BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.01.2025

Pronounced on : 08.05.2025

CORAM

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN
AND
THE HON'BLE MS.JUSTICE R.POORNIMA

C.M.A.(MD)Nos.472 and 530 of 2022
and
C.M.P.(MD)No.4149 of 2022

C.M.A.(MD)No.472 of 2022:-

The Board of Trustees,
V.O.Chidambaranar Port Trust,
Rep. by its Chairman,
Tuticorin. ... Appellant

Vs.

M/s.Seaport Logistics Pvt Limited,
Through its Managing Director,
B32, World Trade Avenue,
Harbour Estate,
Tuticorin - 628 004. ... Respondent

Prayer : Civil Miscellaneous Appeal is filed under section 37 of the Arbitration and Conciliation Act to submits the following Memorandum of Civil Miscellaneous Appeal to set aside the order dated 15.02.2022 made in Ar.O.P. No.42 of 2019 on the file of Principal District Judge, Thoothukudi in A.F.No.105 of 2017 on the file of the Arbitral Tribunal, Chennai.

For Appellant : Mr.Yashodh Vardhan, Senior Counsel,
For Mr.VR.Shanmuganathan.

For Respondent : Mr.K.Kabir, Senior Counsel,
For Mr.L.Siva.

C.M.A.(MD)No.530 of 2022:-

M/s.Seaport Logistics Private Limited,
Rep. by its Director,
B32, World Trade Vanue,
Harbour Estate,
Tuticorin - 628 004. ... Appellant

Vs.

The Board of Trustees,
V.O.C. Chidambaranar Port Trust,
Tuticorin,
Rep. by its Chairman. ... Respondent

Prayer : Civil Miscellaneous Appeal is filed under Section 37 (1) and (2) of Arbitration and Conciliation Act to set aside the order dated 15.02.2022 in Ar.O.P. No.46 of 2019 on the file of the Principal District Judge, Thoothukudi and allow Ar.O.P. No. 46 of 2019.

For Appellant : Mr.K.Kabir, Senior Counsel,
For Mr.L.Siva.

For Respondent : Mr.Yashodh Vardhan, Senior Counsel,
For Mr.VR.Shanmuganathan.

COMMON JUDGMENT

(Judgment of the court was delivered by G.R.SWAMINATHAN, J.)

These civil miscellaneous appeals are directed against the common order dated 15.02.2022 passed by the learned Principal District Judge, Thoothukudi dismissing Ar O.P Nos.42 and 46 of 2019.

2.V.O.Chidambaranar Port Trust (VOCPT) located at 8 kms from Thoothukudi City is a major port. The port then had a draught restriction of 12.8 meters. As a result, vessels requiring draught of more than 12.8 meters could not enter the port as they would get grounded. Hence, they had to lighten their weight at the outer anchorage itself. The lightening process was carried out by discharging the cargo by using the ship's crane, if available, and putting them in the barge alongside the vessel. The barge will thereafter bring the cargo to the berth. There will be a shore excavator which will unload the cargo from the barge and put them into the wharf for the purpose of clearing the same. This unloading operation from the vessel to the barge and from the barge to the berth and from the berth to the shore and to any other place is called “anchorage operation”.

3.It was suggested to VOC Port that the loading/unloading of cargo using a floating crane would be an improved method. The claimant vide letter dated 03.08.2013 sought in-principle approval for operating floating crane as the anchorage handling had dwindled on account of increasing of draught from 10.70 meters to 12.80 meters and that importers were interested in bringing bigger vessels if off-shore facilities were created. The Tuticorin Stevedores Association, Indian Chamber of Commerce and Industries and All India Chambers of Commerce and Industries also made similar requests. After getting approval from the Ministry of Shipping, Government of India vide letter dated 20.11.2013, the Port Trust issued tender notification dated 08.10.2013 inviting tenders for grant of license for deployment of floating cranes for a period of ten years on a revenue sharing basis at a minimum of 32 percent on tariff charged per mt. Since Kandla Port had fixed 32% as the sharing formula for the floating crane contract, the same figure was adopted by Tuticorin Port Trust also.

4.The tariff for cargo handling using floating crane was fixed by the Tariff Authority for Major Ports (TAMP) on 23.12.2013. On 06.01.2014, M/s.Seaports Logistics Private Limited, Tuticorin submitted their technical and price bids. They were the sole bidders. Interestingly, they had offered a revenue share of 50%. On 31.01.2014, the bid was accepted and work order was issued. On 01.03.2014, license agreement was entered into between the parties. The contract value was fixed at Rs.70.71 crores. The period of contract was ten years. The licensee was required to supply, install and commission minimum one number of floating crane or more within six months from the date of issue of letter of intent. The floating crane was to be brand new or less than five years old. Section IV of the agreement sets out the scope of work in full with specifications. The licensee could, however, commence commercial operations only on 16.12.2014.

