

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.04.2019

Delivered on : 19.07.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P.(PD)Nos.517 & 549 of 2019
&
C.M.P.Nos.3361 & 3648 of 2019

M/s.Positive Systems
Rep. by its Proprietor,
Mr.M.P.Sampath Kumar,
39/1568 Madakkapilly Line,
Chithoor Road, Ernakulam,
Cochin, Kerala

...Petitioner

Vs

M/s.Redington (India) Limited,
Redington House Centre Point,
Plot Nos.8 and 11 (S.P),
Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai 600 32

...Respondent

Prayer in C.R.P.(PD)No.517 of 2019: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order dated 08.12.2018 passed by the learned Sole Arbitrator, District and Session Judge, Chennai in I.A.No.1 of 2018 in Arbitration Case No.Red 1 of 2018.

Prayer in C.R.P.(PD)No.549 of 2019: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order dated 08.12.2018 passed by the learned Sole Arbitrator in I.A.No.3 of 2018 in Arbitration Case No.Red 1 of 2018.

For Petitioner : Mr.S.Giritharan

For Respondent : Mr.S.S.Rajesh

COMMON ORDER

The respondent in an Arbitral proceedings before the sole Arbitrator is the revision petitioner before this Court. The Civil Revision Petitions have been filed against the dismissal of two interlocutory applications, details of which are as follows:

a) I.A.No.1 of 2018 in arbitration case No.Red 1 of 2018, which is an application that has been filed for a direction to the claimant to furnish certain documents. Against the said order C.R.P.No.517 of 2019 has been filed.

b) I.A.No.3 of 2018 in Arbitration case No. Red 1 of 2018 is another application for producing the originals of the authorization letter issued by the respondent herein while collecting goods as per the invoices that have been listed in the petition.

2. The parties are referred to in the same litigative status as before the sole Arbitrator. The facts being similar as the applications emanate from a single arbitral proceedings a common order is being passed.

3. The claimant is a reputed company engaged in the business of IT Hardware and Software products and peripherals including products from non-IT and Telecom segments. In the course of their business the respondents have approached the claimant for buying their products on credit basis. The 2nd respondent (in the arbitration proceedings) on behalf of the 1st respondent had agreed and undertaken to pay the price of the

products supplied to them on the respective due dates. The claimant would contend that 47 of the invoices that had been raised by them totalling a sum of Rs.1,73,81,218/- remained unpaid. On 29.05.2018, the claimant had issued a pre-arbitration notice and thereafter since there was no payment from the respondents they had proceeded to refer the matter to arbitration vide letter dated 21.06.2018.

4. The respondents who have entered appearance questioned the very constitution of the Arbitral Tribunal stating that they had not entered into an arbitration agreement with the claimant. To fortify this defense, the 1st respondent had taken out an application in I.A.No.1 of 2018 seeking direction to the claimant to produce the following documents:

"1.Contract/Agreement of Arbitration entered in between the claimant and the respondent duly signed by them, showing for the appointment of Arbitrator as per arbitration clause in the contract or agreement of

Arbitration to resolve the dispute between the claimant and the respondent herein.

2.Document showing that this Hon'ble Arbitrator is duly appointed by the Hon'ble Court to resolve the dispute between the claimant and the respondent herein as per the provisions of Arbitration and Conciliation Act - 1996.

3.Any other documents if available in the possession of the claimant in connection with the above documents may also be produced."

5. In the affidavit filed in support of the said application the 1st respondent would contend that on 20.07.2018, in response to the summons issued by the sole Arbitrator, they had entered appearance in the Arbitral proceedings and the claimant had given them the claim statement along with volumes of documents. Thereafter while preparing the written statement they had realised that some vital documents necessary for

preparing the written statement were missing and therefore they had come forward with the said petition.

