant too is that FORCADOS Pilot station is where vessels usually wait before proceeding to Bonga terminal."

(emphasis supplied)

80. Clearly, the aforesaid findings of the Majority Tribunal are based on the interpretation and construction of the clauses of the Charter Party keeping in the backdrop two judgements of the House of Lords and the obtaining factual matrix. The binding dicta of the Supreme Court in Ssangyong (supra) does not permit this Court to interfere in the interpretation of the contractual clause made by the Majority Arbitrators and the contentions of the Petitioner are thus rejected.

81. The argument of the Petitioner that the Reid Test would be inapplicable to the present case since the ship was outside the port and

not within the port as envisaged in Johanna Oldendorff (supra) is without merit and has been rightly rejected by the Tribunal in view of the provisions of Clause 6 of the Charter Party, which has been extracted in the earlier part of the judgment, where the emphasis is on arrival at 'customary anchorage'. The Majority Tribunal took note of the argument and rejected the same as follows:

> *"11.9 Even if the Claimant's contention that the vessel in the instant case was "outside" the Port when it was at FORCADOS Pilot station and hence not an "Arrived" Ship is to be accepted, even then the Charterer can not be held responsible in view of the law laid down in the "Maratha Envoy" case [1977] Lloyd 's Law Reports Vol 2. Page 301 wherein it has been held that;*
>
> > *"The Reid test, applies to a port charter in which there is no express provision dealing with how the misfortune risk of delay through congestion at the loading or discharging port is to be allocated between Charterer and Shipowner. In such a case it allocates the risk to the charterer when the waiting place lies within the limits of the port; but to the shipowner when it lies outside those limits."*
>
> *Thus if the vessel was 'outside the limits of Bonga port" as claimed by the Claimant then risk of delay would indeed fall on the ship owner and not on the Charterer."*
>
> *(emphasis supplied)*

82. With respect to the emphatic argument of the Petitioner that the normal procedure in force for all vessels proceeding to load at Bonga terminal was to proceed to Forcados and obtain inward clearance and thereafter tender NOR by Radio contact, the Majority Tribunal has noted that the Petitioner had not placed on record any material/document to

substantiate the assertion that NOR could be tendered only via Radio contact, after receiving inward clearance and proceeding to Bonga. Learned Senior Counsel for the Respondent is right in his contention that bare assertions in the pleadings are not enough to further the case of the Petitioner and the Petitioner ought to have led evidence to substantiate the claim, which it failed to do. The Tribunal, in my view, was correct its finding that in the absence of any material on record, no conclusion could be drawn in favour of the Petitioner.

83. The Majority Tribunal has rightly held that the Petitioner could not adopt a position that in the absence of inward port clearance, a valid NOR could not be tendered and in my opinion, rightly held that there was no stipulation or pre-condition to that effect in the Charter Party. In this context, relevant it would be to take note of the case in Feoso (Singapore) Pte Ltd. vs. Faith Maritime Company Limited **[2003] SGCA 34** wherein a similar issue came up for consideration before the Singapore Court of Appeal involving interpretation of a similar Clause 6 therein. The contention of the Charterer, Feoso, was that the vessel owner had no claim for demurrage as the NOR was tendered prematurely. NOR could be tendered only once the vessel arrived at the destination specified in the Charter, both physically and legally ready to discharge cargo and only at that stage would she become an 'arrived ship'. It was not disputed between the parties that when the NOR was tendered, the vessel was at the customary anchorage stipulated in Clause 6 of the Head Charter and had reached the recognized waiting place for the port, even though the anchorage was 20 miles from the port. It was held by the Court of Appeal that Clause 6 required NOR to be tendered

at the customary anchorage. If joint inspection or any other condition was required to be fulfilled before NOR could be tendered, such a requirement should have been written into the charter and it was not open to add additional requirements at a later stage. Likewise, in the present case, the Charter Party did not impose any precondition to the tender of NOR.

