

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
14~08~2019	26~08~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.1166 of 2018 and
A.No.10020 of 2018

M/s. Sankhya Infotech Limited,
Rep.by Mr.Sridhar Krishna
(also known earlier as Sridhar Nadupalli)
1-1-39, II Floor, S.D.Road, Seven Hills Plaza,
Secunderabad .. Petitioner/Respondent

.Vs.

Redington (India) Ltd.,
Rep.by Mr.S.Srinivasan, Senior Manager - Credit
Having its Registered Office at SPL Guindy House,
No.95, Mount Road, Guindy
Chennai 600032. .. Respondent/Claimant

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 11.09.2018 passed by the learned Arbitrator in Arbitration Case No.04/2014.

For Petitioner : Mr.G. Suryanarayanan

For Respondent : Mr. S.S.Rajesh

ORDER

Aggrieved over the award dated 11.09.2018 of the learned single Arbitrator this Petition has been filed.

2. The brief facts leading to file this petition is as follows:

2(a) The claimant is a Public Limited Company engaged in the business of distribution of IT Hardware and Software products and peripherals, including products from Non-IT and Telecom segments. The Respondent has purchased the products from time to time on revolving credit basis, agreeing to pay the price of them on the due date mentioned in the respective invoices by the claimant. The claimant has supplied IBM Servers, IBM Storage Servers, IBM P Series Servers, IBM Tivoli Software License, IBM Trivoli Software Support, IBM Software, IBM Storage Support Pact and Novel Software Licence

etc., during the period of transaction. Under 7 Invoices from various dates the claimant supplied the products to the tune of Rs.3,96,14,103.87. After adjustment of the part payments made by the respondent, there remains an outstanding sum of Rs.1,68,49,108/-. However, the respondent failed to pay the above amount. Hence the matter referred to the Arbitration as per the clause 20 of the invoice through which the products were supplied to the respondent.

3. It is the contention of the Respondent that the Tribunal has no jurisdiction in view of the fact that there is no agreement. It is his further contention that there is no agreement between the parties containing the arbitration clause. It is also contended that the Respondent along with IBM became successful bidder for the SBI e learning project and initially the IBM made the respondent as a Tier-I partner to buy directly IBM equipments and sell to the end customers. However, later on, that system was suspended by the IBM which asked the Respondent to use the partner distributor route. When the SBI issued a formal purchase order, the IBM and Respondent were bound

by the teaming agreement which includes the payment terms. Further, for the purpose of placing the order for Hardwares, it is only the IBM which introduced the claimant to the Respondent and the Respondent has never itself approached the claimant.

4. On 22.10.2010, SBI placed an order on which IBM's share was Rs.5.15 crores and Respondents share was Rs.1.23 crores, which resulted in the disputed LC and its terms. The Respondent initiated upon having proper annual maintenance agreement, which was finally signed around May 2013. Because of the deliberate delay in delivery by IBM and indirectly by the claimant also, the above contract was even threatened to be cancelled by SBI through its e-mail of 27.11.2010. IBM which had expressed its inability to deliver equipment ordered by the respondent on time, however, on considering the interest of the customers and SBI project agreed to issue Rs.1 crore performance bank guarantee. On 06.12.2010 when the claimant persuaded the respondent for doing business, the respondent informed the IBM and claimant of the readiness of LC. However, several things happened such as delayed delivery, short supply and wrong shipment of the

materials. Meanwhile, the respondent made a transfer of Rs.3.7 crores to claimant on 02.06.2011. Further, because of the poor performance of the contract by the claimant, the respondent even threatened to revoke the contract but the claimant only persuaded the respondent not to do so. Hence, it is the contention of the respondent that because of the long delay in providing the AMC document, the respondent suffered on account of non-payment of its bills for the service that respondent performed to SBI and therefore prayed for dismissal with a direction to the claimant to pay a sum of Rs.1,80,00,000/- to the respondent towards compensation for the loss sustained by the Respondent along with interest.

5. Rejoinder also filed by the Claimant to the statement of defence.

6. Based on the above pleadings the following points were taken up for deciding the case:

1. *Whether the invoices as stated in the claim statement are true, valid and carrying the terms and*

conditions including the Arbitration Clause?

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

3. Whether the contention raised by the respondent in its statement of defence is true and correct?

4. Whether the respondent is entitled to the counter claim of Rs.1,80,00,000/- from the claimant?

5. Whether the respondent is liable to pay a sum of Rs.1,68,49,108/- along with interest at the rate of 22% per annum to the claimant?

6. What relief the claimant is entitled to?

7. The learned Arbitrator after considering the evidence on both sides passed an Award directing the Respondent to pay the Claimant a sum of Rs.1,68,49,108/- along with further interest i.e.18% p.a.and dismissed the counter claim, against which the present Original Petition has been filed.

