IN THE HIGH CO URT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 07th DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.871 of 2016

In the matter of the
Arbitration and Conciliation
Act, 1996
And
In the matter of disputes between
Aghora Enterprises Private Limited
and P.R.Selvarajan

M/s.Aghora Enterprises Private Limited
No.171, Luz Church Road, 2nd Street,
Mylapore, Chennai 600 004
Represented by its Executive Director
Mr.T.Rathinam ...Petitioner

Vs

P.R.Selvarajan
S/o.Late Rathinasamy Nadar,
No.7, Vaidyanatha Mudali Street,
Tondiarpet,
Chennai 600 081.
...Respondent

Original Petitioner praying that this Hon'ble Court be pleased to set aside the award dated 23.07.2016 passed by the Sole Arbitrator.

This Original Petition having been heard on 26.08.2021 in the presence of Mr.S.Ravi for M/s.Gupta & Ravi, Advocates for the petitioner herein and Mr.S.Ramanarayanan for M/s.Sampath Kumar & Associates, Advocates for the respondent herein and upon reading the petition and award dated 23.07.2016 filed herein, and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto, and this Court having observed that the learned Arbitrator has analysed the entire evidence, document as well as the oral evidence of the parties to the contract and found that there was a mutual discussion prior to entering into the contract and the parties had entered into the terms of the contract and the invoices raised by the Sister company has also not been proved, and the evaluator given the value of the weight the reports also with held and thereby non suited the claimant and the contention of the learned counsel that only Section 12 of the Sale of Goods Act will apply to the facts of the present case cannot hold water, and accordingly, the same is rejected and on perusal of the entire award and contract terms, this Court do not find any of the grounds made out to interfere with the award passed by the learned sole Arbitrator, and it is ordered as follows:-

That the petition in O.P.No.871 of 2016 be and is hereby dismissed.

WITNESS THE HON'BLE MR.JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 07th DAY OF SEPTEMBER 2021.

Sd./-
ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//
Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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KY
23.12.2021

O.P.No.871 of 2016

ORDER

DATED:07.09.2021

THE HON'BLE MR. JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 30.12.2021

APPROVED ON: 03.01.2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	*26.8.2021*
Pronounced on	07.09.2021

C O R A M

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

O.P.No.871 of 2016

Aghora Enterprises Private Limited
rep. By its Executive Director
Mr.T.Rathinam

...Petitioner

Vs

P.R.Selvarajan ...Respondent

Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award, dated 23/7/2016 passed by the sole Arbitrator.

For petitioner ... Mr.S.Ravi
for M/s. Gupta & Ravi

For respondent ... Mr.S.Ramanarayanan
for M/s.Sampath Kumar & Associates

<u>O R D E R</u>

This Original Application has been filed to set aside the Award, dated 23/7/2016 passed by the sole Arbitrator.

2. The brief facts which are leading to the filing of this Original Petition is as follows:-

The petitioner is a Private Limited Company, engaged in the business of assessment, dismantlement, buying of locked out factories and plants. It buys them as scrap and sells them in the open market. The respondent is engaged in the business of sale of provisions and Real Estate. By an agreement, dated 30/9/2013, the petitioner had agreed to purchase the entire materials in the front and rear portion, at Nos.9 and 10, Elaiya Mudali Street, Tondiarpet, Chennai 600 081. Subsequently, the parties entered into an agreement which was only for the rear portion. The respondent assured a return of 10% of the total deal and to compensate if the weight/value varied. It was agreed that the parties would monitor the work and movement of the materials and records were maintained by an outward register. After a detailed negotiation, Rs.2,00,00,109/- was agreed to be the consideration of the agreement. The respondent agreed to give all the materials with weight and value as committed therein. The entire consideration has been paid to the respondent. As per the agreement, the weight of the scrap was supposed to be 410.39 metric tonnes, but the actual weight was only 265.69

