IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.08 .2020

Delivered on : 17.09.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P No.511 of 2009

The Board of Trustees of the Port of Chennai
Rajaji Salai
Chennai – 600 001 ... Petitioner

Vs.

1.M/s.X-Press Container Line (UK) Ltd.,
S.P.Centre 'B' Wing
41/44, Minoo Desai Marg
(Behind Radio Club), Colaba
Mumbai- 400 001

2.Mr.Justice Malai Subramaniam (Retd)
No.1101-B, Second Street
Thendral Colony
Anna Nagar
Chennai – 600 040

3.Mr.V.Subramaniam
(IA & AS) Retd.,
Flat No.19, 3rd Floor
1st Main Road
R.A.Puram, Chennai – 600 028

4.Mr.T.R.Gopalakrishnan
No.5, Ground Floor

First Trust Link Street
Mandaveli
Chennai – 600 028 ... Respondents

(Respondents 2 to 4 deleted in and by this order)

Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to set aside the majority Arbitration Award dated 14.09.2013 passed by the 2nd and 3rd respondent arbitrators.

For Petitioner : Mr.Richardson Wilson
assisted by Adithyaraj
of M/s.P.Wilson Associates (Law Firm)

For 1st Respondent :Mr.J.Sivanandaraaj
assisted by Mr.N.Senthil Kumar
for Mr.V.Sankaranarayanan

ORDER

Over one decade and one year ago or in other words more than 11 years ago, to be precise on 13.04.2009 captioned 'Original Petition' ('OP' for the sake of brevity) was presented in this Court. 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' shall hereinafter be referred to as 'A and C Act' for the sake of brevity / convenience and captioned OP is an application under Section 34 of A and C Act.

2. Arbitral award, which is sought to be set aside in instant OP is dated 17.01.2009 (hereinafter 'impugned award' for the sake of

convenience) and the impugned award was made by a three member 'Arbitral Tribunal' ('AT' for the sake brevity). To be noted, impugned award is a unanimous award, but two Arbitrators have given additional reasons.

3. 11 years is a long time in one tier of litigation and in this sense of the matter, case on hand is vintage and can even be described as ancient owing to arbitration being one of the important pillars of Alternate Dispute Resolution (ADR) mechanism with emphasis on timelines.

4. Applications under Section 34 of A and C Act are neither appeals nor revisions. Such applications are not even those which entail a full-fledged judicial review, but are mere challenges to arbitral awards within the 8 slots adumbrated in sub-section (2) of Section 34 of A and C Act and the juristic doctrines culled out by Courts/facets elucidated by Court qua those 8 slots. Besides this, going by ***Fiza Developers*** principle, being the principle laid down by Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796,*** which was reiterated in ***Emkay Global*** case [***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***] as a step in the right direction and further

reiterated very recently in ***Canara Nidhi Limited*** case [***M/S. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244***], a one issue summary procedure has to be adopted for disposal of case on hand. To be noted, ***Fiza Developers*** principle also lays down that Section 34 proceedings are one issue proceedings meaning the presentation of Section 34 (on one or more slots adumbrated thereunder) is to be construed as a issue by itself.

5. Instant case being a mere challenge to an arbitral award within the limited legal perimeter, contours, confines of Section 34 of A and C Act, legal landscape being nanoscopic and procedure being summary, factual matrix in a nutshell or in other words short facts shorn of particulars not imperative for appreciating this order, will suffice. In this view of the matter, this Court proceeds to set out factual matrix in a nutshell.

6. Factual matrix in a nutshell is that there is an agreement between Chennai Port (to be noted, Chennai Port which is petitioner before this Court is respondent before AT) and one X-press Container Line (UK) Ltd., (Claimant before AT and contesting First respondent before this Court) being 'an agreement dated 18.01.1995 captioned Agreement for Berth Reservation' (hereinafter 'said contract' for the sake of convenience

and clarity); that said contract is for reservation of 200 meters of berth length at West Quays I and II in Dr.Ambedkar Dock; that period of said contract was originally from 18.01.1995 to 24.01.1997 with first extension upto 24.12.1997 and second extension upto 31.03.1998; that in the said contract there was a provision for guaranteed throughput berth hire charges, penal wharfage charges etc., besides several other covenants; for the sake of convenience and clarity, petitioner before this Court / respondent before AT shall be referred to as 'Chennai Port' and contesting first respondent before this Court / claimant before AT shall be referred to as 'Licensee'; that Article X of said contract is an arbitration clause, the same serves as arbitration agreement between Chennai Port and Licensee (arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act); that at the end of the first year, Chennai Port issued a notice levying penal wharfage charges for not achieving guaranteed throughput, the same was duly paid by the licensee; that when a similar notice was issued for the second year, the same was contested by the licensee; that such contest resulted in arbitration agreement being triggered vide a notice dated 01.08.1997 which is Ex.R14 before AT; that this trigger notice was received by Chennai Port on the same day i.e., 01.08.1997 and therefore, this is the

