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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 13TH DAY OF JULY 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P. No.365 of 2014

In the matter of Arbitration under
Arbitration and Conciliation Act,
1996,

And

In the matter of Disputes under the
Agreement dated 23.09.2004.

And

In the matter of Arbitration Award
dated 12.12.2013 and clarified on
4.2.2014

Between

The Board of Trustees of Tuticorin Port Trust
Tuticorin – 628 004.

: Petitioner

And

1. M/s. Tebma Shipyards Ltd.
No. 5/360, Rajiv Gandhi Salai (OMR)
Okkiam, Thoraipakkam
Chennai – 600 097

2. Mr. Justice (Retd) R. Jayasimha Babu
No.612, R.M.V. Extension,
2nd Stage, 3rd Block,
Bangalore – 560 094



***3. The Cochin Shipyard Limited
Administrative Building,
P.O. Box No. 1653, Perumanoor Post,
Kochi – 682 015.**

... Respondents

***(3rd Respondent impleaded as per order dated 23.09.2020 in A.No. 1640/2020)**

Original Petition praying that this Hon'ble Court be pleased to

(a) set aside the award dated 12.12.2013 and on 4.2.2014 passed by
the Second Respondent.

(b) direct the respondent to pay the costs of this proceedings to the
Petitioner herein;

This Original Petition having been heard on 06/07/2021 in the presence of Mr. Yashod Vardhan, Senior Counsel for Mr. S. Yashwanth, advocates for the petitioner herein and Mr. Manoj Menon, for M/s. Menon, Karthik, Mukundan, Neelakantan, advocates for the respondents herein and upon reading the petition and the award dated 12/12/2013 and 04/02/2014 filed herein and having stood over the consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court is of the view that though Respondent claimed in their one of the letters 12% of interest in the event of termination of the contract, taking note of the economic reforms in the



interest is excessive, accordingly, the same is reduced to 6% for the post arbitration period, and **it is ordered as follows:**

That the O.P. No. 365 of 2014 be and is hereby dismissed with the modified rate of interest of 6% per annum for post award.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
13th DAY OF JULY 2021.

Sd/-
ASSISTANT REGISTRAR (O.S.II)
//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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24/08/2021

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O.P. No.365 of 2014

ORDER

DATED: 13/07/2021

THE HON'BLE MR. JUSTICE

N.SATHISH KUMAR

FOR APPROVAL: 20.09.2021

APPROVED ON : 21.09.2021

**THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on	Delivered on
06~07~2021	-07~2021

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.365 of 2014

The Board of Trustees of Tuticorin Port Trust,
Tuticorin 628 004.

.. Petitioner

.Vs.

1. M/s. Tebma Shipyards Ltd.,
No.5/360, Rajiv Gandhi Salai (OMR)
Okkiam Thoraipakkam
Chennai 600097

2. Mr.Justice R. Jayasimha Babu
No.612, R.M.V.Extension
2nd Stage, 3rd Block,
Bangalore 560094.

3. The Chochin Shipyard Limited,
Administrative Building, P.Ob.Box.No.1653
Perumanoor Post,
Kochi 682 015.

[3rd Respondent impleaded as per order
dated 23.09.2021 in A.No.1640/2020]

.. Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 12.12.2013 and 04.02.2014 passed by the 2nd Respondent and to direct the Respondent to pay the costs.



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For Petitioner : Mr. Yashad Vardhan SC for
Mr. S. Yashwanth

For Respondents : Mr. Manoj Menon for
M/s. Menon Karthik Mukundan
Neelakantan

ORDER

Following the Award of the Sole Arbitrator, the present Petition has been filed challenging the same.

1. Brief facts leading to file this Petition is as follows:

2.a. Parties are arraying by their own ranking in the Arbitral Tribunal.

