IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.10.2020

DATE OF DECISION : 11.11.2020

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.485 of 2015

The Chennai Port Trust,
represented by its Chairman,
No.1, Rajaji Salai,
Chennai-600 001. .. Petitioner

Vs.

1.M/s.Chettinad Logistics (P) Ltd.,
6th Floor, Rani Seethai Hall Building,
603, Anna Salai, Chhennai-600 006.

2.Mr.Justice Doraiswamy Raju,
Former Judge,
Supreme Court of India,
Presiding Arbitrator,
New No.20, Old No.39,
Puram Prakash Road,
Royapettah, Chennai-600 014.

3.Mr.Justice J.Kanagaraj,
Former Judge,
Madras High Court,
Member Arbitrator,

New No.7, Old No.3,
Justice Ramanujam Road,
Malaviya Avenue, Sastri Nagar,
Thiruvanmiyur, Chennai-600 041.

4.Mr.Justice K.Govindarajan,
Former Judge, Madras High Court,
Member Arbitrator,
New No.5, Old No.8,
Justice Ramanujam Road,
Malaviya Avenue, Sastri Nagar,
Thiruvanmiyur, Chennai-600 041.
(Respondents 2 to 4 were given up
on 20.04.2018) .. Respondents

This original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 20.11.2013 passed by the Arbitrators / respondents 2 to 4 herein and allow this original petition and pass such further or other reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.

For Petitioner : Mr.R.Sankaranarayanan
Additional Solicitor General of India
instructed by
Mr.P.M.Subramaniam (Legal advisor
for Chennai Port Trust)

For Respondent : Mr.M.S.Krishnan, Senior Counsel
for Mr.M.Praveen Kumar

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ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' and this Act shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience. Captioned OP which is under section 34 of A and C Act is a challenge to an 'arbitral award dated 20.11.2013' (hereinafter 'impugned award' for the sake of convenience) made by a Three member 'Arbitral Tribunal' ('AT' for the sake of brevity). Impugned award is a unanimous award made by the three member AT. To be noted, when captioned OP was presented in this court, the three noblemen who constituted the AT were arrayed as respondents 2 to 4, but they were subsequently given up on 20.04.2018. Therefore, there is only one respondent, i.e., a lone respondent now in the captioned OP.

2 Petitioner in captioned OP is 'Chennai Port Trust', which shall hereinafter be referred to as 'Chennai Port' for the sake of convenience. The company which entered into (with Chennai Port) a

memorandum of agreement dated 27.03.2008 (pursuant to a letter of intent dated 06.09.2007) is now the lone respondent and this company shall hereinafter be referred to as 'Contractor' for the sake of clarity.

3 Aforementioned letter of intent dated 06.09.2007 issued by Chennai Port and memorandum of agreement dated 27.03.2008 shall hereinafter be collectively referred to as 'said contract' for the sake of clarity. This court is informed that said contract is for design, manufacture, supply, installation, operation and maintenance of semi mechanised closed conveyor system for coal handling at Jawahar Dock including Bubble Structure complete with all accessories. 'Design, manufacture, supply and installation' shall be referred to as 'said work'; 'Operation and Maintenance' shall be referred to as 'O and M' for the sake of convenience and clarity. To be noted, O and M is for a period of three years in the case on hand. There is no disputation or disagreement before this court that the value of said contract for said work and O and M put together is little over Rs.46.44 Crores (Rs.46,44,40,000/- to be precise) besides a tax component of Rs.3.61 crores, but there is disagreement as to whether O and M should be treated as part of said contract qua said

contract value. Contractor contends that O and M should not be included in the value of contract and therefore, the value of said contract is Rs.42,83,00,000/- only. Be that as it may, there is no disputation or disagreement that said work has to be completed by the contractor within a period of six months from the date of letter of intent, i.e., by 05.03.2008, but it was ultimately completed only on 16.11.2009. O and M was for a period of three years and obviously, it commenced post completion of said work, but it did not continue for entire three years period and had to end on 01.10.2011 as this Hon'ble Court directed Chennai Port to stop handling coal owing to environmental issues, this court is informed that coal handling was moved to Ennore Port, but it is not necessary to delve any further into that aspect for the purpose of case on hand. In other words, that O and M came to a premature end on 01.10.2011 needs to be noticed for the limited purpose of completion of narrative qua facts.