date of commencement of arbitration proceedings within the meaning of Section 21 of A and C Act; that 30 days from the date of receipt of notice by Chennai Port elapsed on 31.08.1997 and therefore this is the date on which cause of arbitration arose; that on 30.10.2000 claimant filed an application under Section 11 of A and C Act vide O.P.No.292 of 2001, the same was disposed of on 28.09.2004; that this order dated 28.09.2004 in O.P.No.292 of 2001 was assailed by Chennai Port in a writ petition being W.P.No.7692 of 2005 wherein an interim order came to be passed on 30.06.2005; that this interim order was carried in appeal by way of an intra-court appeal vide W.A.No.1459 of 2005; that this writ appeal came to be disposed of by an order dated 23.09.2005 (to be noted, leaving open the question of limitation to be decided by AT) paving the way for constitution of AT, which made the impugned award; that AT which stood constituted pursuant to this order of a Hon'ble Division Bench made in W.A.No.1459 of 2005 entered upon reference, adjudicated upon the arbitrable disputes between Chennai Port and Licensee; that after full contest, AT made the impugned award on 17.01.2009; that full contest *inter alia* includes adjudication wherein oral evidence and documentary evidence was let in; that one witness was examined on either side; that 19 exhibits, namely Exs.R1 to R19 were marked on the side of the licensee

and 22 exhibits, namely Exs.C1 to C22 were marked on the side of Chennai Port (to be noted, normally the claimant exhibits are given 'C Series' and respondent exhibits are given 'R' Series'; though this is not a rule, in the instant case AT has chosen to do the reverse (this is mentioned only for the purpose of enhancing clarity in narration); that as mentioned supra, Chennai Port presented instant application in this Court on 13.04.2009 with a prayer to set aside the impugned award as the same went in favour of Licensee *inter alia* owing to orders of refund of penal wharfage charges and berth hire charges collected from other third parties / port users was ordered.

7. To be noted, besides essential facts in a nutshell, the trajectory this matter has taken thus far has also been captured in the narrative contained in preceding paragraph.

8. In the web-hearings on video-conferencing platforms or in other words in the virtual Court hearings, Mr.Richardson Wilson, learned counsel of M/s.P.Wilson Asscoiates (Law Firm) for the Chennai Port and Mr.J.Sivanandaraaj, learned counsel representing Mr.V.Sankaranarayanan, counsel on record for contesting first respondent (licensee) readily agreed for instant OP being taken up for final disposal, main OP was taken up for final disposal and heard out.

9. Be that as it may, as submissions proceeded, it came to light that it is not necessary to have the three noblemen, who constituted the AT to be in the array of parties in instant OP and therefore, respondents 2, 3 and 4 stand deleted in and by this order, consequently the Licensee, which was originally contesting first respondent, now becomes the sole respondent in captioned OP.

10. As already mentioned supra, impugned award directed Chennai Port to refund to the Licensee what according to the findings returned by impugned award is excess penalty collected for shortfall in throughput, besides refund of berth hire charges. Refund of excess penalty was to the tune of Rs.95,10,040/- (Rupees Ninety Five Lakhs Ten Thousand and Forty only) and refund of berth hire charges was to the tune of Rs.26,81,829/- (Rupees Twenty Six Lakhs Eight One Thousand Eight Hundred and Twenty Nine only). This Court deems it appropriate to usefully / gainfully extract/reproduce summary of the findings of AT from the impugned award, this Court does so and the same reads as follows:

'*SUMMARY OF FINDINGS:*

From the analysis and findings stated above and

having considered all the documents on record and appraisal of the evidence, the Tribunal would like to sum up its findings as under:

1. Pursuant to a berth reservation scheme for container vessels introduced by the Respondent, a Berth Reservation Agreement was entered into between the Respondent and the Claimant on 18 January 1995. This Agreement came into operation on the 25.9.1995 and ended on 31.3.1998.

The Claimant gave notice of arbitration to the Respondent on 1.8.1997, and culminated in the present Arbitration Tribunal taking up reference on 26.10.2005.

2 Preliminary issue of limitation was taken up by the Tribunal, which issued its ruling on this issue on 11.10.2006, rejecting the petition filed by the Respondent u/s. 16 of the Arbitration and Conciliation Act, 1996. The Tribunal ruled that the arbitral proceedings would continue.

3 On the question whether the Tribunal had jurisdiction to entertain claims raised after 1.8.1997, the date of seeking arbitration, the Tribunal ruled that its jurisdiction extends to all disputes that have arisen between the parties.

4. On the question of whether the claim petition is affected by the provisions of Sec.599 of the Indian Companies Act, 1966, the Tribunal ruled that in the factual background of the case the provisions of Section 599 of ICA

are not applicable.

5 On the issue of shortfall in guaranteed throughput, the Tribunal ruled that the shortfall in throughput is 18,668 TEUs, after adjusting the strike period of 51 days. The rate of penalty applicable on this shortfall shall be Rs.40/- per TEU and after adjusting amount due from the Claimant, the excess amount of Rs.95,10,040/- collected by Respondent should be refunded to the Claimant.

