



OSA (CAD) No.37 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2024

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CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

and

THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A. (CAD) No. 37 of 2024

Chennai Port Trust
rep. By its Traffic Manager,
Rajaji Salai, Chennai – 1.

.. Appellant

Vs

1.M/s.T.Arumaidurai & Co.,
rep. By its Chief Executive
Joachim Robert,
DIVA, 5, II Cross Street,
Kasturibai Nagar, Adyar, Chennai – 20.

2.Justice R.Balasubramaniam,
No.157/17, P.S.Kumarasamy Raja Road,
Raja Annamalaipuram, Chennai – 28.

3.Justice A.Ramamoorthy,
No.9, 32nd Main Road, Mogappair,
Chennai.

4.K.Ramasamy,
Retired District Judge,
No.138, LB Road, Judges Avenue,
Kamarajar Nagar, Chennai – 41.

.. Respondents

(R2 to R4 deleted vide order
dated 19.09.2023 made in
C.M.P. No.18105 of 2023 in
O.S.A. (CAD) SR. No.91602 of 2021)



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Appeal filed under Section 13 of Commercial Courts Act, 2015 r/w Clause 15 of Letters Patent against the order and decretal order dated 31.10.2019 in O.P.No.97 of 2010.

For Appellant : Mr.S.Haja Mohideen Gisthi

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned intra-court appeal i.e., 'Original Side Appeal' (hereinafter 'OSA' for the sake of brevity) has been presented in this 'Commercial Appellate Division' ('CAD' for the sake of brevity) on 05.10.2021 by 'Chennai Port Trust' (hereinafter 'CPT' for the sake of brevity).

2. Captioned OSA is a statutory appeal under Section 37 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' (hereinafter 'A and C Act' for the sake of convenience and clarity).

3. Captioned OSA is listed under the cause list caption 'ADJOURNED ADMISSION' today.



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4. Mr.S.Haja Mohideen Gisthi, learned standing counsel for CPT submitted that the captioned OSA is directed against an order dated 31.10.2019 made in O.P.No.97 of 2010. To be noted, O.P.No.97 of 2010 is a petition under Section 34 of A and C Act which was filed by CPT assailing an 'arbitral award dated 26.01.2009' (hereinafter 'impugned award' for the sake of convenience and clarity) made by a three member Arbitral Tribunal. Section 34 Court dismissed O.P.No.97 of 2010 in and by aforementioned 'order dated 31.10.2019' (hereinafter 'impugned order' for the sake of convenience and clarity). As already alluded to supra, captioned OSA has been filed by CPT assailing the impugned order of Section 34 Court.

5. Considering the limited legal landscape or limited legal perimeter within which a legal drill under Section 37 of A and C Act has to perambulate, we are of the view that short facts (shorn of elaboration) will suffice. In other words, short facts imperative for appreciating this order will suffice.

6.Factual matrix in a nutshell is that the nucleus of the dispute between CPT and a licensee is an agreement dated



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04.03.1998 (Ex.C7 before the Arbitral Tribunal); that it is to be noted that in this narrative, the reference to exhibits will be as before the Arbitral Tribunal, which shall be referred to as 'AT' for the sake of convenience and clarity; that the license agreement is for a period of 20 years from the date of commencement; that the subject matter of license is JD1 Berth (one of the berths in CPT); that the license was terminated in the 4th year of operation; that on and from 25.08.2001, the licensee was not permitted to use the berth; that under the license agreement, the licensee was required to make two kinds of payment, one is Berth Hire Charges (BHC) and the other is Berth Reservation Charges (BRC); that the central *lis* pertains to alleged non-payment of BRC by licensee and consequential termination; that license agreement (Ex.C7) provides for BRC to be paid at the equivalent of one day's average BHC or at 25% of the BHC of the vessels total stay in the berth whichever is higher; that according to CPT, it is entitled to revise BRC as per directions of the Government in applicable scheme; that CPT as per directions of the Government vide Ex.C8 (letter dated 01.04.1999) revised BRC from 25% of BHC to 50% thereof for the actual stay of the vessels; that the failure/refusal to pay such dues i.e., enhanced dues led to termination which is put to challenge and this is the epicentre of the *lis*; that the termination



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was vide two notices both dated 04.08.2001 (Exs.C26 and C27); that AT was constituted; that before AT, CPT was claimant and licensee was respondent; that licensee made counter claims; that AT framed as many as 17 issues; that AT answered issues 8 and 10 to 13 in favour of CPT; that issues 1 to 7, 14 and 15 were answered against CPT and the other issues have been answered in the manner set out in the impugned award; that it is to be noted that owing to dissent on one aspect of the matter by one of the three arbitrators, an additional issue was framed and the same was answered separately vide a dissenting view of the lone arbitrator but it is nobody's case that there is any issue on this dissenting aspect; that therefore the dissenting view has not even been placed before Section 34 Court; that the challenge to the arbitral award by CPT failed leading to the captioned OSA as already alluded to supra.

7. This Section 37 Court i.e., CAD having set out the factual matrix in a nut shell i.e., short facts imperative for appreciating this order as well as the trajectory the matter has taken in reaching this Court now embarks upon the legal drill of hearing the captioned matter qua admission i.e., in the Admission Board.