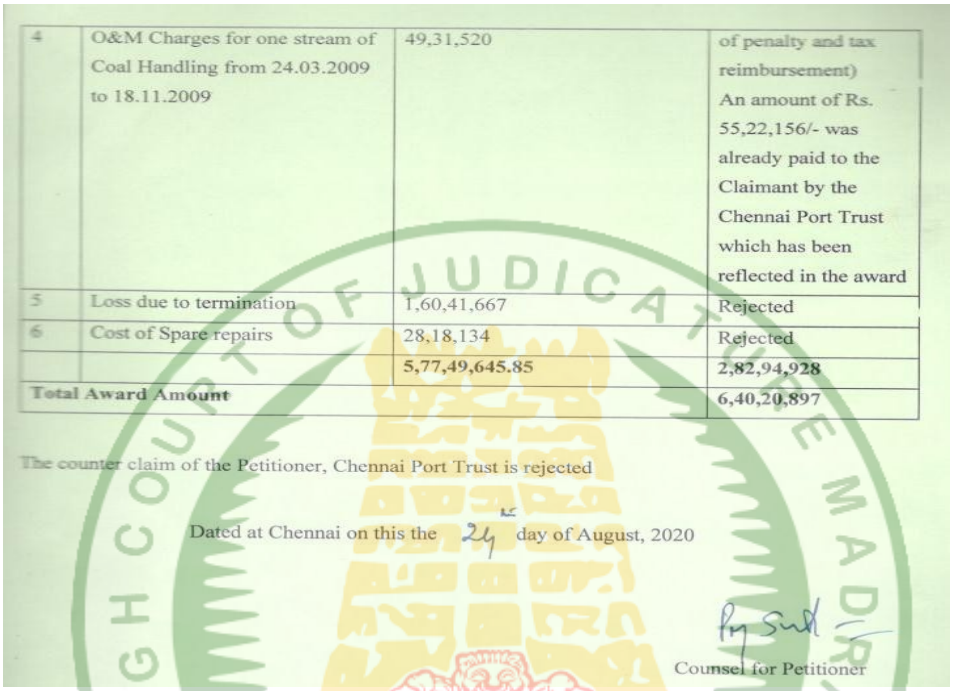
4 There is also no disputation or disagreement that there is an arbitration clause in said contract between Chennai Port and Contractor. Disputes erupted, contractor triggered the arbitration clause, AT was

constituted, Contractor made claims under as many as 9 heads qua said work followed by claims under another 6 heads qua O and M. Chennai Port made a counter claim of a little over Rs.8.17 Crores (Rs.8,17,22,333/- to be precise). This counter claim was made by Chennai Port by saying that this represents the revenue that would have been generated by Chennai Port if said work had been completed by contractor within the originally agreed time frame of six months. To be noted, this sum of a little over Rs.8.17 Crores was arrived at by Chennai Port factoring into it a sum of Rs.2.57 Crores deducted by way of liquidated damages.

5 Contractor was claimant and Chennai Port was respondent before AT. With regard to 9 + 6 = 15 heads of claims made by contractor, eight were rejected, one was awarded in full and six were awarded in part. This has been placed before this Court in the form of a tabulation by learned counsel for Chennai Port. As there is no disputation or disagreement about this tabulation, it can be usefully referred to, therefore this court deems it appropriate to scan / reproduce the same and it is as follows:

TABULATION OF CLAIMS AWARDED AND REJECTED

Sl. No.	Head	Claim	Awarded
Claim – I			
1	Towards refund of Liquidated Damages (LD) deducted	2,57,00,000.00 For Rs.51.44Crores	1,71,34,000 (2,57,00,000-85,66,000)
2	Towards reimbursement of Taxes & Duties	1,71,00,000 (Max.R.3.61Crores)	1,71,00,000
3	Towards redesign charges	20,00,000	Rejected
4	Towards belt weighers	20,00,000	Rejected
5	Towards damages by stevedores	7,00,000	Rejected
6	Towards reimbursement of Insurance & Transportations	46,22,413	14,91,969 Insurance awarded, transportation rejected
7	Towards cost of escalation	6,40,000	Rejected
8	Towards interest for delayed payment	20,00,000	Rejected
9	Towards additional work done	1,63,00,061	Rejected
Total claim		**13,44,22,474.06**	**3,57,25,969**
Claim – II			
1	O&M Charges for the 1st year	1,50,00,000	2,82,94,928 (Which includes O&M charges, refund
2	O&M Charges for the 2nd year	1,75,00,000	
3	O&M Charges for the 3rd year	14,58,333	



