

**Reserved on :19.06.2019**

**Pronounced on :21.06.2019**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

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

**Original Petition No.316 of 2014**

M/s.South Indian Shipping & Export Co.,  
Represented by its  
Managing Partner Mr.Saleem Basha,  
Taj Towers, No.22A, Second Line Beach,  
Chennai – 600 001.

... Petitioner

Vs

1. The Managing Director,  
Tamil Nadu Civil Supplies Corporation Ltd.,  
12, Thamusamy Salai, Kilpauk,  
Chennai – 600 010.

2. Mr.V.Boovalingam,  
Sole Arbitrator,  
Tamil Nadu Civil Supplies Corporation Ltd.,  
12, Thamusamy Salai, Kilpauk,  
Chennai – 600 010.

... Respondents

**Prayer :-** This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Award passed by the second respondent dated 19.07.2013 and consequently allow the claims of the petitioner as prayed for in the claim petition.

For Petitioner : Mr.A.Edwin Prabhakar

For Respondents : Mr.S.Sarvanan – R1

### **ORDER**

Challenge has been made against the impugned Award passed by the Sole Arbitrator dated 19.07.2013.

2. Brief facts leading to filing of this Original Petition is as follows :

The first respondent Corporation floated tender for clearing, stevedoring, and forwarding of imported pulses at Chennai and Tuticorin Port. The Claimant was appointed vide proceedings dated 14.09.2009 and the details of Orders are as follows :

For Chennai :

| <i><b>S.No.</b></i> | <i><b>Description</b></i>     | <i><b>Rate in Rs/MT</b></i> |
|---------------------|-------------------------------|-----------------------------|
| 1.                  | Clearing & Forwarding         | 145.00 per M.T.             |
| 2.                  | Transportation (Upto 30 Kms)  | 304.00 per M.T.             |
| 3.                  | Transportation (Above 30 Kms) | 3.10 per M.T./KM            |
| 4.                  | Plus taxes applicable         |                             |

For Tuticorin

| <i>S.No.</i> | <i>Description</i>                  | <i>Rate in Rs/MT</i>                               |
|--------------|-------------------------------------|----------------------------------------------------|
| 1.           | Clearing & Forwarding               | 103.00 per M.T.                                    |
| 2.           | Transportation (Upto 30 Kms)        | 122.00 per M.T.                                    |
| 3.           | Transportation (Above 31 to 90 Kms) | 3.10 per M.T./KM                                   |
| 4.           | Transportation (From 91 to 150 Kms) | 2.20 per MT/KM                                     |
| 5.           | Transportation (Above 150 Kms)      | 1.30 per MT/KM subject to minimum of Rs.400 per MT |
| 6.           | Plus taxes applicable               |                                                    |

At the time of scrutinizing the bills, the first respondent has withheld a sum of Rs.6,68,960 towards detention charges for delay in supply of pulses by the Claimant. Similarly, the respondent Corporation has withheld certain amount towards Service Tax in the bill totaling to about Rs.21,46,664/-. Similarly, a claim has also been preferred by the claimant for additional charge of 75/- per M.T. for clearing and claimed recovery of a sum of RS.73,197.25 towards cost of shortage of 35 bags noticed at the place of delivery. According to the claimant, the claim of Service Tax is tenable and sustainable. Once, Service Tax paid on behalf of the Civil Supplies Corporation, it is the duty of the Corporation to return the amount, since the Claimant is entitled to get back the refund as time has expired. The learned Arbitrator failed to consider the entire materials in proper perspective and dismissed the claim. As against which, the present petition has been filed.