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8. Notwithstanding very many averments in the memorandum of grounds of appeal and the grounds set out therein, learned standing counsel for CPT predicated his campaign against the impugned order/projected his arguments on the following points:

8.1 Section 34 Court fell in error in overlooking the position that BRC (unlike BHC) is fixed by TAMP (Tariff Authority of Major Ports);

8.2 AT vide impugned award erred in coming to the conclusion that there is no estoppel qua claim for BRC at 50% and this aspect of the matter has been overlooked by Section 34 Court though it was projected before Section 34 Court;

8.3 AT erred in rejecting the claim for damages caused by the licensee as certain damages made i.e., for an illustration, 11 sliding doors being replaced was not disputed by licensee in oral evidence.

9. Before we embark upon the exercise of considering aforementioned points that were projected by learned standing counsel for CPT in his campaign against the impugned order made



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by Section 34 Court, we deem it appropriate to set out certain obtaining positions which would add specificity and clarity to the legal perimeter within which this Section 37 legal drill would perambulate in this CAD and they are as follows:

9.1 Section 34 is neither an appeal nor a revision. It is not even a full-fledged review. Section 34 is a mere challenge to an arbitral award vide eight slots adumbrated under Section 34(2) and 34(2A). These eight slots have been repeatedly described by this court as 'pigeon holes', the reason is challenge to an arbitral award will not be heard as an appeal and the test is to see whether the challenge to an arbitral award fits snugly into any one of the eight slots and if so, the award will be dislodged failing which the award will be sustained. This principle is in the light of Sections 5 and 35 of A and C Act which provide for minimum judicial intervention and sanctity of finality of arbitral awards. Therefore, Section 34 legal drill and obviously Section 37 legal drill is a delicate legal balance between sanctity of finality of arbitral award/minimum judicial intervention on one side and judicial review qua eight pigeon holes on the other side;

9.2 The aforementioned point has been repeatedly reiterated by Hon'ble Supreme Court in a catena of case laws



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starting from ***Fiza Developers*** case [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796***], wherein Hon'ble Supreme Court held that Section 34 legal drill is a one issue summary procedure. It was made clear that 'one issue' does not mean that Section 34 legal drill should turn on only one issue but the arbitral award being put to challenge in a Section 34 legal drill itself is the lone issue. It was reiterated that it is a summary procedure. Thereafter, in ***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***, Hon'ble Supreme Court reiterated that the ratio in ***Fiza Developers*** case is a step in the right direction. This was followed by ***Canara Nidhi Limited v. M.Shashikala*** reported in ***2019 SCC OnLine SC 1244*** wherein Hon'ble Supreme Court held that a Section 34 Court would look at only the records of the Tribunal and not material outside the same;

9.3 As regards eight pigeon holes adverted to supra, five are slotted under Section 34(2)(a), two are slotted under Section 34(2)(b) and one is a stand alone provision vide Section 34(2A).

10. Now we revert to the legal drill at hand. Section 34 petition before Hon'ble Single Judge presented by CPT is dated



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24.04.2009. A careful perusal of the petition makes it clear that it merely refers to Section 34 without advertent to specific slot/pigeon hole under which the challenge to arbitral award has been laid. However, in the light of the submissions made today before us i.e, Section 37 Court and in the light of the Section 34 Court order which captures the submission of the protagonist of Section 34 legal drill, it is clear that challenge is under Section 34(2A) patent illegality and at the highest public policy point vide Clause (ii) of Explanation 1 of Section 34(2)(b)(ii).

11. On the above basis, we now proceed to consider the three points on which learned standing counsel for CPT predicated his campaign (against Section 34 Court order) in this CAD.

12. As would be evident from what we have captured supra, the first point turns on BRC being fixed by TAMP unlike BHC. In this regard, a careful perusal of paragraphs 6 and 7 of Section 34 Court order makes it clear that Section 34 Court has considered the award in the light of the terms of the contract more particularly Article III (e), (f) and (n) thereat and come to the conclusion that as regards BRC, it cannot be said that the AT disregarded TAMP order. Section 34 Court came to this conclusion



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by holding that AT held that authority of TAMP does not extend to fixation of BRC as opposed to tariff and scale of rates. This is based on The Major Port Trusts Act, 1963 (MPT). We are unable to persuade ourselves to accept the argument that the Section 34 Court has fallen in error in coming to the conclusion that the AT has applied the terms of the contract as this is what the AT is expected to do.

13. This takes us to the next point which turns on increase of BRC i.e., from 25% to 50% and the estoppel point. As regards this point also, a careful perusal of the impugned Section 34 Court order makes it clear that it has noticed that there is no consent and absent consent, the AT held that BRC would be payable only on one day's average BHC or 25% of the BHC vessels total stay in the berth whichever is higher as stipulated in clause (f) of Article III of the license agreement (Ex.C7). Therefore, we find no error in the approach of Section 34 Court, on the contrary, we find that the approach of Section 34 Court is sound and in consonance with the sublime philosophy underlying Section 34 legal drill as it is gone by the terms of/covenants in contract.

