IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.892 of 2015

M/s.SIECHEM TECHNOLOGIES PVT.LTD.,
Rep. by its Executive Director,
Mr.G.M.Arunkumar
RS 104/8 & 105/7, Sedarapet Main Road,
Pondicherry - 605 101. ... Petitioner

Vs

1.M/s.MMTC Limited
Represented by its Senior Manager,
Mr.D.Kabali,
Chennai House,
No.6, Espalade, Chennai - 600 108.

2.The Hon'ble Justice K.Venkatraman (Retd.).,
Former Judge, Madras High Court,
Sole Arbitrator,
No.125, L Block,
East Anna Nagar,
Chennai - 600 101. ... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 18.06.2015 of the learned Arbitrator.

For Petitioner : Mrs.Bagyalakshmi

For Respondents : Mr.M.Santhanaraman

ORDER

The respondent before the Arbitral Tribunal has challenged the award dated 18.06.2015 passed by the learned Arbitrator in his proceedings pertaining to the arbitration between the petitioner herein and the respondent. The facts in brief preceeding the filing of the claim petition is herein below narrated and the parties are referred to in the same array as before the arbitral tribunal.

Claimant's Case:

2.The claimant, which is Government of India undertaking, was engaged by the respondent for the supply of CC rods. Pursuant to this arrangement the respondent vide letter dated 12.08.2008 had requested the claimant to supply 50 Metric tones of CC rods (+/-5 %) of 8 mm CC rods. As per the terms of the agreement the claimant had agreed to sell 47.945 Metric tones of 8 mm CC rods on high seas. The respondent had demanded the specifications as 8 mm CC rods confirming to ASTM B-49/98 with 99.90 % purity. The price per metric tone was 7276.67 US dollars. This price was inclusive of insurance and freight and 0.75% trading margin of the claimant. Under clause 9 of the said claim, the respondent had agreed to pay the full value of the consignment within seven days from the date of intimation by the claimant or two days prior to the expected date of arrival of the vessel whichever is earlier.

3. Pursuant to this demand the respondent had also issued cheque for Rs.16,00,000/- towards earnest money deposit. The claimant had also arranged for the shipment of the above referred goods and on 15.09.2008 the consignment had left the Russian port. The claimant had immediately intimated the respondent about the consignment having sailed out and calling upon them to remit the value of the consignment which was a sum of Rs.1,70,82,129/-. However, the respondent had sent a letter dated 25.10.2008 raising quality issue for the first time and contending that with reference to the earlier consignment there were quality issues and that if the present consignment also did not meet the expected standard the claimant should return the earnest money deposit. Such a statement being made by the respondent even before they had received the consignment was clearly indicative of the fact that the respondent wanted to renege from the contract as the copper price had dropped drastically since the date of the respondent placing an order with the claimant.

4.The claimant had also, vide their e-mail dated 17.11.2008, called upon the respondent to have the joint inspection for checking the quality through mutually accepted internationally reputed / LME approved independent surveyor. However, the respondent did not evince any interest and ultimately the petitioner after issuing due notice had sold the consignment to third party at a much lesser price. The petitioner meanwhile issued a legal notice dated 26.02.2019 calling upon the respondent to pay a sum of Rs.2,17,33,764/-. After the said notice, receiving no response from the respondent, the goods were sold to third party at Rs.1,28,81,287/-. The claimant would therefore submit that the respondent was due and payable a sum of Rs.91,37,927/- together with Rs.10,00,000/- as damages and the same was also demanded vide legal notice dated 08.06.2009. Despite receipt of the said notice the respondent did not come forward to clear the dues. The claimant was therefore constrained to invoke the arbitration clause and commenced arbitral proceedings.

5.The statement of defence to the above claim was that the quality of the earlier supply was substandard and therefore the respondent informed the claimant that they would take charge of the consignment after the product was tested at the Government of India owned test labs. The respondent would submit that despite repeated request vide their e-mails and letters dated 01.11.2008, 18.11.2008, 10.12.2008 etc., the claimant had not come forward to send the product for testing. It was for this reason that the respondent had refused to take the goods.

6. The respondent would further contend that though they had paid EMD on 12.08.2008 the agreement was entered into only on 09.10.2008 that too after the goods were loaded on the ship. Therefore, the respondent would question the deduction of the EMD towards the outstanding. The averments made in the claim statement was denied by the respondent. The respondent would therefore submit that the claimant was not entitled to any

award and that the respondent was entitled to be awarded their counter claim of a sum of Rs.16,00,000/- paid towards EMD together with interest at 12% per annum.

7. The claimant had filed a reply refuting the allegations contained in the counter statement/statement of defense of the respondent. They would emphatically contend that the goods that had been shipped were of good quality and that the respondent were looking out for excuses to wriggle out of the contract since the price of copper had come down drastically.

8. Before the learned Arbitrator both the parties had not let in any oral evidence but had only filed documentary evidence. On the side of the claimant Ex.C.1 to Ex.C.28 were marked and on the side of the respondent Ex.R.1 to Rx.R.11 had been marked. During the arguments the respondent had raised two preliminary objections.

a)That the person who has instituted the suit was not the person authorized to file the claim petition.

b)That the goods had been sold by the claimant to third party even before invoking the arbitration clause.

