

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	17.10.2019
Judgment pronounced on	22.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P.No.152 of 2013

The Tamil Nadu Civil Supplies Corporation,
No.12, Thambusamy Road, Kilpauk,
Chennai - 600 010.

... Petitioner

Vs.

1.M/s.Nithya Enterprises,
No.11,Thanthamuthiappan Street,
1st Floor, Chennai-600 001.

2.K.Kanniayiram
District Revenue Officer(Retd),
Arbitrator,
Flat No.2-A, Balu Miamond Apartment,
No.52, Mothilal Street, Chennai-17.

... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 20.03.2012 passed by the Arbitrator.

For Petitioner : Mr.S.T.S.Moorthy, Senior Counsel,
for M/s.L.P.Shanmugasundaram

For Respondents : Mrs.Nalini Chidambaram,
Senior Counsel for
M/s.C.Uma for R-1.

ORDER

The respondent in the Arbitration is the Petitioner before this Court. The Petitioner awarded a contract to the first Respondent herein for the supply of toor dal pursuant to tender floated on 23 June 2008. The said contract was executed on 19 September 2008 (the First Contract). Under the First Contract, the first Respondent was required to supply 2000 metric tons of toor dal at a price of Rs.37,940/- per metric ton and such supplies were to be completed by 11 August 2008. It is the admitted position that supplies were made belatedly and that about 2005.94 metric tons were supplied by the first Respondent by 13 February 2010. While supplies were still being made under the First Contract, the Petitioner floated another tender for procuring toor dal. Once again, the first Respondent was the successful bidder and the parties executed a contract dated 10 November 2009 (the Second Contract) for the supply of 1000 metric tons of toor dal (imported variety) at the price of Rs.66,800/- per metric ton. As one of the conditions for the award of the Second Contract,

the first Respondent remitted earnest money deposit of Rs.19,48,200/- and the balance security deposit of Rs. 13,93,800/- thereby aggregating to a sum of Rs.33,42,000/- which constituted the security deposit for the Second Contract. Even before supplies were effected under the Second Contract, one more tender was floated and awarded at a price of Rs.60,400/- per metric ton. Thereafter, a dispute arose between the parties with regard to the price at which the supply should be made. The case of the first Respondent was that the supply should be made either at the price of Rs.66,800/- or at the price of Rs.60,400/- whereas the Petitioner demanded that the supply should be at the price of Rs.37,940/- per metric ton. In light of the inability of the parties to resolve the dispute, the said dispute was referred to arbitration. In the Arbitration, the first Respondent made claims for the refund of the security deposit with interest thereon at 18% per annum, for payment of a sum of Rs.12,00,000/- as compensation for loss of profit with interest thereon at 18% per annum and further compensation of Rs.20,25,000/- as compensation for the loss of the EMD amount withheld by PEC Ltd against the confirmation order for 500 metric tons of toor dal. Both parties adduced documentary evidence with the first Respondent exhibiting documents as Ex. C-1 to C-19 and the Petitioner exhibiting documents as Ex.R-1 to R-14. Upon consideration of pleadings, evidence and submissions, the Arbitral Tribunal, by Award dated 20 March 2012 (the

Award) allowed the claim for refund of security deposit albeit with interest thereon at 9% per annum. All the other claims were rejected. The said Award is under challenge in this Petition.

2.The learned senior counsel for the Petitioner, Mr.S.T.S. Moorthy, referred to the history of the dispute. By relying upon a list of dates and events, the learned senior counsel pointed out that the supply obligation under the First Contract was required to be fulfilled on or before 11 August 2008 whereas the first Respondent did not adhere to the said time limit. According to the learned senior counsel, the Petitioner was entitled to forfeit the security deposit and terminate the First Contract but did not do so notwithstanding the undue delay. Meanwhile, a second tender was floated on 6 October 2009 and the first Respondent was awarded the Second Contract on 10 November 2009. In light of the failure to fulfil the obligation to supply 2000 metric tons under the First Contract, he pointed out that such supplies continued after the execution of the Second Contract at the price of Rs.37,940/- per metric ton. In fact, he submitted that the first Respondent supplied about 1820 metric tons by quoting the second purchase order and, thereafter, sent a communication to the effect that the second purchase order was quoted by mistake. In these facts and circumstances, he submitted that extension of time was granted for making supplies under the Second Contract at the board

meeting of the Petitioner, which was held on 12 February 2010, on condition that the supply should be made at the price of Rs.37,900/- per metric ton, which is the lowest rate in operation. This position, he said, was reiterated at the board meeting on 11.06.2010 wherein the appeal of the first Respondent, in this regard, was rejected. In spite of this high-level decision, he pointed out that the first Respondent did not make any supplies under the Second Contract.