6. The claimant had filed their counter inter alia contending that the provisions of the Code of Civil Procedure would not apply to the proceedings before the Arbitral Tribunal, since, the respondent had moved the application invoking the provisions of Order XI Rule 14 and Section 151 of the Code of Civil Procedure. The claimant would submit that it is only Section 19 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act) which applies to the Arbitral proceedings. As regards the first document the claimant would contend that the arbitration clause is contained in the invoice at Clause 19 and there was no separate arbitration agreement. As regards the second document the same was very much available in the typed set of papers and the third document which is sought for was rather vague and the claimant was unable to identify the said document.

7.As regards I.A.No.3 of 2018, the said application has been filed for a direction to the claimant to produce the originals of Ex.R.4, authorization letter, for each of the invoices that has been listed in the petition. The respondent has listed about 93 invoices. In the affidavit filed in support of the said application the respondent would submit that on 10.11.2018, they had produced two documents, Ex.R.4 and Ex.R.5 along with an additional list of documents. According to the respondent they would submit that the documents are in the format of the authorization letter issued by the claimant to the respondent while collecting the goods. The respondents would submit that they had filled up the said format and sent it by mail through their e-mail ID along with the details of the persons whom they had authorized. The copy of the e-mail was not only sent to the claimant but also to their Accountant, Ranjith's e-mail as well as the senior accountant, Rajendran. The respondents would submit that Ex.R.4 is only a format and has not been filled up by the

respondent and therefore it becomes obligatory for the claimant to produce all the authorization letters that the respondent has issued to them. This exercise was being undertaken by the respondent in order to substantiate their case that there was no arbitration agreement between them and the claimant and that the persons signing the invoices are not the persons who had been authorized by the respondent.

8. The defense of the claimant was that clause 19 of the Invoices contained an Arbitration clause and by accepting and acting upon the Invoice the respondents had bound themselves to its terms. The claimant would submit that all the documents have been filed by them in their typed set of papers and made available to the respondents. The respondents without filing a counter to the claim petition has filed one application after another with a sole intent of dragging on the proceedings. The respondent would also submit that having accepted all these invoices the respondent would also be in possession of the same

and the authorization letter was only for the purpose of collecting the goods from claimant and had not bearing to the issue on hand.

9. The learned Arbitrator by two independent orders of the same date proceeded to dismiss the applications. As regards I.A.No.1 of 2018, the learned Arbitrator had pointed out that the invoice entered into between the claimant and the respondent was the arbitration agreement. Clause 19 contained the arbitration clause and the invoice clearly provided that any person signing the said invoice would bind the respondent company to the terms of the invoice. As regards the second document the learned Arbitrator had pointed out that the same had been filed at page No.522 of the typed set of papers served on the respondent and the third document lacked clarity and unless there was a request for the production of specific documents, the Arbitrator's hands were tied.

10. As regards I.A.No.3 of 2018, the learned Arbitrator had rejected the said application by holding that the respondents had not disputed the receipt of the goods under the invoices and further Ex.R.4, was only a format of the authorization letter for taking delivery of the goods and this document is also not disputed by the respondent therefore at this stage there was no necessity to entertain the said application.

11. Challenging these orders the 1st respondent is before this Court. Mr.S.Giritharan, learned counsel appearing on behalf of the respondent/revision petitioner would contend that there was no arbitration agreement between the claimant and the respondent. He would submit that in view of the objection of the respondents to the constitution of the Arbitral Tribunal, the claimant ought to have moved this Court by filing a Section 11 petition before this Court instead of unilaterally appointing an Arbitrator of their choice.

12. He would further argue that though I.A.No.1 of 2018 was stated to be filed invoking the provisions of the Code of Civil Procedure, however under Section 19 of the Act it is open to the Arbitrator to lay down the procedure to be followed in the course of the arbitration. He would further submit that without any agreement between the parties to refer the disputes to arbitration the claimant cannot rely on the invoices to infer consent.

