



WEB COPY



Original Side Appeal (CAD) No.124 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.02.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal (CAD) No.124 of 2021
and CMP Nos.20089 of 2021 and 16169 of 2022

Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
Rep. by its Chairman & Managing Director,
II Floor, Western Wing, NPKRR Malaigai,
No.144, Anna Salai, Chennai 600 002.

... Appellant

Versus

M/s. Adani Global Pvt. Ltd.,
No.80, Raffles Place,
No.33-20, UOB Plaza-II,
Level-33, Singapore 048624.

.... Respondent

PRAYER: Original Side Appeal (CAD) filed under Order XXXVI Rule 1
of the Original Side Rules read with Section 13(1) of the Commercial
Courts Act 2015, to set aside the order passed in O.P.No.55 of 2020 dated
17.09.2021.

1/16



Original Side Appeal (CAD) No.124 of 2021

WEB COPY

For Appellant : Mr.J.Ravindran, Additional Advocate General
Asst. by Ms.M.Sneha Standing Counsel
for TANGEDCO

For Respondents : Mr.Satish Parasaran, Senior Counsel
for M/s. Abishek Jenasenan

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

Challenge in this Appeal is to the order of the learned Single Judge dismissing an application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The facts that led to the reference to the Arbitrator are as follows:

The Appellant a Public Sector undertaking engaged in power generation issued a tender on 05.01.2015 for import of Coal for the period between April 2015 and September 2015. The quantity to be imported was 21 Metric Tonnes of coal and the respondent emerged as the L-1 bidder



Original Side Appeal (CAD) No.124 of 2021

when it quoted a rate of 94.90 US dollars per Metric Tonne. After negotiation, the respondent agreed to supply the said quantity of coal at 79.50 US dollars per metric tonne.

3. According to the respondent, on a promise of immediate payment, that is within 60 days, the respondent had agreed to reduce the price to 77 US Dollars per metric tonne. It was agreed between the parties that the entire 21 lakh metric tonnes of imported coal would be supplied between June 2015 and November 2015. The respondent also furnished the Bank Guarantee for 62,85,000 US dollars for supply and earnest money deposit of 1.8 Million US dollars was also made.

4. Initially there were some hiccups on the engagement of the inspection agency at the load Port and the arrival Port which caused some delay in the commencement of the supply. After the issues were resolved, the respondent started supplying the coal through various ships and the supplies continued till January 2016. According to the respondent, the



Original Side Appeal (CAD) No.124 of 2021

delay in the supply was mainly due to the re-scheduling of supplies by the officials of the appellant on the ground that some of their Thermal Power Generation Units were under overhauling or there was a shutdown or there was surplus stock of imported coal. During the period, some of the Ships were put on the outer anchorage at the Ports for several days resulting in demurrages being levied.

5. Finally after the conclusion of the supply, the respondent lodged a claim for repayment of the demurrages paid, refund of the liquidated damages rejected unauthorisedly, refund of the Clean Energy Cess which was levied because of the delay in supply. As the agreement provided for Arbitration, a retired Judge of this Court was nominated as an Arbitrator by the appellant, pursuant to the request made by the respondent. Evidence was placed before the Arbitrator. Various claims were made before the Arbitrator and the claims in a nutshell are as follows:

*i) Directing the respondent to pay USD
3,223,063 towards the demurrage incurred by the
claimant on account of the delay caused by the*



WEB COPY



Original Side Appeal (CAD) No.124 of 2021

respondent's actions and omissions in not permitting the claimant's vessel to berth and discharge the consignment as agreed.

ii) Directing the respondent to refund the liquidated damages for USD 1,737,484, which is arbitrarily and illegally deducted from the amount payable to the claimant.

iii) Directing the respondent to refund USD 873,606 illegally deducted on account of enhancement of Clean Energy Cess applicable from 1st March 2016.

iv) Directing payment of USD 896,267 as interest @ 18% per annum on account of delays in payment against invoices and further interest.



Original Side Appeal (CAD) No.124 of 2021

6. The claim was resisted by the appellant contending that the respondent was also equally guilty of delay and therefore, it is not entitled to the claims. On the claim for demurrage, it was pointed out that the ships were made to wait in the outer anchorage because of their delayed arrival or bunching of ships viz. more than one ship arriving at the same time, despite there being a provision in the contract for ships to arrive with the minimum gap of five days. It was also contended that the shutdowns in the Thermal Power Units were also unexpected and therefore, the appellant cannot be made liable for the delay caused.