14. This takes us to the question of damages. On



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damages, there is a specific plea that 11 numbers of sliding doors were changed. To be noted, this is by way of illustration. Nonetheless a careful perusal of the impugned award of the AT makes it clear that it turns on oral evidence on the side of the respondent. This has been noticed by Section 34 Court. Law is well settled that there can be no re-appreciation of evidence in a Section 34 legal drill and a lis under Section 37 legal drill unlike a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity]. As regards patent illegality, we also deem it appropriate to advert to the proviso to Section 34 of A and C Act which makes it clear that two aspects are forbidden. First is 'mere erroneous application of law' and second is 're-appreciation of evidence'. Therefore, even on a demurrer, even if it is an erroneous application of law, it would pass muster under Section 34(2A) challenge. However, we are not saying that it is an erroneous application of law and we are only saying that AT has proceeded on the basis of oral evidence let in by the licensee and re-appreciation of evidence is impermissible and therefore Section 34 Court was right refusing interference.

15. This takes us to the obtaining position as laid down by



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Hon'ble Supreme Court as regards public policy in Associate Builders [***Associate Builders Vs. Delhi Development Authority*** reported in **(2015) 3 SCC 49**]. Hon'ble Supreme Court culled out three facets of public policy, they are : (i) judicial approach, (ii) Natural Justice principle (NJP) and (iii) irrationality / perversity. Hon'ble Supreme Court also laid down three separate tests for these three facets and they are : (i) fidelity of judicial approach, (ii) age old *audi alteram partem* and (iii) Wednesbury's principle of reasonableness, respectively. Thereafter, in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India [(2019) 15 SCC 131]***, in the light of amendments to A and C Act, Hon'ble Supreme Court explained Associate Builders to say that judicial approach is no more available as a ground. As regards NJP, it is still available and the test is *audi alteram partem* but in the case on hand, i.e., captioned matter, it is nobody's case that there is NJP violation and therefore, NJP does not arise. As regards irrationality / perversity, Hon'ble Supreme Court held in ***Ssangyong*** that this facet of public policy is still available but not under Section 34(2)(b)(ii) (public policy point), but as patent illegality under Section 34(2A) of A and C Act. If it is patent illegality under Section 34(2A), the proviso kicks in and two



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aspects are forbidden (as alluded to supra) and the two forbidden aspects are (a) re-appreciation of evidence and (b) mere erroneous application of law. Be that as it may, we have already alluded to supra that the legal drill in Section 34 Court was under Section 34(2A) (patent illegality) and at the highest bordering on section 34(2)(b)(ii) of A and C Act. In the light of this aspect of the matter, i.e., **Associate Builders** as explained in **Ssangyong**, Section 34(2)(b)(ii) public policy part of legal drill will also get slotted only under patent illegality, namely Section 34(2A) of A and C Act.

16. Before concluding, we need to notice that no issue has been raised with regard to the additional issue framed owing to the lone dissenting view of one of the learned arbitrators and the separate view rendered by the lone arbitrator. To be noted, this has been set out supra elsewhere in this order. Therefore, it is really not necessary to enter into that arena. Be that as it may, as regards arbitral awards by ATs which are not sole arbitrator ATs, whenever there is a dissenting view, the majority view constitutes the award and when the award is challenged before the Section 34 Court and subsequently before Section 37 Court what the Court would look into is the correctness of the award i.e., the majority view and statutory remit of Section 34 or Section 37 Court is not



to test whether the majority view or minority view is correct. In other words, there is only one award before Section 34 and Section 37 Courts and that is the 2:1 award as in the case on hand. This principle has been clearly concluded in **Ssangyong** case where the Hon'ble Supreme Court made a departure by resorting to Article 142 of The Constitution of India and upheld the minority view. Hon'ble Supreme Court made it clear that upholding the minority view is an exception which is being resorted to by Hon'ble Supreme Court by taking recourse to Article 142. Therefore, it is also to be noted that as regards other issues which have been adverted to and alluded to supra, the award is unanimous as would be evident from the concluding paragraph of the impugned award viz., paragraph 32 which reads as follows:

'32. The award passed as above is unanimous as far as all the issues, except issues 12, 13, 8, 9, 10, 11, 16 and 17 are concerned. In respect of the specific issues referred to above and the additional issue framed, one of the Member Arbitrators viz., Shri.K.Ramasamy, District Judge (Retd.) had given a dissenting award. To make it more clear, this award, on all the issues, except issues 8, 9, 10, 11, 12, 13, 16 and 17, is the unanimous decision of all the three Arbitrators while on the above mentioned issues alone one of Arbitrator has given a dissenting award. The dissenting Arbitrator had also framed an additional



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issue and had answered it in favour of the licensee and it does not get the approval of the other two Arbitrators.'

17. The sum sequitur of narrative, discussion and dispositive reasoning thus far is captioned OSA fails and the same is dismissed. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)
26.06.2024

Index:Yes/No
Neutral Citation: Yes/No
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To

The Sub Assistant Registrar,
Original Side, High Court,
Madras.



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M.SUNDAR.J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,
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