4	O&M Charges for one stream of Coal Handling from 24.03.2009 to 18.11.2009	49,31,520	of penalty and tax reimbursement) An amount of Rs. 55,22,156/- was already paid to the Claimant by the Chennai Port Trust which has been reflected in the award
5	Loss due to termination	1,60,41,667	Rejected
6	Cost of Spare repairs	28,18,134	Rejected
		5,77,49,645.85	**2,82,94,928**
Total Award Amount			**6,40,20,897**

The counter claim of the Petitioner, Chennai Port Trust is rejected

Dated at Chennai on this the 24 day of August, 2020

Counsel for Petitioner

6 To be noted, in the tabulation scanned and reproduced supra, this Court finds that the figure in Sl.No.7 (towards cost of escalation) reads as Rs.6,40,00,000/- in the claim petition and in impugned award, whereas it has been shown as Rs.6,40,000/-. In other words, what is Rs.6.40 Crores in the claim petition and impugned award has been shown as Rs.6.40 lakhs. Suffice to say that this has been noticed by this Court.

7 This court is informed that the contractor has not preferred any challenge to the impugned award with regard to the heads of claims that where either rejected or partly rejected. Therefore, Chennai Port alone is before this court assailing the impugned award with regard to some heads of claim which went against it and rejection of counter claim in its entirety.

8 On behalf of Chennai Port, learned Additional Solicitor General of India Mr.R.Sankara Narayanan assisted / instructed by Mr.P.M.Subramaniam, learned counsel on record / legal advisor for Chennai Port and Mr.M.S.Krishnan, learned senior counsel leading Mr.M.Praveen Kumar for the contractor were before this court in the web hearings for final disposal of captioned OP on a video conferencing platform. To be noted, both sides consented for captioned OP being taken up for final disposal in web hearings, i.e., virtual court, it was taken up and heard out.

9 Before proceeding further, it is deemed appropriate to make it clear that the date of presentation of captioned OP in this court is 14.03.2014 and therefore, captioned OP will be governed by pre 23.10.2015 regime of the A and C Act. In other words, captioned OP will

be governed by the A and C Act as it stood prior to 23.10.2015, i.e., prior to amendment of the A and C Act by Act No.3 of 2016 which kicked in with retrospective effect on and from 23.10.2015. This is based on Ssangyong principle, i.e., law in this regard laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131***.

10 Learned Solicitor submitted that crux and gravamen of the lis between Chennai Port and Contractor before AT is delay in execution of said work and according to learned Solicitor, the delay is 20 months and 12 days. It was also made clear that challenge to impugned award is posited on 2 slots and they are conflict with public policy of India, i.e., Section 34(2)(b)(ii) and patent illegality. To be noted, patent illegality which is now a statutory slot available for challenge to an arbitral award under sub section (2A) of section 34 was not statutorily available prior to 23.10.2015 as sub-section (2A) was inserted in Section 34 only on and from 23.10.2015, but this ground was available by way of law laid down by Hon'ble Supreme Court in Saw Pipes case being ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd***. reported in ***(2003) 5 SCC 705***.

Relevant paragraph in Saw Pipes is paragraph 31 and the same reads as follows:

> '**31.**Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar case* [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (*a*) fundamental policy of Indian law; or
>
> (*b*) the interest of India; or
>
> (*c*) justice or morality, or
>
> (*d*) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.'

This is of significance as patent illegality slot for challenge to an arbitral award prior to 23.10.2015 is based on Saw Pipes principle and not sub-section (2A) of section 34 of A and C Act. It has already been delineated supra elsewhere in this order that captioned OP will be governed by pre 23.10.2015 regime of the A and C Act.

11 Owing to Ssangyong principle, it was submitted by learned Solicitor that in the instant case on hand, as it is governed by pre 23.10.2015 regime of the A and C Act, the three distinct juristic doctrines culled out by Hon'ble Supreme Court in *Western Geco* case law being ***ONGC Ltd. v. Western Geco International Ltd.,*** reported in ***(2014) 9 SCC 263***, which was reiterated in the oft quoted *Associate Builders* case being ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49*** are available to the petitioner. To be noted, three distinct juristic doctrines qua conflict with public policy laid down by Hon'ble Supreme Court are (a) judicial approach, (b) natural justice principle and (c) irrationality / perversity. After setting out these three distinct juristic doctrines or facets qua conflict with public policy slot, Hon'ble Supreme Court also laid down three separate tests (one test for

each of these facets) and they are (a) fidelity of judicial approach (b) time honoured *audi alteram partem* maxim and (c) Wednesbury principle of reasonableness, respectively.

