

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **12.08.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.1 of 2009

The Board of Trustee of
Chennai Port Trust,
Rep. by its Chairman,
Rajaji Salai,
Chennai - 600 001.

.. Appellant

Vs.

1. M/s. Chennai Container Terminal
Private Limited,
Chennai - 600 013.

2. Mr.Justice S.Padmanabhan
Presiding Arbitrator,
No.4, II Street,
Wallace Garden,
Chennai - 600 006.

3. Mr.Justice K.Sampath
Arbitrator,
12, Jagadambal Colony I Street,
Royapettah,
Chennai - 600 014.

4. Mr.Justice T.N.C.Rangarajan
Arbitrator,
No.502, Capri Towers,
Sai Nagar Colony,
Hyderabad - 500 073.

..Respondents

Original Side Appeal under Order XXXVI Rule 9 of Original
Side Rules read with Clause 15 of the Letters Patent, against the
order, dated 09.06.2008 made in O.P.No.535 of 2006.

For appellant : Mr.T.R.Rajagopalan, Senior counsel
for Mr.R.Karthikeyan

For respondents : Mr.Navroz Seervai, Senior counsel
for Mr.S.Raghunathan for R1

R2 to R4 - Arbitrators

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the order of the learned single Judge, dated 09.06.2008 made in O.P.No.535 of 2006, dismissing the Original Petition against the Arbitral Award.

2. The brief facts as to the dispute between the parties are as follows :

(i) The Government of India took a policy decision to privatise some of the operations of the port. Tenders were invited in November 1997 to take over, maintain, manage and operate the existing Chennai Container Terminal for 30 years under revenue sharing basis. The Ministry issued non-negotiable conditions for the tenders on 20.04.2000. P&O Ports Australia made a successful bid. It formed a special purpose vehicle called Chennai Container Terminal Private Ltd., (CCTPL). The Chennai Port Trust (ChPT) and

CCTPL entered into an agreement on 09.08.2001. Possession of the terminal berths with the back area was handed over on 30.11.2001 and additional area was handed over on 18.08.2002. The agreement provided for land lease charges in accordance with the Scale of Rates (SOR) as notified by the Tariff Authority for Major Ports (TAMP). The Ministry issued certain policy guidelines, which were incorporated in an order of the TAMP, dated 28.11.2001. A sum of Rs.22,84,14,770/- was payable by CCTPL towards annual escalation at 5% of the lease rent. Subsequently, the demand was raised to Rs.39,38,10,972/- including one year's rent as premium and one year's rent as security deposit. CCTPL raised a dispute and the matter was referred to Arbitration.

(ii) The Arbitral Tribunal rejected the claim of the Chennai Port Trust and allowed the counter claim of the CCTPL to the extent that the Chennai Port Trust shall adjust the sum of Rs.33,77,09,219/- along with simple interest at 9% p.a from 28.02.2005 till the date of adjustment against the dues payable by CCTPL and Chennai Port Trust shall not make any further demand until the adjustment is made.

(iii) The Chennai Port Trust filed O.P.No.535 of 2006 before this Court, under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside the Award passed by the Arbitral Tribunal and praying to direct the CCTPL to pay the arrears of license fee at Rs.3800/- per sq.mts with annual escalation at 5% for the entire land and security deposit and premium equivalent to one year's license fee with interest till the date of payment and also to direct to pay the arrears of annual land license fee, annual escalation and land license fee at 5%, security deposit and premium equivalent to land license fee.

3. The learned single Judge, after analysing the divergent contentions of either side, dismissed the Original Petition. Against the said order, Chennai Port Trust has come forward with this appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

4. The learned Senior counsel appearing for the appellant contends that the Tribunal ought not to have made Chennai Port Trust as claimant, when CCTPL was actually making the claim; that the finding of the Tribunal is contrary to the terms of the agreement; that the letter dated 15.02.2000 of the Government of India cannot be called as guidelines and does not form the

agreement between the parties. But the Tribunal held that the said guidelines is also applicable to pending agreements, which is not correct. It is also further contended that the terms and premium upfront which has been used for the first time by the Government of India in the order, dated 15.02.2000 meant only the premium for the land and the land value if so calculated for the lands handed over to the respondent, such land premium would be an astronomical figure. But in this case, an initial upfront had been collected and no land premium had been collected, in which event alone, the rate of Rs.1 per sq.mt as stated in the 2000's Government Order will apply. Thus, the Award has been passed out of the purview of the agreement and therefore, it is to be set aside.

