

**Reserved on :28.06.2019**

**Pronounced on :05.07.2019**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

**THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

**Original Petition No.43 of 2009**

The Chennai Petroleum Corporation Ltd.,  
536, Anna Salai, Teynampet,  
Chennai – 600 018  
represented by its Company Secretary,  
Mr.M.Sankaranarayanan

... Petitioner

Vs

1. M/s.Tinna Overseas Ltd.,  
A-151, Mayapuri Phase II,  
New Delhi 110 064.
2. Mr.P.Sridharan,  
Sole Arbitrator,  
Plot No.50, U.R.Nagar Extension,  
Anna Nagar, Chennai – 600 101.

... Respondents

**Prayer :-** This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Award dated 26.09.2008 passed by the Arbitrator in relation to the dispute between the petitioner and the first respondent by allowing the claim of the petitioner along with interest thereon with costs throughout.

For Petitioner : Mr.M.S.Krishnan (Sr. Counsel)  
for Mr.B.Kishore

For Respondent : Mr.D.Balaraman – R1

### **ORDER**

This petition has been filed challenging the Award passed by the sole Arbitrator dated in dismissing the claim of the petitioner.

2. The matter has been referred to the Arbitrator in pursuant to the Memorandum of Understanding entered between the parties dated 16.08.2000. The case of the Claimant is that the respondent had agreed to supply Bitumen with crumb rubber modified bitumen with American Gilsonite. However, after two years of the contract, the respondent breached the contract and instead of supplying Bitumen with American Gilsonite, supplied Bitumen with Asphalt from Iran and this Asphalt was used to manufacture TBM Super Modifier. Therefore, it is the case of the Claimant that but for the representation of the respondent to supply Bitumen with American Gilsonite, they would not have entered into the contract and agreed and continued the agreement with the respondent. Excess amounts have been paid to the respondent for using American Gilsonite which cost more than using Asphalt as availed from Iran. Therefore, the Claimant preferred the claim for the refund of the excess mount of Rs.5.09 crores paid to the respondent with interest at the rate of 12% per annum.

3. It is the contention of the respondent that they had never agreed to use Gilsonite from America for production of the modifier and stated that the price was based on the American Gilsonite and never admitted to use American Gilsonite as ingredient for its product. There was no difference in production of the modifier, the claimant has wrongly believed that TBM Super is manufactured with crumb rubber modifier by adding American Gilsonite. The claimant assumed that TBM Super was manufactured using Gilsonite. The respondent never informed the Claimant that they will be using only the American Gilsonite as ingredient for TBM Super Modifier. Hence resisted the claim.

4. The learned Arbitrator considered the several communications and the Memorandum of Understanding entered between the parties, dismissed the claim as against which the present petition has been filed.

5. The learned counsel appearing for the petitioner would contend that the Memorandum of Understanding was entered into between the parties based on the pre-contract correspondences. In the pre-contract correspondences, the respondent has specifically agreed to supply bitumen modifier with American Gilsonite. In all the pre-contract correspondences, it is agreed by the respondent that they had agreed to supply TBM Super modifier known as Technical Know-how of American Gilsonite. All the pre contract correspondences also make it clear that the respondent agreed to supply TBM Super Modifier with Technical

Know-how of American Gilsonite. It is also made clear that they will use additive chemical used by the American Gilsonite Company, for which they also specifically quoted rates for TBM Super N i.e., 25% per kg. plus taxes applicable. Based on the correspondences, the Memorandum of Understanding came to be executed. The respondent for the first two years supplied the modifiers with American Gilsonite and after two years of Memorandum of Understanding, the respondent has infact supplied the modifier using Asphalt. Thereby using cheaper modifier without informing the claimant. Thereby, the claimant has paid excess amount of Rs.5,09,00,000/-.

