IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.03.2021

Pronounced on : 01.04.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

O.P.No.945 of 2017

Central Warehousing Corporation,
Represented by its Regional Manager,
Having its Regional Office at,
No.4, North Avenue, Srinagar Colony,
Saidapet, Chennai – 600 015. ... Petitioner

Vs.

M/s.PSTS Heavy Lift and Shift Ltd.,
Having Head Office at
2nd Floor, Wavoo Mansion,
Rajaji Salai, Chennai – 600 001. ... Respondent

Prayer:- This suit filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 01.08.2016 by the Arbitrator in respect of refund of recoveries and withdrawal of demand for service tax reimbursed and claiming the right to set off against conveyance charges incurred by the petitioner corporation.

For Petitioner : Mr.Venkatachari Lakshmi Narayanan

For Respondent : Ms.Hema Murali Krishnan

JUDGMENT

The respondent before the Arbitral Tribunal is the petitioner herein.

2.The respondent before the Arbitral Tribunal has preferred the present Original petition taking advantage of Section 34 of the Arbitration and Conciliation Act, 1996 calling into question the award of the Arbitrator Tribunal / Sole Arbitrator dated 01.08.2016.

3.The facts in brief are as follows:

4.M/s.PSTS Heavy Lift and Shift Ltd., a Company incorporated under the Companies Act 1956, are in the business of providing, handling and transport service with respect to containers. The Central Warehousing Corporation had issued a Tender notice on 20.11.2004 inviting rates for appointment of a Handling and Transport Contractor capable of providing suitable handling equipments / road vehicles for handling and transportation of ISO Containers / other cargo at Container Freight Station, Virugambakkam, Chennai. The contract was finally awarded to M/s.PSTS Heavy Lift and Shift Ltd., for the period from 13.04.2005 to 31.05.2010. An agreement was entered into on 04.05.2005. It is not disputed that the terms of the agreement was executed by M/s.PSTS Heavy Lift and Shift Ltd. A further Tender notice was issued by the Central Warehousing Corporation on 27.04.2010 again inviting item-wise rate tenders and a further agreement was entered into on 01.06.2010 for a period of further three months and extendable for a further period of three months. This period was extended till a contractor was appointed for the period from 01.10.2011.

5.Among other terms of the agreement, Clause XII (h) is the bone of contention between the parties.

6.Clause XII (h) is as follows:

"*XII.LIABILITY OF CONTRACTOR FOR LOSSES ETC., SUFFERED BY CORPORATION:-*

....

....

h).All taxes/levies/fees/charges payable to any Govt. body/local body shall be paid by the contractor and no claim whatsoever shall be against the Corporation on this account.

......."

7.At the time of execution of the agreement and commencement of the contract, Cargo Handling Service was liable to Service Tax. This amendment to the Finance Act took place in 2002 and was effective from 16.08.2002. The contract therefore remained covered by Service Tax. However, Handling and Transport of Export Cargo was exempt from Service Tax by a specific exemption as a measure of incentive for exports.

8.M/s.PSTS Heavy Lift and Shift Ltd., the contractor was under an obligation to perform various duties relating to cargo handling and transport of loaded / empty containers from Ports to Container Freight Station, Virugambakkam, Chennai. They were performing both cargo handling and transport by truck. They transported stuffed containers and empty containers.

9.The issue was whether this transport could be taken as a Goods Transport. The Central Government amended the classification as 'Goods Transport Agency' and applied tax retrospectively with effect from 01.01.2005. This would indicate that when the tender was issued in November 2004, there was no levy of Service Tax on Goods Transport, while Cargo Handling Services were liable to Service Tax from 16.08.2002. There were issues whether transport of such goods which went through Cargo Handling will also be subjected to Service Tax under Section 65(23) of the Service Tax Act, 2017.

10.M/s.PSTS Heavy Lift and Shift Ltd., calculated the Service Tax due on the freight and paid it to authorities and later took reimbursement of the tax paid from Central Warehousing Corporation. Bills in this regard, were periodically cleared by the Central Warehousing Corporation. There were no disputes. The disputes arose when communications were issued by the Central Warehousing Corporation dated 26.03.2012 and 09.04.2012, whereby they stated that they would effect recovery of the Service Tax reimbursed to M/s.PSTS Heavy Lift and Shift Ltd.