2.b. The Claimant and Respondent entered into a contract dated 23.09.2004 for the Design, Construction and Delivery at Tuticorin Port Harbour of one Forty Five Tonnes Bollard Pull tractor Tug with Cycloidal Propulsion System. The contract, inter alia, provided for stagewise payment in ten stages and for levy of liquidated damages Respondent's right to terminate the contract for delay in delivery voyage vessel at its cost own cost and time; registration of the vessel, compliance with the Rules, Regulations and standards; Responsibility for drawings and specifications,



irrespective of Engineer's approval or non-approval and Force Majeure Clause which defined it, inter alia, as including “any Happening affecting the performance by the Contractor of its obligations under the contract, which in the opinion of the Engineer, the contractor cannot reasonably prevent or control against.”

2.c. The Tug was to be built as per the specifications given in Section III tender, inter alia, as per the Rules of Indian Registry of Shipping, the Indian Marine Safety Act and Rules; and the statutory regulations of the Mercantile Marine Department and in accordance with the specifications and general arrangement drawings. In section VII 17.3, it was, inter alia, provided that “The accommodation ceiling, partition bulkhead should be covered with good quality marine plywood with polyester lamination of water proof quality”.

2.d. The tender for this supply had been issued on 19.12.2003 specifying inter alia, a delivery period of 12 months which was later changed to 16 months. Certain changes were made after the Pre Bid Meetings. After that, claimant submitted bid on 02.03.2004. After negotiations the price was reduced by Rs.35 lacs. The Respondent, on



months i.e., by 26.12.2005 at a price of Rs.25,64,20,000/- which was inclusive of sales tax and transportation charges. The Tug reached the Respondent's port on 17.08.2006 and after trials, was accepted without any reservation of any kind by the Respondent on 29.08.2006. The Handing Over Certificate also delivered to the claimant. When the matter stood thus, the Respondent by letter dated 18.11.2006 levied the liquidated damages to the tune of Rs.2,56,42,000/- and also penalty of Rs.5,12,840/-. Aggrieved over the levy of liquidated damages the matter was referred to the Arbitrator. Hence, the claimant sought the following reliefs:

a. to recover the outstanding amount of Rs.3,49,50,622/- due under the Contract towards the unpaid invoices.

b. To recover the sum of Rs.6,64,218 received by the Respondent on 06.01.2007 by wrongful encashment of the Bank Guarantee dated 10.09.2004.

c. To declare that the Respondent's levy of liquidated damages of Rs.2,56,42,000/- towards alleged delay in delivery of the Tug, is illegal, wrongful, arbitrary and against the terms of the contract;

d. To award interest at Rs.1,63,30,898.21 as per Annexure a, towards interest oin (i) and (ii) at 18%

per annum, being the interest from the respective due dated till date of statement of Claim [i.e.23.06.2009]

e. To award interest at 18% per annjum of the the amounts claimed in paragraph (i) and (ii) both pendete lite, from 24.06.2009 till the date of Award, and Post Award

f. To award all costs of the proceedings.

3. It is submitted by the Respondent/Petitioner herein that the amount has been withheld and has been adjusted towards the expenditure incurred in hiring a tug from Great Eastern Company on account of delay in delivery of tug by the Claimant. The Respondent has given extension of time by 75 days considering the request of the Claimant by its letters of 18.01.2005 and 02.06.2005 on account of Tsunami and heavy rain based on the Mumbai Port Trust's decision for their tug which was built at the same yard during the period. Liquidated damages has been imposed for further 171 days after such extension, in accordance with the provisions of the contract. The respondent has also applied for voyage permission only on 17.5.2006 and obtained it on 04.08.2006. Therefore, delay of 79 days plus an additional delay of 25 days has occurred. The claimant has ignored the directives of



Type Approval Certificate of the material proposed to be used in the accommodation area before use on board. The Respondent had to hire other tugs on payment of Rs.1,28,000/- per day which resulted additional financial implication for the port was Rs.313.35 lacs, but the recovery has been restricted to 10% of the contract value i.e., Rs.2,56,42,000/-. The Respondent had no option but to withhold from the final bill, namely the 10th stage payment, the amount of the liquidated damages as quantified by it, as such withholding towards liquidated damages is permissible under the agreement, besides the imposition of penalty as per law. Hence it is the contention of the Respondent that as per the contract liquidated damages has been levied.

