

Reserved on :14.08.2019

Pronounced on :20.08.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.291 of 2018

1. Nirmal DataComm Private Limited,
Rep. by its Managing Director,
Mr.Kedhar Ganshyam Shah,
Prem Estate, "C" Wing, 3rd Floor,
Sant Savta Cross Road No.1,
Mustafa Bazar, Byculla, Mumbai – 400 010.
2. Nirmal DataComm Private Limited,
Rep. by its Director, Mrs.Saroj Kedhar Shah,
Prem Estate, "C" Wing, 3rd Floor,
Sant Savta Cross Road No.1,
Mustafa Bazar, Byculla, Mumbai – 400 010.
3. Nirmal DataComm Private Limited,
Rep. by its Director Mrs.Saroj Purshottam Makwana,
Prem Estate, "C" Wing, 3rd Floor,
Sant Savta Cross Road No.1,
Mustafa Bazar, Byculla, Mumbai – 400 010.
4. Nirmal DataComm Private Limited,
Rep. by its Director Mr.Ghansyam Maneklal Shah,
Prem Estate, "C" Wing, 3rd Floor,
Sant Savta Cross Road No,
Mustafa Bazar, Byculla, Mumbai – 400 010.
5. Mr.Kedhar Ghansyam Shan
6. Mr.Ghansyam Maneklal Shah (Deceased)

7. Mrs.Saroj Kedhar Shah

8. Mr.Saroj Purshottam Kakwana

... Petitioners

Vs

1. M/s.Redigton (India) Ltd.,
Rep. by Mr.M.Sundararajan,
Senior Legal Executive,
SPL Guindy House,
95, Mount Road, Guindy,
Chennai – 600 032.

2. Mr.K.Balasubramanian, B.A. B.L.,
Sole Arbitrator,
D.No.33A, Block No.52,
Jeevan Bheema Nagar, (LIC Colony),
Anna Nagar West Extension,
Chennai – 600 101.

... Respondents

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the Award made in Arbitration case No.5 of 2015 dated 22.01.2017 passed by the second respondent in the above Arbitration case and to direct the first respondent to bear the cost of this petition.

For Petitioners : Ms.Thilagavathy (Sr. Counsel)
for Mr.Sajeev Kumar

For Respondents : Mr.S.S.Rajesh - R1

ORDER

Aggrieved over the Award passed by the learned Arbitrator dated 23.01.2017, the present Original Petition has been filed.

2. Brief facts leading to filing of this Award is as follows :

The Claimant is a public Limited company doing the business of distribution of IT Hardware & Software produces and peripherals including products from Non IT and telecom segments, carrying on the business activities across the country through its branch offices. The respondent herein approached the claimant and offered to purchase products from time to time on revolving credit basis, agreeing to pay the price of them on the due date as mentioned in the respective invoices raised by the claimant. Believing that assurance given, the claimant in good faith supplied the products to the respondent vide various invoices from 17.05.2011 till 13.03.2012 (367 invoices). Through the letter dated 19.01.2015, the respondent confirmed the balance outstanding payable to the claimant to the tune of Rs.6,52,42,759/- as on 30.09.2014 after the adjustments of part payments made by the respondent, the remaining due amount is Rs.6,44,69,007/-. Despite the requests made by the claimant, the respondent evaded payments. Hence, the matter has been referred to Arbitrator.

3. During the Arbitral proceedings, despite receipt of notice, the respondent has not appeared before the Arbitrator. Therefore, the Arbitrator framed following points for consideration :

1. Whether the invoices are true, valid carrying with them the terms and conditions including the Arbitration Clause?

2. Whether respondents committed default in payment of the dues as alleged by the claimant?

3. Whether the respondents are liable to pay a sum of Rs.6,44,69,007/- (Rupees six Crores forty four lakhs sixty nine thousand and seven only) along with interest at the rate of 22% per annum to the claimant?

4. What relief the claimant is entitled to?

and passed the Award for a sum of Rs.6,44,69,007/- with interest at the rate of 18%. Challenging the same, the present Original petition has been filed.

4. The main contention of the learned Senior Counsel appearing for the petitioner is that the Arbitrator has not followed mandatory procedures. There is a procedural error committed by the Arbitrator as against the Sections 23, 24 of the Arbitration and Conciliation Act. The Arbitrator has not followed the mandatory provisions of Sections 23, 24 and 34 of the Arbitration and Conciliation Act. The Arbitrator has not framed the time frame for filing the claimant statement and hearing dates. Further all the statements and documents and other information has not been communicated to the respondent as contemplated under section 24(3) of the Arbitration and Conciliation Act and

the entire Award is bereft of reasons. The Arbitrator has decided the matter exparte. Clause 19 of the Invoices clearly indicate that the claim can be made within a period of three years. This aspect has not been considered by the Arbitrator and the statements produced by the Claimant has been accepted in whole without looking into respondent's contention that the accounts required to be reconciled. Further a sum of Rs.2 crores paid by the respondent has not been given credit and accounts have not been reconciled. This aspect has not been taken note by the Arbitrator. It is further contended that the claim statement has not been sent to the respondent. In nutshell, it is contended that if there is procedural error and violation of the provisions of the Arbitration and Conciliation Act, the Award is liable to be set aside. In support of her contentions the learned Senior Counsel relied upon the following judgments :