13. He would argue that the claimant was attempting to mulct liability on the respondents on the basis of a clause in the invoices that any person signing the document would bind the respondents to the terms of the invoice. He would further argue that prior to the commencement of the contract with the claimant, the claimant had requested the respondents to give an authorization letter giving details of the staff who would check and collect the shipments made by hand delivery and therefore without this authorization letter accompanying each of the

invoices the invocation of the arbitration clause was misconceived. He would also contend that such Authorization letters have not been produced by the claimant. He therefore sought for setting aside the order passed in I.A.Nos.1 and 3 of 2018.

14. Mr.S.S.Rajesh, learned counsel arguing on behalf of the respondent/claimant, at the outset would contend that the Civil Revision Petitions under Article 227 of the Constitution of India was not maintainable and in support of his argument would rely upon the Judgement reported in **2002 (2) CTC 585 – M/s.Mangayarkarasi Apparels Pvt. Ltd., Sona Towers, 71, Millers Road, Bangalore – 52 and another Vs. Sundaram Finance Ltd., 21, Pattullos Road, Chennai-2.** He would contend that on and from the date of the commencement of the Act the challenge to any order passed by the Arbitrator/Court was only possible as per the procedure contemplated under the Act.

15. He would further argue that as against the orders passed on interlocutory applications no appeal or revision would lie and as per the terms of the Act the same could be challenged only when the final award was being challenged under Section 34 of the Act since each of these orders were considered to be an interim award. He would further argue that the constitution of the Arbitral Tribunal has not been challenged in the manner prescribed under Section 13 of the Act. In support of his contentions he would rely on the Judgement reported in **2005 (5) CTC 302 – S.B.P. & Co. Vs. Patel Engineering Ltd and another** and the Judgement reported in **2018 (4) CTC 81 – Dhanalakshmi Srinivasan Charitable and Educational Trust Vs. Consolidated Construction Consortium Ltd., Chennai.**

16. The learned counsel would further argue that the various Judicial pronouncements starting from the Honourable Supreme Court as well as Judgements of this Court has held that the arbitration agreement need not be a document signed by

both the parties and a commercial document that containing an arbitration clause would suffice to bind the parties. In support of the said arguments the counsel has relied on the following Judgements:

- i) **(2015) 13 SCC 477** – Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Private Limited.
- ii) **2018 SCC Online SC 2417** – Caravel Shipping Services Pvt. Ltd Vs. Premier Sea Foods Exim Pvt Ltd.
- iii) **(2019) 1 CTC 148** – M/s.Endeka Ceramic India Pvt., Ltd., Vs. Mr.K.Raviraja Pandian.

17. Heard the counsels and perused the records and Judgements. The superintending Jurisdiction of this Court has been invoked challenging the interim orders passed by an Arbitral Tribunal. Since the issue of maintainability has been argued by the claimant it is necessary to first consider the same. The Act is self contained one which lays down the procedure for conducting the arbitration as well as stages of challenge and the procedure

for challenge. The Act also restricts the scope of Judicial review against orders passed by the Arbitral Tribunal.

18. In the Judgement relied upon by the counsel for the claimant namely **2002 (2) CTC 585 – M/s.Mangayarkarasi Apparels Pvt. Ltd., Sona Towers, 71, Millers Road, Bangalore-52 and another Vs. Sundaram Finance Ltd., 21, Pattullos Road, Chennai-2**, this Court had observed as follows:

"27.In the light of the above pronouncements of the Apex Court, referred to already, this Court is of the considered view that the petitioner cannot maintain an action by invoking the powers of judicial review under Article 226 or Article 227 with respect to the order passed by the Arbitrator in a private arbitration or a non statutory arbitration arising out of a commercial transaction. As the Arbitration and Conciliation Act, 1996 provides for remedies besides it also restricts invocation of the jurisdiction of the

Courts at interlocutory stage, this Court taking note of the Legislative Policy adumbrated in the Arbitration and Conciliation Act, 1996 also will not be justified in exercising the powers of judicial review or superintendence under article 226/227.”

Therefore the challenge to the interlocutory orders invoking the provisions of Article 227 of the Constitution of India is misconceived.

