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Arb.O.P.(Comm.Div.) No.372 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2022

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Comm.Div.) No.372 of 2022

M/s.PSTS Shipping Services Private Limited,
106, H/11 Millerpuram,
Palayanmkottai Road (West),
Tuticorin - 628 008.
Represented by its Director.

... Petitioner

VS.

1.M/s.Ashray Logistics India Private Limited,
1732, 21st Main Road,
Anna Nagar, Chennai 600 040.

2.Mr.Manoj Pillai

... Respondents

PRAYER: Arbitration Original Petition filed under Section 14(1)(A) and 14(2) Read With Section 15(2) of the Arbitration and Conciliation Act, 1996, pleased to terminate the mandate of the Second Respondent and substitute the second respondent by appointing a Panel of Three Arbitrators



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as per Clause 8.2 of the Lease Rental Agreement dated 10.10.2019.

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For Petitioner : Mrs.Rajeni Ramadoss
for M/s.Rajeni Associates

For Respondent 1 : M/s.H.Adaikala Arockiaraj

ORDER

The lessee under a lease rental agreement dated 10.10.2019 has presented this petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. The petitioner states that the aforesaid agreement was entered into by the petitioner and the first respondent herein. Thereafter, the petitioner / lessee vacated the relevant premises. Disputes arose between the parties in relation to claims made by the first respondent *inter alia* for damages for not handing over the premises in reasonable condition. In relation thereto, the first respondent issued notice dated 12.04.2022 claiming a sum of Rs.6,84,750/- towards rental arrears and a sum of Rs.1,50,000/- as damages.

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Thereafter, a notice dated 02.05.2022 was issued under Section 21 of the Arbitration Act whereby the first respondent nominated its arbitrator and called upon the petitioner to nominate its arbitrator. The said notice was not replied to. The petitioner, however, issued a lawyer's notice dated 25.05.2022 and refuted the claims made by the first respondent. The nominee arbitrator of the first respondent entered upon reference as sole arbitrator and fixed the hearing by communication dated 20.06.2022. The statement of claim was filed before the arbitral tribunal and the hearing was fixed on 04.08.2022 for the receipt of the statement of defence. The present petition is filed in these facts and circumstances.

3. Learned counsel for the petitioner refers to clause 8 of the lease rental agreement, which provides for resolution of disputes by arbitration. She points out that clause 8.2 prescribes resolution of disputes by a three member arbitration panel. Therefore, it is stated that the second respondent does not have the authority to assume the role of sole arbitrator and proceed with the arbitration.



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4. Learned counsel for the first respondent referred to the communication by which the petitioner was called upon to nominate its arbitrator. Therefore, he submits that the first respondent was constrained to proceed with arbitration on account of the failure of the petitioner to cooperate in the constitution of the arbitral tribunal.

5. Clause 8 of the lease rental agreement, which provides for dispute resolution by arbitration, is set out below:

"8. Arbitration

8.1. Any and all disputes or controversies arising out of or in connection with the interpretation, performance or non-performance, or termination of this Rental agreement, shall, to the extent possible, be settled in the first instance by prompt and good faith negotiations between the parties mutually.

8.2. If the dispute cannot be settled within Thirty (30) days by mutual discussions, such dispute shall be finally settled by arbitration in accordance with the arbitration rules of the



Indian Arbitration and Conciliation Act, 1996.
The Arbitration Panel shall be of 3 (three) arbitrators, of whom each of the disputing Party shall appoint one arbitrator each and the third arbitrator shall be appointed by the two arbitrators so appointed. Any arbitral award shall be final and binding on the Parties, including the non-disputing Party. The seat of arbitration shall be Chennai. The language of the arbitration proceedings shall be in English. The Parties hereby expressly agree that Indian Arbitration and Conciliation (Amendment) Act, 2015 shall be applicable to any arbitration proceeding.

8.3. During the pendency of any arbitration, each party shall continue to perform its obligations hereunder and no party shall exercise any remedies hereunder arising by virtue of the matters in dispute."

6. Clause 8.2 undoubtedly provides for an arbitration panel consisting of three arbitrators. The manner of formation of the arbitral tribunal is also set out therein. The documents on record evidence that the first respondent



endeavoured to constitute the arbitral tribunal in accordance with clause 8.2.

By not replying to the Section 21 notice, it is clear that the petitioner failed to cooperate in the constitution of the arbitral tribunal. In such circumstances, the appropriate recourse for the first respondent was under Section 11 of the Arbitration Act. Instead of approaching this Court under Section 11, the first respondent proceeded to unilaterally constitute the arbitral tribunal in contravention of the arbitration clause in the lease rental agreement.

7. Unlike a public Court, which derives authority either from the Constitution of India or statute, an arbitral tribunal derives authority entirely from the relevant contract. Therefore, an arbitral tribunal which is constituted in contravention of the relevant contractual stipulation has no authority to proceed with the matter. Put differently, the sole arbitrator is a person *de-jure* unable to perform functions as per Section 14 of the Arbitration Act. To that extent, the petitioner is entitled to succeed.

8. It should be noticed, however, that the relevant clause enables the



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contesting parties to each nominate an arbitrator. Therefore, the arbitrator nominated by the first respondent is entitled to continue as the nominee of the first respondent. On instructions, learned counsel for the petitioner has provided the details of its nominee, namely, Mr.K.Thyagarajan, Advocate, Old No.168, Thambuchetty Street, New No.344, 2nd Floor, Chennai - 1, Mobile No.9444306847. As per the arbitration clause, the two nominee arbitrators are required to agree upon the presiding arbitrator. Once the arbitral tribunal is constituted in the manner aforesaid, the arbitral tribunal is entitled to proceed with the arbitration.

9. Subject to the above observations and conclusions, Arb.O.P.(Comm.Div.) No.372 of 2022 is disposed of without any order as to costs. Consequently, A.No.3587 of 2022 is closed.

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SENTHILKUMAR RAMAMOORTHY,J

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and A.No.3587 of 2022



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