12 In aforementioned backdrop, this court now proceeds to deal with each point raised by leaned Solicitor, response of learned Senior Counsel for contractor, set out discussion on the same and give dispositive reasoning to each of those points. Before this court embarks upon this exercise, it is relevant to mention that this court has noticed that oral evidence was let in and documentary evidence was marked before AT. Three witnesses each were examined on the side of Chennai Port and contractor. On the side of Contractor as claimant, Exs.C.1 to C.71b were marked and on the side of Chennai Port, 55 exhibits, namely Exs.R.1 to R.55 were marked.

13 Learned Solicitor referred / took this court through the award copiously and submitted that with regard to delay, the findings rendered by AT and the verdict run into each other or in other words, are in conflict with one another. This was projected as patent illegality. It was argued with specificity that after returning a finding to the effect that

the contractor was responsible for delay, AT committed patent illegality by holding that the contractor was responsible for only 23 days delay from 26.10.2009 to 18.11.2009. It was submitted that this is based on no evidence. In this regard, most relevant portions of the finding is contained in paragraphs 15(b) and 16 of the impugned award and the relevant portions read as follows:

'15. xxxxxx

(a) xxxxxx

(b)..... The Claimant as a seasoned Stevedores functioning in the very port area ought to have very well known about the normal conditions of work in a busy harbour like Chennai Port area and also known that complete halt would have serious ramifications upon International trade causing colossal loss to the Importers and Exporters putting them to severe financial losses.... '

'16. xxxxxx

(a) xxxxxxx

(b)..... On a careful consideration of the respective stands taken in the light of the oral and documentary evidence placed on record by both sides, we are of the considered view that the attempt of the Claimant to throw all the blame for the delay upon the Respondent is unwarranted and unjustified and the Claimant is not only equally but more at fault and has not been found to be that diligent in executing the project so as to complete the same in all respects within the allowed time....'

14 Conclusion or in other words, the verdict in this regard is as follows:

> '16. xxxxxx
>
> (a) xxxxxxx
>
> (b).....Even on a liberal view of the matter the delay of 23 days from 26.10.2009 till 18.11.2009 cannot be ignored and atleast for the said period the Claimant are liable to pay and the Respondent is entitled to get the liquidated damages in terms of the stipulated Clauses providing for the pre-estimated damages.....'

15 It was submitted that a careful reading of the impugned award makes it clear that this restricting of delay attributable to contractor to 23 days is based on no evidence, it does not turn on appreciation of evidence and it is simply contrary to the findings.

16 Furthering his submission in this direction, it was submitted that said contract provides for liquidated damages of ½ % to 5% of the total contract value for the delay. Relevant covenant in said contract is Clause XI and the same reads as follows:

> 'XI)**<u>LIQUIDATED DAMAGES</u>**:
>
> For delay if any, during the construction phase in completing the work a sum equivalent to ½ % per week or part thereof subject to

a maximum limit of 5 % of the total contract value will be levied as Liquidated Damages.'

17 It was argued that AT erred in awarding liquidated damages of ½ % by holding that 5% is not really liquidated damages, but is a onerous stipulation which is confiscatory in nature. It was argued that if parties have agreed on liquidated damages and when a covenant has been entered into in this regard, the Nabha Power principle being the principles laid down by Hon'ble Supreme Court regarding interpretation of commercial contracts reported in ***(2018) 11 SCC 508 [Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL)]*** will apply and therefore, this awarding liquidated damages at ½ % by holding that 5% is not really liquidated damages as it is onerous / confiscatory, is really contrary to the terms of the contract and therefore, this vitiates the impugned award. Liquidated damages no doubt provides for a band of ½% to 5%. If the AT had decided that ½% would be reasonable based on evidence before it, that would have been a different matter altogether, but AT after finding the contractor responsible for the delay did not award 5% on the ground that it is onerous and confiscatory in nature.