5. The learned Senior counsel appearing for the first respondent per contra contends that the learned Arbitrators, after careful analysis of the relevant clauses of the agreement, the notified Scale of Rates, the TAMP order, dated 28.11.2001, the Government guidelines and the order of the Ministry and also relevant provisions of the Major Port Trusts Act, 1963, rightly passed the Award. The Award can be challenged only on the grounds specified under Section 34 of the Arbitration and Conciliation Act, 1996 and the Court cannot sit in appeal and

reappraise the evidence on record. The interpretation of a contract is a matter for the Arbitrator to determine and the Court can interfere when the Tribunal ignores the terms of the contract or if the Award is patently illegal. The learned Senior counsel appearing for the first respondent further contends that the real issue in this case was to determine the liability of the first respondent to pay the lease charges, as per Article 5.04 (A) of the Agreement and the Tribunal answered the real issue by true and correct interpretation of the said clause of the agreement read with relevant Scale of Rates and the Award is a well reasoned one and it does not require any interference.

6. The learned Senior counsel for the first respondent cited the Supreme Court Ruling, for his contention that the interpretation of the Award is to be left to the Tribunal and the Court can interfere only when the terms of the contract is ignored or when the Award is patently illegal.

7. In **Rashtriya Ispat Nigam Ltd., v. Dewan Chand Ram Saran**, reported in **(2012) 5 SCC 306**, the Hon'ble Supreme Court has held as follows :

22. Mr. Ganesh referred to the following observations of this Court in *H.P.SEB v. R.J.Shah and Co.*, [(1999) 4 SCC 214], at the end of paragraph 27, which are to the following effect: (SCC p.226)

"27.The dispute before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators."

23. It was also submitted by the learned counsel that the court is not expected to substitute its evaluation of the conclusion of law or fact arrived at by the arbitrator and referred to the following observation in paragraph 31 in *Sudarsan Trading Co., v. Govt. of Kerala* [(1989) 2 SCC 38] : (SCC p.56)

"31.....in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out

whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties.”

...

29. It was submitted by the respondent that this Hon'ble Court very succinctly summarised the legal principles for setting aside an award in *SAIL Gupta Brother Steel Tubes Ltd.*, [(2009) 10 SCC 63] (by one of us – Lodha J.) in para 18 wherefrom principles (i) and (iv) would be attracted. As against that, the appellant stressed sub-paras (ii) & (vi) of the same paragraph 18. We may therefore quote the entire paragraph which reads as follows (Scc p.79):

“18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal

misconduct and because of which the award would become amenable for being set aside by a court.

ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal."

v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award."

8. Bearing the above settled proposition of law in mind, let us analyse the Award passed by the Arbitral Tribunal.

9. The following Clauses in the contract between the parties are relevant to resolve the dispute between them :

1.01 Definitions :

"Guidelines" means the Guidelines : Private Sector Participation in Major Ports, dated 26th October, 1996 as modified and supplemented by "Guidelines : Private Sector Participation in Major Ports through joint ventures and Foreign Collaboration, dated 1st June 1998" issued by GOI (Ministry of Surface Transport) as amended, supplemented or otherwise modified hereafter from time to time.

"Scale of Rates" means the existing scale of rates as prevalent on the Date of Award of License or as approved and notified by TAMP or any other authority under the provisions of MPT Act from time to time, as may be applicable.

5.02 Royalty Payment

a. The percentage of gross revenue earned from operations of the container terminal by levy of tariff that shall be shared with the Licensor by the Licensee shall be 37.128%. The Licensee shall pay the Licensor 37.128% of all revenue earned from operation, storage or in any other form recovered / charged from users.

5.04 Lease Charges

a. Lease charges payable by the Licensee to the Licensor for the lands handed over as per Appendix 4 and 5 shall be as per the applicable licence fee contained in the Scale of Rates, as amended from time to time and such charges are payable in advance every year. "

10. The other guidelines and orders issued by the Tariff Authority for Major Ports, which are relevant for the dispute are given below :

"(i) Conditions for Long-Term lease allotted on premium upfront

(a)...

(b) The lease rental will be nominal value of Re.1 per square metre / year, with 30% escalation in the licence fee after every 5 years.

(ii) The order issued by the Tariff Authority for Major Ports, dated 05.11.2001.

(iii) The Notification of the Tariff Authority for Major Ports, dated 15.03.2012 in Clause 8.2 (vii) - A detailed working of annual lease charges receivable from the CCTL was given vide its letter, dated 8 January 2002. Subsequently, it has clarified that the CCTL paid the annual lease charge of Rs.9.62 crores for the back up area leased out to them as per the Port Scale of Rates. No premium or security Deposit is payable by the CCTL for the area leased.

(iv) The Government order, dated 15.02.2000

provides thus :

4. The above delegation is subject to Board of Trustees of the respective Major Port observing the guidelines on land and waterfront management of the Major Ports issued by this Ministry from time to time. The guidelines are hereby amended to the extent indicated below :

(i) ...

(ii) For future cases where tenders are yet to be invited, the Port Trusts will charge land premium up-front based on tender. In the case of captive facilities, the premium shall not be below the commercial value of the land either obtained through tender in the vicinity or notified by the Port.

