

MINERALS & METALS TRADING CORPORATION OF
INDIA LTD.

v.

OCEAN KNIGHT MARITIME CO. LTD. AND OTHERS
(Civil Appeal No. 4360 of 2006)

MARCH 29, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Arbitration Act, 1940 – ss.5, 11, 12 and 37 – Time barred arbitration petition – By a Charter Party, respondent No.1 had let its vessel to appellant for carriage of cargo – Disputes between appellant and respondent No. 1 – Arbitration clause in Charter Party invoked – Respondent no.1 appointed respondent no.2 as its arbitrator whereas appellant appointed respondent No.3 as its arbitrator – Time for giving the award by the arbitrators was up to March 31, 1993 – Arbitral award could not be passed for want of consensus between the arbitrators – On July 3, 1999, respondent No.1 filed application u/ss.5,11 and 12 of the Act seeking removal of respondent No. 3 as co-arbitrator and for declaration that respondent No.2 was the sole arbitrator and in the alternative seeking revocation of authority of respondent No.3 as co-arbitrator and appointment of a new arbitrator in his place – High Court allowed the application and after revoking the authority of both the arbitrators appointed a former retired Judge of that Court as a sole arbitrator – Whether application u/ss.5,11 and 12 of the Act filed on July 3, 1999 by respondent No.1 was within limitation – Held: S.37 of the Act makes provisions of Limitation Act applicable to arbitrations – The Limitation Act does not expressly provide for limitation for an application u/ss.5,11 and 12 of the Act – Article 137 is a residuary provision which prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act – Period of three years commences when the right to apply accrues – In the instant

A case, right to apply for removal of respondent No.3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became *functus officio* – It was thus, on April 1, 1993 that respondent No.1 became entitled to apply for the reliefs claimed in the application u/ss. 5,11 and 12 of the Act – Such application could have been made by respondent No.1 within three years from April 1, 1993 and not thereafter – Application u/ss. 5,11 and 12 of the Act filed by respondent No.1 was clearly time barred and deserved to be dismissed as such – Limitation Act, 1963 – Article 137.

By a Charter Party, respondent No.1 had let its vessel to appellant for carriage of cargo. Disputes arose between the parties in respect of demurrage charges. Clause 56 of the Charter Party contained arbitration clause. Respondent No.1 invoked the above arbitration clause and vide a letter communicated the appointment of respondent No. 2 as its arbitrator whereas the appellant appointed respondent No. 3 as its arbitrator. The time for giving the award by the arbitrators was up to March 31, 1993. Arbitral award, however, could not be passed for want of consensus between the arbitrators. On July 3, 1999, respondent No.1 filed application under Sections 5, 11 and 12 of the Arbitration Act, 1940 seeking removal of respondent No.3 as co-arbitrator and for declaration that respondent No. 2 was the sole arbitrator and in the alternative seeking revocation of the authority of respondent No.3 as co-arbitrator and appointment of a new arbitrator in his place. The appellant raised objection that the application was beyond the prescribed period of limitation and, was liable to be dismissed on that ground alone. By the impugned order, the High Court allowed the application filed by respondent No.1 under Sections 5,11 and 12 of the 1940 Act and after revoking the authority of both the arbitrators appointed a former Judge of that Court Justice Usha Mehra (retired) as a sole

arbitrator to decide the disputes between appellant and respondent No.1.

In the instant appeal, the question that arose for consideration was whether the application under Sections 5,11 and 12 of the 1940 Act filed on July 3, 1999 by respondent No.1 was within limitation.

Allowing the appeal, the Court

HELD: 1. Section 37 of the Arbitration Act, 1940 makes the provisions of Limitation Act, 1963 applicable to the arbitrations. The Limitation Act does not expressly provide for limitation for an application under Sections 5,11 and 12 of the 1940 Act. In this view of the matter, Part II, Third Division of the Schedule gets attracted. This part has title "Other Applications" and it has only one Article namely Article 137. [Paras 15, 16] [970-G; 972-B]