18 To this learned Senior Counsel for contractor submitted that

liquidated damages is governed by Clause XI of said contract which has already been extracted and reproduced supra. Adverting to Clause XI of said contract, learned Senior counsel submitted that there is a band for ½% to 5% of the value of the contract with regard to liquidated damages and therefore, it is a matter of discretion for the AT as to what the liquidated damages should be and it cannot be found fault with when AT exercises such discretion as long as it is not less than ½% and not more than 5% of the value of the contract. Furthering his submission on liquidated damages, learned Senior counsel drew the attention of this Court to the value of the bank guarantee to be given. Referring to the value of bank guarantee, learned Senior counsel submitted that it is relatable only to said work excluding O and M and therefore, the value of the contract should only be that of said work and not said work and O and M put together.

19 Yet another limb of submission on behalf of the contractor was regarding the length of delay for which the contractor is liable to pay liquidated damages. It was submitted that length of delay was arrived at on the basis of evidence before AT and contestation of same would tantamount to reappreciating evidence. In this regard, attention of this

court was drawn to Gantry Cranes and the date of removal of the same. Reference was made to cross examination of RW1, more particularly questions 46 to 53 and answers to the same.

20 This Court now proceeds to deal with liquidated damages aspect of the matter first. As would be evident from the rival submissions on this aspect of the matter, the controversy is threefold. One pertains to the value of the contract. The second pertains to the percentage of liquidated damages within the band of ½% to 5% and the third pertains to limiting the period for which contractor is liable for liquidated damages to 23 days (26.10.2009 to 18.11.2009) when the delay is 20 months and 12 days, i.e., date of scheduled completion (5.3.2008) to the actual date of completion (16.11.2009). As far as the first aspect pertaining to the value of said contract is concerned, it turns on whether it should be a total of said work and O and M or it should be said work. This essentially is the difference between Rs.51.44 Crores (inclusive of Rs.3.61 Crores taxes) projected by Chennai Port and Rs.42.83 Crores projected by the contractor which excludes Rs.5 Crores O and M. A perusal of said contract makes it clear that there are two separate heads

being Clause 2.0 captioned 'WORK INCLUDED' and Clause 3.0 captioned 'WORKS NOT INCLUDED'. While under clause 2.0, there is a adumbration of as many as 17 different aspects of work, under clause 3.0, a provision of HT incoming cable form the sub-station to the Wharf area alone has been excluded. What is of significance is both clauses 2.0 and 3.0 are completely silent about O and M. (To be noted, O and M also figures in said contract as clause 18.0). Therefore, O and M has neither been classified as 'work included' nor as 'work not included'. With regard to bank guarantees to be given, there are two separate clauses, namely Clauses VI and VII. While Clause VI pertains to 'Performance Guarantee' which relates to said work, Clause VII which is captioned 'Performance Security' pertains to O and M. Performance guarantee for said work talks about total contract value and not total costs. The reason for performance guarantee and performance security for said work and O and M respectively is separate is obvious as O and M kicks in only on completion of said work. Therefore, plain reading of said contract makes it clear that it leaves (gives) enough discretion to the adjudicator (in this case AT) to decide about the value of contract. In other words, it can swing both ways. It is quite clear that it is capable of two interpretations.

The ambivalence or in other words, ambiguity is clear as day light. To put it differently, ironically there is clarity about the ambivalence (if not ambiguity). When it is clear that it is capable of two interpretations owing to lack of specificity, AT in its wisdom has gone by one of the interpretations. Exercising power under section 34 in captioned OP, it is not for this court to examine which of the views is more appropriate much less substitute this court to the view of AT even if this court finds the view other than the view taken by AT to be the more appropriate view. This is more so as the view taken by AT is not an implausible view. Therefore, this court is clear that with regard to the value of said contract, there is no scope for intervention under section 34 owing to the nebulous / ambiguous or at best, ambivalent language in which said contract is couched.

21 This takes us to the second aspect of liquidated damages which pertains to a band of ½% to 5%. There is no difficulty in accepting the submission that there is discretion to levy liquidated damages and that discretion is between ½% and 5% of the contract value. Chennai Port has levied liquidated damages at the maximum of 5%, wheres AT has scaled it down to ½%. Under normal circumstances, this would also

have clearly been a matter of discretion and would not call for intervention in exercise of power under section 34 of A and C Act, but AT has in the impugned award held that 5% is really not liquidated damages, but a onerous stipulation which is confiscatory in nature. This aspect of the matter is articulated in sub paragraph (d) of paragraph 16 of the impugned award which reads as follows:

> '(d)Consequently, the percentage of liquidated damages will have to be in respect of the delay caused in completion of the contract in relation to Item I of the project and has to be necessarily with reference to Rs.42,83,00,000/- and not on Rs.51.44 crores. So far as the percentage of the sum is concerned the minimum starts with ½% and the maximum at 5%. The contract in question is a challenging task undertaken to be implemented at an operational Port in the midst of its varied activities. Keeping into view that calculation at 5% would really render it not as liquidated damages but really work out to be an onerous stipulation and of confiscatory nature, we are of the considered view that working out liquidated damages at ½% of Rs.42,83,00,000/- would be just, reasonable and would equitably met the exigencies of the situation and ends of substantial justice. Consequently, the deduction, thus worked out would in our view be justifiable to the tune of Rs.85,66,000/-. To this extent we uphold the deduction. The balance of Rs.1,71,34,000/- (Rs.2,57,00,000/- -

Rs.86,66,000/-) shall be refunded and returned to the Claimant by the Respondent.'

(*Underlining made by this court to supply emphasis, highlight and for ease of reference*)

22 This clearly tantamounts to rewriting the said contract, more particularly clause XI captioned 'Liquidated Damages' which has already been extracted and reproduced supra elsewhere in this order. Though arising out of a power purchase agreement and an order of APTEL (Appellate Tribunal for Electricity), New Delhi, *Nabha Power Limited* principle being the principle laid down by Hon'ble Supreme Court in ***Nabha Power Limited*** case penned by Hon'ble Mr.Justice Sanjay Kishan Kaul, is instructive with regard to interpretation of commercial contracts and is applicable to case on hand owing to the nature of work and relative position of parties to the contract. After cataloging and analysing judgments in this regard, Hon'ble Supreme Court held that giving business efficacy to the transaction is paramount. In the instant case, the AT itself has observed that contractor is not a stranger to Chennai Port and is a seasoned stevedores. Therefore, if parties have consciously by their own volition agreed for liquidated damages in a band of ½ % to 5%

of value of contract, AT cannot scale down the maximum of 5% on the ground that it is not liquidated damages and it is a onerous stipulation which is confiscatory in nature. This court deems it appropriate to add a word of caution and caveat here. If AT had held that 5% is not appropriate in the facts and circumstances of this case and that ½% is more appropriate, then the dynamics and dimensions of the matter would have been very different as it would have then been a case of exercising discretion by perambulating within the perimeter of a contractual covenant. In the instant case, as rightly pointed out by learned Solicitor, AT has found 5% deduction of liquidated damages to be unacceptable not because it is disproportionate or incommensurate in the fact setting of the case or because a figure less than 5%, i.e., ½% is more appropriate/commensurate in the fact setting / factual matrix of this case, but AT has scaled down 5% by holding that it is not in the nature of liquidated damages, whereas parties have agreed that anything between ½% and 5% of the value of the contract would be liquidated damages. Therefore, this finding of AT clearly calls for judicial intervention.

23 This takes us to the third facet on liquidated damages,

namely delay period being restricted to 23 days as opposed to 20 months and 12 days complained of by Chennai Port. On this aspect of the matter, a plain reading of the impugned award makes it clear that this 23 days is based on no evidence. This is clear from sub paragraph (b) of paragraph 16 of the impugnd award which reads as follows:

> '(b)Though the Claimant would contend that the delay was on account of the hindrances at the site, the changes in the plan and work places and delay in giving approval to the plans, the Respondent would dispute such claims and assert that as and when hindrances were pointed out they were removed then and there and that having regard to the peculiar situations at harbour to clear the ships after unloading expeditiously the situation has been brought to the notice of the Claimant well in advance in the Tender Document as evidenced by clause 5 of Schedule "A" of the agreement and despite all these, due to poor planning and delay and lapses at every stage i.e. from the submission of correct drawing for approval, excavation and fabrication works, lack of adequate labour force and related technicians for the special woks, etc., only the delay occurred and not due to reasons which in any way could be attributed to the Respondent or at any rate solely to the Respondent. On a careful consideration of the respective stands taken in the light of the oral and documentary evidence placed on record by both sides, we are of the considered view that the attempt of the Claimant to throw all