84. As far as the second ground of challenge is concerned, while it is the contention of the Petitioner that the present case is governed by the judgments in Angelos Lusis (supra), President Brand (supra), Delian Spirit (supra) and Samuel Crawford (supra), *per contra* learned Senior Counsel for the Respondent has placed reliance primarily on the judgments in Johanna Oldendorff (supra) and Maratha Envoy (supra). Perusal of the Majority award reflects that the Tribunal has heavily relied on the observations of the House of Lords in the two cases relied upon by the Respondent, as aforesaid. In Johanna Oldendorff (supra), the House of Lords held that the essential factor before a ship can be treated as an 'arrived ship' is that she must be within the port and at immediate and effective disposition of the Charterer, but for practical purposes if the ship is at the usual waiting place within the port, it can generally be presumed that she is there fully at the Charterer's disposal. Notice of Readiness can be tendered once the ship is an 'arrived ship' and thereafter the obligations of the Charterer are triggered and depending on the provisions of the Charter Party, Laytime begins. Reading of the judgment shows that the relevant factor to determine if the ship is an 'arrived ship' is to see the immediate and effective disposition over her by the Charterer and the 'usual waiting area' is a place where a

presumption is raised that the Charterer has effective disposition over the ship. These observations of Lord Reid, known as 'The Reid Test', were echoed by the House of Lords in the subsequent judgment in Maratha Envoy (supra). Relying on these judgments, the Majority Arbitrators interpreted Clauses 6 and 9 of the Charter Party harmoniously. Clause 6 of the Charter Party required the Master of the vessel to tender the NOR once the vessel arrived at the customary anchorage and thus going by the Reid Test and the admitted case of the parties that Forcados was the usual waiting area, a conclusion was drawn that NOR was required to be tendered at Forcados. Learned Tribunal interpreted the words 'reachable on arrival' under Clause 9 of the Charter Party to connote that the Charterer's obligation under the said clause will be triggered once the vessel had given its NOR under Clause 6 of the Charter Party and there was no bar or pre-condition in Clause 6 of the Charter Party which prevented the vessel to give NOR on arrival at Forcados, in the absence of invoking Clause 9 of the Charter Party. The view taken by the Majority Tribunal is not only in consonance with the contractual clauses but also the two judgments by the House of Lords, which squarely apply to the present case and calls for no interference. Having carefully perused the said judgments, this Court finds no merit in the contention of the Petitioner that the claims of the Petitioner were squarely covered by the four judgments relied upon by the Petitioner and the impugned award is in total disregard of the said judgments of the Superior Court.

85. In Samuel Crawford (supra), the plaintiffs were shipowners and the Charter Party was entered into with the defendants by which a ship was to receive cargo at Calcutta and the place of delivery was Colombo. The

ship arrived in the port and gave Notice of Readiness but could not berth and receive the cargo for many days on account of delay by the Charterer and hence made a claim for damages for detention and demurrage. The Privy Council held that if a ship is prevented from getting to a loading berth owing to an obstacle created by the Charterer or owning to the default of the Charterer in performing his duty, then the shipowner has done all that is needful to bring the ship to the loading place and the Charterer must pay for the subsequent delay. Once the vessel was at the disposal of the Charterers, it was their act which caused the delay. A few facts in the said judgment glaringly distinguish the case from the present one. First and foremost, the case before the Privy Council was that of a berth-charter, wherein it was clearly stipulated in Clause 11 of the Charter Party that Lay-days at the loading port were to count after expiry of 24 hours' notice from the Master of the ship indicating readiness, the same having duly entered at the Customs House, but not until the ship was in berth. Therefore, until the berth was allocated by the Charterer, he remained responsible and liable, provided NOR was tendered by the shipowner. Facts also reveal that the moment the ship arrived in the loading port on 27.12.1920, Master had tendered NOR forthwith. Quite contrary to these facts in the present case, the Charter Party is a port-charter with a clear WIBON clause i.e. 'berth or no berth' and there was failure on the part of the Master of the vessel to tender the NOR at Forcados.