6. The learned Senior Counsel for the petitioner also brought to the notice of this Court various correspondences starting from 20.10.1998 till 21.02.2000 to show that the correspondences indicate that it is agreed to supply TBM Super modifier with American Gilsonite. The learned Arbitrator has failed to consider the pre-contract correspondences and simply rejected the claim based on the Memorandum of Understanding. Hence, it is the contention of the learned Senior Counsel that if the pre-contract correspondences are carefully analysed, the same clearly indicate the intention of the parties can be seen in the matter of consideration of the contract, particularly for the construction of the contract. When the learned Arbitrator has failed to consider the entire documents, the finding of the Arbitrator is based on no evidence at all or an Award which ignores vital evidence in arriving at its decision would be perverse and liable to be set

aside on the ground of patent illegality. Hence, it is his contention that the entire Award has to be set aside. In support his submissions, he also relied on the judgment in **Ssangyong Engineering & Construction Company Limited Vs. National Highways Authority** unreported judgment in **Civil Appeal No.4779 of 2019**, **Associate Builders Vs. Delhi Development Authority** reported in **2015 (13) Supreme Court Cases 49** and **The Board of Trustees of Chennai Port Trust rep. by its Chairman Vs. Chennai Container Terminal Private Ltd.** reported in **2014 (1) CTC 573** and **M/s.Navdhaan Enterprises rep. by its Partner Mr.T.V.Mani Vs. Union of India Rep. by the Deputy Salt Commissioner and another** reported in **2019 (3) Law Weekly 258**.

7. The learned counsel for the respondent submitted that the respondent at no point of time agreed to supply modifier with American Gilsonite. The correspondences between the parties also makes it clear that the respondent never admitted to supply the modifier with American Gilsonite. What was stated in the contract is that the respondent shall supply Modifier with technical know-how of American Gilsonite. The Memorandum of Understanding entered between the parties makes it very clear that the parties have infact understood the contract and the respondent has never intended to supply the modifiers with American Gilsonite. What was stated in the Memorandum of Understanding is that Modifier with technical know-how American Gilsonite would be supplied. What was agreed between the parties is to supply the bitumen which satisfy the

Indian Road Congress Regulations. Therefore, it is his contention that the claimant cannot claim the excess amount beyond the terms of the contract. The learned Arbitrator has considered the entire correspondences and factually found that the respondent never agreed to supply the modifier with additive of American Gilsonite. When the Arbitrator had considered the entire documents and passed a reasonable Award, this Court, cannot as an appellate Court re-appreciate the entire evidence. Hence, submitted that all the material documents have been threadbare analysed by the learned Arbitrator. There is no patent illegality in the Award passed by the Arbitrator. Hence, prays for dismissal of this petition.

8. It is now well settled that the award can be interfered only when the grounds set out under Section 34 of the Arbitration Act is made out. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

9. In the judgment in ***Associate Builders Vs. Delhi Development Authority*** reported in **2015 (3) Supreme Court Cases 49** the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter, Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

10. Further in a latest judgment in ***Ssangyong Engineering & Construction Company Limited Vs. National Highways Authority*** in **Civil Appeal No.4779 of 2019** the Honourable Apex Court has held that when the finding of the Arbitrator based on no evidence at all or an Award which ignores vital evidence in arriving at its decision would be perverse and such an award is liable to be set aside. Similarly, the Apex Court has also held that a finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence, in as much as such decision is

not based on evidence led by the parties and such an Award also have to be characterised as perverse. Similarly in the judgment in **Associate Builders Vs. Delhi Development Authority** reported in **2015 (13) Supreme Court Cases 49** the Honourable Apex Court has held that signing of the agreement, even the agreement is not signed, from the correspondences exchanged between the parties the same is binding between them. In 2014 (1) CTC 573, the learned Single Judge of this Court has held that there is no absolute embargo for looking into the pre-contract correspondences for finding out the matters on which the parties were *ad idem*. In Advanced Law Lexicon for 'Representation' it has been stated as follows :

“Representation .... may introduce terms into a contract and affect performance; or it may induce a contract and so affect the intention of one of the parties, and the formation of the contract . . . . At common law . . . . if a representation did not afterwards become a substantive part of the contract, its untruth (save in certain excepted cases and apart always from fraud) was immaterial. But if it did, it might be one of two things: (1) it might be regarded by the parties as a vital term going to the root of the contract (when it is usually called a 'condition'); and in this case its untruth entitles the injured party to repudiate the whole contract; or (2) it might be a

term in the nature only of an independent subsidiary promise (when it is usually called a 'warranty'), which is indeed a part of the contract, but does not go to the root of it; in this case its untruth only gives rise to an action ex contractu for damages, and does not entitle the injured party to repudiate the whole contract." William R. Anson, Principles of the Law of Contract 218, 22 (Arthur L. Corbin ed., 3d Am. ed. 1919).

