



O.S.A(CAD)No.54 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	Orders Pronounced on
28.11.2023	27.02.2024

CORAM

**THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR.JUSTICE P.DHANABAL**

O.S.A.(CAD) No.54 of 2022

1.The Tamil Nadu Text Book and
Educational Services Corporation,
EVK Sampath Maaligai,
68, College Road, Chennai – 600006.

2.The Managing Director,
The Tamil Nadu Text Book and
Educational Services Corporation,
EVK Sampath Maaligai,
68, College Road, Chennai – 600006.

... Appellants

Vs.

M/s. Kores (India) ltd.,
Having its registered Office at No. 301/302
Ashford Chambers, Lady Jamshedji Road,
Mahim (West), Mumbai – 400016,
And branch offices, iner alia, at
191, Anna Salai, 3rd floor, 'Hamid Building', Chennai -600006.
rep by its authorised signatory,

Page No.1/22



O.S.A(CAD)No.54 of 2022

WEB C... Mr K.S.Vijaykumar.
Respondents

...

Prayer: Appeal filed under Sec.37(1)(c) of the Arbitration and Conciliation Act 1996 to set aside the judgment dated 19.03.2020 made in O.P.No. 538 of 2019 and thereby set aside the arbitral award dated 14.03.2019 in the matter of arbitration between the appellants and the respondent in the matters arising out of agreement dated 21.07.2015.

For Appellant : Mr.J. Ravindran, AAG
For M/s.S. Varsha

For Respondents : Mr.K.F. Manavalan

J U D G M E N T

D.KRISHNAKUMAR, J.

The challenge in the instant intra Court appeal is against the order passed by the learned Single Judge dismissing the O.P.No. 538 of 2019, dated 19.03.2020, confirming the award dated 14.03.2019 passed by the Arbitral Tribunal.

Facts in Brief:

2.1 The appellant/Corporation is a government-owned entity, initiated a tender for Geometry Boxes procurement for the students studying in Government and Government aided schools in the State of Tamil Nadu. The

Page No.2/22



O.S.A(CAD)No.54 of 2022

WEB COPY

respondent/supplier emerged as the successful bidder, with a prescribed delivery period of 75 days from the date of sample acceptance. Issues arose due to defects in the supplied goods, causing delays in delivery, leading to a penalty imposed by the Corporation. The respondent appealed the penalties, and during its pendency, sought conciliation. However, the appointment of a conciliator was delayed. The respondent then filed a petition for the appointment of a Sole Arbitrator, and this court by order dated 12.04.2018 appointed an arbitrator.

2.2 During the arbitration proceedings, the respondent claimed a refund. The Arbitrator, by an award dated 14.03.2019 held that the appellant suffered no monetary loss and awarded a payment of Rs. 75,19,451/- with interest to be paid to the respondent by the appellant. Challenging the said award, the appellant filed an application before this Court in O.P.N.538 of 2019 under Section 34 of the Arbitration and Conciliation Act. The learned Single Judge, by order dated 19.03.2020, dismissed the said original petition filed by the appellant herein and confirmed the award passed by the Arbitrator. Aggrieved by the said order of the learned Single Judge, the present appeal is filed.



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3. The learned counsel for the appellant-Corporation has submitted that before the arbitrator, the respondent put forth imaginary submissions that the transport of cargo was affected due to the December 2015 Chennai floods without any substantiation of documents. Further, the respondent claimed refund of sum of Rs.75,19,451/- along with interest @ 18% per annum, i.e., a sum of Rs. 29,96,244/- from 19.05.2016 till 08.08.2018. The appellant- corporation has paid 18% interest amount of Rs.2,36,873/- on the sum of Rs. 63,20,084/, totaling upto a sum of Rs.1,07,52,568/- on sympathetic consideration.