7. It was also pointed out that the Thermal Power Generation Plants of the appellant used indigenous coal and imported coal at a proportion and preference is always given to ships carrying indigenous coal into the Ports in India. Therefore, the fact that the Vessels carrying imported coal were made to wait in the outer anchorage which led to demurrages being levied is inevitable. On the above rival contentions, the learned Arbitrator framed the following issues:



WEB COPY



Original Side Appeal (CAD) No.124 of 2021

1. Whether there was any delay in arrival of the claimant's vessel against the schedule;

2. Is there any delay in berthing and discharge of the vessels of the claimant by the respondent and if so, whether the claimants is entitled to payment of any demurrage as claimed?;

3. Whether the claimant is entitled to the refund of liquidated damages (LD) deducted by the respondent;

4. Whether the claimant is entitled to the refund of the amount deducted by the respondent on account of clean energy cess for the cargo discharges after 01.03.2016 though the Vessels arrived earlier;

5. Whether the Claimants are entitled for payment of any interest for the alleged delayed payments;



Original Side Appeal (CAD) No.124 of 2021

6. To what relief the parties are entitled to?

WEB COPY

8. Before the Arbitrator, the parties let in documentary evidence and both sides produced voluminous documents. We find from the perusal of the award, the learned Arbitrator had made a microscopic examination of all the documents that were placed before him and had concluded that in the initial stages both the parties were responsible for the delay. However, in the latest stage of supply, the delay occasioned mainly due to the rescheduling made by the appellant. Since the rescheduling was made due to very short notice, the respondent was unable to reschedule the Ships which resulted the Ships waiting in the outer anchorage for a longer time.

9. The learned Arbitrator also found that the management of the facilities at the Port by the appellant was not proper and it was due to mismanagement of the berthing of the vessels in the Port that the Vessels had to wait in the outer anchorage resulting in payment of heavy demurrage charges. The learned Arbitrator also concluded that the deduction of the



Original Side Appeal (CAD) No.124 of 2021

liquidated damages is also unacceptable, in view of the fact that the delay was on the part of the appellant. On the claim for Clean Energy Cess, the Arbitrator found that the liability to pay Clean Energy Cess arose because of the delay occasioned in supply of the coal and if the entire coal had been supplied by September 2015, the levy of the Clean Energy Cess would not arise at all. Therefore, the learned Arbitrator had held that the respondent is entitled to refund of the Clean Energy Cess that were levied.

10. On issue No.5 relating to the interest, the learned Arbitrator after referring to the judgment of the Hon'ble Supreme Court in ***Assam State Electricity Board & Others vs. Build Worth Pvt Ltd***, reported in ***(2017) 8 SCC 146***, concluded that the appellant would be entitled to *pendente lite* interest on the belated payment of interest. In fine the learned Arbitrator passed an award granting the following:

An Award is passed:

i) Directing the Respondent to pay to the claimant USD 2,768,103 on account of demurrage;



WEB COPY



Original Side Appeal (CAD) No.124 of 2021

ii) Directing the respondent to refund USD 1,737,484 deducted towards the Liquidated Damages to the Claimant;

iii) Directing the respondent to refund USD 873,606 deducted towards Clean Energy Cess to the claimant;

(iv) Directing the respondent to pay to the claimant USD 448,133.80 towards interest on the belated payment of their invoices;

v) The interest claimed on 5% of the retention amount is rejected;

vi) The parties are to bear their own costs;

vii) Time for payment three months from the date of Award, failing which the above amounts shall be paid with interest @ 18% from the date of award till the date of payment.

11. While the respondent accepted the award, the appellant filed an Application under Section 34 of the Arbitration and Conciliation Act in OP No.55 of 2020. The learned Single Judge, who heard the application under Section 34 of the Arbitration and Conciliation Act, concluded that the



Original Side Appeal (CAD) No.124 of 2021

appellant has not made out any ground for interference within the four corners of Section 34 of the Arbitration and Conciliation Court. The only ground of perversity that was raised and argued before the learned Single Judge was rejected on the conclusion that the award is a well reasoned one and the Arbitrator has considered the entire evidence on record and come to a plausible conclusion which cannot be said to be perverse.