5.The licensee sought certain concessions from the Port Trust to facilitate the business operations. Accordingly, on 17.10.2015, the Port Trust granted approval for exemption from pilotage charges for barges and labour levy. On 31.05.2016, the tariff was also reduced to attract more traffic.

6.The licensee did not own any floating crane. They hired one from Goa. They had entered into a hire purchase agreement on 03.10.2014 for a period of ten years. On 26.09.2016, the licensee wrote to the Port seeking permission to sail the floating crane out of Tuticorin to Goa for dry docking since the crane had developed some major technical snag and could not be locally repaired. It was also admitted that the floating crane encountered some minor collisions with the mother vessels during rough weather conditions. The licensee reiterated their request vide letter dated 18.10.2016 and undertook to abide by the extant rules.

7.On 19.10.2016, the Port gave the permission sought for on condition that the existing floating crane be replaced by another floating crane of similar specification before it was taken out. The licensee was reminded that as per the agreement condition, 90% availability of the crane should have been ensured. The licensee replied on 20.10.2016 that they could not effect replacement and reiterated their request for taking the crane for dry docking. On 26.10.2016, they agreed that the Port may collect penalty as per the agreement. Thereupon, permission was granted vide certificate dated 27.10.2016 on condition that the floating crane must be brought back after completion of dry docking repairs ; it was also to be subject to levy of penalty. On 20.12.2016, the Port Trust called upon the licensee to inform the date of arrival of the floating crane. The licensee had earlier stated that the floating crane would be back on 28.12.2016. However, on 22.12.2016, the licensee informed the Port Trust that the owners of the floating crane had told them that they would not be able to return the floating crane that was given on hire. On 03.01.2017, the licensee sought time till 28.02.2017 to procure an alternative crane. On 11.01.2017, the Port Trust made it clear that either an alternative arrangement should be made on or before 15.02.2017 or the consequences would follow.

8.On 09.02.2017, the licensee informed the Port Trust that there were no takers for floating crane and contended that the contract had become impossible of performance. Pleading frustration, they sought temporary suspension of the floating crane operation without disturbing anchorage operations by using barges and excavators. On 17.02.2017, the Port Trust raised a demand for payment of Rs.1,73,64,821/- towards revenue share and penalty. On 15.03.2017, the Port Trust formally terminated the agreement and also invoked the performance guarantee of Rs.3.53 crores furnished by the licensee when the agreement was entered into. On 20.03.2017, the bank guarantee was encashed by the Port Trust.

9.The licensee invoked the arbitration clause in the agreement. A three member Arbitral Tribunal was constituted on 30.03.2017. The licensee filed claim statement to declare the agreement dated 01.03.2014 as void due to mutual mistakes and frustration. They also wanted the termination notice dated 15.03.2017 to be declared as illegal. Damages to the tune of Rs.34,97,78,702/- was sought. The break-up of the claim was as follows:-

(a) Revenue share refund	= Rs. 4,55,04,721/-
(b) Bank guarantee refund	= Rs. 3,81,37,540/-
(c) Damages	= Rs.26,61,36,441/-

The Port Trust denied the claim and lodged counter claim. During the period when the floating crane was not in operation, the licensee had rendered service to the vessels by using barges and excavators and thus collected a sum of Rs.2,02,37,204/-. The port claimed Rs.1,01,18,602/- representing 50% of the said revenue. It also claimed damages to the tune of Rs.20,46,65,833/- together with interest.

10.The Arbitral Tribunal after going through the pleadings on either side, framed the following issues:-

> *"1) Whether the claimant proves that the agreement dated 01.03.14 is void due to mutual mistake?*
>
> *2) Whether the claimant proves that the agreement dated 01.03.14 is void due to frustration?*

3) Whether the claimant proves that the termination of the agreement dated 01.03.14 by the respondent's notice dated 15.03.17 is illegal?

4) Whether the claimant proves that the respondent has committed breach of the agreement dated 01.03.14?

5) Whether the respondent's action of invoking the Bank Guarantee furnished by the claimant is illegal?

6) Whether the claimant proves that it has suffered damages of Rs.25,48,95,368/- which is entitled to recover from the respondent?