4.The learned counsel for the appellant has further submitted that the respondent themselves admitted the fact that they could not make the entire lot of Geometry boxes within a stipulated period and they made ready only on 10.10.2015, therefore the initial delay on the part of the respondent led to affecting the entire schedule of performance of the contract. The learned counsel for the appellant has further submitted that since the respondent provided defective pieces even after the pre-dispatch and pre-delivery inspections, there



O.S.A(CAD)No.54 of 2022

WEB COPY

occasioned further delay in completing the supply and the defects in the supply were also solely attributable to the respondent, since they are the manufacturer of the Geometry boxes. Therefore the appellant has right to levy penalty/liquidated damages as per tender conditions and agreement dated 21.07.2015 in the event of delay on the part of the respondent. Further upon the request made by the respondent, the appellant had waived 63 days of delay from the final computation.

5. The learned counsel for the appellant has further submitted that without considering the above factual aspects, the learned arbitrator had passed the award dated 14.03.2019, directing the appellant-corporation to pay a sum of Rs.75,19,451/- along with interest @ 9% from 19.5.2016 till the date of realisation and further a sum of Rs.7,11,000/- as cost of the arbitral proceedings. The learned Single Judge has also completely erred in holding that the ground raised in the petition under Section 34 of the Arbitration and Conciliation Act 1996 sought for re-appreciation, without considering the fact that the grounds raised in the petition filed by the appellant-corporation clearly specified the provisions under which a challenge was made to the impugned award.



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6. The learned counsel for the appellant has further submitted that the learned single judge incorrectly observed that the fixation of time limit of 75 days was dependent on the fulfillment of reciprocal promises made by the appellant-corporation by completely losing sight of the fact that the appellant corporation is a Government entity and the agreement between the corporation and the private contractor stipulated the time line only towards the respondent's supply of the geometry boxes and not towards the corporation's duties which constitutes Government administrative procedures.

7. According to the learned counsel for the appellant since the learned Single Judge has failed to protect the interest of the appellant-corporation and refused to set aside the award under challenge, there is every likelihood that the respondent would proceed with attempts to execute the impugned award against the Corporation and in the event any execution order is passed, the same would cause grave and irreparable loss to the appellant-Corporation. Hence, the



O.S.A(CAD)No.54 of 2022

impugned order passed by the learned single judge is liable to be set aside.

8. Per contra the learned counsel for the respondent submitted that the appellant has unlawfully deducted a sum of Rs. 75,19,451/- towards penalty vide their communication dated 24.05.2016. Despite multiple reminders for full payment, the appellant has paid partial payment of Rs. 63,20,084/- on 04/08/2016, deducting Rs. 75,19,451/- for alleged delays without providing any reasoning or calculation for this deduction. A belated calculation sheet dated 20/02/2017 [Ex. C-17] was presented to the respondent without any substantive proof for such alleged deductions.

9. The learned counsel for the respondent has further submitted that Clause 14(a) of the C-4 Contract explicitly addresses willful delay in supply, outlining the potential for contract termination or the imposition of liquidated damages. Notably, no steps were taken by the appellant during the contract period to terminate the contract, indicating a lack of willful default in supply. Further, the



O.S.A(CAD)No.54 of 2022

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deduction made by the appellant-corporation on 19/05/2016, post the contract completion, lacks justification in law and the deduction of amount under penalty is unsustainable in law.

10. The learned counsel for the respondent has further submitted that as per Clause C-4 of the Contract limits deductions to 4 weeks, not exceeding 12% aggregate, subject to proof of willful unreasonable delay by the respondent and compliance by the appellants with their obligations. In the instant case, no willful or unreasonable delay occurred on the part of the respondent. Moreover, the appellant failed in timely obligation fulfillment and accepted goods without objection, rendering the sum payable, therefore the concept of liquidated damages will not arise as contended by the learned counsel for the appellant.

11. The learned counsel for the respondent has further submitted that the contract does not prohibit interest payment. Statutorily, as per Section 3(1)(b) of The Interest Act, 1978, interest can be granted. Moreover, Section 31(7)(a) & (b) of the Arbitration & Conciliation Act, 1996 allows for interest inclusion in the



O.S.A(CAD)No.54 of 2022

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arbitral award. The current RBI Base Lending Rate being 8.95%-9.45%, the appellant is liable to pay interest at 11.45% as per Section 31(7)(a) & (b) of the Arbitration & Conciliation Act, 1996 for the amounts due and unlawfully withheld. Therefore, the impugned order passed by the learned Single Judge, confirming the award passed by the learned Arbitrator, directing the appellant-corporation to pay a sum of Rs.75,19,451/- along with interest at the rate of 9% per annum to the respondent is perfectly valid and does not require any interference by this Court.