4. Based on the pleadings, the following issues were framed

1. *Whether the Claimant is entitled to recover the unpaid invoices amounting to Rs.3,49,50,682/-?*
2. *Whether there has been delay in delivery of the Tug? If so, is the delay justified, and the recovery of Liquidated Damages not justified?*
3. *If the delay is not justified, whether the Respondent is entitled to levy liquidated damages?*



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4. *Whether the Respondent proves that it has suffered actual damages of Rs.3,13,25,000/- as stated in para 7 of the defence statement and is entitled to retain a sum of Rs.2,56,42,000/- adjusted by it towards Liquidated Damages levied by it?*
5. *Whether the Respondent is entitled to retain Rs.6,64,218/- received from Bank by partial encashment of the bank guarantee dated 10.09.2004 submitted by the claimant?*
6. *Whether the Claimant is entitled to interest @ 18% per annum for the amounts claimed from the date of course of action till the date of payment?*
7. *Who is to bear the cost of these proceedings and the proposition in which the same is to be borne?*
8. *Whether the parties are entitled to any other relief?*

5. After analysing the entire evidence on both sides the Sole

Arbitrator has passed the following Award:



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“The Respondent shall pay the Claimant the following sums:

Rs.2,75,622/- being the amount of Claimant's invoices less damages of Rs.74,20,000/- suffered by Respondent for the delay of 58 days, with interest at 12% from the date of the respective invoices / recovery from Bank Guarantee, till the date of the Award.

If payment is made within one month from the date of Award the rate of interest for the Post Award Period will be 12%.

If the payment is not made to the Claimant within one month from the date of the Award, the rate of interest for the post Award period shall be 18%. ”

Challenging the same, present Petition under Section 34 of the Arbitration and Conciliation Act has been filed.

6. Though various grounds have been raised in the application, the learned Senior Counsel fairly submitted that the challenge is mainly against the applicability of the Force Majeure clause which was applied by the



learned Arbitrator mechanically. Force Majeure clause normally has to be construed narrowly. The delay on the part of the claimant has not been properly considered. The learned Arbitrator did not take into consideration of the fact that the similar period the claimant has supplied Tugs to the Bombay Port. Therefore applying the Force Majeure clause to the Respondent is not permissible. It is his further contention that the post award interest at the rate of 18% is also not according to law. Similarly, there was a delay due to the error in the specifications. The claimant has not made specification as per the contract which also led to the delay. Therefore, the delay attributable only to the claimant and not to any events to consider it as Force Majeure. In support of his submissions learned senior counsel relied upon the following judgments:

1. *Oil and Natural Gas Corporation Ltd., vs. Saw Pipes Ltd.*, [(2003) 5 SCC 705]
2. *Krishna Bhagya Jala Nigam Limited vs. G.Harichandra Reddy and Another* [(2007) 2 SCC 720]
3. *Energy Watchdog v. Central Electricity Regulatory Commission and Others* [(2017) 14 SCC 80]



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4. Sough East Asia Marine Engineering and Construction Ltd., vs. Oil India Ltd.,[(2020) 5 SCC 164]

7. Learned counsel appearing for the Claimant/Respondent herein submitted that there were six events shown as Force Majeure events which resulted in delay of 280 days. The first event is damage to the ship building yard and holding up of work on account of Tsunami; and the second event is on 26.10.2005 to 07.11.2005 which resulted in suspension of work due to unprecedented rain fall. The Petitioner in fact has accepted these events as Force Majeure even 75 days extension as against 76 days sought were given. Further events pleaded by the Respondent/Claimant has not even denied disputed by the Respondent. This fact has been factually found by the learned Arbitrator and established. Therefore, now it cannot be said that the Learned Arbitrator has not properly considered the Force Majeure clause in the contract and awarded the counter claim. It is his contention that the learned Arbitrator in fact has taken note of the nature of the damages suffered by the Claimant and calculated hire charges and awarded damages to the tune of Rs.74,20,000/-. It is his contention that the learned Arbitrator has considered the entire aspects carefully and awarded the damages for the claimant for 58 days. The remaining delay has been properly explained and the delay was occurred due to Force Majeure events.



