IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	20.12.2018
Orders prounced on	11.01.2019

CORAM

THE HONOURABLE Mr.JUSTICE **D.KRISHNAKUMAR**

O.P.No.58 of 2012

1. Nisuki Bio Products Pvt. Ltd.
   A/1003, Navpad Apartment,
   City Light Road,
   Surat - 395 007.

2. Niraj K.Parekh
   M/s.Nisuki Bio Products Pvt. Ltd.,
   A/1003, Navpad Apartments,
   City Light Road, Surat 395 007.

3. Kiran D.Parek
   M/s.Nisuki Bio Products Pvt. Ltd.,
   A/1003, Navpad Apartments,
   City Light Road, Surat 395 007. ... Petitioners

Vs.

1 M/s.V.T.Impex Ltd.,
Rep. by its Admin. Officer D.Gopi
No.12, SBI Officers colony,
2nd Street, Arumbakkam,
Chennai 600 106.

2 Kumarichelvan Bosco
Arbitrator,
No.294, New Law Chambers,
High Court, Chennai 104. ... Respondents

Prayer:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award, dated 19.10.2011 passed by the second respondent in respect of the Arbitration proceedings between the petitioners and the first respondent.

For Petitioner : Mr.P.J.Rishikesh
For Respondent No.1 : No appearance

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ORDER

The first respondent company is engaged in imports and exports, manufacturer of blended spices and supplying quality agricultural produce and products. The first petitioner herein and the first respondent have entered into an agreement on 2.6.2008. As per the terms of the agreement, dated 2.6.2018, a sum of Rs.5,00,000/- deposited as security deposit to the claimant/first respondent herein for appointing the first petitioner as Consignee and forwarding Agent of the first respondent company for the areas of Gujarat including Surat. The agreement comes into effect from 2.6.2008 and shall remain valid, till such time. Written notice of 30 days shall be served upon the parties, if the said agreement is terminated. On 13.11.2009, the first respondent herein terminated the agreement of Sales Agent entered into between the parties and filed a claim petition before the Arbitrator for damages along with interest.

2. According to the claimant/first respondent herein, in terms of the agreement, the first petitioner herein/respondent in the claim petition receive the goods sent by the claimant/first respondent and despatch the same to the customers in that area, collect the amount in respect of the goods released by the claimant/first respondent herein. The first petitioner herein not only keeping the goods, in his warehouse, but also part and parcel of entire business transaction in

that area, as per the terms and conditions of the agreement. As per regular course of business accounts, the first petitioner herein is holding Rs.9,86,778.50 worth of stock in his warehouse at the time of termination. On 13.11.2009, the claimant/first respondent herein sent a letter to the first petitioner, requesting them to return all the stock under their custody immediately and the claimant will settle an amount of Rs.5,77,879/- as claimed by the first petitioner herein. But the petitioner herein failed to comply with the demand made by the first respondent herein. Hence, the claimant/first respondent herein issued a legal notice, dated 14.12.2009 calling upon the first petitioner to return the stock, stating that the petitioners herein were very well aware that the stock is perishable in nature and because of the irresponsible action of the petitioners herein, sales in Gujarat were very badly affected and the claimant incurred loss to the tune of Rs.2,00,000/- for which the respondents had failed and neglected to pay inspite of repeated demands made by the claimant/first respondent herein. But the petitioners refused to receive the post. Hence, the first respondent herein filed a claim petition before the Arbitrator.

3. According to the petitioners, V.T.Impex Ltd. the claimant/first respondent herein filed a Claim petition before the Arbitrator for damages along with interest. The first petitioner herein filed a counter to the claim statement, mainly on the ground that the respondents 2 and 3 are not necessary parties to the arbitration proceedings. Before the Arbitrator, the main issue urged by the

petitioner is that the petitioners 2 and 3 are not necessary parties in the arbitration proceedings since the first petitioner company is having separate entity. Therefore, an application has been filed to struck off the claim against the petitioners 2 and 3 herein. By relying upon the doctrine of piercing or lifting of the veil of corporate personality marks a change in the attitude that the law had originally adopted towards the concept of the separate entity, the Arbitrator came to the conclusion that the petitioners 2 and 3 herein are just and necessary parties. On termination of the agreement, the first petitioner has sent a communication to the first respondent to inspect the goods and take the stocks jointly with the petitioner's representative and move the stocks to the location as deem fit by them. Thereafter, referring to clause 8(u) of the agreement, the first petitioner's obligation in the contract is only to assist the first respondent company and nothing more than that. Therefore, there is no breach of contract raised by the first respondent. Hence, the award passed by the Arbitrator is per se illegal, unsustainable in law and the same is liable to be set aside.