2. Article 137 is a residuary provision in respect of the applications. It prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act. The period of three years commences when the right to apply accrues. One, therefore, has to see as to when did respondent No. 1 become entitled to apply for the relief claimed in the application under Sections 5,11 and 12 of the 1940 Act. It is from such date that limitation under Article 137 would begin to run. [Para 17] [972-D-E]

3. In the instant case, the parties extended the time for passing the award by the arbitrators till March 31, 1993. No extension of time was sought after March 31, 1993. In the backdrop of the factual position, the right to apply for removal of respondent No. 3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became *functus officio*. It was thus, on April 1, 1993 that the respondent No. 1 became entitled to apply for the reliefs claimed in the

A application under Sections 5,11 and 12 of the 1940 Act. Such application could have been made by respondent No. 1 within three years from April 1, 1993 and not thereafter. The limitation for making application under Sections 5,11 and 12 of the 1940 Act, thus, expired on
 B March 31, 1996. Respondent No.1 made the application under above provisions on July 3, 1999. The application under Sections 5,11 and 12 of the 1940 Act filed by the respondent No. 1 was clearly time barred and deserved to be dismissed as such. The High Court was in error in
 C allowing that application which was filed after the prescribed period of limitation. [Paras 19, 21] [972-H; 973-D-F].

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4360 of 2006.

D From the Judgment & Order dated 04.02.2005 of the High Court of Delhi at New Delhi in OMP No. 193 of 1999.

Jay Savla, Renuka Sahu for the Appellant.

E The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The present appeal by special leave arises from the order dated February 4, 2005 passed by the Delhi High Court whereby the Single Judge of that court allowed the petition filed by the present respondent No.1 under Sections 5,11 and 12 of the Arbitration Act, 1940 (for short "the 1940 Act") and appointed a former Judge of that Court Justice Usha Mehra (retired) as a sole arbitrator to decide the disputes between the appellant and respondent No.1.

G 2. Bereft of unnecessary details, suffice it to notice for the purposes of the present appeal that by a Charter Party dated October 14, 1987, the respondent No. 1 let its vessel 'MV Ocean Knight' to the appellant for carriage of a cargo of Rock Phosphate in bulk. The disputes arose between the parties in
 H respect of demurrage charges. Clause 56 of the Charter Party

which contains arbitration clause, reads as follows:

"Clause 56: All disputes arising under this Charter shall be settled in India in accordance with the provisions of the Arbitration Act, 1940 in India, each party appointing an Arbitrator from out of the panel of Arbitrators maintained by the Indian Council of Arbitration, New Delhi and the two Arbitrators appointing an Umpire whose decision, in the event of disagreement between the Arbitrators, shall be final and binding upon both parties hereto. The Arbitrators and the Umpire shall be commercial men."

3. The respondent No.1 invoked the above arbitration clause and vide its letter dated May 30, 1989 communicated the appointment of Shri K.P. Patel (respondent No. 2) as its arbitrator.

4. On August 14, 1989, the appellant appointed Captain D.K. Verma (respondent No. 3) as its arbitrator.

5. The above arbitrators jointly appointed Shri R.S. Cooper as the Umpire.

6. On October 13, 1989, the respondent No. 1 filed a statement of claim claiming US\$ 1,12,136.28 along with interest @ 18% p.a The appellant traversed the claim of respondent No. 1 and raised diverse pleas in opposition thereto.

7. The two arbitrators concluded the hearing on May 12, 1992. It appears that the draft of the award was prepared by one of the arbitrators and sent to the other but for want of consensus, the award could not be given by them. It is an admitted position that the time for giving the award by the arbitrators was up to March 31, 1993. The fact, therefore, is that the arbitrators became *functus officio* w.e.f. April 1, 1993.

8. On July 3, 1999, the respondent No. 1 filed a Petition (application) under Sections 5,11 and 12 of the 1940 Act seeking removal of respondent No. 3- Captain D.K. Verma as

A co-arbitrator and for declaration that respondent No. 2 – K.P. Patel was the sole arbitrator for deciding the disputes between the appellant and respondent No. 1 and in the alternative revoking the authority of respondent No. 3 as co-arbitrator and for appointment of a new arbitrator in his place.