7) Whether the respondent proves that the claimant is liable to pay the respondent the balance revenue share of Rs.1,01,18,602?

8) Whether the respondent proves that the claimant is liable to pay the respondent the loss of earnings of Rs. 20,46,65,833/-?

9) What is the rate of interest payable on the sums awarded, for the preference period, the period pending Arbitral proceedings and for the post award period?

10) Which party is entitled to costs or arbitration?

11) To what other relief?"

11.The claimant / licensee examined two witnesses on its side and marked Exs.C1 to C48. The port trust examined one of their officers as R.W.1 and marked Exs.R1 to R40. The Arbitral Tribunal vide award dated 20.11.2018 answered Issue Nos.1, 2, 3, 4 and 6 against the claimant. Issue No.5 was answered against the port trust and it was held that encashing bank guarantee for a sum of Rs.3.53 crores was erroneous and that the said sum was liable to be returned to the claimant / licensee with interest at the rate of 18% per annum. Issue No.7 was also decided against the port trust. Issue No.8 was also decided against the port trust and it was held that the trust has not proved their claim for damages. Issue No.9 was answered by granting interest at the rate of 18% per annum for Rs.3.53 crores of the bank guarantee amount. It was held that the withheld amount of Rs.1,01,18,602/- should be returned to the claimant with 18% per annum from the date of withholding till the date of actual payment. The cost of proceedings was ordered to be borne equally.

12.The port trust filed Ar.O.P.No.42 of 2019 under Section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Judge, Thoothukudi for setting aside the award. The licensee also filed Ar.O.P.No.46 of 2019 questioning the award insofar as it denied claim against them. Both Ar.O.Ps were heard together and both were dismissed vide common order dated 15.02.2022. Challenging the same, port trust filed C.M.A.(MD)No.472 of 2022 and the licensee filed C.M.A.(MD)No.530 of 2022.

13.The learned Senior Counsel for the port trust submitted that the award passed by the Arbitral Tribunal suffers from an internal inconsistency. After rightly holding that the agreement dated 01.03.2014 was not void and that the termination of the same was justified, it could not have been held that invocation of bank guarantee was not lawful. He submitted that the finding of the Arbitral Tribunal in this regard was patently illegal. He took us through the relevant clauses in the license agreement and contended that the port trust rightly forfeited the performance security and called upon this Court to set aside this part of the award. Since the award had dealt with the various claims separately and distinctly, this Court can set aside the impugned award in respect of Claim No.5. He relied on the decision of the Hon'ble Supreme Court reported in ***(2011) 5 SCC 758 (J.G.Engineers Private Limited v. Union of India)***. He also submitted that this Division Bench, exercising appellate jurisdiction under Section 37 of the Arbitration and Conciliation Act, 1996, can exercise the powers as are exercisable under Section 34 of the Act. He submitted that the learned Principal District Judge failed to exercise the jurisdiction conferred on her under Section 34 of the Act. Written submissions were filed on behalf of the port trust and the learned Senior Counsel took us through its contents. He submitted that the port trust had suffered huge loss and by invoking bank guarantee, it was only partially offset. He relied on a catena of judgments and called upon this Court to allow C.M.A.(MD)No.472 of 2022 and dismiss the appeal filed by the licensee.

14.The contentions of the Port Trust were vehemently contested by the learned Senior Counsel for the claimant / licensee. Even though the licensee had also filed an independent appeal under Section 37 of the Act, we are of the view that it is only a mock appeal and not a real appeal. Just as in elections, dummy candidates are put up, the licensee has mounted a dummy challenge to the arbitral award. From the manner in which the learned Senior Counsel for the licensee put forth his arguments, we could discern that he was more interested in upholding the arbitral award. He relied on a catena of decisions. He strongly contended that the licensee had been misled in entering into contract by the projections held forth by the port trust. The licensee had made considerable capital investments and suffered huge loss by entering into the agreement. On the other hand, the port trust has not at all suffered any loss. The clause relating to forfeiture of bank guarantee was in the nature of penalty and therefore, Section 74 of the Indian Contract Act, 1874 will come into play. The Arbitral Tribunal rightly held that invocation of bank guarantee was unlawful. The view taken by the

Arbitral Tribunal was both a plausible and proper view. When the learned Principal District Judge in exercise of jurisdiction under Section 34 of the Act did not interfere with the award, the question of interference with the arbitral award in exercise of appellate jurisdiction under Section 37 of the Act will not arise at all. He explained the nature of challenge mounted under Section 34 of the Act ; it was neither a original proceeding nor an appeal. Therefore, the scope for exercising the power under Section 37 of the Act becomes all the more constricted. He also submitted that in view of the judgment of the Hon'ble Supreme Court reported in ***(2021) 9 SCC 1 (NHAI v. M.Hakeem),*** there cannot be partial setting aside of the award. He called upon this Court to dismiss the appeal filed by the port trust.