3. The learned counsel appearing for the petitioner has submitted that the claimant has preferred four claims and he is not pressing the Claim Nos.3 and 4, claiming additional charges of Rs.75/- per M.T. and also he has given up the claim No.4 for recovery towards cost of shortage of 35 bags. The learned counsel has canvassed this petition only with regard to the two claims, namely, detention charges recovered from the claimant to the tune of Rs.6,68,960/- and for refund of Service Tax paid by the claimant to the tune of Rs.21,46,664.45. It is the main contention of the learned counsel that the learned Arbitrator has not looked into the documents with regard to the fact that the delay of 5 days in delivery of the pulses was mainly due to the Corporation has not allotted godown for effecting delivery. The documents have not been looked into by the learned Arbitrator. Therefore, the detention charges of a sum of Rs.6,68,960/- withheld by the Corporation is not correct. The learned Arbitrator ought to have allowed the above claim. It is his contention that the documents filed by the Claimant clearly indicate that the delay was attributable only to the Corporation and not to the Claimant. With regard to the Service Tax, it is the contention of the learned counsel that thumb rule is that recipient of service has to pay the Service Tax. The Claimant has paid the Service Tax on behalf of the Corporation. Therefore, the claimant is entitled to refund of Service Tax paid on behalf of the Corporation. It is his contention that the Service Tax has been withheld due to certain clarification. Subsequently, the Service Tax Department has clarified that the claim of Service Tax at the rate of 10.3% is reasonable and reimbursable.

The learned Arbitrator has ignored the above clarification issued by the Government and simply dismissed the claim. The learned Arbitrator has taken into irrelevant aspects and ignored relevant materials. Hence, the Award is liable to be interfered.

4. Whereas, it is the contention of the learned counsel for the respondent that the tender notification clause 7.4 makes it very clear that the rate quoted for customs clearing and stevedoring and transportation is inclusive of payment of Service Tax. When the Invitation of offer was accepted by the petitioner, he now cannot claim refund of Service Tax paid by him. Even in the agreement, it is agreed between the parties that works also include the payment of Service Tax as per the contract. The contract stipulate only the port dues paid by the C&F alone would be refundable. The contract does not speak about service Tax reimbursement. Further, the rate finalized shall be as per tonne basis which shall be all inclusive and the rate shall be deemed to cover all operations, works, mentioned in the resultant work Order and any other work incidental thereto and no claim for any incidental will be entertained. Hence, it is the contention of the learned counsel that the Arbitrator has rightly rejected the claim based on the terms of the contract and tender conditions. Even the Order placed for clearing and forwarding at the rate of Rs.103.00 per M.T., which is inclusive of payment of Service Tax. Therefore, when the parties agreed in the Contract and accepted the tender conditions, the petitioner now cannot claim a

reimbursement. It is the further contention of the learned counsel that the claimant has violated the terms of the contract in delivering the goods and it is also mandatory on the part of C&F to carry out loading, clearing, and reloading of pulses at storage point as well as stocking at the place of storing point. The learned Arbitrator has found that the delay of 5 days was attributable only to the claimant. Therefore, it is his contention that the learned Arbitrator has assessed the evidence and materials under section 34 of the Arbitration and Conciliation Act and such finding cannot be re-appreciated. Hence, submitted that the Award of Arbitrator has to be sustained and this petition is liable to be dismissed.

5. Heard the learned counsel for the petitioner and the learned counsel for the first respondent and perused the Award.

6. As far as the claim with regard to the detention charges is concerned, the learned Arbitrator has considered the entire evidence adduced on both sides and assessed the same and has found that the claimant has delivered the consignment with a delay of 28 to 51 days, which has not been denied by the claimant. As such though the Claimant's contention that the respondent has condoned the delay in one earlier occasion and held that the respondent has only restricted the recovery of only 5 days instead of 28 to 51 days, in view of the factual finding of the Arbitrator, this Court cannot re-appreciate the evidence.

7. Similarly, with regard to the Service Tax, though the learned counsel for the petitioner pointed out similar Order placed in some other agencies while granting an Order, Service Tax is also included as actual and applicable. It is to be noted that the tender condition 7.4 reads as follows :

“Price Terms :

The rate quoted for Customs Clearing and Stevedoring and Transportation should be firm during the contract period and inclusive of Clearing charges, Handling Charges, Transportation Charges, Unloading Charges, Service Tax, Statutory Levies and Other Incidental Charges as applicable. The Tenderer should clearly indicate all charges falling under the purview of Statutory Levies separately.”

The above condition rate includes Service Tax payable by the Contractor. The above offer was accepted by the petitioner herein which resulted in fructifying the agreement.