9. As regards the first preliminary objection the learned Arbitrator had relied upon clause 19 of Ex.C.25 which would show that the person concerned was authorized to file the claim. As regards the second objection, the learned Arbitrator would observe that in the agreement between the parties, that is; Ex.C.5 dated 09.10.2008 in clause 10 (III (c)) right has been given to the parties to the agreement to invoke the arbitration clause in the event of dispute arising between the two. The case of the claimant is that the respondent had breached the terms of the agreement particularly clause 9 which reads as follows:

"Clause 9: The buyers shall pay the full value by Demand Draft/Pay Order or shall establish confirmed irrevocable without recourse to drawer Letter of Credit through a scheduled bank of the full 100% value of

the goods within seven days from the date of intimation from the sellers or two days prior to expected time of arrival of the vessel whichever is earlier. The payment against L/C shall be drawn by the Sellers on presentation at sight Draft and Commercial invoice together with the usual shipping documents and/or Delivery order of MMTC Ltd.,"

10. Therefore, it is clearly evident that the arbitration proceedings have been initiated only because the condition enumerated under Ex.C.5 has been violated by the respondent. After disposing of the preliminary objections the learned Arbitrator has considered the main issues that have been raised. The sole ground on which the respondent seeks to move out of the agreement is on account of the fact that there has been a drop in the quality of the materials supplied. However, the statement of defense is totally silent as to how the quality has been compromised and the basis upon which the respondent

would submit that the goods are substandard. In this regard, the learned Arbitrator has taken note of Ex.C.14 and Ex.C.15 where the respondent was asked to depute their Engineers to the claimant's factory to assess quality however this offer was not taken up by the respondent. The Tribunal has also taken note of the prior intimation delivered by the claimant to the respondent under Ex.C.21 that in case the respondent does not lift the products the claimant was free to transport and sell the goods in the open market and that on such sale the respondent would be mulcted with the difference. The claimant would submit that the conduct of the respondent would clearly indicate that they are trying to take advantage of the lower price in the market for the same product for which they had invented this excuse. The learned Arbitrator has also taken note of the fact that though the respondent had questioned the quality, however, when offers were made by the claimant asking the respondent to be present for a joint inspection before an authorized agency, the respondent has not come forward to take up the offer. With this view the Arbitrator has passed the following award:

> *"a. A sum of Rs.75,05,051/- which includes balance amount payable by the Respondent after deducting the value of the goods sold, custom charges and CHA charges paid by the Claimant for the goods imported.*
>
> *b. Interest at 9% per annum on Rs.28,43,416/- from 20.02.2009, the date of notice under Exc 20, till payment.*
>
> *c. Rs.10,000/- towards cost."*

11. Aggrieved by the said award the respondent has challenged the same by filing a petition invoking the provisions of Section 34 of the Arbitration and Conciliation Act.

12. Mrs.Bagyalakshmi, learned counsel appearing on behalf of the respondent would put forward the following grounds for challenge:

a) That the respondent wanted to cross check as to whether the quality of the product was as advertised or whether they are substandard.

b) The respondent was not liable to pay customs duty and interest since the product had been sold to the third party and the payment of the above amounts would solely be the responsibility of the party who purchased the product.

13. She would also question the levy of interest when there was no agreement between the parties to charge interest. She would further contend that despite the respondent raising the issue of quality, the claimant has not come forward to produce any certificate confirming the quality. Therefore, she would contend that the order has to be set aside. She would also find fault with the sale prior to the arbitration in view of the fact that the goods had been sold to a third party prior to arbitration and there is no possibility of inspecting the consignment. She would therefore submit that the claimant is not entitled to the claim as

prayed for.

14. Per contra, Mr.M.Santhanaraman, learned counsel appearing for the claimant would contend that under Ex.C.14 and Ex.C.15, the claimant had invited the respondent to participate in a joint inspection. That apart, on 17.11.2008, under Ex.C.16 the claimant had informed the respondent that they should take delivery of the goods, failing which the claimant would have to take delivery and sell it to some third party. The claimant would further contend that the sale to a third party was also done only after prior notice to the respondent calling upon them to clear the consignment and also informing them that in the event of the respondent not coming forward to take delivery, the claimant would be constrained to sell the property and after adjusting the earnest money deposit, the balance amount would be recovered by the claimant. The counsel would therefore contend that there is no anomaly or grounds available to challenge the award passed by the learned sole Arbitrator under Section 34 of the Arbitration

and Conciliation Act.

15. Heard the learned counsel on both sides and perused the records.

16. The counsel for the respondent had attacked the award of the arbitral Tribunal mainly on two grounds:

i) That the claimant despite requests by the respondent had failed to send the consignment for testing and therefore the refusal on the part of the respondent was justified. The Exhibit on the side of the claimants, namely, Ex.C.14, Ex.C.15 and Ex.C.16 would amply demonstrate the fact that the claimant had repeatedly invited the petitioner to have a joint inspection of the consignment by a reputed Government Agencies. However, the respondent did not come forward to co-operate with the claimant. Therefore the contentions regarding quality becomes peurile. The claimant had also put a notice about the sale in favour of third party since the respondent had refused to remove consignment. The terms of the purchase order clearly stipulates that it is the purchaser who is responsible for paying the customs duty. The respondent attempts to wriggle out of the said contract by stating that since the goods have been sold to third parties it is the duty of the third party to pay the aforesaid customs duty is to say the least an absurd contention. The sale to the third party is more or less a distress sale since the property has been sold for 50% of the amount agreed by the respondent. Therefore, considering the terms of the purchase order it is the responsibility of the respondent to take charge of the goods immediately which he had failed. The claimant has been putting the respondent on notice at every stage and despite this the respondent has not come forward to clear the dues.

ii) The next point which is raised by the learned counsel for the respondent was the levy of interest by the learned Arbitrator. The learned Arbitrator in the award has given a clear reasoning as to why he was levying interest and the counsel for the respondent has not been able to show as to how the said levy was illegal.

17. The respondent/petitioner has not made out any grounds as envisaged under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside the award. In the result, the Original Petition is dismissed. No costs.

19.12.2019

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

P.T.ASHA, J.,

kan

O.P.No.892 of 2015

19.12.2019