11.This was the issue taken up before the sole Arbitrator. A Claim Petition was filed on 16.03.2013 claiming that the Central Warehousing Corporation was not entitled to detect the sum paid towards Service Tax under a contract when at the time the tender was invited, the work was not covered under the said tax regime. In the claim statement the relief sought was for a Declaration that Central Warehousing Corporation was wrong in deducting the Service Tax paid during the period 2005-2006 to 2010-2011 and from April 2011 to September 2011 which amounts had been paid by M/s.PSTS Heavy Lift and Shift Ltd., to the Government of India and for a further Declaration against Central Warehousing Corporation to refund the amounts deducted towards Service Tax for the period of 2005 to 2010 and extended up to September 2011.

12.There was yet another issue with respect to hiring charges for vehicles which was also brought up before the sole Arbitrator, but the finding on the same was not agitated during arguments before this court.

13.The learned Arbitrator by his award held as follows:

> *a).Reimbursements made to the claimant company towards service tax is final and will stand. Hence any payments withheld or deducted would be refundable; 1) Rs.11,32,205/- deducted shall be refunded; 2)Security Deposit of Rs.1,67,500/- will be refunded; 3)Bank Guarantee bond for Rs.15 (Fifteen Lakhs) will be released.*
>
> *b).For the period from 13.04.2005 to 31.03.2007 since no payment of tax has been made by the claimant,*

the question of reimbursement does not arise. It will be the responsibility of the claimant company to sort out of the matter with the Tax authorities directly as Service provider and tax payer, if such an occasion arises. No claims on CWC will lie on this regard."

14.A counter claim had been preferred by the Central Warehousing Corporation with respect to repayment of Service Tax and that was consequentially rejected. The recovery made towards finance was also held to be not maintainable.

15.Aggrieved by the said Award, the Central Warehousing Corporation has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996.

16.Heard arguments advanced by Mr.Venkatachari Lakshmi Narayanan, learned counsel for the petitioner / Central Warehousing Corporation and Ms.Hema Murali Krishnan, learned counsel for the respondent / M/s.PSTS Heavy Lift and Shift Ltd.

17.This Court must place its deep appreciation for the sanguine manner in which arguments were presented.

18.Mr.Venkatachari Lakshmi Narayanan was deeply aware of the limitation any petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 suffers from. He also fairly admitted that this petition cannot be examined as an appeal against the Award of the Arbitral Tribunal. The scope is quite narrow. But however, there is an obligation to examine whether the Award suffers from anyone of the grounds stated under Section 34 of the Arbitration and Conciliation Act, 1996.

19.The learned counsel for the petitioner has probably drawn strength from Section 34(2)(A) to assail the award on the ground that it is vitiated by the patent illegality.

20.To reiterate M/s.PSTS Heavy Lift and Shift Ltd., was the claimant before the Arbitrator and the Contractor appointed for Cargo and Handling Service. Central Warehousing Corporation, was the respondent before the Arbitrator. They are however, the petitioner before this Court. The parties are referred by their name to avoid confusion.

21.There is a Container Freight Station at Virugambakkam, Chennai. The containers which arrive in the Ports at Chennai will have to be transported to the Container Freight Station at Virugambakkam. The cargo will have to be handled. Transportation of containers may include both stuffed and empty containers. A composite tender notice for Handling and Transport work at Container Freight Station at Virugambakkam, Chennai was issued by Central Warehousing Corporation on 20.11.2004.

22.M/s.PSTS Heavy Lift and Shift Ltd., participated and was awarded the contract. The contract was initially for a period of five years from 13.04.2005. The contract was extended and as on the date of the Award they continued to be the contractors. It is to be mentioned that there were no disputes regarding the work done by M/s.PSTS Heavy Lift and Shift Ltd. Rather, disputes had arisen over the bills submitted by them. The Cargo Handling Service was categorized as a taxable service with effect 16.08.2002. Thereafter, Goods Transport Services were also independently brought under the scope of Service Tax with retrospective effect from 01.01.2005. When the tender was floated on 20.11.2004, the Goods Transport Services were not subject to Service Tax.