6 Refund of Berth Hire Charges for the period that the berth allotted to the Claimant was used by third party vessels relates only to the charges collected from the Claimant, and not to such charges collected by the Respondent from third party vessels. The Tribunal has assessed the amount to be so refunded at Rs.26,81,829/-.

The total amount to be refunded by the Respondent to the Claimant is thus Rs.1,21,91,869/-.

8. There is no ruling on the claim for 'other charges' collected from third party vessels, as no data was furnished to the Tribunal.

9 The Respondent shall pay interest at 12% per annum for the period of lis pendens from 1.4.1998 to date of this award, payment to be made within 90 days of date of award, failing which, interest at 18% per annum shall be payable from date of this award till date of actual payment of the amounts awarded.

AWARD OF THE TRIBUNAL

WHEREAS disputes have arisen in respect of Agreement for Berth Reservation dated 18.1.1995 between the Claimant and the Respondent

AND WHEREAS a panel of 3 arbitrators viz., Justice Malai Subramaniam (Retd), Shri.V.Subramanian and Shri T.R.Gopalakrishnan was constituted in accordance with the provisions of the agreement

AND WHEREAS having held arbitration meetings in respect of the disputes, where both parties were duly represented and having discussed the issues in internal meetings of the Arbitrators

NOW THEREFORE we the Arbitrators having taken upon ourselves the burden of reference and having deliberated fully and considered thoughtfully all aspects placed before us and having duly applied our minds in the matter in the light of facts and circumstances of the case the Agreement conditions and the applicable laws, we have determined and decided on the disputes referred to us.

We, the Arbitrators accordingly hereby make our award in respect of the disputes referred to us as under:

Considering all arguments by both parties the evidence and documents placed before it, and on the basis of the findings and conclusions, as stated above, the Tribunal gives its award on the claims brought before it by Claimant as follows:

1. As against the claim of a sum of Rs.1,37,28,608.47, the Tribunal awards a sum of Rs.1,21,91,869/- to be refunded by the Respondent to the Claimant comprising-

(i) refund of excess penalty collected on shortfall in throughput – Rs.95,10,040/-

(ii) refund of Berth Hire Charges – Rs.26,81,829/-

2. The Respondent shall pay interest at 12% per annum on the awarded amounts from 1.4.1998 till date of this award and thereafter at 18% per annum till date of actual payment, if the refund of the awarded amounts is not made within 90 days of this award.'

11. As far as arbitration cost is concerned, AT directed the parties, namely Chennai Port and Licensee to bear the same equally on what has been described by AT as 50:50 basis.

12. Before this Court proceeds further, it is necessary to set out that from the summary of findings (extracted from the impugned award and re-produced supra), it will be clear that limitation was taken up as a preliminary issue and a finding was returned by AT. This finding has now become part of the impugned award and the same forms part of challenge to impugned award before this Court.

13. With regard to limitation, this Court deems it appropriate to extract the order of Hon'ble Division Bench of this Court being order

dated 23.09.2005 made in W.A.No.1459 of 2005, this Court does so and the same reads as follows:

'This Writ Appeal has been filed against the impugned interlocutory order of the learned single Judge dated 30.06.2009 in WMP No.1151 of 2005 and WPMP No.8397 of 2005 in W.P.No.7692 of 2005.

2. Heard the learned senior counsel for the appellant and the learned Additional Solicitor General for the Port Trust.

3. Both sides agree for the appointment or a third Arbitrator. Accordingly, a third Arbitrator will be appointed by

(i) the Arbitrator appointed by the contractor

(ii) the Arbitrator appointed by the Court.

This appointment of the third Arbitrator should be done by the aforesaid two Arbitrators expeditiously and the Arbitral proceedings should also go on expeditiously. The question of Limitation or any other question can be raised before the Arbitrators. The Writ Appeal as well as the connected Writ Petition from which the present appeal has arisen, are disposed of finally. Connected W.A.M.P.Nos.3124 and 2708 of 2005 are closed.'

(underlining made by this Court to supply emphasis and highlight)

14. Adverting to the question of limitation being left open to be raised before AT, both the learned counsel, very fairly submitted that it is limitation pertaining to Section 11 application (O.P.No.292 of 2001) being filed on 30.10.2000. In other words, both the learned counsel agreed that limitation issue, which had to be decided by AT, is whether Section 11 application filed on 30.10.2000 (O.P.No.292 of 2001) was within time or was it barred by limitation. There is also no disputation or disagreement that AT also embarked upon this very exercise and returned a finding, which is captured in the summary of the award (extracted and reproduced supra). For the purpose of enhanced clarity and specificity, it is recorded that both learned counsel agreed that this limitation does not pertain to limitation qua commencement of arbitral proceedings on 01.08.1997.

