

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

**Original Petition No.168 of 2010**

M/s.Ezhil Roadways rep. by its  
Managing Partner

.. Petitioners

Vs.

1.M/s.Indian Oil Corporation Ltd.,  
rep. by its Chief Plant Manager (LBP),  
Tondiarpet, Chennai.

2.K.Ramalingam,  
Sole Arbitrator,  
Chief Manager (HR),  
Indian Oil Corporation Ltd.,  
Indian Oil Bhavan,  
139, Nungambakkam High Road,  
Chennai - 34.

.. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation  
Act, 1996 to set aside the Award dated 24.10.2005.

For Petitioner : Mr.T.A.Srinivasan

For Respondents : Mr.P.A.Sivasubramanian for R1

**ORDER**

Seeking to set aside the award dated 24.10.2005, the present Original Petition has been filed.

2.The petitioner became the successful tenderer pursuant to the public Tender No.LBP/S&D/PT-15/96/CT. The tender was for transport of packed petroleum lubricants from Lube Plant at Tondiarpet to various places in South India. The period fixed for one year to be extended for a further period by the first respondent.

3.Clause 23 of the work order dated 01.11.1996 speaks about performance incentive. It is apposite to reproduce the aforesaid clause:

*Performance Incentive: It has been agreed by the contractor of the respective State to perform 77 trips per truck per year for Tamil Nadu and Pondicherry and 55 trips per truck per year for Andhra Pradesh/Karnataka/Kerala.*

*In case of extension of Contract (at Corporation's option) after the initial period of award of one year:*

(a) for second and third year of operation, a PERFORMANCE INCENTIVE shall be granted to the contractors fulfilling the laid down performance levels and conditions thereof, details of which would be communicated shortly for specific acceptance by the contractor.

4.The petitioner was given extension for a period of two years. For the incentive period between 16.10.1997 and 15.04.1998, the bills were submitted on 15.05.1998. The guidelines issued by the first respondent speak about the period within which the separate bills for performance incentive were to be submitted. The following is the relevant guideline:

12.The transporters should submit separate bills for performance incentive as under:

| For the period     | Bill to be submitted | Payment to be made in |
|--------------------|----------------------|-----------------------|
| 13th to 18th month | 19th month           | 20th month            |
| 19th to 24th month | 25th month           | 26th month            |
| 25th to 30th month | 31st month           | 32nd month            |
| 31st to 36th month | 37th month           | 38th month            |

*You are advised to go through the above guidelines carefully and confirm your specific acceptance by acknowledging & returning the duplicate copy of this letter with your signature & seal within 15 days time.*

5.As the first respondent did not accede to the request of the petitioner for performance incentive, the arbitration clause was invoked.

6.The Tribunal was pleased to grant the relief only insofar as two trucks alone. The claims made otherwise were rejected on the ground of limitation having raised the issue after the period of three years from the date of submission of the bills and non-compliance of Clause 23 with reference to the required number of trips.

7.Learned counsel appearing for the petitioner would submit that the technical approach is not necessary. The object of the performance incentive is to make a payment keeping in view the escalation of the price. There is no limitation involved as it has to be seen from the date of denial of payment.

8.Learned counsel appearing for the first respondent would submit that as facts are not in dispute, no interference is required. It is a clear case of non-compliance of Clause 23 coupled with the guidelines. Therefore, the original petition will have to be dismissed.

9.By way of reply, learned counsel appearing for the petitioner would submit that the clauses governing are onerous and impossible of being performed. An agreement was entered into by using the bargaining power of the first respondent. There is a difference between the travel to a place situated on the border of a State and an interior one.

10.As rightly submitted by the learned counsel appearing for the first respondent, this Court cannot rewrite the terms of the agreement nor declare it as against the public policy. The issuance of the agreement is not in dispute. Even otherwise, this Court does not find anything wrong in the clauses introduced. Admittedly, the petitioners have raised the issue seeking performance incentive after a period of three years from the date of submission of the bill. The guidelines mandate the submission of the bill within the prescribed time. Even if

the period of three years is reckoned from the date of submission of the bill, the claim is barred by limitation and a factual finding has been given by the Tribunal that the petitioner has not complied with clause 23. While construing the agreement, literal interpretation is to be given. There is no ambiguity in Clause 23. Therefore, the petitioner has not complied with the mandate of required number of trips. The incentive cannot be granted as a matter of course. It is subject to the compliance by the petitioner. Merely because the contract was extended for a period of two years, it cannot be stated that Clause 23 and the guidelines need not be given effect to.

11. Thus, this Court does not find any merit in the Original Petition. Accordingly, the Original Petition stands dismissed. No costs.

08.12.2017

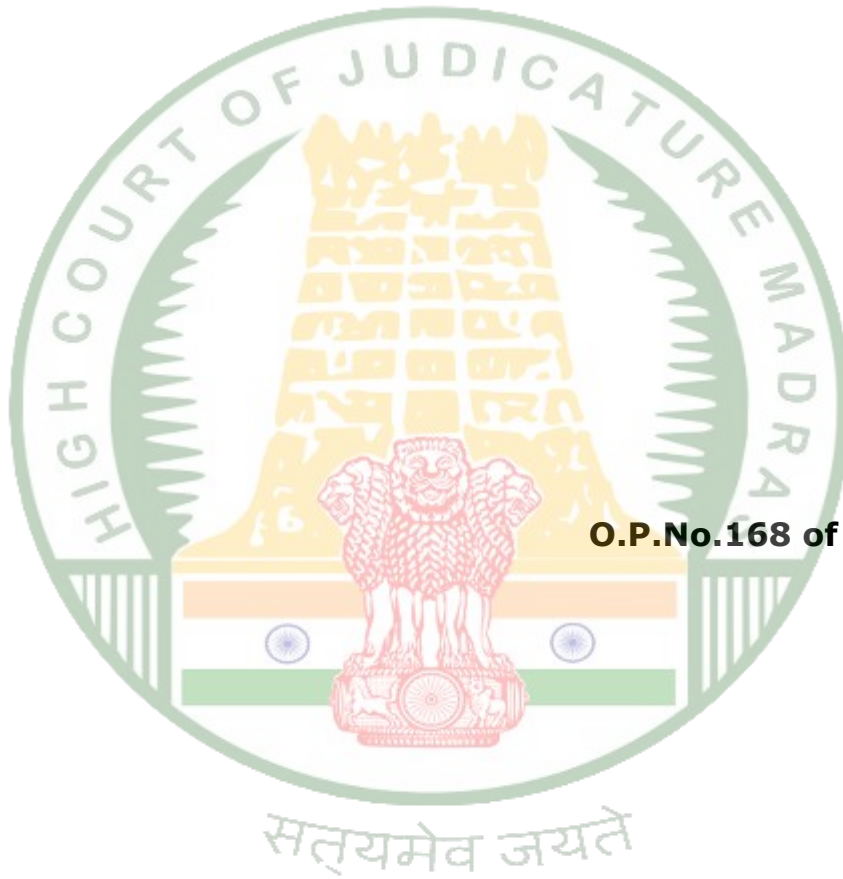
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**M.M.SUNDRESH,J.**

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