3. According to the learned senior counsel, such non-supply by the first Respondent amounted to breach of contract which justified the forfeiture of the security deposit and that the Award is liable to be set aside because it is evidently contrary to the contractual stipulation enabling such forfeiture. In this connection, he referred to clause 11 of the Second Contract, which reads as under:

"11) It is agreed that the purchaser is at liberty to forfeit the Security Deposit of Rs.33,42,000 (Rupees thirty three lakhs forty thousand only) either in full or in part for any violation of this agreement or for the loss and also to claim further damages or loss, if any, sustained by the Corporation after forfeiture of the Security Deposit."

4. In order to substantiate this submission, the learned senior

counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in **ONGC vs. Saw Pipes (2003) 5 SCC 705(the ONGC case)** . In specific, he relied upon paragraph 15 of the said judgment wherein it is stated that an award that is "against the terms of the contract" could be interfered with under Section 34 provided such failure of procedure is patent. He also relied upon paragraph 46 wherein the Hon'ble Supreme Court held that when a specific sum is stipulated as damages it is for the party who contends that such sum is not reasonable compensation to prove the said contention. On the basis of the above submissions, he concluded his submissions by reiterating that the Award is directly contrary to Clause 11 of the Second Contract and to the decisions of the board of the Petitioner and is, therefore, liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996(the Arbitration Act).

5.In reply and to the contrary, the learned senior counsel for the first Respondent, Mrs. Nalini Chidambaram, submitted that the agreed price under the First Contract was Rs.37,940/- per metric ton of toor dal whereas the agreed price under the Second Contract was Rs.66,840/- per metric ton. In this regard, she referred to clause 4(iii) of the Second Contract wherein it is specified as follows:

"(iii) The supplier shall supply 1000 Mts of

Toor dhal (imported variety) at the rate of Rs.66,840/- (Rupees sixty six thousand eight hundred and forty only) net per metric ton as per the specification indicated in Annexure-A."

6. According to the learned senior counsel, if the supply is not made within the stipulated time, the Second Contract envisaged that the supply during the extended period would be made either at the price agreed to or at the price at which a subsequent tender is confirmed, whichever is less. In this case, the stipulated time limit for supply under the Second Contract was on or before 21 November 2009. The first Respondent did not make supplies under the Second Contract by 21 November 2009. Therefore, the contractual clause relating to the extended period is applicable and the supply price, on that basis, would be Rs.60,980/- per metric ton, which is the price at which the subsequent tender was awarded. Therefore, the learned senior counsel pointed out that the first Respondent by, letter dated 12 May 2010, agreed to supply toor dal at the price of Rs.60,980 per metric ton instead of the contractual price of Rs.66,840/- per metric ton. The relevant clause, in this regard, is clause 10 (ii) (c) of the Second Contract, which reads as under:

"(c) During the extended period, in case

the rate of the Toor Dhall or any other dhall in the subsequent tender is confirmed less than the approved rate at which the offer of this supplier was confirmed, further supply will be accepted only at the lesser rate after negotiation in the subsequent tender without penalty (or) existing approved rate with penalty for the belated supply as per clause 10 (ii) (a) above whichever is less for the dhall supplied beyond the scheduled time already fixed. The supplier agrees to accept the above conditions and undertakes that they will not raise any dispute at a later date. The levy of penalty towards belated supply at the quantum shall be as indicated in para 10 (ii) (a) above."

7. The learned senior counsel, thereafter, referred to the Award of the Arbitral Tribunal and pointed out that the other claims of the first Respondent were rejected but the said findings are not under challenge by the first Respondent. By referring to the Award, she pointed out that the first Respondent was paid at the rate of Rs.37,440/- per metric ton under the First Contract by deducting Rs.500/- per metric ton as penalty for belated supply. As regards the Second Contract, she pointed out that the learned arbitrator examined the price clause of the Second Contract and held that the imposition of the condition that the first Respondent should supply at the rate of Rs.37,900/- under the Second Contract is not as per the terms of the agreement and that,

therefore, it is not correct. She also pointed out the key findings of the Arbitral Tribunal to the following effect:

(a) Each tender should be settled separately and not linked.

(b) The lowest price at the subsequent tender, which was floated on 4 May 2010, was Rs.60,980 per metric ton and that the request of the first Respondent herein to supply at this rate by letters dated 21.6.2010 and 21.7.2010 was not accepted by the Petitioner herein.

(c) The Petitioner herein had requested the first Respondent herein to supply the stock at the rate of Rs. 37,940 per metric ton, which was not approved in the next tender.

(d) The Petitioner had refused to perform its reciprocal promise of accepting supply at the rate stipulated in clause 10 (ii) (a) and (c) of the agreement and hence the first Respondent/claimant was absolved from the obligation to supply toor dhall to the Petitioner herein under the Second Contract dated 10.11.2009.