86. In Angelos Lusis (supra), the vessel anchored 'in roads' at Constantza on 28.01.1962, but was not permitted by the Port Authorities to enter the port until the berth was available on 02.02.1962. The

shipowners laid a claim for damages for the delay at the roads and the contentions were that there was an absolute obligation on the Charterers to have a place of loading reachable on arrival of the vessel at Constantza and while she may not be an 'arrived vessel' for Laydays' purposes, she had arrived within the meaning of Clause 6 of the Charter Party therein (which is *pari materia* to Clause 9 in the present case). The Charterers contended that the charter was a port-charter and the risk of loss of time before vessel became an arrived vessel was on the shipowners, and that 'reachable on arrival' in Clause 6 of the Charter Party meant arrival in the port and thus the Charterers were not obliged to nominate the loading berth until she entered the commercial area of the port. The Queen's Bench held that provisions of Clause 6 were intended to impose on the Charterers a contractual obligation of value to shipowners to nominate a reachable place i.e. a berth where she could load, reach and occupy, whether within or outside fiscal or commercial limits of the port. It was thus held that the Charterers were in breach in failing to provide a reachable berth for the vessel when she anchored on 28.01.1962. The said case is completely distinguishable not only on the facts but also the question that arose before the Queen's Bench for consideration and the interpretation of the clause which was called in question. For the sake of better appreciation, Clause 6 in the said case was as under :-

> "*6. - The Vessel shall load and discharge at a place or at a dock or alongside lighters reachable on her arrival which shall be indicated by charterers, and where she can always lie afloat…"*

87. The question before the Bench was as follows :-

> *"The question of law for the decision of the Court is whether on the true construction of the Charter Party the Respondents were in breach in falling to provide a reachable berth for the vessel when she required a berth on 28th January, 1962."*

88. With this issue for consideration before it, the Bench held as follows :-

> "*Here, I think that another meaning can reasonably be attributed to the words "on her arrival", and I have little doubt but that that meaning reflects the true intention of the parties, and, indeed, the true meaning of the words in that context. The parties, in using the words "on her arrival", did not have in mind, or at least did not have solely and exclusively in mind, the technical meaning of "arrival" in respect of an "arrived vessel" in a port charter-party: they had in mind her physical arrival at the point, wherever it might be, whether within or outside the fiscal or commercial limits of the port, where the indication or nomination of a particular loading place would become relevant if the vessel were to be able to proceed without being held up. At that point the charterers had to nominate a reachable place, which involves that it was the charterers' responsibility to ensure that there was at that point of time a berth which the vessel, proceedings normally, would be able to reach and occupy. The time of her arrival, within Clause 6, had come when the vessel had gone as far as she could go, whether to the verge of or within the port, in the absence of a nomination by the charterers of a place which she would reach without being held up, where she could load.*
>
> *The opening words of Clause 15, with their reference to "arrival off the port of loading", lend some support to this view. They show, at least, that the contract contemplates something described as an "arrival" before the vessel enters the port. True, the qualifying words "off the port of*

loading" do not appear in Clause 6, but that fact does not give rise to an inference that "arrival" in Clause 6 excludes an "arrival off the port". Indeed, on the meaning which I think should be given to Clause 6, it would have been inapposite so to limit or qualify "arrival". The point of arrival might be off the port, but it might be within the limits of the port before the vessel was able to reach the place where vessels usually lie awaiting a loading berth, assuming, perhaps wrongly on the facts as found, that there is such a place in Constantza. .....".