11. From the above settled position, the law emerge is that when the Award is based on no evidence or there is patent illegality, the same can be interfered or when there is violation of public policy, the same can be interfered. Similarly, the pre contract correspondences also can be looked into in construction of the Contract.

12. In the light of the above submissions, when the matter in dispute is analysed, it is the contention of the petitioner that the petitioner entered into a contract only on the basis of the undertaking given by the respondent that they will supply TBM Super with the technical know-how of American Gelsonite and agreed to pay certain amount for that quality. It is his contention that all the correspondences prior to the Memorandum of Understanding entered into between the parties in this regard dated 16.08.2000 clearly indicate that the

respondent has made representation that they would supply TBM Super Modifier known as TBM Super with technical know-how of American Gilsonite and Addictive of American Gilsonite. The contention of the learned Senior Counsel is that the learned Arbitrator has not considered the entire pre-contract correspondences and when the same was analysed, this Court finds that such contention has no merits. Infact, the learned Arbitrator has considered the entire documents and found that the respondent did not agreed to supply modifier with American Gilsonite.

13. Be that as it may. The correspondences between the parties placed before this Court right from 20.10.1998 till the date of Memorandum of Understanding entered in the year 2000, when carefully perused, the first letter dated 20.10.1999, wherein it is stated that the laboratory investigation report on the product from Highways research Station, Chennai have informed that their product will improve the road surface by almost 2.5 times. In a letter in the year 1999, they introduced themselves as a manufacturer of Bitumen Modifier known as technical know-how of American Gilsonite Co. of United States of America. It is also indicated in the above letter that TBM Super has been tested and approved by different distinguished laboratories of India. In the above letter, it is indicated that the respondent is manufacturer of Bitumen Modifier known as TBM Technical know-how of American Gilsonite. This letter did not indicate that the modifier itself is to be produced with addictive of American Gilsonite. What has

referred in the above letter is that they are manufacturers of modifiers with technical know-how of American Gilsonite and they have quoted rates for several categories of the modifiers. They also indicated that their product will increase the life of the road. In the letter dated 11.10.1999, they indicated that their product has shown the improvement of 70% as compared to ordinary Bitumen and expressed their consent to the claimant that they can put up their unit near the refinery where Madras Refineries can supply the Bitumen to them and after modifying the same as per the Standards of IRC/MOST. Subsequently, in the minutes dated 02.07.1999, it is informed to the members in the meeting that the respondent is manufacturing Bitumen Modifier known as TBM-Super which consists of mainly chemically treated crumb rubber and hydrocarbon additive with technical know-how of American Gilsonite Co., USA. The above minutes also indicate that the Technical know-how of American Gilsonite and it is stated that they are using additive of American Gilsonite in their modifier. In the subsequent letter exchanged between the parties also, they did not indicate the above aspect. What has been stated is that they are manufacturing Modifiers known as TBM Super with Technical Know-how of American Gilsonite. In the subsequent letter dated 22.01.2000, addressed by the respondent it is stated as follows :

“You may kindly recall that Ministry of Surface Transport  
(Road Wing) had issued a Circular No.RW/NH-34041/36/9-S&R

(Vol.II) dated 21<sup>st</sup> April '99 directing all State and Central Government Organisations to use bitumen modifier to the extent of 10% in all the projects funded by the Central Government pending finalisation of the norms set by the Flexible Pavement Committee of the Indian Roads Congress.

Since the guidelines of Indian Roads Congress have been published vide their publication No.IRC-SP-53-1999, Ministry of Surface Transport, in supersession of their earlier circular dated 21.04.99 has now issued another circular of even number dated 17.01.2000 (copy enclosed) stating that the modified bitumen should be used in all the road work projects.