Metric Tonnes, as per the weighment slips, which caused huge losses. It fetched only Rs.80,76,650/- even at the best market rates. As per Clause 8 of the agreement, it is the liability of the respondent in case such an event took place. Hence the petitioner has claimed as follows:-

ITEM	***AMOUNT (RS.)***
Difference in weight/value	119,23,350.00
Additional loss due to sales return	10,45,209.00
Difference in capital investment elsewhere	1,00,00,000.00
Legal charges	5,00,000.00
Total	234,68,559.00

3. It is the case of the respondent that the plant and machinery were in working condition. The respondent wanted to develop the property and decided to dispose of the plant and machinery along with the industrial shed. The respondent had estimated the value at Rs.225.30 lakhs. However, Mr.T.Rathinam, representing to be the Vice President of M/s.Tes-Amm (India) Private Limited offered to purchase a portion of the plant and machinery for a sum of Rs.2 crores. In the agreement, it is stated that items have been weighed and valued. However, the respondent had no occasion to weigh them. In fact, plant and machineries and tanks were embedded to earth. The shed was intact. Therefore, there was no possibility to weigh

them. The insertion of words, 'weighed and valued' was not acceptable to the respondent. On the date of the agreement, storage tanks could not have been weighed and mention of the weight is fraudulent. The petitioner has produced certain invoices suppressing the invoices produced before the High Court. These invoices were raised in the name of the sister Company and is not a genuine transaction and disputed the claim.

4. The petitioner had filed his rejoinder, wherein, the petitioner had denied the averments.

5. The sole Arbitrator had framed the following issues:-

(i). Whether the Memorandum of Agreement, dated 30th September 2013, is true, valid and enforceable?

(ii). Is the claim based on false and fabricated documents?

(iii). Is the respondent due and liable to pay the sums as claimed in the claim statement.

6. On the side of the petitioner, the petitioner himself was examined as C.W.1 and Exs.C.1 to C.34 were marked. Son of the

respondent was examined as R.W.1 and Exs.R.1 to R.31 were marked.

7. On analysing the entire documents and evidence, the learned Arbitrator had dismissed the claim of the petitioner.

8. Heard Mr.S.Ravi for M/s.Gupta and Ravi for the petitioner and Mr.S.Ramnarayanan for M/s.Sampathkumar & Associates for the respondent and perused the materials available on record.

9. Learned counsel appearing for the petitioner contended that when the weight of the equipment constitutes as warranty when it is found that the weight was not in accordance with the representation made by the respondent, the petitioner is entitled to treat the same as breach of warranty. If any shortfall is found, only Section 12 of the Sale of Goods Act,1930 will apply, whereas the learned Arbitrator found that Section 16 of the said Act will apply, same is not correct.

10. Annexure I itself clearly shows that machineries have been sold as scrap and price was fixed in a lumpsum. Materials which were sold in lots amounts to warranty and any short fall found in the materials sold, the petitioner is certainly entitled to get back his money for the short fall.

Once it is the warranty, principle of caveat emptor will not apply. Therefore, the learned Arbitrator applying Section 16 of the Sale of Goods Act, 1930, is wrong.

11. In support of his submissions, he has placed reliance on the following judgments.

(i). AIR 1949 Nagpur 178 (HARNARAIN RAMCHANDRA JAISWAL Vs.FIRM RADHAKISAN NARAYANDAS).

(ii). DUDHIA FOREST CO.OP LABOURERS AND ARTISAND SO.LIMITED Vs. MOHAMED SAIYED AND ABDUL REHMANS COMPANY 1980 (1) GLR 272

(iii). SSANGYONG ENGINEERING AND CONSTRUCTION COMPANY LIMITED Vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI) (2019) 15 SUPREME COURT CASES 131.