(e) The contentions of the Petitioner herein with regard to forfeiture of the security deposit cannot be accepted because of the mistakes made by the Petitioner and the violation of Clause 10(ii)(a) and (c) of the Second Contract.

8.After referring to the aforementioned findings of the Arbitral Tribunal, the learned senior counsel referred to the judgment of the

Hon'ble Supreme Court in **M.P. Power Generation Co. Ltd. v. Ansaldo Energia Spa 2018 SCC Online SC 385(the M.P. Power Generation Co. Case)**, wherein, at paragraphs 23 to 25, the Hon'ble Supreme Court discussed the law with regard to interference with an arbitral award by referring to various judgments, including the judgment in **Associate Builders v. DDA (2015) 3 SCC 49**, wherein the relevant principles were summarised. In particular, with regard to interpretation of the terms of a contract, it was held that if there are two possible interpretations of the terms of a contract, the arbitrator's interpretation has to be accepted and the court under Section 34 cannot substitute its opinion for the arbitrator's view. On the facts of this case, the learned senior counsel submitted that the Arbitral Tribunal had examined the Second Contract and applied the relevant provisions thereof in a reasonable manner to the dispute. Therefore, she concluded that the Award is not liable to be set aside.

9.The records were examined and the oral submissions of both sides were considered carefully. The main issue that arises for consideration is whether the Arbitral Tribunal interpreted the Second Contract in a perverse or implausible manner. This issue should be tested by first examining the relevant provisions of the Second Contract and, thereafter, the Award in that regard. The principal bone of contention

relates to price. On examining clause 4(ii)(iii), there is no doubt that the price fixed under the Second Contract for the supply of 1000 metric tons of toor dal (imported variety) is Rs.66,840/- per metric ton. This is self-evident from the clause and does not require interpretation. The next question is with regard to the impact of delay in supply on price. For this purpose, the relevant clause is clause 10 (i) and (ii). Clause 10(i) provides that if the supplier fails to supply the agreed quantity within the time schedule fixed under clause 6 (iii), the corporation is entitled to purchase the undelivered quantity from any other source at the prevailing market rates at the risk and cost of the supplier and to claim the loss. The supplier/first Respondent also agreed to the forfeiture of the security deposit or termination of the contract in such a situation. As per clause 10 (ii), supply during the extended period would be made either at the price determined at a subsequent tender, if lower than the contract price, or at the approved rate with penalty for belated supply as per clause 10 (ii) (a), which provides for a penalty of Rs.25/- per metric ton per day up to maximum of Rs.500/- per metric ton.

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10. In this case, it is the admitted position that supply was not done by the first Respondent within the stipulated period under the Second Contract, i.e. on or before 21 November 2009. Therefore, the Petitioner was entitled to resort to risk purchase but this was admittedly

not done. The other option would have been to impose the penalty of Rs.25/- per day per metric ton up to the maximum of Rs.500/- per metric ton as specified in clause 10 (ii) (a) but this was also not done. The third option would have been to apply the rate at which the subsequent tender, i.e. tender following the Second Contract was awarded. On examining the records and from the submissions, it is the admitted position that the tender subsequent to the Second Contract was awarded at the price of Rs.60,980/- per metric ton. However, the Petitioner insisted on supply at the price under the First Contract, namely, Rs.37,940/- per metric ton.