We can supply bitumen modifier and the technology of mixing with the bitumen immediately but at the same time we are going to start production of modified bitumen from Panipat, Madras and and Mumbai by March 2000.

You are, therefore, requested to kindly plan your estimates accordingly and we assure you to supply the bitumen modifier/modified bitumen regularly as per IRC Guidelines.”

14. Similarly, in the subsequent letter dated 28.01.2000 also, the same has been reiterated. On 03.02.2000, they have also reiterated that they are manufacturing Bitumen Modified with Technical Know-how of the American

Gilsonite and stated that their principal also even depute their technical people to assist the refineries in adopting this new technology. Thereafter, on 16.02.2000, for the first time it is stated by the respondent that they are using chemically treated Crumb rubber and by adding hydrocarbon additive in American Gilsonite. In the letter dated 16.02.2000, only for the first time it is stated that they are using chemically treated rubber adding Hydrocarbon Rubber in American Gilsonite. In subsequent letter dated 21.02.2000, it has been reiterated that they are using Hydrocarbon additive by adding American Gilsonite. Based on that they also quoted the rates. In continuation of the earlier letters referred above, they stated that the Bitumen Modifier is similar to American Gilsonite's product calling HMA. Based on the letter correspondences, the Claimant has sent a letter dated 05.05.2000 which is reduced as follows :

“We are glad to inform you that our Management has given in principle its approval to our proposal for manufacture of Polymer Modified Bitumen at out Manali Unit using your technical Know-how and your Modifier branded as TBM Super on experimental basis. In this regard, Memorandum of Understanding will be entered into between CPCL and TOL shortly. The draft MoU will be sent to you for your review, comments and approval.

Meanwhile, we plan to propose a meeting between CPCL and TOL on the action plan to implement the above proposal and request to indicate the convenient date and time next week.

Should you have any clarification, please get in touch with the undersigned or Shri R.Kumar, Manager (Marketing ) at Phone No.5944287.”

15. The above letter makes it clear that the draft Memorandum of Understanding has been sent by the Claimant to the respondent. In the above letter also, it is informed to the Claimant to the effect that, they are agreeable for the respondent's proposal for manufacturing of Bitumen Modifier at their Manali Unit using respondent's technical know-how and Modifier branded as TBM Super on experimental basis. In the above letter, also the claimant is not keen in American Gelsonite. In fact, the draft Memorandum of Understanding was prepared by the Claimant. The draft has also been subsequently exchanged between the parties. Thereafter, a meeting was held between the petitioner and the respondent and based on the meeting between the petitioner and the respondent, a communication has been sent by the petitioner. Wherein, the petitioner has given its consent for manufacture of Modifier using technical know-how in their land adjacent to Bitumen packing plant. In the above letter also the cost has been agreed between the parties. In the above letter, the Claimant has not insisted that the Modifier should be manufactured using American Addictive.

Similarly, in letter dated 02.06.2000, the rate is agreed by the Claimant. After exchange of various correspondences, finalising the rates, the Memorandum of Understanding dated 16.08.2000 has been entered between the parties. The relevant portion of the Memorandum of Understanding reads as follows :

“TOL owns technical know-how for the manufacture of Bitumen Modifier and manufactures such modifier using the said technology and assists other companies in the manufacture of Polymer Modified Bitumen (PMB)/Crumb Rubber Modified Bitumen (CRMP). TOL expressed its willingness to put up the required facilities at CPCL's Manali Refinery at the cost, supply the Modifier and also to assist the CPCL's Manali Refinery for the manufacture of Polymer Modified Bitumen/Crumb Rubber Modified Bitumen.”