the blame for the delay upon the Respondent is unwarranted and unjustified and the Claimant is not only equally but more at fault and has not been found to be that diligent in executing the project so as to complete the same in all respects within the allowed time. Even forgetting and forgiving to some extent the period prior to 07.08.2009 (the date of meeting and minutes of the meeting – Ex R 3) wherein on the request of the Claimant under Ex R 35 dated 01.08.2009 time was granted as requested till 15.09.2009 on the assurance to complete the entire work by then, as communicated by letter dated 07.09.2009 (Ex R 37) the delay thereafter, cannot be justified or ignored. Further time was also granted on 01.10.2009 at the meeting in the presence of the Chief Executive (Mr.V.Lakshmanan – CW1) of the Claimant till 16.10.2009. Again on 16.10.2009 (Ex R44) further time was sought till 26.10.2009 and granted under Ex R45. Even thereafter there had been delay and the work was completed only on 18.11.2009. Even on a liberal view of the matter the delay of 23 days from 26.10.2009 till 18.11.2009 cannot be ignored and atleast for the said period the Claimant are liable to pay and the Respondent is entitled to get the liquidated damages in terms of the stipulated Clauses providing for the pre-estimated damages. The further questions that arise in this regard is as to at what rate and on what amount. The words "total contract value" has to be contextually, construed to make it just and reasonable. Article I of the LOI, while providing the Price Schedule –

specifically and distinctly treats Item No.1 (design, supply, installation, testing, commissioning and handing over of 2 parallel semi mechanised closed conveyor systems for coal handling with cross conveyors and all accessories as detailed in Technical Specification etc, (4 items) to be of total value of Rs.42,83,00,000/- (exclusive of taxes and duties) and likewise operation and maintenance of the conveyor system as per the tender specification is distinctly treated as a separate item No.II with a value of its own Rs.5,00,00,000/-.'

(*Underlining made by this court to supply emphasis, highlight and for ease of reference*)

24 As already alluded to supra, while capturing the submissions of learned counsel for contractor, a portion of cross examination of RW1 was adverted to to say that it is based on evidence.

25 This Court exercising powers under section 34 of A and C Act would not go into appreciation of evidence. Without going into this forbidden area, i.e., appreciation of evidence, it is clear that this part of the deposition has got no relevance to restricting the liquidated damages attributable to contractor to 23 days. In any event, it has become necessary to mention this as it was put forth as submissions. Learned

Solicitor submitted that he is reading only the impugned award copiously. This court has already extracted and reproduced relevant portions of impugned award. A careful perusal of relevant portions of the impugned award makes it clear that restricting liquidated damages attributable to contractor to 23 days is not based on evidence. In other words, as rightly pointed out by learned Solicitor, it is based on no evidence. In this regard also, it is necessary to put in a caveat and caution. That caveat and caution is, the contractor was not able to demonstrate that there was evidence with regard to number of days delay attributable to contractor. If there was evidence in a given case, it is quite possible to presume that AT has considered evidence and then the *Hodgkinson* principle, i.e., principle that AT is the best judge of quantity and quality of evidence before it would have come into play. In this case, there is no evidence and AT after returning a finding that contractor is certainly responsible for delay has restricted the period of delay to 23 days with no evidence in this regard. Therefore, this aspect of liquidated damages also is clearly vitiated by patent illegality.

26 In this regard, by placing reliance on *Hindustan*

Construction Company case being ***State of Maharashtra Vs. Hindustan Construction Company Limited*** reported in ***(2010) 4 SCC 518*** and *Satyam Computer Services* case being ***Venture Global Engineering Vs. Satyam Computer Services Limited*** reported in ***(2010) 8 SCC 660***, it was argued on behalf of the contractor that specific ground has not been raised and raising a ground by amending the pleadings post 120 days is impermissible. A careful perusal of these two case laws makes it clear that they do not come to the aid of the contractor in the instant case. *Hindustan Construction Company* case is one where amendment of memorandum of ground of appeal was sought for in a statutory appeal under section 37 of A and C Act, i.e., post decision of Court exercising power under section 34 of A and C Act. As far as *Satyam Computer Services* case law is concerned, that is one where Hon'ble Supreme Court took the view that High Court rejecting the prayer for amendment on the ground that wrong provision has been quoted is hyper technical. Therefore, fact setting of these two case laws are such that it does not come to the aid of contractor in the case on hand. In any event, it is not necessary to delve into this aspect of the matter as liquidated damages being scaled down has clearly been raised as a ground in captioned OP

(to be noted, inter-alia grounds F, H, etc.,) and it is not a case where amendment or permission to raise additional ground has been made. Therefore, claim under head No.1 pertaining to refund of liquidated damages deserves to be set aside.

