

In The High Court At Calcutta
Civil Appellate Jurisdiction
(Commercial Division)

Present:

The Hon'ble Justice Harish Tandon.
&
The Hon'ble Justice Prasenjit Biswas

F.M.A. 1290 of 2021

MSV Laboratories Pvt. Ltd.
v.
West Bengal Essential Commodities
Supply Corporation.

For the Appellant	: Mr. Bikash Ranjan Bhattacharyya, Mr. Arup Nath Bhattacharyya, Mr. Saptarshi Banerjee, Ms. Sreetama Biswas.
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For the Respondent.	: Mr. Susanta Dutta, Mr. Sanjay Saha.
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Heard on : November 15, 2022.

Judgment on : November 15, 2022.

The Court:- A piquant situation arises in the instant appeal when the Court within the meaning of the “court” assigned under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 quashed and set aside the arbitral award made and published by the statutory Arbitral Tribunal constituted under the Micro, Small and Medium Enterprises Development Act, 2006 on the ground of non-joinder of necessary party.

Before we venture to decide the points emanate from the impugned order and heavily supported by the learned Advocate for the respondent, the undisputed facts are required to be adumbrated in order to have the clarity and understanding of the genesis of the disputes involved in the instant case.

Indubitably, the lease and service agreement was executed between the parties to the proceeding, i.e. M/s. MSV Laboratories Pvt. Ltd. and the West Bengal Essential Commodities Supply Corporation Ltd. in respect of the demised premises owned and controlled by the appellant herein. The essential feature of the said agreement can be manifestly seen from different clauses incorporated therein that the demised premises was leased out to the respondent herein for a period of nine years three months and sixteen days at a lease rent to be calculated at rupee 8.88 per quintal per month totaling the amount of Rs. 17 lakhs 76 thousand with an annual increase in rent at the rate of 33% of the percentage increased in the wholesale price index.

Clause 7 whereof further stipulates that the lessee, respondent herein, agrees to make payment of rent to the appellant through authorized bank of the lessee as per the request of the lessor till the contract remains in operation from the date of the actual possession. The other essential terms of the said agreement are more or less uniform as used to be found in a lease agreement and the respondent herein was given liberty to sub-

lease whole or any portion of the said demised premises to any party for such period as may deem fit but not exceeding the duration of the said lease. Since it was a composite agreement involving services to be rendered by the appellant, the service charges was also agreed to be paid by the lessee at such rate as may be settled by mutual negotiation.

Clause 40 of the said agreement postulates that the said demised premises shall be used for stocking of the food-grains and it was further indicated that since it is mandatory at the behest of the Food Corporation of India to maintain daily stock account by feeding data in the IISM software and transmit the same to the Central Server situated at New Delhi, it is obligatory on the part of the appellant to feed such data on daily basis. Apart from the same there is no reference in the said agreement pertaining to the Food Corporation of India though one can reasonably infer or logically deduce therefrom that such demised premises was used for keeping the food-grains belonging to the Food Corporation of India.

Admittedly the Food Corporation of India is not a party to the said agreement. Our attention is drawn to the fact that another agreement was entered into on the same day by and between the respondent and the Food Corporation of India reserving the same duration as provided in the agreement being the subject matter of disputes in the instant appeal and the corresponding obligations and liabilities in relation to the food-grains to be stored at the place provided by the respondent. In order to have the clarity and to avoid any ambiguity the appellant is not a party to the said agreement.

The dispute arises when the respondent failed and neglected to pay the lease rent and service charges in terms of the said agreement dated 27th November, 2014 and since the respondent is micro, small and medium enterprises, the dispute was referred to the West Bengal State Micro Small

Enterprises Facilitation Council, who has been entrusted to conduct the arbitration under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006. Sub-section (2) of Section 18 of the said Act provides that the said Council shall conduct the conciliation proceedings in terms of the provisions contained in Arbitration and Conciliation Act, 1996 and the similar provision in relation to an arbitration can also be seen from Sub-section (3) thereof.

The reference was entered into and ultimately culminated into an award in favour of the appellant which was further challenged by the respondent herein in an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the Court below.

As indicated in the first paragraph of the impugned judgement, the award was set aside solely on the ground of mis-joinder of necessary party. According to the learned Judge in the Commercial Court, the Food Corporation of India is a necessary party and, therefore, non-impleadment would strike at the root of the matter without indicating how the Food Corporation of India can be said to be a necessary party.

Before we proceed further to decide the said point, it would be profitable and relevant to record the fact that the claim raised by the appellant before the statutory Arbitral Tribunal has not been disputed by the respondent. The only defence which was taken against the statement of claim that since in terms of the separate agreement dated 27th November, 2014 entered into between the respondent and the Food Corporation of India, there was an obligation on the part of the Food Corporation of India to pay the said lease rent and unless such rent is paid, the respondent cannot be held liable or responsible to pay lease rent. Even in an application under Section 34 of the Act filed before the Court the aforesaid stand is reiterated in the following:

“12. It is stated that the petitioner has already submitted claim of godown rent as well as supervision charges of the godown, which has been constructed by the respondent herein under PEG Scheme, as the Supervisor of the project to the FCI. According to the claim raised, the respondent is entitled to the godown rent and the petitioner is entitled to supervision charges, once such payment is released by FCI.