23.Among other Clauses in the agreement between the parties, Clause XII (h) is again extracted below:

> *"XII.Liability of Contractor for losses etc., suffered by Corporation:-*
>
> ....
>
> *h).All taxes/levies/fees/charges payable to any Govt. body/local body shall be paid by the contractor and no claim whatsoever shall be against the Corporation on this account."*

24.The Service Tax component with respect to transportation of Goods had been paid by M/s.PSTS Heavy Lift and Shift Limited., to the Government of India. When they submitted bills for work done to Central Warehousing Corporation, they also included this tax component. Initially, the bills were cleared automatically. Reimbursement was also made towards Service Tax paid by M/s.PSTS Heavy Lift and Shift Ltd. Later when Central Warehousing Corporation was subject to audit, this reimbursement was questioned. Therefore, Central Warehousing Corporation issued notices seeking recovery of the reimbursement already made. They also called upon M/s.PSTS Heavy Lift and Shift Ltd., to extend their Bank Guarantee. It is over these issues that a reference was made to Arbitration.

25.One significant finding by the sole Arbitrator in this connection was not put to questionable test before this Court by the learned counsel for Central Warehousing Corporation, the petitioner herein. There is no issue on the calculation of the Service Tax due on the transportation of Goods and paid to the Revenue Department and taken reimbursement from Central Warehousing Corporation. However, the Arbitrator had given the following specific finding:-

> *"33.4.Summing up this is mainly a Cargo handling service contract and liable to tax ab initio at the time tenders were invited. The claimant Company provided the service and paid the taxes to Revenue and took reimbursement from the CWC who was the Principal who in turn collected the tariff rates from the Customers and paid service tax on the entire amount availing of CENVAT credit. This course of action seems to be on all fours as per the agreement. Considering the way the rate schedule and Clause XII(h) are structured and worded it does not justify any recoveries from the Claimant company. It can at best be linked only to an one off levy or tax for a transaction or a series of transactions for a limited period but not something directly and inextricable linked with the Rate structure and of such high proportions."*

26.The learned Arbitrator had specifically found that M/s.PSTS Heavy Lift and Shift Ltd., executed the contract and had paid the taxes to the Revenue and later took reimbursement from Central Warehousing Corporation. In turn Central Warehousing Corporation collected the tariff rates from the customers and paid Service Tax on the entire amount availing of CENVAT credit. It had been held that this course of action was in accordance with the terms of the agreement. It had therefore been held that Central Warehousing Corporation cannot thereafter make further recovery from M/s.PSTS Heavy Lift and Shift Ltd.

27.I would naturally hold that Central Warehousing Corporation would get a double benefit if they are permitted to do so. This would not be proper. As per the agreement M/s.PSTS Heavy Lift and Shift Ltd., should pay the Service Tax. They submitted bills to Central Warehousing Corporation. The bills also included the Service Tax component. It was reimbursed to M/s.PSTS Heavy Lift and Shift Ltd. Later Central Warehousing Corporation collected the tariff rates from its customers and paid Service Tax on the entire amount availing of CENVAT credit. Thus the issue of once again recovering reimbursement already made to M/s.PSTS Heavy Lift and Shift Ltd., would not arise and if that were to be permitted then it would mean that, to that particular extent, there would be unlawful gain by Central Warehousing Corporation. The reasons of the Arbitrator cannot be termed to be perverse or patently illegal requiring interference.

28.I would therefore, refrain from acceding to the request of the learned counsel for the petitioner / Central Warehousing Corporation to revisit the Award passed.

29.The Award passed stands and is affirmed. This Original Petition is dismissed. No order as to costs.

01.04.2021

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Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No

C.V.KARTHIKEYAN, J.,

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Pre-Delivery order made in

O.P.No.945 of 2017

01.04.2021