12. The learned counsel appearing for the respondent submitted that the entire award is based on proper appreciation of evidence wherein the learned Arbitrator has found that the invoices raised by the petitioner were fabricated. The invoices in fact raised only to sister Company. The

entire sale consideration agreed upon between the parties for the entire machineries and the petitioner is an expert in the field. They are aware of the value of the machineries. Hence submitted that the learned Arbitrator has found that only the materials have been sold not as scrap. Report of the Evaluator has not been filed by the petitioner before the Court. Hence submitted that the learned Arbitrator had gone through the entire documents available on record has come to the conclusion that the petitioner is not entitled to the claim made. Hence prayed for dismissal in the light of the above submissions.

13. The learned counsel appearing for the respondent has relied on the following judgments.

(i). HARISH CHANDRA AND COMPANY Vs. STATE OF U.P through SUPERINTENDING ENGINEER (AIR 2016 SUPREME COURT 4257)

(ii). THE PROJECT DIRECTOR, TAMIL NADU ROAD SECTOR PROJECT II, TNMB BUILDING, I FLOOR, 171, SOUTH KESAVAPERUMALPURAM, OFF GREENWAYS ROAD, R.A.PURAM, CHENNAI 600 028 Vs. RNS INFRASTRUCTURE LTD – GPL (JC) AND THREE OTHERS.

(iii). V.S.EKAMBARAM, PROPRIETOR Vs. SRI KRISHNA TILES AND POTTERIES (MADRAS) PVT LTD., rep. By its DIRECTOR, THIRU.A.R.SANTHANAKRISHNAN {2017 (5) CTC 420 (Mad).

(iv). G.SATHYAN Vs. B. VASUDEVAN {2017 (1) CTC 534 (Mad).

(v). NAVODAYA MASS ENTERTAINMENT LTD Vs. J.M.COMBINES {2015 (1) CTC 797 (SC)}

(vi). ISG NOVASOFT TECHNOLOGIES LTD., rep. By its MANAGING DIRECTOR (formerly was rep. By CHAIRMAN OF THE BOARD) Vs. GAYATRI BALASAMY AND TWO OTHERS.

(vii). SOFTWARE TECHNOLOGY PARKS OF INDIA Vs. CONSOLIDATED CONSTRUCTION CONSORTIUM LIMITED AND ANOTHER {2020 (1) CTC 661}.

14. The main contention of the learned counsel for the petitioner

is that after entering into agreement for specific weight, there was a short fall of 144.70 metric tons and the sale is only for the scrap. Therefore, when the goods are unascertained and sold in lots, Section 12 of the Sale of goods Act, 1930, will come into aid.

15. It is relevant to extract Section 12 of the Sale of Goods Act, 1930.

> Condition and warranty – (1). A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
>
> (2). A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.
>
> (3). A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

> (4). Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

16. From the above, it is clear that when there is a stipulation in a contract of sale with reference to goods is a warranty, the breach of which gives rise to claim for damages but not a right to reject the same and treat the contract as repudiated. However, where the stipulation of contract of sale is a condition, its breach may give rise not only for damages but also the right to treat the contract repudiated. Further, whether there is a stipulation in the contract of sale is a condition or a warranty, the same depends on each construction of the contract.

17. The contract entered between the parties is as follows:-

> WHEREAS the party of the first part has the absolute ownership of the materials shown in Annexure – I, lying at the rear side of the site Nos.9 & 10, Elaiya Mudali Street, Tondiarpet, Chennai

600 081 (hereinafter referred to as 'Materials') weighed & valued at Rs.2,00,00,109/- (Rupees Two crores one hundred and nine only) free from all encumbrances and offered to sell them and whereas the party of the other part has agreed to purchase the above materials free from all encumbrances and both the parties have decided to reduce their terms in writing.

18. The important clause in the contract is as follows:-

The party of the first part has agreed to sell & dispose the materials namely plant, machinery, electrical, electronic, shed/building covered under Annexure – I to the party of the other part for a total sale consideration of Rs.2,00,00,109/- (Rupees Two crores one hundred and nine only) free from all encumbrances.

19. Clause No.8 of the Contract is as follows:-

> "Party of the first part has agreed to support the party of the other part to the satisfaction of the party of the other part in case of any dispute by a third party for the above materials. In case of any issues, the party of the first part has agreed to return the respective payment, immediately to the party of the other part."

