IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.371 of 2023

Suresh Kumar
Prop.Shekhar Industries,
Kh.No.19/5/2, Vill. Kassar,
HSIIDC Industrial Estate, Tehsil Bhadurgarh,
District Jhajjar. ... Petitioner

Vs.

1.Sattva Hi Tech and Conware Private Limited,
High Gate Level 4, 153/82, Santhome High Road,
RA Puram, Chennai, Tamil Nadu – 600 028.

2.MSTC Limited,
ISPAT Bhawan, Third Floor No.5,
Kodambakkam High Road,
Chennai, Tamil Nadu – 600 034. ... Respondents

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitaror to adjudicate the disputes between the petitioner and the respondents in terms of the clause 26 of the e-bidding cum e-auction bidding process terms and conditions and to direct the respondents to pay the costs.

For Petitioner : Ms.G.Savitha and Mayan K Sharma

For Respondents : Mr.Adarsh Ramanujam

ORDER

This Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointing an Arbitrator to adjudicate the dispute between the petitioner and the respondents in terms of the clause 26 of the e-bidding-cum-e-auction bidding process terms and conditions and to direct the respondents to pay the costs.

2. The petitioner had purchased a consignment of imported goods on 02.12.2021 in an auction conducted by the second respondent. The imported goods was not cleared and was lying unclaimed with the first respondent as a custodian appointed under the provisions of the Customs Act, 1962. The second respondent acted as an auctioneer appointed by the Customs Department.

3. The petitioner took delivery of the same from the custody of the first respondent, a Container Freight Station (CFS) under a *bona fide* belief that the petitioner was indeed purchasing fully refined Paraffin Wax declared in the advertisement. After taking delivery of the goods and after paying the auction

amount together with GST components, the petitioner moved the imported goods to Haryana where, the imported goods was subjected to chemical analysis with M/s.Bahadurgarh Footwear Development Services, established under MSE-CDP Scheme of Ministry of MSME, Government of India.

4. The said M/s.Bahadurgarh Footwear Development Services has given Test Certificate on 13.01.2022 wherein, it has been stated that the sample contained "Nil" Paraffin Wax. Under these circumstances, the petitioner has issued notices to the respective respondents.

5. The terms of the auction contemplates resolution of dispute through arbitration. Relevant clauses read as under:-

> "1.SATTVA HI TECH AND CONWARE PRIVATE LIMITED, the owner/seller, will be hereinafter referred to as PRINCIPAL and MSTC Ltd., the Selling Agent of PRINCIPAL will be hereinafter referred to as MSTC. Wherever the word Buyer, Purchaser, Successful Bidder are indicated, it will be referred to as Successful Bidder.
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> 2. VALIDITY OF BIDS: All bids will be valid for acceptance upto the validity period of the Delivery Order issued by MSTC/Seller or upto the extended period of validity of the Delivery Order/Release Order in case the Delivery period is extended by the Seller at his sole discretion, as the case may be and the exercise of such discretion shall not be questioned.
>
> 3. INSPECTION: The intending bidder or his authorized representative may inspect the materials as per the schedule, between 10 AM to 1 PM only on any working day of Principal at

the location specified with the prior permission from the PRINCIPAL. The bidders/customers shall carry the photo identification card issued by MSTC, without which inspection will not be permitted. In case the bidders/customers send their authorized representative for inspection, they will be permitted subject to their producing the authorization letter and photo identification card (issued by MSTC). The detailed description of all lots including list of spare parts, if any, are available at site.

26. In the event of any disputes or differences in connection with the contract, the decision of the authorized representative of the Principal shall be final and binding on all parties. Any un-resolved issue will be referred to arbitration in terms of the provisions of the Arbitration and Conciliation Act and the Arbitrator shall be appointed by the Principal. The seat of arbitration shall be Chennai."

6. The Legal Notice dated 28.06.2022/30.06.2022 sent by the petitioner's Counsel was responded by the first respondent by a Reply dated 10.09.2022. The second respondent has also responded by a Reply dated 30.03.2022 by directing the petitioner to approach the first respondent as the second respondent was only a service provider in the auction of unclaimed/uncleared import cargos from the Custody of the first respondent.

7. The petitioner has thereafter issued a Notice under Section 21 of the Arbitration and Conciliation Act, 1996, with a request to the first respondent to nominate an arbitrator to resolve the dispute. Since there was no response, the petitioner has approached this Court. The first respondent has responded by

stating that the first respondent is not bound by the arbitration clause as the first respondent is not party to the Agreement.

8. Arguing the case on behalf of the petitioner, the learned Counsel for the petitioner has drawn attention to the above mentioned clauses to say that there is a dispute between the petitioner and the respondents herein which has to be resolved by way of an arbitration.