89. Therefore, quite clearly, the Bench therein was only called upon to interpret the words 'reachable on arrival' and in that context, decide whether the Charterer was in breach in failing to provide a reachable berth when the vessel arrived on 28.01.1962. Interpretation and connotation of the term, 'arrived ship' or the tender of NOR was not the question arising before the Bench. In fact, the same Clause 6 and the legal issue arose for consideration before the Queen's Bench in the case of President Brand (supra). The Queen's Bench interpreted the term 'reachable on arrival' in Clause 6 of the Charter Party and held as under:-

"*.....I would construe "arrival" in Clause 6 as meaning "arrival" in the popular sense of that word, determining as a matter of common sense on the evidence when it can be said that the vessel "arrived" at the port of discharge.*

When I look back at the facts I find that at 08 00 hours on Sunday, Apr. 19 the President Brand is described as having arrived off Lourenco Marques and anchored at the pilot station: see par. 6. Par. 7 says:

> *Although the pilot station is outside the commercial limits of the port of Lourenco Marques, it is the usual practice for the vessels to report their arrival at the pilot station and, subject to the draft of the vessel allowing her to cross the bar, the vessel then enters the port…*

I think as a matter of ordinary common sense if one asked two businessmen if a ship had arrived at Lourenco Marques when she reported at the pilot station in that way and in those circumstances they would answer: "Yes, she had arrived there", notwithstanding that she had not yet got within the commercial limits of the port.

xxx xxx xxx

....I thus I reach the conclusion on the agreed facts that although at 08 00 hours on Apr. 19 the vessel was not within the commercial limits of the port of Lourenco Marques, nonetheless she had at that time arrived at Lourenco Marques.

xxx xxx xxx

..."Reachable" as a matter of grammar means "able to be reached". There may be many reasons why a particular berth or discharging place cannot be reached. It may be because another ship is occupying it; it may be because there is an obstruction between where the ship is and where she wishes to go; it may be because there is not a sufficiency of water to enable her to get there. The existence of any of those obstacles can prevent a particular berth or dock being reachable and in my judgment a particular berth or dock is just as much not reachable if there is not enough water to enable the vessel to traverse the distance from where she is to that place as if there were a ship occupying that place at the material time. Accordingly in my judgment, the charterers' obligation was to nominate a berth which the

vessel could reach on arrival and they are in breach of that obligation if they are unable so to do.

It may be (and I think the present case is such a case) that the breach arises without what one might call fault on their part but the ultimate question is what does this charter-party provide are the respective liabilities of owners and charterers if the ship cannot cross the bar owing to shortage of water and then proceed to a berth. My answer to that as a matter of construction of the four words in Clause 6 is that liability for that loss of time falls upon the charterers and not the owners."

90. The Queen's Bench also noted that the judgment in Angelos Lusis (supra) fortified its view. In the said case, as is evident, the Court was not concerned with the interpretation or construction of the word 'arrived ship' and the issue whether the NOR was to be tendered at the waiting area, which was the customary anchorage or once the ship had entered the limits of the port, which is the precise issue arising in the present case.

91. In Delian Spirit (supra), the Charterers directed the vessel to Tuapse and she reached the roads on 19.02.1964 and on the same day the Master tendered the Notice of Readiness to load, which was accepted by the Charterer's agent. She lay in the roads until 24.02.1964, when she was ordered to go alongside a loading berth which was 1/1/4th miles from her anchorage in the roads. Originally, the shipowners claimed demurrage on the basis that the time spent at the anchorage counted as lay time, but later claimed damages for delay, with a claim for demurrage in the alternative. The shipowners contended that the Charterers were in breach of their obligations under Clause 6 of the

Charter Party to nominate an available berth as soon as the vessel arrived in the roads while the Charterers contended that no damages were payable because the vessel was an 'arrived ship' as soon as she arrived on the roads and an award of damages would deprive them of the benefit of 120 running hours of Laytime. The Court held that the Charterers were in breach of the obligation under Clause 6 of the Charter Party to nominate an available berth and that the vessel, based on evidence, was an 'arrived ship' when she reached the roads. The judgment in the Delian Spirit (supra) was considered by the House of Lords in Johanna Oldendorff (supra) and suffice would it be to quote the following passages from the judgment in Johanna Oldendorff (supra) as follows :-