8. Though several grounds were raised in the Petition, the main

contention of the learned counsel appearing for the Petitioner is that there is tripartite agreement between the parties which has not been taken note of by the Arbitrator and no opportunities had been given to the petitioner and it is the main contention that there is no agreement between the parties contains arbitration clause. Mere invoice cannot give a jurisdiction to the arbitrator to decide the issue. Arbitrator has not considered the documents. Therefore the entire award is vitiated. The Arbitrator has passed an award beyond the period of six months as per the amended Act. Therefore it is the contention of the learned Counsel that the award is liable to be set aside. In support of his contention he relied upon the following judgments:

1. *NSK India Sales Company Private Limited vs. Proactive Universal Trading Company Private Limited*
[AIR 2016 Mad.19]

2. *Alupro Building Systems Pvt. Ltd., vs. Ozone Overseas Pvt. Ltd.,* **[2017(162) DRJ 412 : MANU/DE/0495/2017]**

9. Whereas the learend counsel appearing for the Respondent

would contend that the tripartite agreement cannot be the subject matter for arbitration and the claimant was never a party to such agreement wherein the products supplied to the Petitioner and invoices raised against them. There is no dispute with regard to the invoices. The clause contained in the invoice, contained the arbitration clause. Therefore, it is his contention that when there is no dispute as to the supply of the products in respect of the same, the parties are bound by the terms of the invoices in a commercial transaction. Hence, his contention is that the Arbitrator has considered this aspect and further the Arbitrator analysed the entire evidence and documents and factually found that the petition is liable to be admitted amount. Therefore, prayed for dismissal of this Petition.

10. In support of his submission he placed reliance of the following judgments:

1. Karan Ores & Specials vs. Endeka Ceramic India Pvt.Ltd., [(2019)1 CTC 148 : SCC online Mad 2434]

2. Govind Rubber Limited v. Louis Dreyfus

Commodities Asia Pvt. Ltd., [(2015) 13 Supreme Court Cases 477]

3. Caraval Shipping Services Pvt. Ltd., vs. Premier Sea Foods Exim Pvt. Ltd. [2018 SCC Online SC 2417]

11. The learned Arbitrator has found that there is no dispute with regard to the supply of products. The invoices are also not disputed by the Respondent/Petitioner herein. The learned Arbitrator also considered the entire exhibits filed by both sides and held that the documents relied upon by the Respondent does not prove the tripartite agreement between the claimant, respondent and other parties. The Arbitrator has facultatively recorded the finding as follows:

"It is not disputed that the documents on the respondent side, Ex.R.1 series, R9, R14, R16, R17-R21 and R23 - R25 all speak about the business transaction between the claimant and respondent. However what is to be noted is that none of these documents speak about any contractual agreement between these parties nor I could find any document to prove that the claimant namely the Redington (India) Ltd was ever a party along the

respondent namely Sankya Infotech Limited and IBM in any of the agreements or contracts whatsoever between them. Then automatically one to presume that the claimant was never a party to any of the agreements entered into between respondent and IBM and SBI with whatever be terms and conditions there are."

12. The learned Arbitrator in fact has considered the entire documents and found that the claimant was never a party to the tripartite agreement. The products was only supplied to the respondent and the learned Arbitrator also considered the main allegation of the Petitioner that since the goods were defective there was delay in supply and held that to substantiate such plea no materials available and placed by the Petitioner/Respondent. When the learned Arbitrator factually found that there was no tripartite agreement and the petitioner also not substantiated the defective products, the contention of the counsel before this Court that the learned Arbitrator has not considered the tripartite agreement cannot be countenanced.

13. Admittedly, the goods were supplied to the petitioner. This fact is not in dispute. However, there was no materials placed before

the Arbitrator to show that there are defects in goods. Therefore, the contention that the petitioner alone cannot be mulched with the liability has no force. The learned Arbitrator has considered the entire documents and particularly the e-mail sent by the respondents admitting the liability to pay the amount and factually found that the Petitioner is liable to pay the amount as claimed by the Respondent/claimant. Therefore, as the factual aspects has been thoroughly analysed by the learned Arbitrator this court cannot re-appreciate the evidence as an Appellate Court.

14. Now, with regard to the contention of the learned counsel that no opportunities given is considered the above submission is without any basis. In fact the Petitioner himself filed certain documents and placed materials. All the above documents have been taken note of and discussed by the Arbitrator in his finding. Therefore, such submissions is without any materials. Similarly, the contention that the Arbitrator has not considered the documents is also without any basis.

15. Now, it has to be seen whether the Arbitral Tribunal has no jurisdiction, when there is no written agreements between the parties containing Arbitration clause. Much reliance has been placed by the learned counsel placing reliance on the single Judge decision of this Court and Delhi High Court in **NSK Inda Sales Company Private Limited case (supra)** and **Alupro Building Systems Private Limited case (supra)** respectively. On perusal of the above two judgments the courts have held that since only the invoices issued to the petitioner contained arbitration clause and it is stated to have been simultaneous issue in view of factum of the same being interlinked to the goods received. The above document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of respondent and held that there is no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. The above judgment is followed in the decision of Delhi High Court in **Alupro Building Systems Private Limited case (supra)**.