9. The first respondent has contested this petition by stating that the first respondent is not the actual seller. It is merely the custodian of the imported goods which was stationed in its Container Freight Station (CSF)/Warehouse after import in their premises and that the auction was carried out by the Customs Department with the help of the second respondent and the first respondent had no role to play in the sale.

10. It is further submitted that there is no valid and subsisting arbitration clause which would bind the first respondent to come for arbitration for a dispute.

11. That apart, it is submitted that it is the Customs Department which had auctioned the goods and therefore, dispute if any, has to be resolved by the petitioner with the Customs Department and not from the first respondent.

12. The learned Counsel for the first respondent has further stated that it is the Customs Department which has undertaken the auction of the imported goods in terms of Section 48 of the Customs Act, 1962.

13. The learned Counsel for the first respondent further submits that as far as the first respondent is concerned, the first respondent is governed by the terms of license issued by the Customs Department and by the Handling of Cargo in Customs Areas Regulations, 2009. It is further submitted that the regulation 6 does not contemplate any clause for arbitration of the dispute in respect of sale of goods.

14. The learned Counsel for the first respondent further submits that there is also no *consensus ad idem* in the sense and there is no contract between the petitioner and the first respondent in the auction that was contemplated on 02.12.2021.

15. That apart, it is submitted that prior to issuance of Public Notice in F.No.S.Misc.28/2018-UCC dated 10.12.2018, under similar circumstances, the Container Freight Station like the first respondent auctioning the goods independently had a right to auction the goods and therefore, there was a *consensus ad idem* in such auction that was conducted. However, after 2018, the entire auction is orchestrated by the Customs Department and therefore in absence of any contract containing the arbitration clause, the first respondent cannot be asked to go for an arbitration merely on the strength of a notification published by the second respondent appointed by the Customs Department terming the petitioner as the selling agent and terming the first respondent owner/seller as the Principal and the second respondent as the selling agent of the first respondent.

16. I have considered the arguments advanced by the learned Counsel for the petitioner and the learned Counsel for the respondents.

17. *Prima facie*, the respondents are governed by the terms of Handling of Cargo in Customs Areas Regulations, 2009. In terms of Section 48 of the Customs Act, 1962, if any goods are brought into India from a place outside India and are not cleared for home consumption or warehoused or transhipped

within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof. Thus, the first respondent has power to sell the uncleared goods. The expression, the "Customs Station" includes a Container Freight Station like the petitioner. The expression is defined in Section 2(13) of the Customs Act, 1962. It reads as under:-

> "Section 2 (13)
>
> "customs station" means any customs port, customs airport or land customs station.""

18. A person handling import and export cargo providing customs cargo services, like the first respondent governed by Regulation 6 of the Handling of Cargo in Customs Areas regulations, 2009. Regulation 6(1)(m) contemplates the Customs Cargo Service Provider like the first respondent shall dispose off the imported goods in the manner specified and within a time limit of ninety days, if the import or export goods are lying unclaimed, uncleared or abandoned. In terms of Regulations 6(1)(q), the first respondent is bound would require to abide by all the provisions of the Act and the rules, regulations,

notifications and orders issued thereunder.

19. The procedure for disposal of unclaimed/uncleared goods/cargo under Section 48 of the Customs Act has been clarified by the Commissioner of Customs, Chennai by Public Notification bearing F.No.S.Misc.28/2018-UCC dated 10.12.2018.

20. Therefore, it is not open for the first respondent to say that the first respondent is not governed by the arbitration clause although it is foisted on the first respondent by virtue of the status of the first respondent as the Container Freight Station under the Customs Act, 1962.

21. The argument that the contract is insufficiently stamped and therefore in the light of the decision of the Hon'ble Supreme Court in **N.N.Global Mercantile Private Limited** Vs. **Indo Unique Flame Limited and others**, 2023 SCC Online SC 495/(2023) 7 SCC 1, the arbitration clause contained, will not apply to the facts of the present case, cannot be countenanced.

22. Considering the above, Court is inclined to pass the following order:-

(i) **Mrs.Elizabeth Seshadri**, **Advocate, Enrollment M.S.No.726A/1996, (Cell No.98402 99520) having Office at 15/8, 7th Cross Street, Indira Nagar, Adyar, Chennai - 20,** is appointed as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties.

(ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

(iii) The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondent.

23. The Original Petition is disposed of with the above observations, leaving the parties to bear their own costs.

24. Since the Court has appointed an Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

25. The rights of the respondents to raise objections under Section 16 of the Arbitration and Conciliation Act, 1996, has been preserved.

10.10.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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