> "*Further difficulty has been caused by the decision of the Court of Appeal in The Delian Spirit, [1971] 1 Lloyd's Rep. 506. The small Black Sea port of Tuapse consists of an inner area enclosed by a breakwater and an outer open area where waiting ships lie. While waiting her turn the Delian Spirit lay in the outer area about half a mile outside the breakwater. The loading berth was about half a mile from the breakwater in the inner area so that vessel lay over a mile from this berth. Nevertheless it was held that she lay within the commercial area of the port. I find this quite irreconcilable with The Aello or with the definition of "commercial area" by Lord Justice Parker which was there adopted. I cannot see how it can possibly be said that the open sea outside the breakwater was "within that part of the port where a ship can be loaded when a berth is available". That might reasonably be said to apply to the area within the breakwater, but it seems to me a complete misuse of language to say that it can extend to the open sea outside.*
>
> ***The Delian Spirit affords a classical example of the difficulties created by a decision such as that in The Aello.***

The decision of the Court of Appeal was to mind plainly right: but in order to reach it they had to distinguish The Aello on such inadequate grounds as to create great uncertainty in the law. As things stand at present there must be numerous cases where parties' advisers can only guess what line the Court will take.

So in my judgment this is certainly a case in which this House ought to exercise its power to alter its previous decision."

(emphasis supplied)

92. What follows from the above analysis is that the Majority Tribunal has not disregarded the judgments of the Superior Court and has rather passed the award in consonance with two judgments of the House of Lords in Johanna Oldendorff (supra) and Maratha Envoy (supra), distinguishing the judgements relied upon by the Petitioner. Therefore, even the second ground of challenge by the Petitioner is unsustainable in law.

93. At this stage, it is necessary to decide the plea of the Petitioner that the Majority Tribunal took into account certain documents which were enclosed by the Respondent along with the written submission after the arguments were concluded and proceedings had come to an end. The argument is predicated on the alleged violation of principles of natural justice. It is undisputed that the documents tendered by the Respondent along with the written submission were copies of NORs issued by some third parties under different charterparties, from Forcados, without waiting for inward clearance. The documents were filed to substantiate the stand of the Respondent that the Petitioner was required to tender the NOR at Forcados as that was the usual waiting area for vessels waiting

to enter the Bonga port for loading or discharge. Learned Senior Counsel for the Respondent had drawn the attention of the Court to the fact that the counsel for the Petitioner had acknowledged receipt of the said documents by letter dated 23.06.2017. The Majority award was signed on 08.08.2017 and the Minority award was signed on 21.08.2017 and therefore the Petitioner had over a month to present its objections/ comments on the documents. It is also noticed that while the Petitioner had chosen to respond by a letter dated 23.06.2017 acknowledging the receipt of the letter, it chose not to offer any objection and remained silent on that aspect. Principles of natural justice are violated when a party is unable to present its case but surely when the party fails to avail of the opportunity available, it cannot later complain of the violation of its right to present its case. This is clearly held by the Supreme Court in Sohan Lal Gupta (supra).

94. There is yet another aspect to this issue. According to the Majority Tribunal, Petitioner had admitted in the Statement of Claim and even during arguments before the Tribunal that Forcados was the usual waiting area for the ships to enter into the Bonga terminal. The Tribunal has taken pains to arrive at a conclusion, based on the interpretation of the term 'customary anchorage' in Clause 6 of the Charter Party and the law laid down with respect to the term 'arrived ship' by the House of Lords in the two judgments aforementioned. The findings of the Tribunal are quite independent of the said documents filed with the written submissions. The documents were considered by the Majority Tribunal only for the limited purpose of ascertaining whether similarly placed parties were tendering NORs at Forcados. In fact, as rightly

contended by learned Senior Counsel for the Respondent, even if the said documents are kept out of consideration, the conclusion arrived at by the Majority Tribunal, based on the contractual provisions and the judgments, as aforementioned, would be no different and shall remain undisturbed. Petitioner has been unable to substantiate that the findings and conclusion of the Tribunal were solely based on the additional documents and this contention only deserves to be rejected.

95. For all the aforesaid reasons, I find no merit in the petition and the same is accordingly dismissed along with pending application and the Majority award passed by the Tribunal is hereby upheld.

JYOTI SINGH, J

JUNE 16, 2021
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