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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 510/2021**

SINOCHEM INDIA COMPANY PVT LTD Petitioner
Through: Mr.Dibya Nishant alongwith
Mr.Ryan Singh, Advs.

versus

GAURI SHANKAR SHARMA Respondent
Through: Mr.Gagan Kumar Singhal, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (O R A L)

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22.07.2021

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('the 1996 Act'), for appointment of an arbitrator. The substratum of the dispute between the parties, as set out in sub-paras (a) to (e) and (g) to (t) of para 4 of the petition, may be reproduced thus:

“a. The Petitioner sells, supplies and distributes its agrochemical products on pan India basis and for the said purpose, appoints Carrying and Forwarding Agents (hereinafter referred to as “C&F Agent”) across the country. The Petitioner maintains its mother warehouse at Vadodara, Gujarat, where the agrochemical products are stored after manufacturing through their Job worker/Manufacturer, M/s Aristo Biotech & Life Science Pvt. Ltd. (“Aristo”) and are distributed/supplied to other warehouses across the country. The warehouse at Vadodara, Gujarat also receives the

imported raw material and sends them to the factory of Aristo, for manufacturing them into Finished Product. The warehouse at Vadodara, Gujarat is, therefore, strategically very important to Petitioner.

b. That the Petitioner in the year 2019, at the instance of its erstwhile Supply Chain Manager, namely Mr. Deepak Ranjan, who was looking after the work of warehouse and appointment of C&F agents, decided to appoint a new C&F agent at Vadodara, Gujarat. Mr Deepak Ranjan, suggested the name of the Respondent and vouched for Respondent's experience and credibility stating that it had handled the C&F agency at one of his previous employers' company.

c. That upon meeting, the Respondent, represented and assured the Petitioner that it has prior experience and expertise in handling material of various companies as the C&F agent. Since, Mr Deepak Ranjan was heading the supply chain department and looking after the appointment of C&F agents, the Respondent shared all the documents relevant for his appointment as C&F Agent with him.

d. It is the policy of Petitioner that an employee cannot appoint any vendor with whom he/she has any present or past collaboration or financial dealing. During the process of appointment, the Respondent vide email dated 17th March, 2019 shared its profile, ITR, statement of bank account and a cancelled cheque. Pertinently, later on, it also came to the knowledge of the Petitioner that Respondent and Mr Deepak Ranjan are close family friends and that Ms Deepali Kumari who was shown to be in the management of the Respondent's proprietorship is the wife of Mr. Deepak Ranjan. However, these facts were conveniently not brought to the notice of the Petitioner by Mr Deepak Ranjan at the time of entering into agreement with the Respondent.

e. That it was upon the representations and assurances made by the Respondent about his prior experience, Petitioner decided to appoint it as C&F agent for Gujarat. The Petitioner entered into an Agreement dated 11th March, 2019 (hereinafter referred to as the "Agreement") with the proprietary concern of

the Respondent and appointed it as C&F agent for Gujarat for the warehouses located at Vadodara, Gujarat. The scope of work under the Agreement *inter-alia* included receiving the products sent by the Petitioner, storing them under his control and then delivering/forwarding them to the customers of the Petitioner. As per the terms of the Agreement, the Agreement was valid till 31st January, 2020 and the Petitioner had the right to extend the Agreement at its sole discretion.

g. A bare perusal of the terms of the Agreement would show that the Respondent was under the obligation to safely store the material received from the Petitioner under the Agreement. In the event of any loss or deficiency in material caused, Respondent would be absolutely liable to indemnify the Petitioner under Clause 24a of the Agreement. The Petitioner was also entitled to adjust any loss or damage caused to it due to shortage or theft of product from the warehouse from any sum that was payable to the Respondent. Furthermore, upon termination of the agreement, Respondent was liable to make good the deficiency/gap in stock, if any, as well as return all the materials, statutory documents, papers, and other things in his possession during the handover process in order to avoid any discrepancy or dispute with respect to material or documents. The Agreement also contained dispute resolution clause as per which any dispute arising between the Petitioner and the Respondent, shall be referred to a Sole Arbitrator appointed by the Petitioner.