19. The order in I.A.No.1 of 2018 would clearly show that the documents that were sought for by the respondents had been provided and therefore the filing of the Civil Revision Petitions appears to be redundant. The first document which is sought for namely the document showing the arbitration agreement has already been provided to the respondents in the form of invoices and the notice referring the dispute to arbitration has also been given to the respondents. The third document, as rightly pointed out by the Arbitral Tribunal, appears to be very vague and

without listing out the documents the same cannot be provided for by the claimants. I therefore do not find any infirmity in the order passed by the Arbitral Tribunal in I.A.No.1 of 2018.

20. As regards I.A.No.3 of 2018, the said application is filed for a direction to the claimant to produce the authorization letter which the respondent would submit should be available as against each of the invoices (93 in number) and which according to them would clearly establish that there was no authorization by the claimant. In case, the claimant fails to produce the document, it is well open to the respondent to urge the arbitrator to draw an adverse inference for its non production. Further this Court has already held the very revision is not maintainable under Article 227 of the Constitution of India. However it is open to the respondent to challenge this order under Article 34 of the Act. I do not find any infirmity in the order passed by the learned arbitrator and the said order does not require any interference.

Therefore considering the fact that the Civil Revision Petitions under Article 227 of the Constitution of India is not maintainable the Civil Revision Petitions stand dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petitions are also closed.

19.07.2019

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Index : Yes/No
Speaking order/non-speaking order

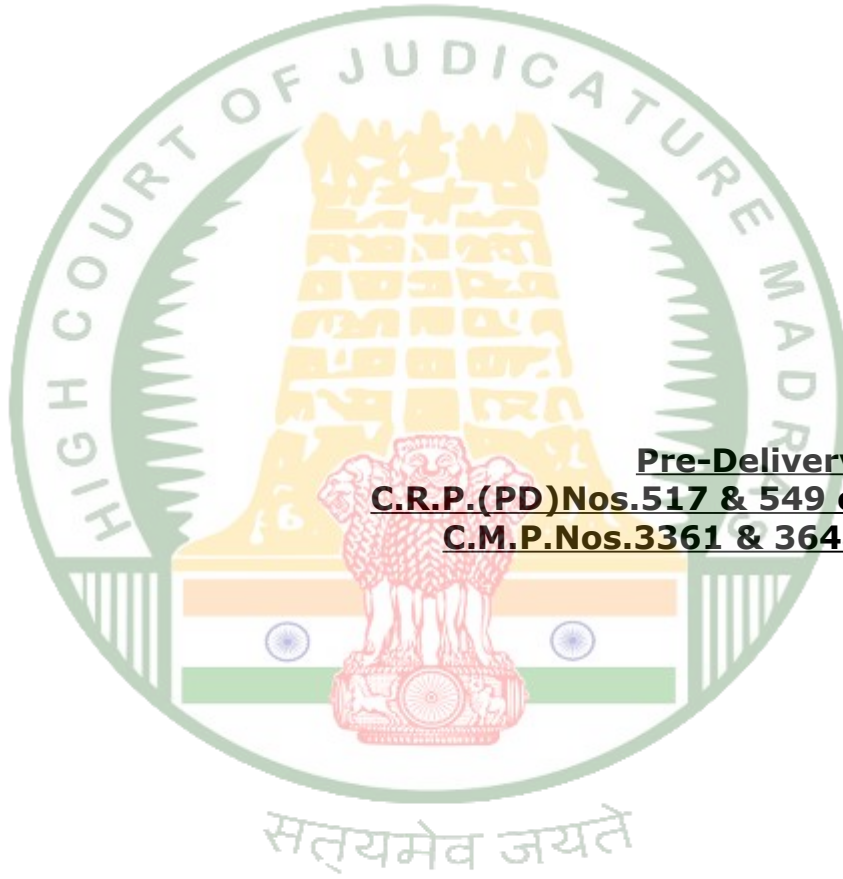
To
The Arbitrator, District and Session Judge,
Chennai



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P.T.ASHA, J.,

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**Pre-Delivery order in
C.R.P.(PD)Nos.517 & 549 of 2019 &
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