20. Clause No.I makes it clear that infact, the petitioner has agreed to sell and dispose the materials for a total sale consideration of Rs.2,00,00,109/- free from all encumbrances. Clause 8 indicate that in the event of any dispute raised by the third party for the above materials, the party of the first part has agreed to return the respective payment, immediately to the party of the other part.

21. The entire contract does not speak about any short fall of the materials purchased by the petitioner. Clause 8 refers to the dispute raised with regard to the materials purchased by the third party. From the pleadings of both sides, it can be seen that there is no dispute with regard to the materials agreed to be sold or purchased. The main dispute seems to be

with regard to the short fall of the weight. It is the contention of the learned counsel for the petitioner that though the total weight of the scrap was supposed to be 410.39 metric tones, as per the agreement, the actual weight was only 265.69 metric tones. The difference being 144.70 metric tones causing heavy loss. The scrap measuring only 265.69 tonnes earned merely Rs.80,76,650/- even at the best market rates.

22. Now, the contention has been raised before this Court that as if the warranty has been breached, they are liable to claim damages, whereas before the learned Arbitrator, it was the contention of the learned counsel for the petitioner that the entire transaction was based on trust as the bed rock of the understanding and maxim "Caveat emptor" would not be applicable to the contract.

23. Another plea also raised by the learned counsel for the petitioner that the respondent had committed a fraud upon the petitioner. However, for the very first time he made his submissions before this Court about breach of warranty.

24 . Annexure I makes it very clear that most of the machinery, sheds, tanks, cables and scraps were accepted for sale and removal. Therefore, from Annexure I, it can be seen that large part of the materials

are the machineries, sheets, cables and tanks and remaining parts are the scraps. Therefore, it cannot be said that the entire machineries were sold as scrap.

25. Contention of the learned counsel for the petitioner before the learned Arbitrator is that since the contract is based on mutual trust, the petitioner is entitled to 10% return and the learned Arbitrator, on reading the entire contract factually found that there is nothing in the contract to indicate that the respondent had assured 10% of the return in the contract. Even the evaluation report does not indicate any such assurance of that kind.

26. As already indicated above, contract does not specify the nature of the consequences in the event of short fall in the weight. However, the learned Arbitrator, after analysing the documents and particularly, the evidence on the side of the petitioner, found that the main objects of the petitioner Company are (a). to provide consultancy services in the area of Metallurgy; (b). to purchase, sell hire or let on hire all form of immovable and movable properties, including machinery equipments, motor vehicles, land, buildings, office equipments, computers and all consumer and industrial items; (c). to buy, sell, export, import, distribute or otherwise deal in or trade in capital goods computers, and telecommunication

equipments; (d). to carry on the business of destruction, dismantling and sale of plant and machinery, sale of scrap material, including metals, plastics, wood, packaging material, cotton boxes, paper and chemicals and to sub-let any of the above activities, finally concluded that it is the petitioner, who is the buyer has the better skill and judgment regarding the weight, value or fitness as compared to the respondent, who is the seller.

27. The learned Arbitrator has disbelieved C.5 series produced by the petitioner to show that the materials weighed only 250 MT. The learned Arbitrator has found that the petitioner has not produced the survey report said to have been produced by the respondent or the valuation report of M/s.Badri and Venkat and also recorded that there is no complaint from any third party to make the respondent liable under Clause 8 of the contract.