8. The agreement is with regard to the clearing, forwarding and transportation upto 91 to 150 kms and above 150 kms and the same never speak about the payment of Service Tax by the Corporation. Whereas, the tender condition makes it very clear that the rate quoted for customs clearing and stevedoring, transportation is inclusive of Service Tax. The Agreement in Clause

19 deals with reimbursement of port dues alone. When there is specific clause in the agreement confined only to the port dues, it can be reasonably held that the Service Tax should be paid only by the Contractor as per the tender conditions. In Clause 6 of the agreement, it is specifically stated that the rate mentioned in the agreement shall not be varied or increased on any ground whatsoever and no additional expenditure will be incurred by TNCSC Limited beyond what is agreed upon. Clause 10 deals with Bill of Entry and other documents with regard to the Customs and Service Tax. As indicated, Clause 19 deals with the reimbursement of the port charges. Therefore, when the petitioner is bound to pay Service Tax and agreed to pay the rate quoted for clearing Customs clearing, which is inclusive of Service Tax, now cannot contend that the Service Tax has to be refunded to him. Though the charges have been withheld on the ground that some clarification is required and subsequently a clarification also said to have been obtained from the Office of the Commissioner of Service Tax stating that claim to an extent of 10.3% on the value of the reimbursement charges appear to be correct. It is to be noted that when the parties are bound by the Contract, they cannot go beyond the terms of the Contract. When the tender conditions makes it clear that rate quoted for Customs clearing is inclusive of Service Tax, the Service tax has to be borne by the Claimant. Hence, no ground enumerated under section 34 of the Arbitration and Conciliation Act, to interfere the Award, is made out.

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

21.06.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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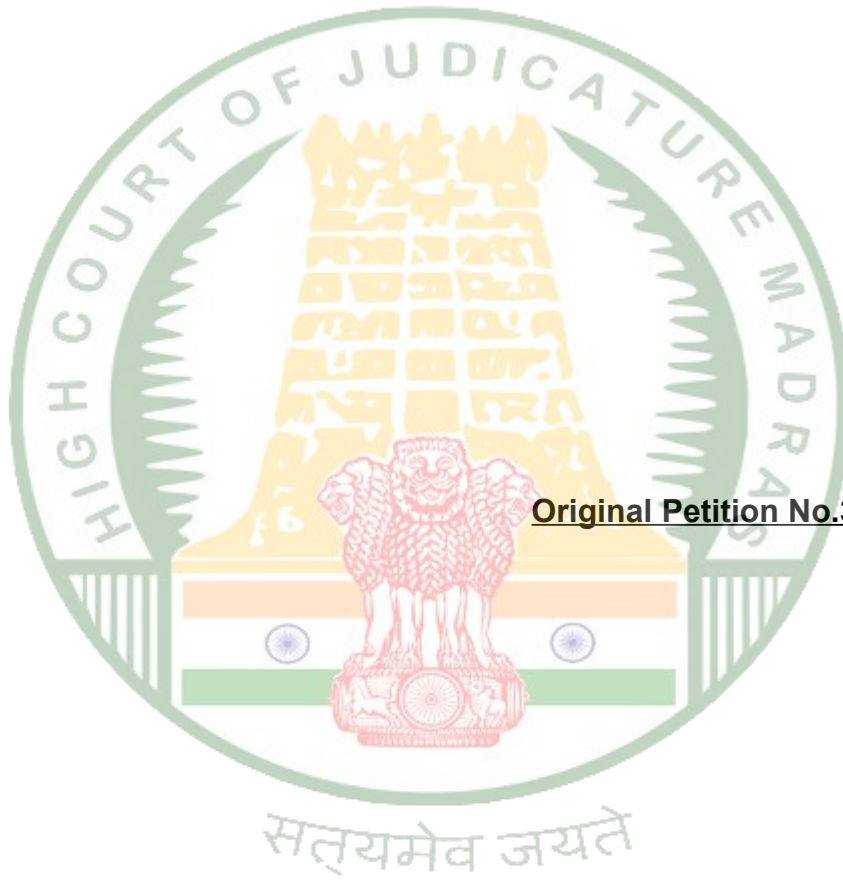
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**N.SATHISH KUMAR, J.**

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**Order in**  
**Original Petition No.316 of 2014**

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