h. Subsequent to Respondent's appointment as C&F agent of its Vadodara warehouse, all its transaction and invoices were handled by Mr. Deepak Ranjan. During the tenure of the Respondent as the C&F agent, the expenses of the Petitioner increased manifold towards freight, labour charges, hydra and forklift charges etc. in comparison to the invoices raised by the earlier C&F agent resulting in an additional cost to the Petitioner. All the inflated invoices raised by the Respondent towards the aforesaid expenses were approved and cleared by Mr Deepak Ranjan. However, this fact did not come to the knowledge of the Petitioner as C&F department was looked after by Mr Deepak Ranjan.

i. That the Petitioner, routinely conducts the audit of various C&F Agents across the country twice a year. The Petitioner also conducted the audit of the warehouse at Vadodara on 6-7 January, 2020, Gujarat. Upon audit the Petitioner found that stocks were highly mismanaged, as a result of which, audit team couldn't count the stock and could only make physical observations. The observations further revealed that the stock was highly mismanaged and there was huge mismatch between physical stock and SAP stock. Furthermore, First expired and First Out (FEFO) system, as mandated under Clause 33 of the Agreement was also not followed by the Respondent. Suffice it to say that Respondent was in gross violation of its obligations under the terms of the Agreement.

j. Upon receiving the aforesaid report, the Petitioner vide email dated 15.01.2020 directed Mr Deepak Ranjan, to terminate the Agreement with the Respondent immediately. In a separate even dated mail, the Petitioner also observed that its expenses had increased exponentially and the said increase was not due to increase in quantity but due to increase in different rates after entering into the Agreement with the Respondent. However, Mr Deepak Ranjan for the obvious reasons did not terminate the agreement with the Respondent and the Respondent continued to work on the same terms and conditions as contained in the Agreement. It is needless to state that Mr Deepak Ranjan was acting in collusion with the Respondent against the interest of the Petitioner and was sharing all the internal information with the Respondent.

k. As Mr. Deepak Ranjan divulged the instructions of the Country Director to the Respondent, the Respondent taking advantage of prior information, vide email dated 2nd March, 2020 informed the Supply Chain Department of the Petitioner that the Agreement had already expired and that it will discontinue the services from 15th March, 2020. Thereafter, vide email dated 12th March, 2020, Mr. Deepak Ranjan due to its own ulterior motive requested the Respondent to continue its services under the Agreement till 31st March, 2020 subject to same terms and conditions.

l. Subsequently, lockdown was announced in the country and it was not possible for the Petitioner to appoint new C&F with effect from 1st April, 2020. The Supply Chain Management Department of the Petitioner under the charge of Mr. Deepak Ranjan vide email dated 23rd March 2020 extended the Agreement further till 15th April, 2020 upon the same terms and conditions. The agreement had to be further extended due to the lockdown and vide another email dated 13th April, 2020, agreement was extended till 30th April, 2020. The agreement was subsequently extended till 31st May, 2020. It is pertinent to mention that Agreement was extended without any modification/alteration to the original terms and conditions and the Respondent never opposed the extension of the agreement and it continued to raise the invoices as per the Agreement for these periods till 30th June, 2020.

m. The Petitioner further vide letter dated 12th June, 2020 extended the validity of agreement till 30th June, 2020 subject to the terms and conditions of the Agreement dated 11th March, 2019. Subsequently, the Respondent informed the Petitioner that it will only continue to provide the services till 30th June, 2020 under the agreement and not thereafter. As the Respondent has already made it clear that it will not be providing the services after 30th June, 2020 under the extended C&F Agreement, the Petitioner vide email dated 23rd June, 2020 shared the handover documents with Respondent and requested it to support the new C&F agent in stock count and transition. In the meanwhile the new C&F agent started the physical count of stock on 25th June, 2020 after taking into assumption the fact that stock of Aristo location as shared by the Respondent was actually available.