16. It is to be noted that in this regard the judgment of a Division Bench of this Court in **Karan Ores & Specials case (supra)** following the judgment of the Honourable Supreme Court in **Govind Rubber Limited case** (supra) held that terms and conditions including arbitration clause contained in the invoices are binding on the appellant. The Apex Court in its judgment **Govind Rubber Limited case** (supra) in para 17 and 18 has held as follows:

"17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a mannere as to give effect to the agrfeement rather tahanan invalidate it. On the principle of construction of a commercial agreement. Scrutrton on Charter Parties (17th Edn. Sweet & Maxwell, Londaon 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense. The learner author also said that the agreement has to be interpreted" in order to effectuate the immediate intention of the parites". Similarly, Russel on Arbitration (21st Edn.) opined relying on Astro Vencedor Comania Naviera S.A.v. Amabnafı GmbH that the court should if the circumstances allow lean in favour of giving effect to the aribtration clause to

which the parties have agreed. The learned author has also referred to another judgment in Paul Smit Ltd. v. H. and S International Holdings Inc. in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intention of the parties" (see p.28 of the book.)

18. The Apex Court also in *Union of India v. D.N. Revri and Co.* [(1976) 4 SCC 147; AIR 1976 SC 2257] held that a commercial document between the parties must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. The learned Judges clarified it by saying: (SCC p.151 para 7)

"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic

interpretation."

17. Similarly in the judgment of the Apex Court in ***Caravel Shipping Services Pvt. Ltd., case*** (supra) the apex Court considered the ratio laid down in ***M.R. Engineers and Contractors Pvt. Ltd., vs Sam dat Builders Ltd., 2009 7 SCC 69*** held that the clause contained in the Bill of Lading would make arbitration clause part of the contract between the parties.

18. In view of the settled position of law and there is no dispute with regard to the invoices and supply of goods, the contention of the petitioner that no agreement between the parties to refer the dispute to the arbitration cannot be countenanced. It is further submitted by the learned counsel for the petitioner that the Award has been passed beyond six months. It is to be noted that the proceedings have commenced much prior to the Amended Act. Therefore, mere delay which is not abnormal in pronouncing the Award in the proceedings which has commenced under 1966 Act cannot be a ground to set aside the Award. Accordingly, this Court do not find any merit in this

petition. None of the grounds available under Section 34 of the Arbitration and Conciliation Act to interfere with the Award. Accordingly the Original Petition is liable to be dismissed.

19. In the Result, the Original Petition is dismissed. Consequently, connected Application is closed. No costs.

26.08.2019

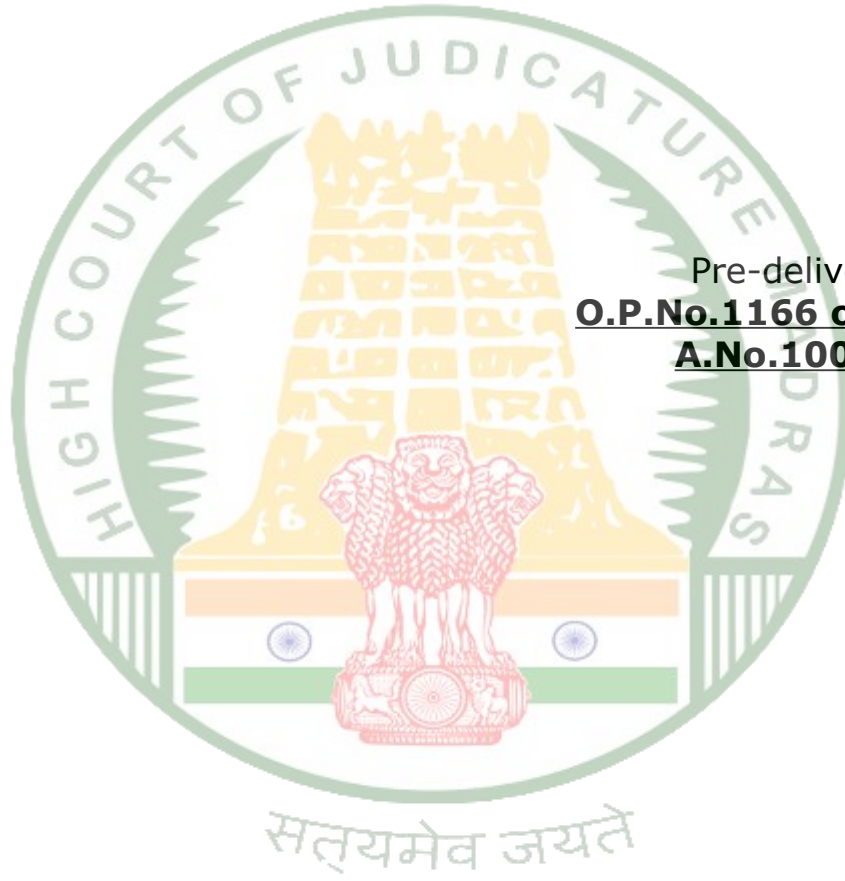
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N. SATHISH KUMAR, J.

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