28. In AIR 1949 Nag 178 (HARNARAIN RAMCHANDRA JAISWAL Vs. FIRM RADHAKISAN NARAYANDAS) with regard to the sale of bidi leaves, Nagpur High Court, has held that a breach of warranty in the matter of quantity may entitle the buyer to reject the goods outright or at any time even after receipt of some of the goods. It is relevant to extract paragraph Nos.16 18 and 19 and the same reads as follows:-

> "16. In Goldsbrough Mort & Co Vs. Carter (1914) 19 C.L.R.429 a case of the Australian High

Court, the defendants by their agents sold to the plaintiff "the under mentioned stock, more or less, namely about 1600 Canonbar bred ewes six years off shears 1912, about 2400 Canonbar bred ewes seven years off shears 1912, now depasturing on Canonbar Station," at price per head. Griffiths C.J in discussing the effect of this contract said:

> There is no doubt that words of description may and often do amount to warranty; but why? Because from the nature of the transaction both parties must have so intended. A statement of a number with the words "about" or "more or less" or both, may, in my opinion, in some cases operate as a warranty, especially if the price is a lump sum.
>
> Griffiths C.J., however held that the words relating to the number of sheep in the case were not a warranty, but merely as estimate in the sense in which the term is used in McConnel V. Murply (1873)

L.R.5 P.C.203. As Barton, J. said in the same case:

Before the appellants can he held to have warranted the number at all the animus contrahendi must be clearly and strictly shown:p.444.

....

18. Applying these tests we find that this was not a case of a sale of an unknown quantity at so much per 1000 gaddis, the amount being given as a mere estimate of the quantity available. The price was fixed in a lumpsum and the element of quantity must have played an important part as pointed out by Griffiths C.J. To quote the words of Lord Atkinson in Schawel V. Reade (1913) 2 I.R. 63 at p.84 and cited by Isaacs, J in the Australian case:

A statement is made, it is acted upon and it is made by the person who makes it for the purpose of the sale, that is with the intention of bringing about the sale .... I do not know what other ingredient is necessary to create a warranty.

It is pertinent to note that Isaacs, J. held even in that case that the mention of quantity was a warranty.

19. The upshot of all this is, therefore, that the seller was guilty of a breach of two warranties. He tendered a quantity which was very short of the warranty and out of the total goods tendered half were utterly worthless."

29. Similarly, in 1980 (1) GLR – 272 (DUDHIA FOREST CO.OP LABOURERS AND ARTISANS SO. LIMITED VS. MOHMED SAIYED AND ABDUL REHMANS COMPANY), wherein at paragraph No.4, Gujarat High Court has held as follows:-

"If the representation does not form part of the contract that if it is neither a condition or a warrant, it amount to an expression of opinion not intended to enter the bargain and its non fulfillment does not give rise to any right to a legal action. Thus, if the parties considered the term as an essential feature of the contract it is a condition; if they regarded it as a subsidiary or collateral term of the contracts it is a warranty; but if they regarded it as a subsidiary or collateral term of the contracts it is a warranty; but if they considered it neither it is a mere representation or expression of opinion not forming part of the contract non fulfillment whereof is of no legal consequence whatsoever. Whether a stipulation in a contract is a condition or warranty or neither would naturally depend on the construction of the contract in each case.

30. Finally, the Court in the above case has held that whether a particular terms is a warranty or utmost, it may be decided on the facts of each case. Absolutely, there is no dispute with regard to the above proposition in the above judgments.

31. Contention of the learned counsel for the petitioner before the learned Arbitrator is that by mere representation made by the respondent contract was entered in a good faith. If there is any short fall, certainly Section 12 of the Act can be invoked. However, the fact remains that the contract was not entered on the mere representation of the respondent. The learned Arbitrator has analysed the entire evidence, document as well as the oral evidence of the parties to the contract and found that there was a mutual discussion prior to entering into the contract and the parties had entered into

the terms of the contract and the invoices raised by the Sister company has also not been proved. The evaluator given the value of the weight the reports also with held and thereby non suited the claimant.

32. In such a view of the above factual scenario, the contention of the learned counsel that only Section 12 of the Sale of Goods Act will apply to the facts of the present case cannot hold water. Accordingly, the same is rejected and on perusal of the entire award and contract terms, this Court do not find any of the grounds made out to interfere with the award passed by the learned sole Arbitrator.

33. Accordingly, the instant Original Petition is dismissed.

Sd./-N.S.K.J
07.09.2021

//Certified to be true copy//
Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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