15. This takes us to the question as to whether limitation qua a Section 11 application before the Court can be decided by AT. In the light of unwavering hierarchal loyalty forming part of judicial discipline, this Court sitting as a single Judge deems it appropriate to not to express any opinion on this and go by the order of Hon'ble Division Bench dated 23.09.2005. In the light of the backdrop that has been captured supra, this Court now proceeds to set out the rival submissions.

16. On behalf of Chennai Port, learned counsel made submissions, summation of which is as follows:

a) O.P.No.292 of 2001 filed on 30.10.2000 was clearly barred by limitation as the cause of arbitration arose on 31.08.1997 and limitation is three years vide Article 137 of the Limitation Act, 1963 read with Section 43 of A and C Act;

b) Licensee company was not in existence as on the date of filing of pleadings and therefore, AT ought not to have entertained the claim;

c) The deponent, who deposed on behalf of Licensee, had no competence to do so as it is evident from the oral evidence and therefore, AT was clearly incorrect in entertaining the claim;

d) Quantum of penal wharfage charges directed by AT to be refunded to licensee has been arrived at by taking the rate of Rs.500/- for full containers as opposed to Rs.40/- for empty containers when there was no evidence in this regard.

e) Refund of berth hire charges collected from other third parties /port users has been ordered without any evidence and contrary to the terms of said contract.

17. Learned counsel for Chennai Port submitted that the aforementioned challenge, speaking in statutory parlance is predicated /posited on conflict with public policy and patent illegality, being two of the 8 slots available for challenge to an arbitral award vide adumbration of slots under sub-section (2) of Section 34 of A and C Act. Furthering his submissions in this direction, learned counsel for Chennai Port submitted that AT has disregarded the judgment of superior courts, violated statutory law and has thereby breached fundamental policy of Indian Law. To buttress this plea, strong reliance was placed on paragraph 29 of ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49]*** and it was submitted that there is lack of judicial approach owing to AT being unfair, unreasonable and not objective. Reliance was also placed on Paragraph 34 of ***Associate Builders*** case law and it was argued that impugned award is hit by the vice of perversity. On patent illegality, it was submitted that acceding to the claims of licensee on no evidence is clearly patent illegality and as a buttressing submission, it was argued that interpretation has been made in favour of Chennai Port, but relief has been granted to the claimant licensee, which by itself constitutes patent illegality.

18. In response to the aforementioned submissions, learned counsel. for contesting respondent/licensee (sole respondent now) made submissions, summation of which is as follows:

a) ***Madras Port Trust Vs. Hymanshu International by its Proprietor V.Venkatadri (dead) by Lrs.*** Judgement reported in ***(1979) 4 SCC 176*** was pressed into service to say that Chennai Port ought not to have taken technical pleas. It was pointed out that out of the five fold challenge to impugned award, three are technical pleas.

b) It was submitted that there is no dispute about the dates qua limitation i.e., that the date of commencement of arbitral proceedings is 01.08.1997, that 30 days from the same elapsed on 31.08.1997 which is the date of cause of arbitration, but there was correspondence thereafter *inter alia* on 25.04.1998, 04.06.1998, 27.08.1999 and 06.01.1999 vide Ex.C10, C11, C12 and C14 and therefore Section 11 OP is not barred by limitation.

c) Thereafter as a demurrer submission it was also argued that Section 11 at the relevant point of time was an administrative order and therefore, Limitation Act will not apply;

d) With regard to licensee company not being live on the date of claim, it was submitted that a certificate from the appropriate authority in UK has been marked as Ex.C22 and even as a successor, the licensee is entitled to be a claimant.

e) With regard to locus of the deponent, who also represented the licensee company before AT, it was submitted that power i.e., Power of Attorney is a curable defect. It was submitted that the penal wharfage charges directed to be refunded, quantum of the same as well as quantum of berth hire charges is based on evidences before AT.

19. By way of reply, learned counsel for Chennai Port while reiterating his submissions made earlier submitted that the judgments pressed into service by learned counsel of licensee are either distinguishable on facts or not applicable to the case on hand. With regard to refund of penal wharfage charges, it was also argued that it is contrary to the terms of said contract and it was reiterated that refund of berth hire charges is based on bald evidence or no evidence or in other words, a finding in abstract.

20. This Court, having set out rival submissions now proceeds to discuss the same and give dispositive reasoning for arriving at a decision in captioned OP.