15.We carefully considered the rival contentions and went through the evidence on record. The following issues arise for consideration : -

(a) What is the scope and extent of the proceeding under Section 37 of the Arbitration and Conciliation Act, 1996?

(b) Whether the finding of the Arbitral Tribunal that invocation of bank guarantee by the port trust was unlawful suffers from patent illegality?

(c) Whether this Court can set aside the finding of the Arbitral Tribunal with regard to invocation of bank guarantee alone and sustain the rest of the award?

16.Issue No. (a) : - Section 37 of the Arbitration and Conciliation Act, 1996 catalogues the appealable orders. An appeal under Section 37 of the Act shall lie from an order setting aside or refusing to set aside an arbitral award under Section 34. An appeal is normally understood as a continuation of the original proceedings. In other words, the first appellate court can do what the original court can and there is a re-appreciation of the entire evidence on record. But the proceedings under Section 34 cannot be said to be a original proceeding. Under Section 34, an arbitral award is put to challenge on the grounds set out in the petition. It is more in the nature of a challenge procedure. That is why, in ***Deep Industries Limited vs. ONGC (2020) 15 SCC 706***, it was observed that Section 37 grants a constricted right of first appeal. A three Judges bench of the Hon'ble Supreme Court in ***DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357** clarified that the jurisdiction under Section 37 of the Act is akin to the jurisdiction of the court under Section 34 and restricted to the same grounds of challenge as Section 34. In ***Punjab State Civil Supplies Corporation Limited vs. Sanman Rice Mills and Others (2024 SCC OnLine SC***

2632), it was reiterated that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited. It was specifically held that the appellate power under Section 37 is exercisable only to find out if the court exercising power under Section 34 of the Act has acted within its limits as prescribed therein or has exceeded or failed to exercise the power so conferred. The appellate court cannot engage in re-appraisal of evidence as if it is sitting in an ordinary court of appeal. In ***Bombay Slum Redevelopment Corporation (P) Ltd. vs. Samir Narain Bhojwani (2024) 7 SCC 218***, it was observed that the jurisdiction of the appellate court dealing with an appeal under Section 37 is more constrained than the jurisdiction of the court dealing with a petition under Section 34. The function of the appellate court is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the appellate court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraint. In view of the aforesaid decisions, all that we need to do is to see if the learned District Judge while exercising jurisdiction under Section 34 of the Act was right in holding that the grounds of challenge have not been established.

17.Issue No.(b) : - The Arbitral Tribunal gave the following reasons for coming to the conclusion that invocation of bank guarantee was illegal :

(i) The claimant factually proved that there was no demand to lighten the ships by lifting the cargo through floating crane and that the said fact was not disputed by the Port Trust by filing material evidence.

(ii) It was an admitted case of the parties that there was little or no demand for using floating crane to unload the cargo.

(iii) In the absence of proof about demand for using the floating cranes and the admitted fact that during the contract period, more than 90% of the business did not fructify, the non-availability of the floating crane from 29.10.2016 to 14.02.2017 makes no difference.

(iv) Though the claimant issued trade notice dated 01.07.2016, still the business did not pick up. There were factors such as world economic slump, crude oil price crash and no cost benefit in anchorage lightening.

(v) The project indisputably is a failure and unviable.

18.The Arbitral Tribunal could not have used the expression “admitted”. Nowhere, the Port Trust conceded the case of the claimant. The agreement between the parties contained a clause enabling the Port Trust to invoke the bank guarantee for a sum of Rs.3.53 crores in the event of termination on the ground of default by the licensee. The question that calls for consideration is whether the finding of the Arbitral Tribunal that as a result of the breach of contract, the Port Trust did not suffer any loss can be characterised as perverse. The Arbitral Tribunal had already held that the agreement between the parties was not void due to mutual mistake. It noted that the licensee has been a stevedore for several years and was already carrying on lightening operations at the anchorage using ship gears and barges. He was not a stranger to the Port. He had gone through the tender notification, participated in the pre-bid hearings, accepted the TAMP order, submitted the bid and signed the agreement. The Arbitral Tribunal remarked that having initially proposed to the Port Trust that floating crane facility will attract more volume of cargo to the Port the claimant was not justified in pleading subsequently that the contract was void.