4. According to the learned counsel for the claimant/ first respondent herein, by relying upon the doctrine of piercing or lifting of the veil of corporate personality marks a change in the attitude that the law had originally adopted towards the concept of the separate entity or personality of the corporation as held by Allahabad High Court in **NARESH CHANDER GUPTA VS. THE DISTRICT MAGISTRATE, ETAH** and in various cases by the Hon'ble Supreme Court,

the arbitrator has rejected the contention of the petitioner and held that the respondents 2 and 3 as directors of the said company are necessary parties in the said proceedings. In support of his contention, he relied on Clause 8(u) of the agreement. It is also useful to extract Clause 8(u) of the agreement which reads as under:

> *"This agreement comes into effect on the 2nd day of June 2008 and shall remain valid till such time. It is terminated by giving 30 days written notice from either side. On receipt of the said letter of termination, the consignee sales Agent shall forthwith conduct a verification of the stock jointly or solely held by him with the company's representatives and on the basis of the joint inventory taken will duly assist the company in moving the stock to the locations as determined by the company and CSA shall not raise any claim or lien of any nature whatsoever on the said goods."*

5. Though notice was served on the first respondent/claimant, none appeared for them.

6. Heard the learned counsel appearing for the petitioners and perused the materials available on record.

7. It is seen that the notice period appeared to be complied with mutually by the proposal of the respondent and consent given by the claimant in the meeting held on 7.9.2009 and the said fact is not disputed by either side. By

email, dated 6.10.2009 marked as Ex.C10, the petitioner requested the first respondent/claimant to take back the goods. In reply to the said email, the first respondent through email dated 6.10.2009 marked as Ex.C11, requested the petitioner to despatch the goods which will be verified by them on receipt, by sending a copy of the cheque, offering an amount of Rs.5,77,879/- as full and final settlement through Ex.C12 statement of accounts. The petitioner through Ex.C13 e-mail, dated 10.10.2009 again insisted the first respondent for sending authorised person to take charge of the stocks physically and make payment through R.T.G.S. of the said amount offered by the claimant. It was not specifically denied by the petitioners herein that under Ex.C14, dated 3.11.2009, claimant/first respondent herein requested the petitioner to send the goods lying with the petitioner, giving assurance that the first respondent herein will settle the account immediately on receipt of the goods by the claimant at Chennai and the same is not disputed by the petitioners herein. The Arbitrator has also considered the said communication while passing the award.

8. Clause 8(a) of the agreement entered into between the parties, which reads as follows:

> *"The CSA shall not accept any defective materials from any dealer/customer for any reason unless an official RAN (Return Authorisation Note) has been received duly signed by the authorised personnel of the company. CSA should make effort to move such defective goods as early as possible in consultation with company and in any case*

CSA should not hold such stock of defective goods with them for more than 30 days. The aforesaid clause 8(a) that the stock of defective goods should be returned to Chennai within 30 days, which they failed to comply with."

9. Clause 8(e) of the agreement reads as under:

"If any shortage or loss arising under any circumstances is noticed by the company, the CSA will be liable to pay value thereof failing which the company shall have the right to either adjust the value at customer price thereof against any security deposit lying with them."

10. Contrary to the aforesaid clause, the petitioner has not followed the instructions given by the first respondent/claimant. Clause 8(i) of the agreement reads as follows:

"Although the company's goods shall be stored in the warehouse in custody of the CSA, the goods shall always be and remains the property of the company and will be held by the CSA for and on behalf of the company as trustees thereof. The CSA will have no lien on the goods in respect of bills or charges or any amount due or remaining outstanding for payment. The CSA shall be responsible for any shortages, losses or damages to the goods for any reason whatsoever, except such damages, losses etc. which are occasioned by Act of God, provided however, that the CSA take all such precautions, actions as a person of ordinary prudence would take of his own goods in the

circumstances and take all necessary measures to ensure minimizing of such damages, losses, etc."

Therefore, as per the aforesaid clause, the petitioner was responsible for the goods which ought to have been kept safely without allowing them to perish.

11. Clause 8(p) of the agreement reads as follows:

"CSA shall maintain proper books of accounts and records as per the company's requirements to be indicated to it from time to time. The CSA shall be liable to maintain the following registers/records. 1. Invoices 2. Stock Ledgers, 3. Daily stock statement, 4. Chassis Registers, 5. Defective stock Register, 6. Delivery cum Gate pass, 7. Sales Register, 8. Claims for stationary and 9. Enclosure sheets."

12. Therefore, the Arbitrator has considered the aforesaid clauses of the agreement and rightly came to the conclusion that the petitioner company is responsible to take care of the goods and also the petitioner company ought to have despatched the goods to Chennai as requested by the claimant/first respondent herein.

13. The learned counsel for the petitioners herein urged before this Court that the petitioners 2 and 3 are unnecessarily impleaded as parties as they are only the directors of the company. Since agreement has been entered into between the petitioner company and the first respondent herein, they are not necessary parties in the proceedings. Therefore, petitioners 2 and 3 are to be

struck off from the arbitral proceedings. It is also submitted that dispute arises between the parties are purely commercial transaction and the first petitioner herein alone having separate legal entity. Therefore, petitioners 2 and 3 are not necessary parties in the proceedings.