12. Heard Mr. J.Ravindran, learned Additional Advocate General appearing for the appellant and Mr.K.F.Manavalan learned counsel appearing for the respondent and perused the documents available on record.

13. Upon hearing the rival submissions made by the learned counsels appearing for the parties concerned, the short points need to be answered in the present appeal are:

- i. Whether the appellant-corporation has complied the reciprocal obligations made by the respondent as per the agreement?

Page No.9/22



O.S.A(CAD)No.54 of 2022

WEB COPY

ii. Whether the act of the appellant-corporation imposing penalty on the respondent claiming wilful delay on the part of the respondent is valid or not?

iii. Whether the order passed by the learned Single Judge in O.P.No.538 of 2019 dated 19.03.2020 is sustainable in law?

14. The contention of the appellant is that as per the agreement dated 21.7.2015 entered between the applicant-corporation and the respondent, the time is the essence of the aforesaid agreement and as per the agreement, the entire quantity of geometry boxes ought to be supplied at their designated places within a total period of 75 days. It is submitted that the said period of 75 days included the pre-inspection at the factory premises and pre-delivery sample testing carried out by the appellant-corporation.

15. It is further contended that it is stipulated in the purchase order that the period of 75 days would be counted from the date on which the sample geometry box provided by the respondent is accepted by the appellant-corporation.



O.S.A(CAD)No.54 of 2022

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According to the appellant, the sample provided by the respondent was accepted on 05.08.2015 and therefore, the said period of 75 days in the instant case ought to be calculated from 05.08.2015 and hence, as per the agreement, the respondent was obligated to make the supply of the entire quantity of geometry boxes by 19.10.2015. Therefore, as per clause 11 of the special terms and conditions of the tender document and Clause 20 of the agreement dated 21.07.2015, the appellant has the right to levy penalty at the rate of 1% of the value of the order for the first two weeks of delay followed by 5% of the values of the order for the next two weeks of delay, therefore the penalty imposed on the respondent is perfectly valid.

16. In order to analyse the above contentions, it is relevant to extract the clauses 1,14 and 20 of the agreement dated. 21.07.2015, which reads as follows;

1.The supplier should manufacture the Geometry Box, in conformity with the specifications given in the tender schedule, and complete the supply to the Government and Government aided Schools, at the designated locations as per the requirement and time schedule, of the Corporation/ Purchaser as detailed below.

Ordered quantity	14,49,390 No. of boxes
Rate per Geometry Box (inclusive of	Rs.31.60/-



O.S.A(CAD)No.54 of 2022

WEB COPY

Ordered quantity	14,49,390 No. of boxes
costs of delivery and designated locations and other incidental charges)	
Delivery Period	75 days

14.Delivery of the Goods and performance of service shall be made by the Supplier in accordance with the time schedule specified by the Corporation / Purchaser in his schedule of requirement or Purchase Order.

a)The willful delay by the Supplier in the performance of his delivery obligation shall render the Supplier liable to any or all the following sanctions 1)imposition of liquidated damages, 2)forfeiture of Security deposit, 3)termination of the contract for default and cancellation of future and pending purchase orders, and 4)ban on future participation of tenders invited by the Purchaser.

b)If the Purchaser has incurred, sustained or put to any loss by reasons of this contract having been so put an end to or on account of the failure or negligence or deficiency or defaults of the SUPPLIER, for reasons of exemption other than those contained in tender document, the Corporation / Purchaser shall be entitled to recover such compensation, loss, cost, damage, expenses or monetary differences or difference in price as may be determined by the Managing Director. The SUPPLIER undertakes to compensate the same to the PURCHASER (Corporation) in full.