When the learned Arbitrator has factually found that these events have led to the delay, absolutely there is no perversity in the order. Hence, submitted that the well reasoned order does not require any interference.

8. It is his contention that as far as the interest at the rate of 12% awarded by the learned Arbitrator from the date of respective invoice also does not require any interference. Even the letter written by the Claimant claiming 12% interest, indicate petitioner claimed 12% interest per annum in the event of termination of contract as per clause clause 23.2. Such being the position interest awarded by the Arbitrator does not require any interference. However, post arbitral award interest is left to the orders of the Court.

9. In support of his submission he relied upon the following judgments:

1. *MMTC Ltd vs. Vedanta Ltd.*, [(2019) 4 SCC 163]
2. *Ssangyong Engineering & Constructions Co. Ltd., vs. National Highways Authority of India (NHAI)* [(2019) 15 SCC 131]
3. *NCC Ltd., vs. Indian Institute of Technology and another* [2020 SCC Online Madras 5857]



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10. The dispute is only with regard to levying liquidated damages for the delay in supply of the Tugs to the Petitioner. Learned Arbitrator held that originally delay occurred due to Tsunami and heavy rain were accepted by the Respondent and in fact it is covered by Force Majeure Clause. Though there were 246 days delay occurred in delivery, out of which 188 days were due to the Force Majeure events. But the remaining 58 days delay was attributable to the Respondent herein, and awarded compensation in favour of the Petitioner herein towards hiring charges to the tune of Rs.74,20,000/- and directed the Petitioner herein to refund of remaining amount at the rate of 12% interest after giving set off towards the amount awarded towards damages of Rs.74,20,000/- and post award period interest as 18% p.a.

11. In *Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd.*, [2003 (5) SCC 705], wherein the Honorable 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.

12. 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.

13. In *Ssangyong Engineering and Construction Co. Ltd.*, case (supra) in paras 24 and 30 the Honourable Supreme Court has held as follows:

“24. It is important to notice that the ground

India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding 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. Additionally, 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 inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”



of the Contract is as follows:

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“14(b) FORCE MAJEURE:

In the event of either party being rendered unable by force majeure to perform any obligation of the party affected by such force majeure shall upon notification to the other party be suspended for the period during which force majeure events last. The cost and loss sustained by either party shall be borne by respective parties. The term force majeure employed herein shall mean Act of God, War (declared or not), storms, floods, restraints imposed by Governments, Riots, Strikes, Go Slow, Lock out or any labour unrest at the works of the contractor (to be substantiated by the contractor with document), civil commotion, fire, accident, sabotage, earthquake or any other natural calamities, plague, quarantine, import or export embargoes, or change in Government policies or the like circumstances or any happening affecting the performance by the contractor or its obligations under this contract which, in the opinion of the engineer, the contractor cannot reasonably prevent or control against.”

15. Interpreting and analysing the above clauses and documents filed

before the learned Arbitrator, the learned Arbitrator made threadbare

analysis and found that the delay of 188 days was due to various reasons



beyond the control of the parties and applied the Force Majeure clauses. It is the contention of the learned Senior Counsel that in the same period the Respondent supplied the Tug to the Bombay Port Trust. Therefore, Force Majeure clause could not have been invoked in this case. It is to be noted that the learned Arbitrator factually found that after the devastation of the yard due to Tsunami in December 2004 there was a major set back due to damage and loss of infrastructure facilities at the shipyard. It took 3 months for the yard to recover from this shock, for reconstruction and refurbishing and get back to normal activity level. Thereafter the vessel that were under construction prior to the tug for Tuticorin Port Trust had to be completed. The delay on the completion of the prior commitments had a cascading effect in the progress of work of the tug for Tuticorin Port Trust.