13. It is stated that as the aforesaid payment/claim of the petitioner was not released by FCI, one reminder to such claim was issued by the petitioner on 21.06.2019. It is reiterated that upon release of such claim of the petitioner is released by FCI, being the Supervisor of the project, the petitioner shall release the godown rent in favour of the respondent.”

What can be deciphered from the aforesaid statements made in the pleading that the respondent has not denied the claim raised by the appellant but denied the disbursement unless the Food Corporation of India paid the amount so agreed in a separate agreement where the respondent is the signatory.

Whether the Food Corporation of India is a necessary party in an arbitral proceeding is the seminal point involved in the instant appeal.

Mr. Bhattacharyya, learned Senior Counsel, appearing for the appellant relies upon the agreement between the parties to the proceeding and submits that the Food Corporation of India being not a party thereto cannot be said to be a necessary party in the arbitral proceeding. Mr. Bhattacharyya further relies upon several Clauses of the agreement to contend that it is an obligation of the respondent to pay the lease rent and service charges and there is no stipulation which could be inferred therefrom that such payment is depended upon the corresponding obligation of a third party to the said agreement. Mr. Bhattacharyya further

submits that the arbitration proceeding is a consensual jurisdiction and, therefore, the non-signatory to the agreement cannot be regarded as a necessary party.

Per contra the learned Advocate appearing for the respondent submits that since the godown is used for keeping the food-grains belonging to the Food Corporation of India, it is a necessary party. It is further submitted that though a separate agreement was entered into between the respondent and the Food Corporation of India, yet it is inbuilt and inhered into the agreement between the appellant and the respondent, which could be inferred from the recital of the Notice Inviting Tender. It is further submitted that the proceeding would be bad for non-joinder of necessary party and, therefore, the Court below have correctly analyzed the proposition of law and set aside the award on such score alone. However, the learned Advocate for the respondent tried to contend before this Court that the dispute so raised before the Arbitral Tribunal was beyond the scope of the Arbitration proceeding or the agreement between the parties and, therefore, there is no difficulty in setting aside the award.

On the conspectus of the aforesaid submissions as already indicated the only onerous task entrusted upon us to embark a journey on the circumference of necessity to join a non-signatory to the agreement as a party.

There is no rigid rule that the non-signatory can not be regarded as party to the agreement which is dependant upon the nature of the agreement providing so and the rights flows therefrom. The non-signatory claiming any right under or through the party can still be regarded as a signatory to the agreement depending upon the facts of each case.

We intend to recapitulate the law relating to the necessary and proper party. The proper party is the one whose presence is necessary for

complete and effective adjudication of the disputes involved in the lis; on the other hand, the necessary party is the one without whose presence the dispute cannot be decided effectively and completely. The question is Whether there was any fetter on the part of the Arbitral Tribunal to decide the dispute in absence of Food Corporation of India being admittedly the non-signatory to the agreement dated 27th November, 2014 entered into between the appellant and the respondent.

Several Clauses of the agreement do not remotely suggest any obligation of the Food Corporation of India in relation to the lease rent and service charges. All the Clauses uniformly indicate the obligation of the lessee, i.e. the respondent to pay the lease rent and service charges. Even the Notice Inviting Tender does not remotely suggest that the Food Corporation of India is an implied signatory to the agreement over which the dispute has arisen. Simply because the respondent would keep the food-grains belonging to the Food Corporation of India and a separate agreement was entered into between them for the rent and other charges, it does not ipso facto make the Food Corporation of India a signatory to the agreement nor can be regarded as an entity of the respondent. It is a simple case of superior lessor, lessee and sub-lessee and, therefore, there is no privity of contract between the superior lessor and the sub-lessee. In such view of the matter since the privity of contract cannot be established between the superior lessor and the sub-lessee, such sub-lessee cannot be regarded as a necessary party.

Having held so we would be failing in our duty if we do not consider the other submissions advanced by the respondent touching upon the merit of the dispute and claims raised by the appellant. Though it is sought to be contended that some of the claims are beyond the scope of the agreement, but we do not think that such point can be agitated at this

juncture. Firstly the Arbitral Tribunal enjoins exclusive powers to interpret the agreement provided such interpretation is not perverse or beyond the legal parameters or opposed to the settled law. Even if there are possibility of two views and if the one taken by the Arbitral Tribunal, it does not invite interference by the Appellate Court or a forum having limited jurisdiction.

Section 34 of the Arbitration and Conciliation Act, 1996 provides the eventualities and the conditions where the interference to the arbitral award can be made and, therefore, cannot act as a Court of Appeal where the entire Writ is at large. The Court is to decide the application for setting aside the award within the strict contour of the conditions laid down therein and cannot act as an Appellate Court and decide every nook and corner of the factual disputes. Secondly it is not open to the respondent to raise such plea on facts in view of the categorical admission having made before the Tribunal and in an application under Section 34 of the said Act. The moment respondent admitted the claim but raised an objection that unless the Food Corporation of India pays the amount, the liability under the subject agreement does not fructify into legally enforceable right, can be regarded as an estoppel against the respondent and cannot be permitted to wriggle out of the same.

From whatever angle this Court looked at does not find that the impugned order can be supported.

The same is hereby set aside.

As a consequence the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 stood dismissed.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)