19.The Arbitral Tribunal also rejected the argument of the licensee that the agreement had become void on account of frustration. The tribunal noted that the licensee upon acceptance of the agreement terms and conditions had hired a floating crane. He had to pay the hire charges as well as incur operating cost. The tribunal noted that the Port Trust had not assured any minimum guarantee. On the other hand, they extended full cooperation to continue the contract. But the performance of the contract had become onerous for the licensee. The tribunal concluded that such commercial failure cannot be treated as an unforeseen circumstance so as to attract the doctrine of frustration.

20.The Arbitral Tribunal also negatived the claim of the licensee that the termination of the agreement by the Port Trust on 15.03.2017 was illegal. The tribunal carefully analysed the correspondence between the parties. It noted that the licensee while seeking permission to move the floating crane for dry docking vide letter dated 26.09.2016, undertook to bring it back immediately on completion of repairs or within sixty days of release, whichever was earlier. The licensee also undertook to pay the penalty for the non-availability of the floating crane to achieve the minimum guaranteed availability. The Arbitral Tribunal went on to record a finding that the licensee could not bring back the floating crane as the crane owner declined to return it. The licensee could not arrange an alternative crane also. An unambiguous finding was rendered that failure to deploy the floating crane amounted to breach of the terms of the license agreement. It was clearly found that the licensee's failure led to termination of the agreement and that therefore, the Port Trust could not be faulted. Issue No.4 was also answered against the licensee. The Arbitral Tribunal was of the view that the parties were bound by the license agreement and revenue share was the consideration for granting license to the licensee and that the Port never promised or agreed or guaranteed any volume of business.

21.After thus answering Issue Nos.1 to 4, the Arbitral Tribunal, proceeded to hold that the Port Trust erred in invoking the bank guarantee only on the ground that it did not suffer any loss. It relied on the decision reported in ***(2015) 4 SCC 136 (Kailash Nath Associates vs. DDA)*** in which it was held that damage or loss caused is sine qua non for award of reasonable compensation under Section 74 of the Indian Contract Act, 1872. According to the Tribunal, since no loss was caused to the Port Trust, it could not have forfeited the bank guarantee furnished by the licensee. The award relies only on paragraph 29 of the ***Kailash Nath Associates*** judgment. Para 29 of the judgment is in two parts. It holds that there was no breach of contract on the part of the appellant. Secondly, DDA was not put to any loss. Therefore, it was held that it would be arbitrary to allow DDA as a public authority to appropriate Rs.78.00 lakhs without any loss being caused. In fact, DDA made a substantial gain by re-auctioning the plots. In the case on hand, even according to the Tribunal, the licensee had breached the contract.

The Port Trust was not at fault. Notwithstanding the distinguishability of facts, we may now proceed to analyze if the principles laid down therein regarding interpretation of Section 74 of the Indian Contract Act are applicable to the case on hand.

22.Section 74 of the Indian Contract Act, 1872 is as follows :

> "74. Compensation for breach of contract where penalty stipulated for.—1 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The agreement between the parties contained penalty clauses as well as a forfeiture clause. The forfeiture clause specified a named sum of Rs.3.53 crores. Therefore, Section 74 of the Indian Contract Act becomes applicable. This provision has been interpreted in a host of decisions by the Hon'ble Supreme Court. In ***ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705,** it was held as follows :

*"**64.....**Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach....*"

The aforesaid ratio was applied in a recent decision reported in ***(2023) 3 SCC 714 (Desh Raj v. Rohtash Singh)*** and it was held as follows :

*"**43.** Hence, in a scenario where the contractual terms clearly provide the factum of the pre-estimated amount being in the nature of "earnest money", the onus to prove that the same was "penal" in nature squarely lies on the party seeking refund of the same. Failure to discharge such burden would treat any pre-estimated amount stipulated in the contract as a "genuine pre-estimate of loss"."*

In ***Ashwini Kumar Handa v. UOI (2018) 3 SCC 322***, the following principles laid down in ***ONGC Ltd vs. Saw Pipes Ltd*** were quoted ;

> "**68.** From the aforesaid discussions, it can be held that:
>
> (*1*) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
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> (*2*) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.
>
> (*3*) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.
>
> (*4*) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

In ***Construction and Design Services v. DDA (2015) 14 SCC 263***, the Hon'ble Supreme Court adopted the approach in ONGC Ltd v. Saw Pipes Ltd wherein it was held that where it would be difficult to prove exact loss or damage which the parties suffer because of breach of contract, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. Where evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances.