12. The learned Single Judge also relied upon the judgments of the Hon'ble Supreme Court in *Associate Builders vs. Delhi Development Authority*, reported in *2015 (3) SCC 49* and *SSangyong Engineering and Construction Company Ltd Vs. National Highways Authority of India*, reported in *2019 (15) SCC 131*. On the question of grant of interest, the learned Single Judge referred to the judgment of the Hon'ble Supreme Court in *Assam State Electricity Board & Others vs. Build Worth Pvt Ltd*, reported in *(2017) 8 SCC 146*. After a thorough reexamination of the facts, the learned Single Judge found that the conclusions of the Arbitrator cannot be said to be perverse.



Original Side Appeal (CAD) No.124 of 2021

13. The learned Single Judge also concluded that the majority of the delay was caused due to poor Port management by the appellant and due to the rescheduling of the supplies by the appellant. It was also found that these two factors which caused the majority of the delay were attributable to the appellant and therefore, the appellant was liable to make the good the loss. On the above conclusion, the learned Single Judge dismissed the Application under Section 37 of the Arbitration and Conciliation Act, hence this Appeal.

14. We have heard Mr.J.Ravindran, learned Additional Advocate General instructed by Ms.M.Sneha, for the appellant and Mr.SatishParasaran, learned Senior Counsel instructed by Mr.AbishekJenasenan, for the respondent.

15. Mr.J.Ravindran, learned Additional Advocate General, would vehemently contend that the Arbitrator having concluded that both the parties were responsible for the delay ought not to have made the appellant



Original Side Appeal (CAD) No.124 of 2021

liable for demurrages, liquidated damages and the delay. Once it is found that the delay is caused by both the parties, the liability should also have been apportioned between the parties. He would term the conclusions of the Arbitrator as perverse since they are against the own findings on the question of delay. The learned Senior Counsel would also attempt to make us re-appreciate the entire evidence and come to a different conclusion. We are afraid such an exercise cannot be carried on by us particularly in an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

16. The Hon'ble Supreme Court has time and again pointed out that the very exercise under Section 34 of the Arbitration and Conciliation Act, is of very very limited scope and award can be interfered with only if it is brought within the eight pigeon holes available under Section 34 of the Arbitration and Conciliation, even an error of fact or even a minor error of law cannot be corrected by a Court sitting in Section 34. The legal drill that is done under Section 34 itself is of a very limited scope and therefore, our jurisdiction in an Appeal under Section 37 is further limited to examining, as to whether, the 34 Court had acted within the four corners of Section 34.



Original Side Appeal (CAD) No.124 of 2021

We are of the firm view that we cannot embark upon a complete review or re-appreciation of the evidence on record in a Section 37 Appeal.

17. The Arbitrator and the learned Single Judge have given plausible reasons for their conclusions. The Arbitrator has after going into the evidence rendered a clear finding that the demurrages were incurred only because of the awful mismanagement of the Port facilities by the appellant which led to the delay and that delay had contributed to the other liabilities also arising as a chain reaction. Once it is found that the main cause for the delay was on the part of the appellant and the other awards are only a follow up or consequential. We are therefore, unable to fault either the learned Arbitrator or the learned Single Judge for having concluded that the appellant was responsible for the major portion of the delay and it was that delay which contributed to the monetary loss that was suffered by the respondent which the appellant is liable to make cost.



Original Side Appeal (CAD) No.124 of 2021

18. We therefore, do not see any reason to interfere with the order of the learned Single Judge, the Appeal fails and it is accordingly **dismissed**.

In the circumstances, we direct the parties to bear their own costs.

Consequently, the connected miscellaneous petitions are closed.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

jv

16.02.2024

Index : No
Internet : Yes
Neutral Citation : No
Speaking Order

To
The Section Officer,
Original Side,
High Court of Madras



WEB COPY



Original Side Appeal (CAD) No.124 of 2021

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

jv

Original Side Appeal (CAD) No.124 of 2021
and CMP Nos.20089 of 2021 and 16169 of 2022

16.02.2024