27 With regard to other heads of claim, there was no real contest and this court holds that a perusal of the impugned award leaves it with the considered view that there is no reason for judicial intervention with regard to other heads of claim. To be noted, the faint arguments in this regard are really in the nature of a regular appeal arguments and therefore, this court holds that there was no real contest. As already alluded to supra, with regard to other heads of claim which were rejected, the contractor has not preferred a separate OP assailing the impugned award.

28 This takes us to the counter claim of little over Rs.8.17 Crores of Chennai Port being rejected in its entirety. This counter claim is based on what according to Chennai Port is possible business for Chennai Port and the revenue it would have generated if said work had been completed by contractor within the originally agreed time frame of

six months. Therefore, this is clearly a notional figure. When a notional figure of this nature is claimed, adequate material should have been placed before the AT to demonstrate the kind of work and the consequent revenue that was actually generated post completion of work on 16.11.2009 or some other comparable operation. When this was pointed out by learned senior counsel for contractor, learned Solicitor very fairly submitted that there is no material or evidence before AT in this regard. Therefore, this court has no hesitation or difficulty in holding that rejection of counter claim of Chennai Port in its entirety by AT vide impugned award calls for no intervention at all.

29 This brings us to the concluding part of this order. As would be evident from the narrative thus far, there are 15 heads of claim (in all) as far as contractor is concerned and one head of counter claim on the part of Chennai Port and this Court has judicially intervened with regard to one head of claim and has not intervened with regard to other heads qua contractor and rejection of Chennai Port's counter claim. Therefore, this court deems it appropriate to set out the legal position as to whether such a course is permissible in application under section 34 of A and C

Act. Leading case law in this regard is ***J.G. Engineers (P) Ltd. v. Union of India*** reported in **(2011) 5 SCC 758**. The most relevant paragraph is paragraph 25 which reads as follows:

> '**25.** It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9.'
> (*Underlining made by this court to supply emphasis and highlight*)

30 In this case, there is no disputation or disagreement before this court that it is possible to segregate the heads of claim which suffer from infirmity from those which do not. Therefore, this court deems it appropriate to set aside the impugned award with regard to first head of claim made by contractor, wherein the contractor asked for refund of liquidated damages of Rs.2.57 Crores and the impugned award ordered

refund to the tune of Rs.1,71,00,000/-. In this regard, undisputed tabulation set out supra should be usefully referred to. In other words, in terms of issues qua impugned award, the answer to issue No.1 vide impugned award alone stands set aside. To be noted, as many as 9 issues were framed. This is set out in paragraph 5(b) of the impugned award which reads as follows:

> 'b)The Respondent filed its statement of defence dated 30.04.2012 strenuously contending that the Claimant is not entitled to any of the reliefs claimed. At the sitting held on 10.05.2012, after hearing the Learned Counsel on either side th following issues were framed:
>
> 1)Whether the Respondent was entitled to levy and deduct liquidated damages / penalty and if so, whether the quantum of liquidated damages / penalty deducted is sustainable in law and on the facts and circumstances of the case?
>
> 2)Whether the Respondent is correct in treating the construction phase and O&M phase as one composite contract for the purposes of deduction of liquidated damages?
>
> 3)Whether the Claimants are entitled to any of the items of claims projected as part of additional claim?
>
> 4)Whether the notice of termination issued by the Respondent is in accordance with the terms and conditions of

the letter of intent and Memorandum of agreement.

5)Whether the Claimant is entitled to losses suffered due to termination of the Contract?

6)Whether the Claimant is entitled to costs of spares and repairs as per the terms and conditions of the letter of intent and Memorandum of agreement?

7)Whether the Claimant is entitled to interest, and if so, at what rate on the additional claims?

8)Whether the Claimant is entitled to costs of Arbitral proceedings?

9)To what other reliefs are the parties entitled?'

31 Answer to issue No.1 is articulated in paragraph 31(a). However, it is desirable to go by the undisputed tabulation which has been extracted and reproduced in paragraph 5 supra.

32 As already delineated above, going by the tabulation, Claim No.1 made by the contractor with regard to refund of liquidated damages of Rs.2.57 Crores and refund ordered to the extent of Rs.1,71,34,000/- alone is set aside. Remaining 14 heads of claim and rejection of counter claim of Chennai Port remain sustained.

33 Captioned OP is partly allowed to the extent indicated

above. There shall be no order as to costs.

11.11.2020

Speaking order

Index : Yes

vvk

M.SUNDAR, J.

vvk

order in
O.P.No.485 of 2015

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