n. Subsequently, the services of the Respondent came to an end on 30th June, 2020, however, the Respondent left the premises without properly completing the handing over process as mandated under the Agreement. It is pertinent to mention that Respondent was obligated under Clause 38 of the agreement to match the physical stock with SAP stock while handing over the warehouse to new C&F agent and

indemnify/compensate the petitioner for any gap or deficiency in physical stock, if found.

o. The Respondent vide email dated 11th July 2020 shared an incomplete report, and informed Mr Deepak Ranjan that its last day as C&F Agent was 30th June 2020. In the meanwhile the report of the physical count of stock conducted on 25th June, 2020 by the new C&F Agent as well as the report forwarded by the Respondent to Mr Deepak Ranjan was received by the Petitioner. To the utter surprise and shock of the Petitioner, it was found out in the report of the new C&F agent that there was a gap amounting to Rs. 20.14 Lacs in the stock/material.

p. The Petitioner vide email dated 16.07.2020 informed the Respondent that the report submitted by him vide email dated 11th July, 2020 was not acceptable and there was a gap amounting to Rs. 20.14 Lac during the physical count of the saleable stock conducted on 25th June, 2020. Petitioner also informed the Respondent that the report of the new C&F agent was only based upon the physical verification of saleable stock at the warehouse and did not include the stocks which were informed by the Respondent to be still lying at Aristo's factory but were shown in the SAP as lying at the warehouse. The Petitioner further informed that they were waiting for the clarity from the Respondent's end for balance non saleable goods but since no clarity was coming from the Respondent, the Petitioner decided to contact the local contractor to get the saleable and non-saleable stock segregated for actual audit/count and asked the Respondent to remain present. However, the Respondent vide email dated 16th July, 2020 stated that since the report was shared after 30th June, 2020, therefore, it cannot be trusted. The Respondent tried to evade its liability on flimsy ground even though the physical count was conducted by the new C&F agent during subsistence of the Agreement with the Respondent. The Petitioner vide even dated email informed the respondent that since date of stock audit fell within the tenure of the Respondent as C&F agent, therefore, the Respondent was liable for any gap or deficiency.

q. Be that as it may, to ensure that there should not be any

doubt or confusion as to the gap between the physical count and SAP count, the Petitioner engaged a contractor and carried out another counting/audit on 22nd July, 2020 and informed the Respondent about this verification in advance. When the Petitioner did not receive any response from the end of the Respondent as to fresh verification of the entire stock, the Petitioner was forced to carry out the same at its end. This time the Petitioner verified the physical stock at the warehouse as well as the physical stock reported by the Respondent to be lying at Aristo factory. To the utter surprise of the Petitioner, this time after verification of the entire stock (warehouse and Aristo factory), the gap of saleable goods/usable goods and packages stood at Rs. 77.85 Lacs. and the main reason for the exponential increase in the gap was the fact that the stocks which the Respondent reported to be lying at Aristo factory was not available there. Pertinently, the above amount pertained to saleable material only. It is needless to add that being C&F agent it was the Respondent's responsibility to safeguard the material of our client and any deficiency in material shall be the responsibility of the Respondent since the gap is coming out from Respondent's tenure as C&F agent of the Petitioner.

r. The Petitioner in order to amicably resolve this dispute as well as remove any doubt or biasness as to the verification/audit that was conducted by local contractor on 22.07.2020, and to ensure absolute fairness vide email dated 7th August, 2020 informed the Respondent that it is conducting the audit of Vadodara warehouse by an independent third-party auditor and requested it to participate in the same. However, the Respondent vide email dated 11th August, 2020, instead of giving its consent to the independent audit suggested by the Petitioner tried to evade its liability.

s. That when the intention of the Respondent became clear that he does not intend to fulfil his liability and make good the deficiency and gap in the stock, the Petitioner through its Lawyer vide notice dated 12th August, 2020 once again informed the Respondent that it is getting audit of the stock at the warehouse, Vadodara conducted by an independent third party auditor on 17th August and 18th