In Kailash Nath Associates vs. DDA (2015) 4 SCC 136, it was held as follows :

> "**43.1.** Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable

compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

23.Section 74 of the Indian Contract Act, 1872 will not have the same manner of application irrespective of the nature of contract. There is no single yardstick to arrive at a finding whether there was loss or no loss. The approach to be adopted by the court or the tribunal would depend on the nature of transaction. In the case of a contract for delivery of goods, if breached, it is very easy to determine the compensation payable to the innocent party. All that needs to be done is to deduct the contract price from the market price on the date of breach. In the case of engineering contracts, damages are assessed by applying Hudson formula or Emden formula or Eichleay formula. The formula applicable will depend on the factual matrix. The licensing agreements on the other hand would be in a different category altogether. Apparently, the licensor who merely grants license may not appear to have suffered any loss as such. But when a revenue share or a fixed fee is the consideration, the premature exit by the licensee would definitely cause loss to the licensor.

24.The case on hand pertains to a licensing agreement. The Port Trust gave license to the claimant to deploy floating cranes to aid their anchorage operations to lighten cargo in the visiting vessels. The Arbitral Tribunal itself noted that the revenue share offered to be paid by the licensee was the consideration. If only the licensee had stayed in the field and the contract lasted for its full period of ten years, the port trust would have earned a substantial sum. It is relevant to note that even though the licensee had performed their contractual obligations only for the period up to October 2016, they had earned Rs.6,92,94,797/- and paid a sum of Rs.3,60,12,874/- to the port trust. If twenty three months of license period would fetch Rs.3.60 crores for the port trust, the revenue, that could have been earned by the port trust if the contract had run its full course, would be several times over.

25.The Arbitral Tribunal came to the conclusion that there was no demand for floating cranes and that the project was a failure and unviable and that consequently there was no loss to the Port Trust only based on the business results of the licensee. In other words, the data generated on account of the manner in which the licensee operated their business led the Tribunal to arrive at the aforesaid finding.

26.The case involves a clear inter-sectionality between law and economics. Long ago, the great American Judge O.W Holmes remarked "for the rational study of law, the black – letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics...". In quite a few academic articles, one notices reference to game theory in auction. Game theory focusses on situations where individuals or entities interact strategically, meaning their choices and actions are influenced by the anticipated actions of others. Games can involve conflict situations or can be based on cooperation. The former is called as zero-sum game. One profits at the cost of another. But there are games based on cooperation which are called as positive-sum games. When a licensor grants license based on a revenue sharing agreement, it is a classic instance of positive-sum game resulting in a win-win situation for both. That is why, when the licensee approached the port trust for some accommodation and concession to increase the traffic, it was readily accepted.

27.We noted at the very outset that the suggestion to start floating crane operation came from the licensee and the trade bodies. The licensee is not a novice. They had been in the field of stevedoring for a quarter of a century when the agreement was entered into. The Port Trust had not guaranteed any definite volume of business. The licensee had made a strategic calculation while entering into the contract. Even though in the agreement, the minimum share payable to the Port Trust was fixed at 32%, the licensee voluntarily chose to offer 50%. It is not as if an entirely novel idea of deploying floating cranes was conceived only in Tuticorin Port Trust. As per the evidence on record, it was already in operation in Kandla Port Trust.

28.The licensee ought to have adopted an effective marketing strategy. Whenever a new product or service is introduced in the market, there will be an effective advertisement to reach out to the prospective customers. In fact, through advertisements, a need is created even where there was none. It all depends on the manner of conducting the business operations. If the anchorage operations by deploying floating cranes could be successfully carried out elsewhere, there is no reason as to why the business model could not have been replicated in Tuticorin. The claimant has not demonstrated that the very idea of floating cranes was an absurd one. It is true that the licensee was not able to carry on beyond a point. But the finding that the project itself was unviable is perverse. Merely because the licensee suffered loss, one cannot conclude that the Port trust did not suffer any loss. If the licensee had performed their part of the contract, the Port Trust would have definitely earned its revenue share.