(iii) The lease rental will be nominal value of Re.1 per square metre / year, with 30% escalation in the rent after every 5 years."

11. The real dispute between the Chennai Port Trust and CCTPL is as to the payment of lease charges. The Chennai Port Trust contends that the CCTPL is to pay the lease charges, as per the Scale of Rates and conditions including Non Negotiable Conditions. Whereas, the CCTPL contends that lease charges is payable as per the terms of contract as stipulated in SOR read with guidelines and the Government Order. As per Clause 5.04 of the agreement, lease charges shall be payable as per the applicable license fee contained

in the Scale of Rates as amended from time to time. According to the definition clause in the Contract, Scale of Rates means the existing scale of rates prevalent on the date of the Award of license or as approved and notified by TAMP from time to time. The Government of India, in its order, dated 15.02.2000, amended the guidelines and communicated to the Chairmen of all Major Port Trusts, stipulating that for future cases where tenders are yet to be invited the Port Trust shall charge land premium upfront based on tender. Further, as per paragraph 4 (iii), lease rental will be nominal value of Re.1 per sq.mt / year, with 30% escalation in the rent after every 5 years.

12. The Tariff Authority for Major Ports [TAMP] in its order, dated 05.11.2001 and notified on 30.11.2001, considered the guidelines issued on 01.04.1995 and subsequent amendments made in 1996, 1998 by Ministry, including the above mentioned guidelines of the Government, dated 15.02.2000 issued further amendments/modifications. In this, the following conditions have been included :

- "II. Conditions to be included for Long Term Lease allotted on premium up-front :
- (a) The Port Trust will charge land premium up-

front based on tender. In the case of captive facilities, the premium shall not be below the commercial value of the land either obtained through tender in the vicinity or notified by the Port.

(b) The lease rental will be nominal value of Re.1 per square metre/ year, with 30% escalation in the licence fee after every 5 years."

13. At this juncture, it is to be noted that in the Contract the meaning of Guideline is given as Guidelines-Private Sector Participation in Major Ports, dated 26th October, 1996 as modified and supplemented by "Guidelines : Private Sector Participation in Major Ports through joint ventures and Foreign Collaboration, dated 1st June 1998" issued by GOI (Ministry of Surface Transport) as amended, supplemented or otherwise modified hereafter from time to time. Therefore, guidelines modified from time to time even after the contract to be taken into account.

14. There is also Clause in the contract under Clause 5.02

providing that the Licensee shall pay the Licensor 37.128% of all revenue earned from operation, storage or in any other form recovered / charged from users. It is also to be noted that when CCTPL applied for tariff revision for other services, Chennai Port Trust responded to state that no premium or security deposit is payable by CCTPL.

15. The Government took policy decision to privatise some of the operations of the Ports and brought in revenue sharing model. Therefore, Royalty has been fixed by way of bidding from the total earnings and therefore, lease charges has been fixed at Re.1/- per sq.mt / year, as per the Scale of Rates in consonance with the amended guidelines as approved by TAMP.

16. The CCTPL also paid 100 million towards upfront payment. Thus, as per the terms of the contract, the Chennai Port Trust is bound to follow the Scale of Rates fixed by Tariff Authority for All Major Ports (TAMP) from time to time and therefore, the lease charges claimed by the Chennai Port Authority contrary to the terms of the agreement is not sustainable.

17. Section 49[2] recognises that different scale and

different conditions may be notified. It varies from case to case depending upon the purpose of usage and sub letting etc. Clause 5.04 does not refer to conditions but only to scale of rates. The claim of Chennai Port Trust at the rate of Rs.2000/- and Rs.3000/- per 100 square metre per month provided as license fee for open space in general in "Non Negotiable Conditions" is not sustainable and it does not come within scale of rates as per Clause 5.04. Thus, the Arbitral Tribunal has rightly interpreted the terms of the contract and directed the Chennai Port Trust to repay or adjust the excess payment made by CCTPL.

18. One another contention of the appellant is that the appellant was treated as claimant by the Tribunal, though the Arbitration emanated from the first respondent CCTPL. As per Section 21, the party who received the request for referring the dispute is respondent. Section 23(1) says that the claimant shall state the fact supporting his claim and the respondent shall state the defence.

19. In this case, the Chennai Port Trust should have been made as a claimant. No prejudice has been caused because of treating the Chennai Port Trust as claimant. This Court is of the

considered view that it does not require any interference as it does not go to the root of the matter affecting the rights of the parties.

20. For the aforesaid reasons, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed, confirming the Order of the learned single Judge, dated 09.06.2008 made in O.P.No.535 of 2006. No cost.

(A.S.,J.) (P.K.,J)
12-08-2016

Index:Yes / No

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**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Pre-Delivery Judgment
in O.S.A.No.1 of 2009**

12-08-2016