August, 2020 and asked the Respondent to be either personally present or appoint its representative to participate in the audit to be conducted by "Jalpesh Gandhi & Associates, Chartered Accountants". The Petitioner further informed the Respondent that in case it does not participate in the audit, the gap reported by the independent auditor shall be final and binding upon the Respondent. However, despite receipt of aforesaid notice, Respondent deliberately failed to participate in the stock audit conducted by the auditors from 17th to 19th August, 2020 and vide Reply dated 8th September, 2020 refuted all its liabilities and sought payment of Rs. 38,09,000/- towards his alleged outstanding dues amongst others. Pertinently, the Petitioner paid an amount of Rs.6,66,166/- to one M/s Swaraj Logistics Pvt. Ltd. for providing Transport Services, Rs.6,24,400 to Mahi Enterprises for Forklift/Hydra and Rs.4,06,518 to KGN Manpower for Labour Expenses at the behest of the Respondent and the same are adjusted against the alleged outstanding of the Respondent.

t. The auditors furnished their report with respect to stock audit and as per the report the gap with respect to saleable material came to the tune of Rs. 85,71, 426.301/-. It was also found by the petitioner that due to the approval of inflated invoices towards Handling charges, Hydra and Forklift expenses etc. by Mr Deepak Ranjan, who was acting in collusion with the Respondent, Petitioner has incurred loss to the tune of Rs. 33,30,000/-. The petitioner shared the aforesaid reported gap with the Respondent vide Letter dated 12th October, 2020 which was served upon the Respondent on 14th October, 2020, and once again asked the Respondent to fulfil its liability and make good the deficiency and stock. However, the Respondent neither came forth to discharge its liability nor responded to the same till date."

2. Needless to say, the right of the respondent to refute any of the allegations contained in the aforesaid paragraphs would remain reserved.

3. The petition further states that efforts at amicable resolution of the dispute did not fructify and that, therefore, on 29th January, 2021, a notice, invoking arbitration, was issued by the petitioner to the respondent. The Arbitration Clause, in the agreement between the parties, reads thus:

“40 DISPUTE RESOLUTION, GOVERNING LAW AND JURISDICTION:

a) It is expressly agreed to/ by and between the parties that if any dispute arises between the Parties hereto during the subsistence of or in connection with, the validity, interpretation, implementation or alleged breach of any provision of this Agreement or on account of any claim by one against the other, the Parties hereto shall endeavor to settle such dispute amicably.

b) In case of failure to settle the dispute amicably as referred to in Clause 40(a), the dispute shall be referred to a Sole Arbitrator appointed by the **Company**. The decision of the Sole Arbitrator shall be final and binding on the parties. The Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and shall be conducted in English. The venue of the Arbitration shall be New Delhi.

c) This Agreement shall be interpreted and governed in all respects by the laws of India and the Courts of Delhi shall have exclusive jurisdiction to entertain and try any dispute or matter relating to or arising out of this Agreement.”

4. Clause 40(b), which vests exclusive jurisdiction on the petitioner, to appoint an arbitrator, can obviously not be enforced, as it is in the teeth of Section 12(5) of the 1996 Act read with the judgments of the Supreme Court in *Perkins Eastman Architects DPC*

*v. HSCC (India) Ltd.*¹, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*², *TRF Ltd. v. Energo Engineering Projects Ltd.*³ and *Haryana Space Application Centre v. Pan India Consultants (P) Ltd.*⁴.

5. As such, the petitioner has moved this Court for appointment of an arbitrator.

6. It is stated that the claim and counter claim, together, would be in excess of ₹ 1 crore.

7. Both learned Counsel are agreeable to the dispute being referred to the Delhi International Arbitration Centre (DIAC) to appoint an appropriate arbitrator to arbitrate thereon.

8. Accordingly, this petition is disposed of by referring the dispute between the parties to the DIAC, who would appoint a suitable arbitrator to arbitrate on the dispute. The arbitration would take place under the aegis of the DIAC and in accordance with the rules and regulations which would also apply in the matter of the fees payable to the arbitrator.

9. The arbitrator would also submit the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

¹ 2019 SCC OnLine SC 1517

² (2019) 5 SCC 755

³ (2017) 8 SCC 377

⁴ (2021) 3 SCC 103

10. The petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J

JULY 22, 2021/kr

HIGH COURT OF DELHI



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