29.The business model envisaged that the parties conduct their business in an efficient manner. Suppose one party handles the affairs inefficiently leading to the termination of contract, the results generated by such inefficient conduct cannot be the basis to infer that the project itself was unviable. The Arbitral Tribunal came to the abrupt conclusion that the project was a failure. From the fact that the breaching party had suffered loss, the Arbitral Tribunal could not have concluded that the project was unviable. In one part of the award, the tribunal held that the licensee cannot plead that the contract had become impossible of performance or frustrated merely because it became onerous to perform. But while dealing with claim No.5, the issue is answered in favour of the claimant for the reason that the claimant took a risky contract which became onerous to perform. The award thus suffers from a patent internal contradiction. The finding of the Arbitral Tribunal in this regard is perverse.

30.The conclusion of the Arbitral Tribunal on the issue of invocation of bank guarantee could not have been a possible view at all. The perverse finding goes to the root of the matter and is the basis for the conclusion in respect of Issue No.5. Hence, the final award suffers from patent illegality on this score. The learned District Judge, Tuticorin adopted a totally hands-off approach. While in matters relating to Arbitration, there is scope only for limited judicial intervention, it is not altogether shut off. Section 73 of the Indian Contract Act, 1872 provides for award of reasonable compensation for loss or damage caused by breach of contract. Section 74 kicks in where liquidated damages or penalty has been stipulated. If the agreement contains a pre-estimated figure of liquidated damages or a sum has been named as penalty, that would operate as the ceiling. What should be awarded as compensation would depend upon the quantification of loss. But there could be certain contracts where it is not possible to exactly quantify the loss occurred. In such cases, if the court comes to the conclusion that the figure mentioned in the agreement is a genuine pre-estimate, the said sum can be awarded (vide ***Kailash Nath Associates v. DDA)***.

31.The case on hand is not a contract for delivery of goods. It is not a contract for completing a project. In such cases, it is fairly easy to quantify the loss caused as a result of the breach of the contract. The Port Trust and Seaport Logistics Private Limited entered into a licensing agreement. The licensee commenced their commercial operations on 16.12.2014 and gave up in October 2016. The contract was to last for ten years. It was a long term contract. The contract value was more than 70 crores. The bank guarantee amount represented just 5% of the contract value. The licensee was not able to procure a floating crane of their own. They had taken one on hire purchase basis for ten years. As per the contract specifications, the crane was to be in a good working condition but the crane developed a big defect. As a result, it even collided with the mother vessels. The crane was taken out on an express undertaking that it will be brought back after the repairs were carried out. But the crane owner detained the crane and the hire purchase agreement between the owner and the licensee was prematurely terminated. There are certain commercial projects that yield returns only in the long run. They are not meant for those players who want to make quick gains and exit early. Justice Ujjal Bhuyan while advising law students made the following remark :

> "Legal profession is not a 20-20 IPL match, it is not even an ODI. It is more like a Test match. You must be technically sound to play a long long innings. You must be able to face the spinners, fast bowlers and even the

bouncers. Therefore, stick to basics. Law is not rocket science. It only requires hard work and perseverance."

What applies to legal professionals would apply with equal force to commercial players too.

32.Admittedly, the licensee violated the contract. That is why, the Arbitral Tribunal rightly held that the termination of the contract by the Port cannot be faulted. Having come to this conclusion, the Tribunal could not have allowed the licensee to wriggle out of their contractual obligations. Once a party to the contract agrees to adhere to certain performance standards, in the event of their failure to do so, there will certainly be some consequence to the other party who was not at fault. In ***Construction and Designs Services vs. DDA (AIR 2015 SC 1282)***, it was held that burden to prove that no loss was likely to be suffered is on the party committing the breach. Considering the long period of contract and the high contract value, the sum of Rs.3.53 crores which represents 5% of the contract value, is definitely a genuine pre-estimate of damages.

33.In ***DMRC Ltd v. Delhi Airport Metro Express (P) Ltd., (2024) 6 SCC 357***, it was held as follows :

"**34.** The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(*a*) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

(*i*) based on no evidence;

(*ii*) based on irrelevant material; or

(*iii*) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

37. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] observed : (SCC pp. 75 & 81, paras 31 & 42)

"*31*. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(*i*) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) *ignores vital evidence in arriving at its decision*, such decision would necessarily be perverse.

42.1. … *42.2*. (*b*) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example *if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside*."

....

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. [*Patel Engg. Ltd.* v. *North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC

> 167 : (2020) 4 SCC (Civ) 149.] 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 under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice."