Juggilal Kamlapet Vs. General Fibre Dealers Ltd.

reported in **1955 AIR (Calcutta) 354**

Lovely Benefit Chit Fund & Finance Vs. Shri Puran Dutt

Sood and others reported in **AIR 1983 Delhi 413**

Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd.

reported in **2003 (5) Supreme Court cases 705**

ONGC Limited Vs. Garware Shipping Corporation

Limited reported in **2007 (13) Supreme Court Cases 434**

Som Datt Builders Limited Vs. State of Kerala reported
in **2009 (10) Supreme Court Cases 259**

**NTPC Vidyut Vyapar Nigam Ltd. Vs. Oswal Woolen
Mills Ltd.** reported in **2018 (6) R.A.J. 708 (Del)**

5. Whereas, the learned counsel appearing for the respondent contended that no ground has been made under section 34 of the Arbitration and Conciliation Act to interfere with the well reasoned Award passed the Arbitrator. The respondent has been served notice and sufficient opportunities have been given to the respondent. The conduct of the respondent assumes significance in this matter. Several notices were sent to the respondent and as the respondent failed to appear before the Arbitral proceedings, the Arbitrator proceeded to decide the matter on merits. In fact, in Ex.C.4 the respondent himself acknowledged the liability. It is also taken note by the Arbitrator. Admittedly, the accounts is a running account and the acknowledgment has been made in the year 2015. Therefore, the question of reconciliation does not arise at all. Hence, this petition is liable to be dismissed. In support of his contentions, he relied upon the following judgments :

**The Oriental Insurance Co. Ltd. Vs. M/s.Sriram
Transport Finance Co. Ltd. - Unreported Judgment in
O.S.A.No.42 of 2019**

**ECS Biztech Pvt. Limited rep. by Managing Director Vs.
M/s.,Redington (India) Ltd. Unreported judgment in
O.S.A.No.148 of 2019**

**Associate Builders Vs. Delhi Development Authority
reported in 2015 (3) Supreme Court Cases 49**

6. With regard to the first contention of the learned Senior Counsel for the petitioner, on a perusal of records placed before the Arbitrator, it can be seen that the Claimant has invoked the Arbitral proceedings on 28.07.2015. The above notice has been sent to the respondent. It is not in dispute. In the letter dated 28.07.2015, the Claimant has claimed a sum of Rs.6,44,69,007. It has not been denied by the respondent. Whereas, by a letter dated 11.08.2015, the petitioner/respondent has sent a communication to the Arbitrator stating that the amount mentioned in the letter of invocation is not correct and requested the Arbitrator to arrive at the correct outstanding amount payable by the respondent. Similarly, the respondent has also complained about the presentation of the cheque by the Claimant. The Arbitrator has issued notice to the respondent on 25.09.2015, wherein he has informed the respondent about his appointment as an Arbitrator and also communicated that there is no circumstances existing that give rise to justifiable doubts as to his independence or impartiality in resolving the dispute referred and communicated the next hearing on 30.10.2015

by 4.30 p.m. The above notice has also been served on the respondent. In reply to the above notice, the respondent has sent a letter dated 28.10.2015 directly to the Arbitrator. In the above letter it has been stated that due to certain emergencies, he is not able to appear on that date and requested to suggest an alternate date after 15th November and he will make sure that he will be present then.

7. Thereafter, once again, on 30.10.2015, the Arbitrator has sent another notice to the respondent fixing the hearing dated on 04.12.2015. Wherein, he has clearly communicated that the Arbitrator shall decide the matter in his absence. The above letter has also been received by the respondent. However, he did not appear before the Arbitrator on 04.12.2015 at 4.30 p.m. On 04.03.2016, another letter was sent by the Arbitrator as final notice fixing the hearing date on 18.03.2016 to the respondent. For the above final notice, the respondent has sent a reply to the Arbitrator and in the above letter he has stated that since it is financial year end, he will not be able to come to Chennai at such a short notice and requested to keep the date for meeting around 15th of April 2016.

8. It is to be noted that along with the letter dated 30.10.2015, the Arbitrator has also sent a copy of the claim petition. In the reply given to the said letter, no grievance has been made as to the non receipt of the claim petition.

As communicated on 18.03.2016, the respondent has not appeared before the Arbitrator. Thereafter, the Arbitrator decided to proceed the issue and received the proof affidavit of the claimant on 22.04.2016 and directed the claimant to send the proof affidavit along with the copies of the exhibits marked therein to the respondent. As per the direction of the Arbitrator, the claimant has sent the proof affidavit and the documents to the respondent as could be seen from the postal endorsement. The same indicate that the weight of the cover is 2530 gms, which, in fact, clearly prove that all the documents have been sent to the respondent. Even in the above letter, further hearing date of 20.05.2016 was communicated to the respondent. Thereafter, it appears that on that hearing date also, the respondent has not appeared before the Arbitrator. Therefore, the Arbitrator proceeded to decide the issue on merits.