B 9. The appellant contested the above petition filed by the respondent No. 1 by filing an affidavit-in-reply. Inter alia an objection was raised by the appellant that the petition was beyond the prescribed period of limitation and, was liable to be dismissed on that ground alone.

C 10. On November 26, 2001, the petition filed by the respondent No. 1 was dismissed in default but later on, it was restored.

D 11. By the impugned order, the Single Judge revoked the authority of both the arbitrators and appointed a former Judge of that Court Justice Usha Mehra (retired) as the sole arbitrator.

E 12. Despite service of notice, the respondent No. 1 has not chosen to appear.

13. We have heard Mr. Jay Savla, learned counsel for the appellant.

F 14. The sole question that requires consideration by us is whether the application under Sections 5, 11 and 12 of the 1940 Act filed on July 3, 1999 by the respondent No. 1 was within limitation.

G 15. Section 37 of the 1940 Act makes the provisions of Limitation Act, 1963 (for short " the Limitation Act") applicable to the arbitrations. It reads as follows:

"37. Limitations.

H (1) All the provisions of the Indian Limitation Act, 1908 , (9 of 1908 .) shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement. A B

(3) For the purposes of this section and of the Indian Limitation Act, 1908 , (9 of 1908 .) an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated. C D

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper. E F

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) G H

A with respect to the difference referred.”

16. The Limitation Act does not expressly provide for limitation for an application under Sections 5,11 and 12 of the 1940 Act. In this view of the matter, Part II, Third Division of the Schedule gets attracted. This part has title “Other Applications” and it has only one Article namely; Article 137 which reads as follows:

PART II – OTHER APPLICATIONS

C 137	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.
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D 17. The above Article is a residuary provision in respect of the applications. It prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act. The period of three years commences when the right to apply accrues. We have, therefore, to see as to when did the respondent No. 1 become entitled to apply for the relief claimed in the application under Sections 5,11 and 12 of the 1940 Act. It is from such date that limitation under Article 137 would begin to run.

F 18. The High Court in the impugned order has noted that the arbitration proceedings could not reach the desired destination and the two arbitrators became *functus officio* due to the reason that the time granted for publishing the award had expired. The High Court, further noted that there had been a dead-lock since 1992 when last hearing was held.

G 19. As noted above, the parties extended the time for passing the award by the arbitrators till March 31, 1993. No extension of time was sought after March 31, 1993. As a matter of fact, respondent No. 3 (one of the arbitrators), in his affidavit-in-reply to the Petition under Sections 5,11 and 12 of the 1940

Act before the High Court, categorically stated that the arbitrators became *functus officio* on March 31, 1993. A

20. Section 5 of the 1940 Act postulates that the authority of an appointed arbitrator or umpire shall not be revoked without the leave of the Court unless arbitration agreement indicates contrary intention. Section 11 empowers the Court to remove arbitrator or umpire in the circumstances incorporated therein. Section 12 confers consequential power on the Court where it grants leave and revokes the authority of the appointed arbitrator or umpire under Section 5 or removes the arbitrator/umpire in exercise of its power under Section 11. B C

21. Insofar as the present case is concerned, in the backdrop of the factual position noted above, the right to apply for removal of respondent No. 3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became *functus officio*. It was thus, on April 1, 1993 that the respondent No. 1 became entitled to apply for the reliefs claimed in the application under Sections 5, 11 and 12 of the 1940 Act. Such application could have been made by respondent No. 1 within three years from April 1, 1993 and not thereafter. The limitation for making application under Sections 5, 11 and 12 of the 1940 Act, thus, expired on March 31, 1996. The respondent No. 1 made the application under above provisions on July 3, 1999. The application under Sections 5, 11 and 12 of the 1940 Act filed by the respondent No. 1 was clearly time barred and deserved to be dismissed as such. In our opinion, the High Court was in error in allowing that application which was filed after the prescribed period of limitation. D E F

20. Civil Appeal is, accordingly, allowed. The impugned order dated February 4, 2005 passed by the High Court is set-aside. The Arbitration Petition (O.M.P. No. 193 of 1999) filed by the respondent No. 1 is dismissed as time barred. As the respondent No. 1 has not chosen to appear, parties shall bear their own costs. G

B.B.B.

Appeal allowed. H