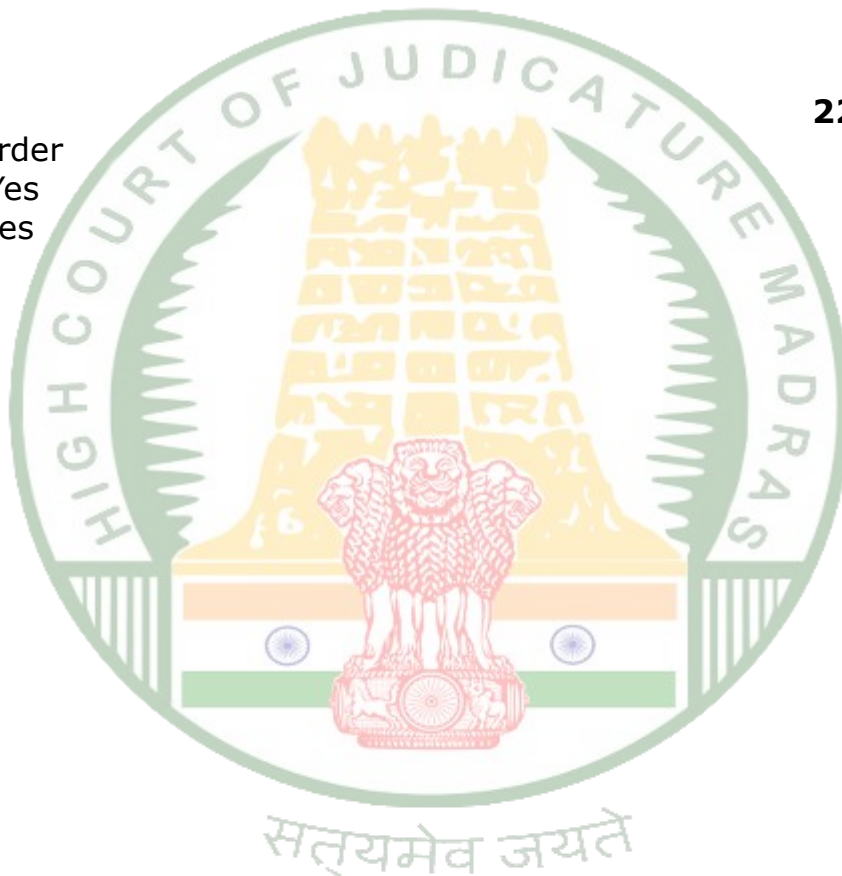
11. In these facts and circumstances, the Arbitral Tribunal appraised the evidence and examined the Second Contract before rendering the findings, which are adverted to in paragraph 5 supra. The said findings are based on a reasonable and, indeed, correct interpretation of the Second Contract. Therefore, it cannot be said that the said findings are either implausible or perverse. In this connection, the principles laid down both in the **ONGC case** and in the **M.P. Power Generation Co. Case**, which were relied upon by the respective senior counsel, categorically provide that an award can be interfered with if it is contrary to contract or in disregard thereof but not if it is based on a plausible or reasonable interpretation thereof. In this case, as discussed above, the findings of the Arbitral Tribunal on the Second Contract are

certainly reasonable. Consequently, the Petitioner has failed to make out a case for interference under section 34 of the Arbitration Act.

12.In fine, for reasons aforesaid, the Petition under section 34 of the Arbitration Act is dismissed but there will be no order as to costs.

22.10.2019

Speaking Order
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SENTHILKUMAR RAMAMOORTHY, J.

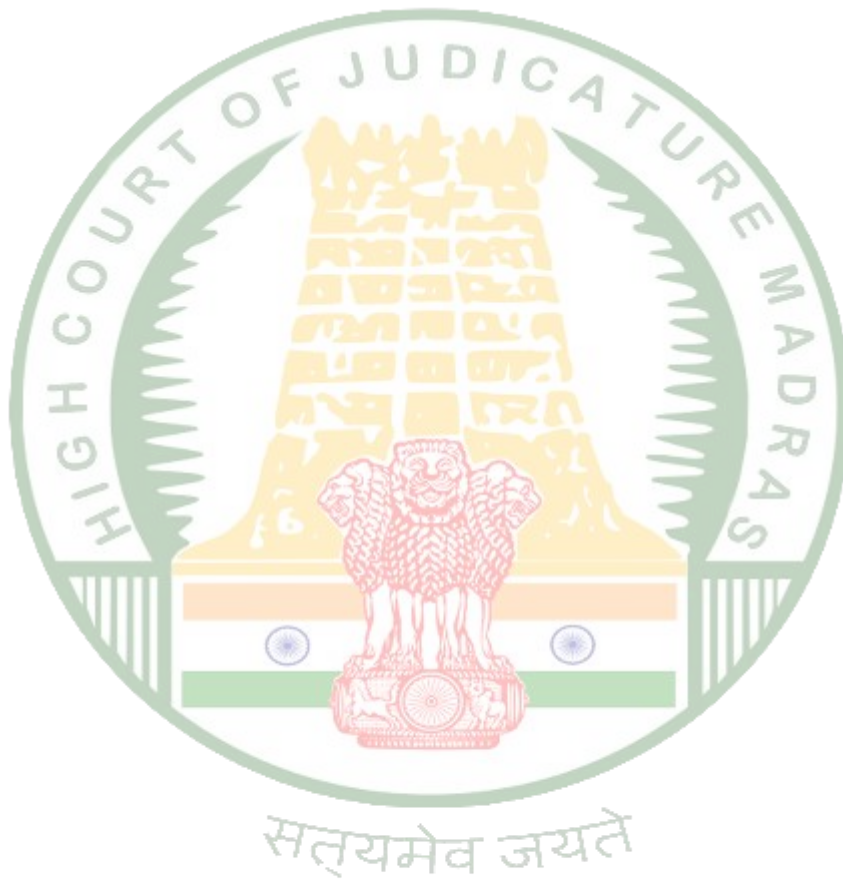
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