21. As would be evident from the narrative supra, learned counsel for licensee opened with the submission that Chennai Port ought not to have taken technical pleas. This submission was made by placing reliance on ***Madras Port Trust vs Hymanshu International*** reported in ***(1979) 4 SCC 176.*** A careful reading of ***Hymanshu*** case law which is short, crisp and epigrammatic brings to light that the facts there turn on Section 110 of the Madras Port Trust Act (II of 1905) and it appears to have arisen out of a suit. Short point in ***Hymanshu*** on facts was whether the claim for refund of wharfage, demurrage and transit charges was well founded. It is also a case where Chennai Port had deposited the entire refund at the time of leave being granted and such deposit was irrespective of the result of the appeal, besides undertaking to pay cost of the appeal. What is of greater significance is, in ***Hymanshu*** Hon'ble Supreme Court has made it cleat that if a plea is well founded, it has to be upheld by the court meaning, even it it is a technical plea, if it is well founded, it has to be upheld by the Court. Therefore, as rightly pointed out by learned counsel for Chennai Port, ***Hymanshu*** is not an authority

for a blanket proposition that no technical pleas can be raised by Port in cases of refund claims. There is one more distinguishing factor qua ***Hymanshu.*** That distinguishing factor is, Hon'ble Supreme Court came to the conclusion that claim made by respondent therein was a just claim, which was supported as it were by a recommendation of Assistant Collector of Customs. Such a conclusion arrived at was on merits qua facts of that case and as already mentioned ***Hymanshu*** case arose out of a suit.

22. For these reasons, this Court holds that ***Hymanshu*** case law does not advance the case of the licensee in its attempt to block the points raised by Chennai Port.

23. As already delineated and alluded to supra, as a matter of unwavering hierarchical loyalty and judicial discipline this Court refrains itself from expressing any opinion on whether limitation qua Section 11 application can be relegated to be decided by AT, as order has been made by a Hon'ble Division Bench, the same has also been put into motion by AT by embarking upon the exercise of examining limitation qua Section 11 application and returning a finding vide impugned award.

24. Be that as it may, limitation is clearly founded on public policy and the lead case law in this regard is ***Ion Exchange India Ltd. Vs.***

Angeripalayam Common Effluent Treatment Plant Ltd. reported in ***2020 (2) CTC 816.*** Besides being founded on public policy, limitation is a plea which has to be decided by the Court even if it is not set up as a defence by the respondent or defendant. This is ingrained in Section 3 of the Limitation Act.

25. As already alluded to supra, there is no disputation or disagreement before me that arbitral proceedings commenced on 01.08.1997 i.e., commencement within the meaning of Section 21 of A and C Act when Ex.R14 notice was issued by the licensee to the Chennai Port and when it was received by the noticee on the same day. In other words, there is no disputation or disagreement before this Court that 30 days from this day elapsed on 31.08.1997 and therefore this is the date on which cause of arbitration arose. Three years is the limitation vide Article 137 of the Limitation Act read with Section 43 of A and C Act and therefore the three years for cause of arbitration elapsed on 30.08.2000. Admittedly, Section 11 OP being O.P.No.292 of 2001 was presented thereafter on 30.10.2000.

26. In the light of the rival submissions of counsel, this Court deems it appropriate to examine how the AT has dealt with the Limitation issue. On a careful perusal of the impugned award it emerges

with clarity that AT has negatived the barred by limitation plea on three grounds, a) AT has held that under Section 11, it is a request, not an application and therefore Article 137 of the Limitation Act will not apply, b) AT has held that there is acknowledgement of liability by Chennai Port vide its minutes dated 04.04.2000, vide reference 84 dated 25.04.2000 (Ex.R14 before AT) and c) order dated 28.09.2004 made in O.P.No.292 of 2001 impliedly condones delay if any.

27. As far as the contention of Licensee/ sole respondent is concerned, as already mentioned supra, it was predicated on Exs.C10 to C13 wherein and whereby it was submitted that post 31.08.1997, there was correspondence between Chennai port and licensee and the limitation therefore stood extended. In support of this submission, a judgment of Hon'ble Supreme Court in ***Geo Miller and Co. Pvt. Ltd., Vs. Chairman Rajasthan Vidyut Utpadan Nigam Ltd.,*** reported in ***2019 SCC online 1137*** and a judgment of Delhi High Court in ***Yogesh Kumar Gupta Vs. Anuradha Ranagarajan*** reported in ***(2007) 35 DRJ 581*** were pressed into service.

28. With regard to proceedings under Section 11 being a request and not an application or suit, this Court is of the considered view that

this cannot be a ground to take a view that there is no limitation qua Section 11 of A and C Act. The reason is, in the considered view of this Court, the term 'request' has been used in Section 11, as prior to 23.10.2015 amendment, Section 11 envisaged appointment by Hon'ble Chief Justices of High Courts or his nominees / designates in case of domestic arbitration and Hon'ble Chief Justice of India or his nominees /designates in case of international commercial arbitration. As these high constitutional offices have been referred to in the statute i.e., in Section 11 the term 'request' has been preferred as a matter of deference. This view taken by this Court is buttressed by the fact that post amendment on 23.10.2015, i.e., post substitution of Hon'ble Chief Justice of High Courts and Hon'ble Chief Justice of India with High Court and Supreme Court respectively, the term used is 'application'. This is evident from sub-section (6A) of Section 11, which continues to be in the statute book. To be noted, though deletion of sub-section (6A) is contemplated vide amending Act 33 of 2019, Section 3 of the amending which deals with amendments to Section 11 has not been notified while some other sections have been notified on 30.08.2019.