9. It is to be noted that as stated above, several opportunities were given to the respondent. Section 24(3) of the Arbitration and Conciliation Act makes it mandatory that all the statement and other documents shall be communicated to the other party. From the records available, right from the claim statement and proof affidavit all other documents have been sent to the respondent. Even after the receipt of the same, he did not appear before the Arbitrator. Section 25 (b) states that if the respondent fails to communicate his statement of defence in accordance with the sub-section (1) of Section 23, the Arbitral Tribunal shall continue the proceedings without treating that failure in itself as an admission of

the allegations by the claimant. Similarly, if the party fails to appear at an oral hearing or to produce documentary evidence, the arbitral Tribunal may continue the proceedings and make the arbitral Award on the evidence before it. Despite several notices sent by the Arbitrator, the respondents have not filed any statement nor appeared for oral hearings. The Arbitrator framed points for consideration and decided the issue on merits. All the documents have been considered by the Arbitrator.

10. It is to be noted that the respondent by letter the dated 09.01.2015 has acknowledged the liability for the sum of Rs.6,71,94,756/- as on 30.09.2014, On respective of the invoices, oral evidence is also considered by the Arbitrator. The above letter has also been marked as Ex.C.4. All the invoices and oral evidence has also been considered by the Arbitrator. Therefore, it cannot be said that no reasons whatsoever has been given by the Arbitrator. The Arbitrator infact framed necessary points for consideration and also considered all the invoices.

11. Further, it is the contention of the petitioner that clause 19 of the invoice indicate that Arbitration shall be initiated within three years from the date of dispute. It is an admitted fact that it is a running account. The invoices have been filed from the year 2011 to 2013. The last invoice is dated 13.03.2012. Within three years from the date of last invoice, an acknowledgment in written

was made by the respondent by his letter dated 09.01.2015 admitting the liability to the tune of Rs.6,71,94,756/-. Therefore, the contention of the learned Senior Counsel that every invoice has to be seen independently cannot be countenanced.

12. Similarly, the two entries brought to the notice of this Court about Rs.2,90,00,000/- is of the year 2012, which has no relevance at all, since the respondent himself has admitted his liability on 09.01.2015, within a period of three years from the date of the last invoice. Admittedly, the accounts are running accounts between the parties. Therefore, the entire aspects have been considered by the Arbitrator. Hence, it cannot be said that no opportunity whatsoever has been given to the parties.

13. When the parties are aware of the proceeding and despite several notices, neither they appeared before the Arbitrator nor presented any documentary evidence, the Arbitrator has no other choice but to proceed with the matter on the basis of the evidence available before him. It is the contention of the learned Senior Counsel that the Award has not been dispatched to the petitioner and only a true copy was sent to the petitioner, that too on 26th October 2017. According to her, this itself clearly show that the entire proceeding is not fair. It is her further contention that the respondent has also

requested the Arbitrator to pass an Award as per their letters dated 07.09.2016 and 12.12.2016. Therefore, there is a bias. Such a contention cannot be pressed into service under section 34 of the Arbitration and Conciliation Act. When the petitioner has been given ample opportunity to appear before the Arbitrator and the petitioner failed to appear before the Arbitrator, despite final notice issued by the Arbitrator, now it cannot be contented that no opportunity has been given to the petitioner.

14. The judgment of the Division Bench of this Court in OSA.No.42 of 2019 and 148 of 2019 relied on by the petitioner will not come to the aid of the petitioner wherein the Division Bench has held that the party challenging the Award has to prove misconduct or bias on the part of the Arbitrator. Therefore, mere allegation itself is not sufficient. Though the learned Senior Counsel has placed reliance on the judgment in **Associate Builders Vs. Delhi Development Authority** reported in 2015 (3) Supreme Court Cases 49 and **Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd.** Reported in 2003 (5) SCC 705, the above judgments will not in any way come to the aid of the petitioner, considering the facts and circumstances of the present case.

15. It is now well settled that the award can be interfered only when the grounds set out under Section 34 of the Arbitration Act is made out. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is

discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

16. In the judgment in ***Associate Builders Vs. Delhi Development Authority*** reported in 2015 (3) Supreme Court Cases 49 the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter, Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

17. In the judgment ***NTPC Vidyut Vyapar Nigam Ltd. Vs. Oswal***

Woolen Mills Ltd. reported in **2018 (6) R.A.J. 708 (Del)**, the learned Single Judge of the Delhi High Court as held that when the Award is without any reasons, such an Award is liable to be set aside. On a perusal of the Award in the present case, this Court finds that the Arbitrator not only framed necessary points for consideration but also considered the entire documents filed by the Claimant and passed the Award. Therefore, the above judgment also is not applicable to the facts of this case. Hence, this Court do not find valid ground to interfere with the well considered Award of the Arbitrator.

18. Accordingly, this Original Petition is dismissed. No cost.

20.08.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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To

1. M/s.Redigton (India) Ltd.,
Rep. by Mr.M.Sundararajan,
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2. Mr.K.Balasubramanian, B.A. B.L.,
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N.SATHISH KUMAR, J.

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