16. When the learned Arbitrator factually found that the vessel supplied to the Bombay Port was already under the process of construction in the yard prior to the tug of Tuticorin Port. Such view of the factual finding, merely because supply was made to the Bombay Port at the relevant point of time, it cannot be said that the tug for Tuticorin Port could have been completed. The only ship yard where the construction was carried out which has suffered damages due to the Tsunami and subsequent heavy rains. Therefore, It cannot be said that the delay is attributable only to the



Claimant. The learned Arbitrator also considered the other events beyond the control of the claimant which are the Force Majeure events in themselves. The learned Arbitrator also taken note of the fact that the approval were not granted by DGS since they did not comply with the Merchant Shipping (Crew Accommodation) Rules. It is to be noted that the learned Arbitrator took note of the fact that the plans were drawn in accordance with the specifications given in the contract and held that the delay in forwarding approval and submitting the revised plans occurred to the tune of 25 days, which is also beyond the control of the Claimant. Every aspect of the delay has been factually considered by the learned Arbitrator and found that the entire delay was not attributable to the Petitioner namely the Respondent except delay of 58 days, for which damages have been rightly awarded in favour of the Respondent towards the hiring charges at the rate 1,28,000/-per day. Except this damage, no other damages established by the Respondent. It is also taken note by the learned Arbitrator. Therefore, when the learned Arbitrator has factually found that the the delay is not attributable to the Respondent and also awarded damages in favour of the respondent which has been proved before the Tribunal, this Court cannot re-appreciate the entire evidence and substitute its own interpretation in place of the factual finding recorded by the learned



before him. The nature of the events pleaded for such delay is also not disputed by the Petitioner herein which is also taken note by the learned Arbitrator. Therefore, this court do not find any perversity in the order of the learned Arbitrator which go to the root of the matter to interfere with the well reasoned award.

17. In *Energy Watchdoc vs. Central Electricity Regulatory Commission and Others [(2017) 14 Supreme Court Cases 80]* the Honourble Supreme Court has held that Force Majeure clauses are to be narrowly construed. Absolutely there is no quarrel over the above judgment. The learned Arbitrator in fact considered very fact and pleadings, found that the delay complained by the Respondent has not been established and it is not attributable to the claimant. Only the delay of 58 days alone attributable to the claimant and the remaining delay of 188 days were beyond the control of the claimant which is squarely fall within the Force Majeure clause envisaged in the contract and award. In such a view of the matter, this Court do not find any perversity in the order of the learned Arbitrator. Accordingly the award is upheld.

18. As far as the interest is concerned it is to be noted that Clause

23.2 of the Contract, the Respondent themselves have claimed interest at the



rate of 12% in the event of termination of the contract as per Clause 23.2 of the contract. When the Claimant themselves claimed 12% interest of the Award imposed by the Arbitrator for the amount refundable by the Claimant is not unreasonable and the same cannot be interfered.

19. In ***Krishna Bhagya Jala Nigam Ltd., vs. G. Harischandra Reddy and Another [(2007) 2 Supreme Court Cases 720]*** the Honourable Apex Court has held as follows:

“11. On the merits of the claims made by the contractor we find from the impugned Award dated 25.6.2000 that it contains several Heads. The Arbitrator has meticulously examined the claims of the contractor under each separate Heads. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%. ”



20. In *Rajasthan State Road Transport Corporation vs. Indag Rubber Limited* [(2006) 7 Supreme Court Cases 700] the Apex Court has also reduced the interest taking note of the long spell of the time have expired from the date of award.

21. Taking note of the fact that the delay occurred beyond the control of the Claimant and the Respondent is also to spend about more than Rs.74 lakhs towards hire charges, this Court is of the view that though Respondent claimed in their one of the letters 12% of interest in the event of termination of the contract, taking note of the economic reforms in the country and long time has been elapsed, this Court is of the view that 12% interest is excessive. Accordingly, the same is reduced to 6% for the post arbitration period.

22. Accordingly the petition filed to set aside the award is dismissed with the modified rate of interest of 6% per annum for post award.

Sd./-N.S.K.J.
13.07.2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)
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