29. This takes us to the next point regarding acknowledgement of liability. A careful perusal of minutes of Chennai Port dated 04.04.2000,

as contained in the reference dated 25.04.2000, makes it clear that this has not been communicated to the Licensee. More importantly, the opinion of the Legal Advisor has been sought and no conclusive decision has been taken. As rightly pointed out by learned counsel for Chennai Port, Section 18 of the Limitation Act would come into play and acknowledgement of liability within the period of limitation would arise only when the acknowledgement is communicated to the other party.

30. This takes us to the next point qua limitation wherein AT has proceeded on the basis that 28.09.2004 order disposing of Section 11 application impliedly condones delay, if any. This Court is of the considered view that this tantamounts to begging the question. It tantamounts to begging the question, as this very order was assailed in a writ petition (whether it is permissible is a question which this Court refrains itself from going into as a matter of unwavering hierarchical loyalty forming part of judicial discipline). In that writ petition, there was an interim order dated 30.06.2005, this interim order was carried in appeal by way of an intra-court appeal to a Hon'ble Division Bench presided over by then Hon'ble Chief Justice and this Hon'ble Division Bench, in its wisdom, has made an order dated 23.09.2005 wherein the question of limitation has been specifically relegated to AT. This Court

deems it appropriate to remind itself that learned counsel on both sides very fairly agreed that this limitation is limitation qua Section 11 owing to which it cannot be gainsaid that order in Section 11 impliedly condones delay. Therefore, all the three points on which AT tested limitation are clearly lacking in judicial approach. To be noted, one of the three juristic principles carved out in ***Associate Builders*** case law qua public policy is judicial approach and test for judicial approach is fidelity of judicial approach. In this regard, this Court has reminded itself that captioned OP having been presented in this Court on 13.04.2009 is governed by pre 23.10.2015 regime qua A and C Act.

31. As already delineated and alluded to supra, limitation is founded on public policy and if the view that a party after triggering arbitration clause/agreement and after accrual of cause of action followed by cause of arbitration can slip into slumber and seek constitution of Arbitral Tribunal at its will and pleasure without any time line cap, the same will clearly be opposed to public policy and it has far reaching consequences. Limitation being founded on public policy, this will have far-reaching consequences. If such a view is sustained, it will lead to a situation where there will be no limitation at all qua Section 11. It would have far-reaching consequence which is certainly not in tune with public

policy as a party after triggering the arbitration clause and after the cause of arbitration accrues can simply slip into slumber for even a decade. This is not only be opposed to public policy as law of limitation is founded on public policy, it will also militate against expeditious remedy which is one of the salutary principles underlying arbitration which is an important pillar of 'Alternate Dispute Mechanism' ('ADR' mechanism). For the reasons articulated herein, this Court is constrained to observe that all the three points are not views that can be taken by adopting a reasonable approach and are therefore, hit by the vice of lack of judicial approach. This means that the impugned award is clearly in conflict with public policy of India owing to being in contravention with the fundamental policy of Indian law. Therefore, this Court deems it appropriate to hold that limitation will certainly operate qua Section 11 application in the light of Article 137 read with Section 43 of A and C Act and therefore, the impugned award is hit by the vice of lack of judicial approach and even perversity as it is an approach, which cannot be taken by adopting a reasonable view.

32. This Court has come to the conclusion that the three points on which AT has decided limitation are perverse, patently illegal and are opposed to public policy. This would be the end of the matter and any

other argument on limitation particularly extension can be rejected on the ground that captioned OP is not an appeal, but limitation is one point which needs to be examined by Court even if it is not set up as a defence by a party and this principle is ingrained in Section 3 of Limitation Act. Therefore, without stopping with discussion on the grounds on which AT decided limitation, this Court proceeds to examine all aspects of arguments on limitation that were advanced before this Court. It is the specific case of the licensee that limitation should not be computed from 31.08.1997 and it should be computed from 13.07.2000. For this purpose, adverting to the communications with Chennai Port, it was submitted that the period from 27.08.1999, when a letter was written by licensee, to 13.07.2000 has to be excluded as 13.07.2000 is the breaking point. This argument in the considered view of this Court is attractive, but unacceptable as Chennai Port vide Ex.R4 dated 22.04.1997 has rejected the claims of licensee and licensee vide Ex.R5 dated 25.04.1997 has accepted this. Law is well settled that limitation cannot be extended and a claim cannot be kept live or resuscitated merely by writing letters. With regard to minutes of Chennai Port internal meeting, as already alluded to supra, it asked for further legal opinion and the same has not been communicated to the licensee. For Section 18 of the Limitation Act

to operate, the acknowledgement has to be in writing, it has to be unconditional and it has to be communicated to the other party. ***K.Rathinasamy Pathar Vs. P.Sadasivam and Ors.*** reported in ***2009(3) CTC 650*** relied on by the learned counsel for licensee in this regard does not help the case of the licensee as ***Rathinasamy*** case law is one where the question was whether Section 18 of Limitation Act will be attracted when brother of a party makes an acknowledgement.