34.The Arbitral Tribunal had failed to note that the floating crane was deployed from December 2014 till October 2016 and during this period, business to the tune of Rs.6.00 crores was conducted. The licensee had abandoned the contract post October 2016. That during this period of 23 months, the contract generated substantial revenue was a vital piece of evidence which was ignored by the tribunal. The conclusion that the port trust did not suffer any loss is based on no evidence. The tribunal failed to take into account the contractual clauses as mandated by Section 28(3) of the Arbitration and Conciliation Act, 1996. Even though all these grounds were projected, the District Court failed to exercise its jurisdiction under Section 34 of the Arbitration and Conciliation Act. Hence, it is our duty while exercising appellate power to interfere in the matter.

35.Even while setting aside the arbitral award insofar as it held that the invocation of bank guarantee by the Port Trust was illegal, we are of the view that the rest of the award has to be confirmed. By doing so, we are not modifying the award. Issue No.5 stands independently and on its own and setting aside the award in respect of Issue No.5 would not affect the operation of the remaining part of the award.

36.Question arose if an arbitral award can be partially set aside and whether it would amount to modification of the award. The learned Senior Counsel for the port trust relied on ***J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd.,* (2008) 2 SCC 444** and ***J.G. Engineers (P) Ltd. v. Union of India*, (2011) 5 SCC 758** in support of his contention that partial setting aside of the award would not amount to modification. He drew our attention to the following passage occurring in ***Union of India v. Alcon Builders & Engineer (P) Ltd.,* (2023) 1 HCC (Del) 134 :**

> "**32.** When the arbitrator's decisions on multiple claims and counterclaims are severable and not interdependent, the court is empowered under Section 34 to set aside or uphold the arbitrator's decisions on individual and severable claims or counterclaims; without having to set aside the entire arbitral award. That would not amount to modification of the arbitral award."

On the other hand, the learned Senior Counsel appearing for the contractor relied on ***NHAI v. M. Hakeem, (2021) 9 SCC*** 1 in support of his contentions that modification of award is impermissible. We took note of the decision of the Kerala High Court in ***Navayuga Engg. Co. Ltd. v. Union of India, 2021 SCC OnLine Ker 5197*** for the proposition that partial setting aside would not constitute modification and that the doctrine of separability can be applied to proceedings under Section 34 of the Act. We also intended to rely on the decision of the Bombay High Court in ***R.S.Jiwani v. Ircon International Ltd., 2009 SCC OnLine Bom 2021***. After we made ready our order, we came to know that this was one of the issues raised in ***Gayatri Balasami v. ISG Novasoft Technologies Ltd*** and that orders have been reserved in the third week of February, 2025. We therefore decided to defer our judgment and await the ruling from the Hon'ble Supreme Court. Now, all the discussions before us have become academic. The Hon'ble Supreme Court in the aforesaid decision reported in ***2025 INSC 605*** has held that the authority to sever the “invalid” portion of an arbitral award from the “valid” portion, while remaining within the narrow confines of Section 34 is inherent in the court's jurisdiction when setting aside an award. Invoking the doctrine of *omne majus continet in se minus* – the greater power includes the lesser, the Hon'ble Supreme Court held that the authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. It was further clarified that the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated – particularly, in relation to liability and quantum and without any correlation between valid and invalid parts.

37.We are clearly of the view that Claim No.5 portion of the impugned award alone is invalid and that the rest of the award is valid. They can be clearly segregated. The parameters laid down in ***Gayatri Balasami v. ISG Novasoft Technologies Ltd*** are very much fulfilled in this case.

38.In the above case, the Hon'ble Supreme Court also held that Section 37 permits an appeal against any order setting aside or refusing to set aside an arbitral award under Section 34. To this extent, the appellate jurisdiction under Section 37 is coterminous with, and as broad as, the jurisdiction of the court deciding objections under Section 34. Of course, the court's authority under Sections 34 and 37 of the 1996 Act is limited by the silhouette of Section 34.

39.In this view of the matter, we set aside the order passed by the court below to the extent it failed to interfere with the impugned Arbital Award in respect of Issue No.5 concerning invocation of bank guarantee by the Port Trust. We hold that the invocation of bank guarantee by the port trust is legal and valid. CMA(MD)No.472 of 2022 filed by the Port Trust is allowed to that extent. CMA(MD)No.530 of 2022 filed by the licensee is dismissed. No costs.

(G.R.S. J.,) & (R.P. J.,)
08.05.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
SKM

To:-

1.The Principal District Court,
Thoothukudi.

2.The Arbitral Tribunal,
Chennai.

G.R.SWAMINATHAN, J.
and
R.POORNIMA, J.

SKM

C.M.A.(MD)Nos.472 and 530 of 2022

08.05.2025