IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.210 OF 2014
ALONG WITH
ARBITRATION PETITION NO.211 OF 2014
ALONG WITH
ARBITRATION PETITION NO.214 OF 2014
ALONG WITH
ARBITRATION PETITION NO.218 FO 2014
ALONG WITH
ARBITRATION PETITION NO.364 OF 2014

M/s Central Warehousing Corporation … Petitioner
Versus
Aqdas Maritime Agency Private Limited … Respondent

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Mr. Sandesh R. Shukla I/b Mr. Rajesh Mirchandani for the Petitioner.
Mr. Amit Dubey I/b Clayderman & Co. for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 18 FEBRUARY 2019

Oral Judgment

. Heard learned Counsel for the parties.

2 These arbitration petitions challenge awards passed by a sole arbitrator in references between the parties, arising out of a "Handling and Transport" contract. The Petitioner is a corporation established under the provisions of the Warehousing Corporation Act, 1962, functioning under the Ministry of Agriculture, Consumer Affairs, Food and Public Distribution, Government of India. The Petitioner has been operating a Container Freight Station (Custom Notified Area) at its establishment in Drongiri near

Navi Mumbai. The Respondent is a handling and transport contractor. In pursuance of notice inviting tenders by the Petitioner-corporation and tenders submitted by the Respondent for the work of handling, transport and other allied services for ISO containers at its various centres such as CFS D' node, CFS Dristipark and CFS Kalamboli, etc., the Respondent was appointed by the Petitioner as its handling and transport contractor under five tenders. Formal agreements were executed between the parties in that behalf. Under these agreements, the Respondent undertook the work of transportation of loaded/empty ISO containers from and to port/other ICDs/CFS, de-stuffing of the cargo and loading it into trucks or stacking in the designated godowns, receipt of export cargo at the designated godowns and placing/retrieving empty containers in/from the container yard of Container Freight Station, etc. The Respondent raised bills towards the work executed under these contracts. The Petitioner paid these bills. After payment, sometime in or about May 2012, the Petitioner initiated steps for recovery of excess amount purportedly paid mistakenly towards service tax to the Respondent. Various demand letters were addressed to the Petitioner by the Respondent in this behalf, calling upon the latter to refund such excess amount. The total amount involved as excess payment towards service tax was Rs.3.29 crore. The Respondent denied its liability and invoked the arbitration agreement. The Respondent applied for interim protection pending reference under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act"). The Respondent submitted title deeds of its properties to secure the amount and on such security, the Petitioner was restrained from recovering any amount from the Respondent. The parties went to arbitration with the Petitioner herein as the claimant. By a common order dated 25 July 2012 passed in all five arbitration references arising out of five separate tenders, the learned arbitrator rejected the Petitioner's claims. Four claims were rejected on the grounds of merit, whereas the fifth was rejected both on merit and on the bar of limitation. The awards on five claims have been challenged in these five arbitration petitions.

3 Learned Counsel for the Petitioner, in support of his challenge, refers to clauses XII (i) and XXII (1)(ii) of tender conditions, which *inter alia* provide for the contractor's liability for payment of all taxes, levies, fees and charges payable to any government/local body or state/central government or body by the contractor. Relying on these clauses, learned Counsel submits that the contract clearly provides for contractor's liability to pay all taxes in connection with the suit contracts, and, in the premises, the learned arbitrator could not have rejected the Petitioner's claims for refusal of service tax wrongly paid by the Petitioner to the Respondent. Learned Counsel submits that construction of the agreement and, in particular of relevant clauses dealing with the liability of the contractor to pay taxes by the learned arbitrator, is an impossible view of the contract and must be interfered with as being in breach of the public policy of India as well as being vitiated by a patent illegality appearing on the face of the award by reason of its perversity.

4 The relevant clauses are quoted below :

> "XII <u>LIABILITY OF CONTRACTOR FOR LOSSES ETC. SUFFERED BY CORPROATION</u>
>
> (i) All the taxes/levies/fees/charges payable to any Government body/Local body shall be paid by the

> contractor and no claim whatsoever shall be against the Corporation on this account.
>
> XXII <u>DUTIES & RESPONSIBILITIES OF THE CONTRACTOR</u>
>
> 1(ii) All taxes/charges payable to the State/Central Government/Local Bodies etc. shall be paid by the contractor and no claim, whatsoever, shall lie against the corporation on this account."

5 The arbitrator was required to construe these clauses and consider whether the liability to pay service tax, which in law inheres in the recipient of service, was meant to be borne by the Respondent contractor by reason of these clauses. The arbitrator held that there was an ambiguity in the contract so far as the stipulation for payment of taxes was concerned. Considering the fact that the amendment to the law of service tax brought in by Finance Act, 2000 foisted the liability to pay service tax on the person who engages a clearing and forwarding agent (which would include even a handling agent), the arbitrator held, the primary liability to pay service tax was on the Petitioner, who had engaged the Respondent as a handling agent. The learned arbitrator held that considering the existing trade practice as also the nature of the contract, being a long term contract extending upto five years having operation from 01.04.2009 to 31.03.2004 and large variations in service tax rates, it was difficult to hold that the contractor had agreed to absorb such large variation in terms of service tax in the rates offered to the Petitioner-corporation for undertaking the handling work. (The learned arbitrator noted large variations in service tax for the entire period.) The learned arbitrator also in this behalf distinguished the judgment of the Supreme Court in the case of **Rastriya**

Ispat Nigam Ltd Vs. Dewan Chand Ram Saran[1], which was a case where service tax liability was to be borne by service provider, and the employer was allowed to deduct taxes or duties and pay them to the tax authority on account of the contractor.

6 The arbitrator's view on construction of the suit contract, in particular reference to clauses XII (i) and XXII (1)(ii), as quoted above, can certainly be described as a reasonable construction. It connotes a possible view in the face of a material ambiguity in the clauses. Such ambiguity arises because it is by no means certain in the language of the clauses, whether the liability referred to therein was the liability of the contractor alone or even the liability to pay taxes of the employer. The learned arbitrator also noticed that the ambiguity in the particular clauses leading to conflicting interpretations by the contracting parties was realized by the Petitioner itself in the year 2011, whereafter a specific provision was added in subsequent handling and transportation contracts of the Petitioner requiring contractors to quote rates exclusive of service tax. Considering the text of the clauses and the law of service tax (amended), in the light of the Supreme Court judgment in **Rastriya Ispat Nigam Ltd** (supra) and also taking into account the nature of the suit contract and its duration, and large variation in rates of service tax in such duration, the arbitrator construed the contract and in particular, the two liability clauses, to mean that service tax liability, which was primarily of the Petitioner as recipient of service, was not to be borne by the Respondent-contractor. There is nothing unreasonable about this view. It cannot be described as a view which no fair or judiciously minded person would take or a view

1 (2012) 5 SCC 306

which would shock the conscience of the court. Accordingly, the impugned award does not merit any interference under Section 34 of the Act.

7 There is, in the premises, no merit in the petitions. The Arbitration Petitions are dismissed.

(S.C. GUPTE, J.)