33. This takes us to the argument that Section 11 was an administrative order at the relevant point of time and therefore Limitation Act does not apply. In other words, it was argued that Section 11 OP in the case on hand was decided in Konkan Railway regime. As rightly submitted by learned counsel for Chennai Port, ***Patel Engineering*** case [***S.B.P. & Company v. Patel Engineering Ltd. and another*** reported in ***(2005) 8 SCC 618***] over ruled ***Konkan Railway*** [***M/s.Konkan Railway Corpn. Ltd., & Anr. Vs. Rani Construction Pvt. Ltd.*** reported in ***(2002) 2 SCC 388***]. To be noted, this is ***Konkan Railway II*** wherein it was held by a five judge Constitution Bench that Section 11 is not a judicial function resulting in an adjudicatory order and therefore not open to challenge under Article 136. This was overruled by a larger seven Judge

Bench in ***Patel Engineering*** [***SBP & Co. Vs. Patel Engineering Limited and another*** reported in ***(2005) 8 SCC 618***] by a 6:1 majority. In ***Patel Engineering*** case it was categorically held that ***Konkan Railway II*** i.e., ***M/s.Konkan Railway Corpn. Ltd., & Anr. Vs. Rani Construction Pvt. Ltd*** (To be noted, ***Konkan Railway Corpn. Ltd., and Ors. Vs. Mehul Construction Co.*** is Kongan Railway I and the same is reported in ***(2000) 7 SCC 201***) stands over ruled and Patel Engineering went on to hold that Section 11 is exercise of judicial power and it is not an exercise of administrative power. In paragraph 47 of ***Patel Engineering*** case law where a summation of conclusions has been given as 12 points, vide Point No.10, as several courts guided by Konkan Railway II had passed orders under Section 11(6), it was clarified that such appointments made by following ***Konkan Railway II*** will be treated as valid. This is to avoid what can be described as setting the cat amongst the pigeons as several orders had been passed by various Courts across the country following ***Konkan Railway II*** principle. This is only a saving mechanism, but this does not alter the legal position laid down by Hon'ble Supreme Court in M.A.Murthy's case [***M.A.Murthy Vs. State of Karnataka and Others*** reported in ***(2003) 7 SCC 517***]. M.A.Murthy

principle is that law declared by Hon'ble Supreme Court has to be assumed as law from inception and prospective overruling is an exception to this normal rule and this exception comes into play only when Hon'ble Supreme Court specifically indicates that the judgement will operate prospectively. That is not the case in ***Patel Engineering***. Orders already made by following ***Konkan Railway II*** to be treated as valid is only a saving mechanism. Therefore, Patel Engineering will start operating from the date of on which A and C Act kicked in i.e., 22.08.1996.

34. Therefore, the argument that Section 11 was only a administrative function on the date on which it was made when ***Konkan Railway II*** was operating does not hold water. This is one other aspect of the matter. ***Konkan Railway II*** is dated 30.01.2002 and ***Patel Engineering*** was rendered on 26.10.2005. ***M.A.Murthy*** Principle is a judgment of Hon'ble Supreme Court and therefore, this Court would follow that principle rather than going by the Bombay High Court judgment dated 27.04.2005 in ***Singhal and Brothers and another Vs. Mahanagar Telephone Nigam Ltd., Mumbai*** **[2005 (3) Mh.L.J 951]** to the effect that Section 11 is an administrative order and therefore,

Limitation Act will not apply.

35. There is another interesting scenario qua impugned award with regard to limitation. As already alluded to supra, though it is a unanimous award made by three member Arbitral Tribunal, two learned Arbitrators have given separate reasons and this is by way of annexures to the impugned award. A careful perusal of the impugned award on this aspect of the matter reveals that all three learned Arbitrators have applied Section 5 and condoned the delay qua Section 11 petition. There are two patent illegalities on this aspect of the matter. One is, having held that Limitation Act is not applicable as Section 11 only is a request, recourse should not have been taken to Section 5. The other patent illegality is, Section 5 cannot be applied to condone the delay in a suit and extend the period of limitation. This logic will apply to Section 11 also.

36. Reverting to extending the limitation, **Hari Shankar** case [***Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others*** reported in ***(2006) 14 SCC 658***], ***Shree Ram Mills*** case [***Shree Ram Mills Ltd., Vs. M/s.Utility Premises (P) Ltd.,*** reported in ***(2007) 4 SCC 599***] and ***Geo Miller*** case [***Geo Miller & Co. Pvt. Ltd., Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.,*** reported in ***2019***

SCC Online SC 1137] do not help the case of the licensee. The reason is **Hari Shankar** case is clearly in the nature of a partition amongst family members, there being no limitation for partition suit, ***Shree Ram Mills*** case was one where there was a factual finding that order regarding contentious 1,20,000 sq.ft of FSI was never closed by parties and it was a live issue.