(c)In case, if any of the materials delivered by the Supplier is rejected by the Corporation / Purchaser under any of the provisions and replacement sought for by the Corporation / Purchaser from Supplier, the latter shall effect replacement



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within such reasonable time as the Corporation / Purchaser may in his discretion allow for the purpose.

d)In the event of the Supplier's failure to supply the specified quantity within the stipulated time, i.e., as per Tender conditions and Purchase Order, the Purchaser shall be entitled at his discretion to reject the Geometry Box and to repudiate the contract and proportionately deduct from the Security Deposit the price paid and the damages and also to recover the sum paid if in excess and this shall be without prejudice to any other remedy open to the Purchaser under these provisions or under law.

20.Liquidated Damages and Penalty:

a)If the Contractor fails to deliver the Geometry Boxes Mathematical Drawing Instruments) as per the Purchase Order and the Delivery Schedule specified by the Corporation, the Corporation shall have the right to impose penalty of 1% of the value of the order for every week of delay or part thereof after the due date of delivery for a period of two weeks and thereafter at the rate of 5% of the value of the delayed supply for each Week of delay or part for another Two weeks of delay. The Corporation shall have the right to make purchase from outside at higher rates if the delay continues even after the expiry of the aforesaid period of four weeks for which penalty is imposed on the Contractor and the loss sustained by the Corporation to this effect shall be deducted from the bill of the Contractor and / or from the Security Deposit of the Contractor.

b)The Corporation shall have the right to place the Purchase Order with the other eligible Tenderer(s) if the supply is delayed beyond four weeks after the due date and it shall be at the cost and consequences of the Contractor who is in default. The Corporation also reserves the right to take any other action against the Contractor in default for the loss and the



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consequential loss sustained by the Corporation.'

17. A perusal of records would show that as agreed by the parties in the said agreement, the time for producing 14,49,378 numbers of geometry boxes by the respondent would be supplied within 58 days. Testing agency had taken 25 days for testing 14,49,378 nos. of geometry boxes and transit from Delhi to Chennai destination would be a 15 days, therefore minimum time to be taken for supply is $58+25+15=98$ days.

18. It is also seen from the records that the respondent by letter dated 06.08.2015 requested the appellant for extension of time to supply materials without any penalty up to 30.10.2015. Subsequently, the respondent by communication dated 18.08.2015 expressed their readiness of 2,30,000 pieces of geometry boxes for inspection. Since there was no response from the appellant, the respondent has sent reminders for requesting for inspection on several dates viz., on 26.08.2015, 02.09.2015, 16.09.2015, 05.10.2015 and 10.10.2015 respectively. Finally, the appellant corporation officially identified the inspecting



O.S.A(CAD)No.54 of 2022

WEB COPY

agency (CIPET) and communicated to the respondent only on 20.10.2015 (90 days from the date of purchase order and 83 days from the date agreement) and the inspection report/clearance was made available to the respondent on 12.11.2015 (i.e after a delay of 32 days from the date of inspection). Thereafter, the respondent had initiated dispatching the geometry boxes on 14.12.2015 to the respective destination, since it has been specifically instructed by the appellant vide communication (Ex.C13) that dispatch shall commence only after clearance from the inspection agency, CIPT.

19. Though the appellant-corporation has strongly contended that there was willful delay in dispatching the geometry boxes and violates the tender conditions in not delivering the entire geometry boxes within the stipulated time of 75 days from the date of acceptance of sample i.e on 05.08.2015 cannot be accepted in view of the communication marked as Ex.C13 in which appellant-corporation had specifically instructed the respondent to commence the dispatch only after issuing clearance by the appellant. In this case, clearance was issued



O.S.A(CAD)No.54 of 2022

only on 12.11.2015, therefore the period for delivery has to be calculated only from 12.11.2015. The records also reveal that as per delivery challans the materials were supplied from 28.11.2015 onwards, but the appellant-corporation did not raise any kind of objection in the manner of supplying the materials alleging delay till the dispute arose between the parties.