14. The arbitrator recorded a finding that the petitioners 2 and 3 being the directors of the company are necessary parties to the arbitration proceedings. The arbitrator by relying upon the doctrine of piercing or lifting of the veil of corporate personality marks a change in the attitude that the law had originally adopted towards the concept of the separate entity or personality of the corporation as held by Allahabad High Court in **Naresh Chander Gupta case (supra).** In support of his submission, the petitioner relied on the decision of the Division Bench of this Court in **CHENNAI CONTAINER TERMINAL PRIVATE LTD. VS. THE BOARD OF TRUSTEES OF CHENNAI PORT TRUST AND OTHERS (MANU/TN/1398/2018).**

15. The learned counsel for the petitioner relied upon the judgment reported in **NEW HORIZONS LIMITED AND ANOTHER VS. UNION OF INDIA AND OTHERS [(1995)1 SCC 478]** the Hon'ble Supreme Court held as under:

> ***"30.*** *Similarly in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725 : (1955) 1 WLR 352] it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the*

appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid with the observation: "This is too technical an argument." The learned law Lord went on to hold : "This is an argument in re mercatoria, and it must be construed in the light of the facts and realities of the situation." (All ER p. 738)"

16. In **S.N.PRASAD, HITEK INDUSTRIES (BIHAR) LTD., VS. MONNET FINANCE LTD. AND OTHERS [(2011)1 SCC 320]** relied upon by the learned counsel for the petitioner, the Hon'ble Supreme Court held as under:

*"**27.** The appellant contended that on 27-10-1995 he was a Director of the borrower company and he had agreed to guarantee the loan of Rs. 75 lakhs; that subsequently, it was decided as he would be resigning from his directorship on account of his advanced age, his son would be the guarantor; and that therefore, he did not become a guarantor by executing a deed of guarantee and he did not also execute the loan agreements. It was contended that the fact that ultimately the loan agreements were executed only among the lender (first respondent), the borrower company (2nd respondent) and the 3rd respondent (guarantor) and the further fact that the third respondent alone executed the deed of guarantee, demonstrated that only the third respondent was the*

guarantor and he was not a guarantor. According to him on execution of the loan agreements among Respondents 1, 2 and 3, the letter dated 27-10-1995 given by him agreeing to be a guarantor ceased to be of any effect."

17. In **VODAFONE INTERNATIONAL HOLDINGS BV VS. UNION OF INDIA AND ANOTHER [(2012)6 SCC 613]** the Hon'ble Supreme Court held as under:

"The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/ participants. Furthermore, shareholders/ participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/ participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers."

18. In the light of the aforesaid judgment, the company has to be treated as separate legal entity. Therefore, in the light of the aforesaid judgment, there is force in the contention of the learned counsel for the petitioners that the petitioners 2 and 3 are not necessary parties to the arbitral proceedings. Therefore, this Court is of the view that the petitioners 2 and 3 are unnecessarily impleaded as parties in the arbitral proceedings. The agreement has been entered into between the first petitioner and the first respondent company and therefore, impleading the petitioners 2 and 3 in their individual capacity in the arbitral proceedings is unsustainable in law. Therefore, this Court has no hesitation to set aside the findings of the arbitrator that the petitioners 2 and 3 are necessary parties in the arbitral proceedings.

19. The Arbitrator/second respondent herein came to the conclusion that as per the agreement, the first petitioner herein had the duty to fulfill the obligations made by the first respondent/claimant and also even if they do not receive any directions from the first respondent/claimant, the petitioner company shall act as a normal prudent person to take all the precautions to minimize the loss or damages. As the first petitioner herein failed to act as normal prudent person, they will be liable to make good the loss, and rejected the claim of the petitioners herein that the warehouse is locked by the first respondent company/claimant in their e-mail Ex.R8 is prove to be false. Therefore, the contention of the petitioner that the Arbitrator has not acted upon the agreement cannot be accepted and the same is rejected.

20. In view of the foregoings, and in the light of the decision rendered by the Division Bench of this Court, the award passed against the petitioners 2 and 3 that they are necessary parties to the arbitral proceedings alone is set aside. In so far as the remaining portion of the award as against the first respondent is concerned, there is no warrant to interfere with the award passed by the 2nd respondent under Section 34 of the Arbitration and Conciliation Act.

21. In view of the above, the award passed against the first petitioner is confirmed and the award passed against the petitioners 2 and 3 is set aside. Consequently, the original petition is partly allowed. No costs.

11.1.2019

Speaking/Non Speaking order
Index: Yes/No
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D. KRISHNAKUMAR, J.

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Pre-Delivery order in
O.P.No.58 of 2012

Dated: 11.1.2019