16. In the above Memorandum of Understanding, the parties have agreed that there will not be any price revision in any other occasion except stated in the Clause 3(c). In the Memorandum of Understanding it has been not stated hat only the additive of American Gilsonite should be used in the Modifier and in clause 3(h), it is stated that the respondent shall even arrange for necessary support of its principal American Gilsonite Company for the successful operation of the plant, if such need arises. The Memorandum of Understanding is mainly

entered between the parties to supply Modifier of Technical Know-how of the respondent's company. That apart, in the initial stage of correspondences referred above the respondent has mentioned that the additive of Gilsonite would be used and their subsequent correspondences, the same has not been insisted by both sides, particularly, by the Claimant and based on which the Memorandum of Understanding has also been entered between the parties. On 03.11.2003 itself, the American Company has informed the respondent not to use their name in any manner since their relationship ended in the year 2002 itself. When the parties have understood the nature of modifier supplied to the parties and entered into a contract, consciously, it cannot be said that only on the basis of the representation made by the respondent, the Claimant has entered into the contract.

17. The Claimant is not an ordinary layman to contend that he was forced to enter into the contract on the basis of the false representations. In fact, the letters referred above clearly indicate that what was referred to supply was Modifier with Technical Know-how of the respondent company. Though it was represented that the respondent is having technical know-how of American company, subsequently, what was agreed between the parties is that the modifier with technical know-how of the respondent company. When the Claimant being a company and understood the nature of the contract and modifier to be supplied and consciously entered into a contract which culminated

into Memorandum of Understanding, now it cannot be said that they have been lured to enter the contract mainly on the basis of the representation of the respondent prior to entering into the contract.

18. In the judgment in **The Board of Trustee of Chennai Port Trust, rep. by its Chairman Vs. Chennai Container Terminal Private Limited** reported in **2014(1) CTC 573**, this Court has given reasons for looking into pre-contract correspondences and held as follows :

“This Court is of the view that the advantage that the English draftsman had was that both contracting parties in England could think in their mother tongue, communicate with each other in their own mother tongue and enter into a Contract in the same tongue in which they thought and spoke. But, in India situation is completely different. The contracting parties, if hailing from different regions even within the country, had to go through a thought process in their own mother tongue, translate them into commercial terms in a foreign tongue, namely English and then have their own communications reduced into writing in English, and that too through a third party. Therefore, I find that we cannot import the straight jacket formula adopted by the English Courts with regard to the admissibility of pre-contract correspondence.”

19. In the judgment in **Associate Builders Vs. Delhi Development Authority** reported in **2015 (13) Supreme Court Cases 477** and in the judgment in **M/s.Navdhaan Enterprises rep. by its Partner Mr.T.V.Mani Vs. Union of India Rep. by the Deputy Salt Commissioner and another** reported in **2019 (3) Law Weekly 258**, it has been held that the correspondences exchanged also required to be looked into by the parties of construction of the contract. Further the Apex Court in **Associate Builders** [supra] has held that interpretation of a contract is a matter for the Arbitrator to determine, even if it gives rise to determination of question of law.

20. The Arbitrator in his Award has reasonably taken note of the entire pleadings, submissions and relevant laws and finally concluded that pre-contract correspondences did not include supply of additive of American Gilsonite and finally held that Claimant has not proved his claim and finally dismissed the claim. When the Arbitrator has made threadbare analysis and reasonably interpreted the Contract and also considered the pre-contract correspondences, this Court cannot re-appreciate the same as an Appellate Court. Even the interpretation of the Arbitrator capable of two views and merely because the view taken by the Arbitrator is different and the other view may be possible and that itself is not a ground to interfere with the well reasoned Award of the Arbitrator as per the settled position of law. At any event, this Court also looked into the correspondences and found that the Claimant has consciously entered into an

agreement, wherein it has been specifically agreed that the modifier of the respondent's company with technical know-how shall be supplied to the claimant. That being the position, the well reasoned Award passed by the Arbitrator cannot be interfered.

15. Accordingly, this Original Petition is dismissed. No cost.

05.07.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

vrc

To

1. M/s.Tinna Overseas Ltd.,  
A-151, Mayapuri Phase II,  
New Delhi 110 064.

2. Mr.P.Sridharan,  
Sole Arbitrator,  
Plot No.50, U.R.Nagar Extension,  
Anna Nagar, Chennai – 600 101.

**N.SATHISH KUMAR, J.**

VRC



**Order in**  
**Original Petition No.43 of 2009**

**WEB COPY**

**05.07.2019**