20. Therefore, We are of the view that despite several obligations through above said communications by the respondent to the appellant corporation for appointing and conducting inspection by the inspecting agency, the appellant-corporation delayed in appointing the inspecting agency and thereafter clearance was issued to dispatch the geometry boxes, and the respondent had commenced dispatch as per communication marked as Ex.C13 which caused the delay. Therefore, We hold that due to non compliance of reciprocal obligations by the appellant-corporation, the alleged delay had caused.

Liquidation damages and penalty:



O.S.A(CAD)No.54 of 2022

WEB COPY 21. The contention of the appellant-corporation is that as per Clause 11 of the special terms and conditions of the tender document and Clause 20 of the agreement dated 21.07.2015, the penalty was computed to Rs.1,38,39,535/- for the delayed supply made by the respondent and the same was communicated the respondent vide letter dated 19.05.2016. Thereafter, upon considering the request dated 24.05.2016 made by respondent, the appellant had reduced the penalty from 1,38,39,535/- to Rs.75,19,451/- and the balance amount of Rs.63,20,084/- was paid as final installment of payment. Without considering the above aspects, the award passed by the learned Arbitrator holding that the respondent is entitled for payment of Rs.75,19,451/- along with interest at 9 % per annum, which was confirmed by the learned Single Judge in the impugned order is liable to be set aside.

22. Undisputedly the tender was floated by the appellant-corporation for the purchase of geometry boxes free of cost to be supplied to the students for the academic year 2015-2016. Even though, the entire geometry boxes were received in the month of March 2016, after a considerable delay which occurred mainly on the part of the appellant-corporation, the same were supplied



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to the students. The said geometry boxes neither refused by the students nor kept by the appellant-corporation as unused. Therefore, the appellant corporation did not sustain any loss in this regard .

23. Further, the due date for supply of entire geometry boxes by the respondent as per the agreement was on 30.10.2015. According to the appellant-corporation, there was 136 days delay caused in supply of the geometry boxes. Undisputedly, out of 136 days, 63 days delay was caused by the appellant due to non appointing of inspecting agency. The written statement filed by the appellant before the tribunal reveals that the said 63 days delay caused due to the act of appellant-corporation has been waived by themselves. But the alleged delay of 73 days was not waived by the appellant-corporation and imposed penalty of Rs.75,19,451/- which act clearly shows the partiality in waiver of delays.

24. It is apparently proved that the appellant-corporation by admitting the delay caused on their part, had permitted the respondent to supply the geometry boxes after clearance, without raising any objections in the manner of supplying



O.S.A(CAD)No.54 of 2022

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the materials. The said delay was also subsequently waived by themselves.

Therefore, the appellant-corporation cannot levy any penalty on the ground of delay on the part of the respondent, since the appellant-corporation did not receive such materials under protest or any kind of objection.

25. In this context, the learned Arbitrator has elaborately discussed about the materials placed before him and passed reasoned order. The scope of power under Section 34 of the Arbitration and Conciliation Act, 1996 is limited and the Court cannot sit as regular appeal or revision. While dealing the original petition, the Court has to see whether any grounds under Section 34 of the Arbitration and Conciliation Act, 1996 are applicable or not. The learned Single Judge after elaborate discussion about the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, confirmed the Arbitration award and dismissed the petition. The power of appellate Court under Section 37 of the said Act is also very limited, on careful perusal of the order, there is no any ground to interfere the award passed by the Arbitrator and the order passed by the learned Single Judge.



O.S.A(CAD)No.54 of 2022

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27. In fine, this appeal is dismissed. No costs.

[D.K.K.J.] [P.D.B.J.]
27.02.2024

Speaking Order/Non Speaking Order
Index: Yes
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To
The Managing Director,
The Tamil Nadu Text Book and
Educational Services Corporation,
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68, College Road, Chennai – 600006.



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O.S.A(CAD)No.54 of 2022

**D.KRISHNAKUMAR, J.
AND
P.DHANABAL, J.**

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**Pre-Delivery Judgment in
OSA(CAD)No.54 of 2022**



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O.S.A(CAD)No.54 of 2022

27.02.2024