37. With regard to ***Geo Miller*** case, interestingly parties were continuously at logger heads with regard to joint development of certain lands and therefore, the breaking point came much later. In ***Geo Miller*** case, ***Hari Shankar*** case has been clearly distinguished by holding that it was in the specific context of a family settlement. In any event, as this Court has held that the reckoning date in the case on hand is only 31.08.1997 qua cause of arbitration and not 31.07.2000 as contended by learned counsel for Licensee, it is not necessary to delve further into this aspect of the matter.

38. The argument that licensee company was not in existence on the date of the claim and that the deponent, who represented the licensee company, did not have the locus to do the same, as he had admitted that he had left the licensee company much earlier, could be dealt with as one

point. It was pointed that certificate from the appropriate authority in UK, had been obtained and filed as Ex.C22 to demonstrate that said company was in existence. It was also argued on a demurrer that even a successor can continue the claim. Furthermore, though the deposition on behalf of the Licensee company leaves much to be desired and though the contradictions pointed out therein are not completely untenable as it is in the realm of appreciation of evidence, applying the ***Hodgkinson*** principle laid down by English Court in ***Hodgkinson Vs. Fernie*** reported in ***140 ER 712,*** this Court is of the view that this is a case which will get covered by AT being the best judge of the quality and quantity of evidence before it. To be noted, ***Hodgkinson*** principle, which is to the effect that AT is the best Judge of the quality and quantity of evidence before it, was reiterated by Hon'ble Supreme Court in celebrated ***Associate Builders*** case ***[Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49].*** This Court hasten to add that ***Hodgkinson*** principle is not an absolute rule and the caveat is, it is not a rule which is so absolute that it does not admit of any exception. The exceptions are in the nature of perversity relying on evidence received behind the back of a party etc.,

39. It is further to be noted that this is not an exhaustive list of

exceptions and it is only illustrative. Suffice to say that case on hand does not fall under exception to ***Hodgkinson*** principle. Therefore, this Court deems it appropriate to hold that this is not a fit case for judicial intervention in a Section 34 petition with regard to findings of AT pertaining to licensee company being live on the date of claim and the locus of the deponent.

40. This takes us to the last two points, which also can be dealt with as one point. With regard to quantum of penal wharfage charges directed to be refunded being arrived at, by taking the rate as Rs.500/- for full containers as opposed to Rs.40/- for empty containers, in the considered view of this Court, clincher in this regard is Article 1(d) of said contract, which reads as follows:

> *'Article 1(d) : "CONTAINER" mean a receptacle of 6.1 metres or more in length and equipped with corner castings to facilitate handling by mechanical equipme nt and discharges from or loading onto the Licensee's Vessels including the Licensee's Goods therein.'*

41. Therefore, without making any foray into the forbidden realm of appreciation of evidence, it comes to light that there is a clear definition clause in said contract and going by the definition clause, it is

clearly full containers. In this regard, this Court is of the view that for the case on hand Naba Power principle being legal principle for interpretation of commercial contracts laid down by Hon'ble Supreme Court in (2018) 11 SCC 508 can be applied. In ***Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limtied (PSPCL) & Another*** penned by Hon'ble Mr. Justice Sanjay Kishan Kaul, after summarising and making an exhaustive survey of case laws on the point, laid down principles for interpretation of commercial contracts. In this case, the licensee is an England based commercial entity and it is obvious that lot of thought would have gone into said contract. Therefore, on the facts of case on hand, it can be safely inferred that the making of said contract is a matter of high technical expertise preceded by seeking clarifications and doubts so that the parties know what they are getting into. Therefore, the case on hand is one where said contract should be read as per its express terms. In this view of the matter, if Article 1(d) is applied, finding of AT by arriving at the quantum by taking full container rates is clearly not in accordance with the terms of the contract. To be noted, said contract by itself is for laden containers and not for empty containers. Therefore, the decision not being in accordance with the terms of the contract, there is a clear infarction of sub-section (3) of

Section 28 of A and C Act. To be noted, as captioned OP is governed by pre 23.10.2015 regime, this Court has taken into account sub-section (3) of Section 28 as it stood prior to 23.10.2015. Therefore, this computation of quantum by taking full containers rates is clearly liable to be set aside as being not in accordance with the terms of the contract. As far as refund of berth hire charges collected from other third parties /port users, there is nothing to demonstrate that there was any evidence whatsoever before AT with regard to what were the hire charges that were collected from third parties/port users. This finding, therefore, is based on no evidence and to this extent this point falls under exception to ***Hodgkinson*** principle. Therefore, finding of AT with regard to berth hire charges collected from third parties / port users is also liable to be set aside.

42. The argument that quantum of penal wharfage charges computation and berth hire charges collected from third parties is based on evidence before AT does not hold water in the light of narrative thus far. Therefore, this Court finds for Chennai port and hold that the impugned award is liable to be set aside.

Captioned OP allowed and impugned award is set aside. There shall be no order as to costs.

17.09.2020

Speaking Order: Yes
Index: Yes

gpa

M.SUNDAR.J.,

gpa

Pre-delivery order in
O.P No.511 of 2009

17.09.2020