

In the High Court of Judicature at Madras

Dated : 24.03.2017

Coram :

The Hon'ble Mr.Huluvadi G.Ramesh, Acting Chief Justice

O.P.No.744 of 2016

M/s.ProConnect Supply Chain Solutions Limited,
Having its office at SPL Guindy House,
No.95, Mount Road,
Chennai – 600 032,
rep. by its Manager – Legal
Mr.S.Hariprasad .. Petitioner

-VS-

M/s.Just Buy Live Enterprise Private Ltd.,
rep. by its Managing Directorate
Mr.Bharat Balachander,
No.404, Sunrise Business Park,
Wagie Industrial Estate,
Thane (West) – 400 604. .. Respondent

Petition filed under Section 11 (5) & (6) of the Arbitration and Conciliation Act, 1996, to appoint a sole Arbitrator in accordance with Section 11 of the Arbitration and Conciliation Act, 1996 for resolving the dispute that had arisen out of the Agreement dated 17.07.2015.

For Petitioner : Mr.V.T.Narendiran

For Respondent : Mr.Thriyambak J.Kannan

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ORDER

This petition has been filed by the petitioner seeking to appoint a sole Arbitrator to adjudicate upon the disputes arisen between the petitioner and the respondent.

2. The petitioner and the respondent have entered into third party logistics services (3PL) agreement dated 17.07.2015. The said agreement was effective till 14.07.2018. In terms of the agreement, the petitioner allocated to the respondent necessary space in the warehouse. While so, on 30.09.2015, the respondent terminated the agreement with thirty days notice with effect from 01.11.2015. On 30.10.2015, the petitioner sent letter to the respondent claiming Rs.33,33,000/- for allocation of space, and man-power recruitment etc. to run the operation as assured under the agreement. The non-utility of infrastructure and services provided by the petitioner was solely due to the respondent and in view of the non-compliance of contract, the petitioner had sustained loss of Rs.58,23,819/- including the above allocation of space etc. On 26.2.2016, the petitioner sent letter invoking arbitration clause. Belatedly on 21.7.2016, the respondent sent reply denying the averments in the notice. Hence, the petition seeking for appointment of an arbitrator.

3. The respondent has filed the counter stating that before any transactions could commence between the parties, the respondent by its letter dated 30.09.2015 terminated the agreement. Since the parties have not acted upon based on the agreement, the claim made by the petitioner was not within the scope of the agreement and was not arbitrable. Hence, prays for dismissal of the petition.

4. Referring to Annexure-I to the agreement (page 11 of the typed set of documents), the learned counsel would contend that the petitioner offered the following scope of services:-

- (i) Allocating warehouse space
- (ii) Receipt of goods
- (iii) Visual Inspection while inward
- (iv) Barcode scanning during GRN
- (v) Application of barcode sticker on every SKU
- (vi) Storage of Goods
- (vii) Accounting stocks in the system
- (viii) Inventory Management
- (ix) Order Processing
- (x) Arranging dispatch

(xi) Providing periodical MIS reports

The learned counsel would further contend that the petitioner allocated the required space, recruited man-power, bought the capex across India to run respondent's operations and in that process, the petitioner had incurred expenses and thus, the expenses have to be borne by the respondent. According to petitioner, there is breach of contract/agreement by the respondent.

5. Taking through the counter and also relying upon the decision of the Patna High Court in *Union of India and others v. Madani Construction Corporation (Private) Limited and another*, 2005 SCC OnLine Pat 794 : (2006) 3 Arb LR 63, the learned counsel for the respondent submits that before commercial relationship could commence between the petitioner and the respondent, the contractual obligation between them ended. Since there was no business relationship between the parties, there can be no dispute that arises out of the agreement. Moreover, before commencement of the business relationship, the respondent terminated the agreement vide its letter dated 30.09.2015. Though clause 7.2 contemplates that in the event of termination by the petitioner, the petitioner is entitled to recover/deduct or withhold any of the warehousing charges, without the submission of the bills, there are no claims that the

petitioner can have under the agreement. As such, there is no scope for appointment of an arbitrator.

6. Clause 15 of the agreement reads thus:-

“15.DISPUTE RESOLUTION & JURISDICTION

In the event of any dispute or difference arising out of this agreement or in any manner connected to it, the same shall be settled through arbitration under the provisions of Arbitration and Conciliation Act, 1996 including statutory amendments thereon, by a sole arbitrator to be appointed on mutual consent. The venue of arbitration shall be Chennai. This Agreement shall be governed, construed and interpreted in accordance with Indian laws and it is specifically agreed to between the parties hereto that Courts in Chennai alone shall have jurisdiction to the exclusion of all other courts.”

7. The main grievance of the petitioner is that after the agreement, they have made preparation work and in the process of preparation work, they incurred huge expenditure for the services to be rendered to the respondent. The said contention was specifically denied by the learned counsel for the respondent.

8. On going through the materials and the submissions of the learned counsel for the parties, this Court finds that no work order was issued in favour of the petitioner. In fact, in their letter dated 30.10.2015, the petitioner has stated as under:-

“we are sad to note that the engagement with us is terminated by you even before commencing the operations.” (emphasis supplied)

9. From the reading of the above, one could understand that the operation/work has not been commenced. It is to be noted that any preparation made by the petitioner before commencement of operation, cannot be termed as operation of the contract.

10. At this juncture, the learned counsel for the petitioner submits that this Court cannot go into the merits of the matter. The only question to be looked into by this Court is whether agreement and arbitration clause are in existence and disputes have arisen between the parties. He further submits that since there is an arbitration clause in existence and disputes have arisen *inter se* the parties, the matter has to be referred to arbitration.

11. As stated above, in their own letter dated 30.10.2015 itself, the petitioner has stated that before “commencement of work, the respondent has terminated the contract”. The agreement is dated 17.07.2015. Termination notice was sent by the respondent on 30.09.2015. After waiting for nearly one month, the petitioner sent a reply on 30.10.2015 stating that they have allocated required space, recruited man-power, bought the capex across India to run the operation of the respondent and in that process, they have incurred Rs.33.33 lakhs and requested the respondent to reimburse the same.

12. The learned counsel for the respondent contended that nowhere the agreement contemplates any of the payments to be made by the respondent to the petitioner in respect of purported setting up costs, which are demanded by the petitioner to be made by the respondent. The learned counsel would further contend that though clause 5.1 of the agreement provides for obligation of the respondent to make payment to the petitioner within 15 days from the date of receipt of the bills for payment, admittedly, the petitioner has not filed any bills which were required to be paid by the respondent. It is pertinent to note that only after

notice of termination was sent by the respondent on 30.10.2015, the petitioner replied that they have incurred Rs.33.33 lakhs in the process of preparation of work. As such nothing arose out of the agreement.

13. As stated above, any preparation made by the petitioner before the commencement of operation, cannot be termed as operation of the agreement. Thus, there is no difference or dispute arising out of the terms of the agreement. The question of appointment of an arbitrator to adjudicate the disputes *inter se* the parties does not arise in this case.

14. The original petition is dismissed, leaving the parties to bear their own costs.

(H.G.R., ACJ.)
24.03.2017

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Internet : Yes
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The Hon'ble Acting Chief Justice

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