



Arb.O.P.No.58of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **25.08.2023**

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Arb.O.P.No. 58 of 2023

1. M/s.Advantech Engineering Enterprises

2. Virumandi Thevar Gunasekaran @

V.Gunasekaran

...

Petitioners

Vs.

Savani Carrying Pvt. Ltd.,

Zonal Office

No.106, Coral Merchant St.

II Floor, Manady,

Chennai – 600 001.

... Respondent

Arbitration Original Petition is filed under Section 34(2)(a)(ii) & (v), 34(2)(b)(ii), 34(2-A) read with Section 16(6) of the Arbitration and Conciliation Act, 1996, to set aside the Arbitral Award dated 23.03.2023 bearing Claim Petition No.BSA2/2022 passed by Mrs.Bina Subash, Advocate, as Sole Arbitrator and to direct the respondent to pay the costs.

For Petitioner : Ms.Dipthi Munoth A

For Respondent : No appearance



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ORDER

WEB COPY This petition has been filed to set aside the Arbitral Award dated 23.03.2023 bearing Claim Petition No.BSA2/2022 passed by the Sole Arbitrator

2. The facts of the case in brief:

The respondent / claimant is engaged in a transportation business and the petitioners have business transaction with the respondent company for several years; the respondent has alleged that they have issued several consignment notes / lorry receipts for the alleged delivery of goods from Chennai to Hosur and has raised a dispute regarding non-payment of certain dues in respect of the alleged delivery of certain goods; they also issued a legal notice on 14.07.2022 calling upon the first petitioner to settle the balance freight dues amounting to Rs.1,21,380/- and Rs.40,000/- towards extra dimension and halting charges, amounting to a total sum of Rs.1,61,318/-; subsequently on 19.08.2022 the respondent has issued a notice to the first petitioner by invoking the arbitration clause printed on the reverse side of the consignment notes / lorry receipts and unilaterally appointed an Arbitrator and the learned Arbitrator has also entered appearance.



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2.1 It is alleged that the first petitioner did not receive any Section 21 notice; no notice has been issued to the second respondent also; however on 30.09.2022, the Arbitral Tribunal commences and the respondent / claimant had filed their claim settlement and on which an arbitral award has also been passed.

2.2 Challenging the award, the petitioners have filed this petition on the ground that the award is passed contrary to law; the petitioners have alleged that they have raised objection for the unilateral appointment of Arbitrator; there is no arbitration agreement in existence; the award has been passed in conflict with the fundamental policy of law; the consignment notes are fabricated one and they do not contain the signature of the petitioners for accepting any arbitration clause; without any *consensus ad idem* no arbitration agreement could have been entered between the parties; the second petitioner has not signed any consignment notes and the signatures in consignment notes are not the authorized signatory of the first petitioner partnership firm; the petitioners have already filed a petition under Section 16 of the Arbitration and Conciliation Act challenging the maintainability of the arbitration proceedings, validity of the arbitration agreement and legality of the composition of Arbitral Tribunal; however the



said applications have been dismissed without any application of mind by the learned Arbitrator; the eleven consignment notes produced by the respondent / claimant have got separate arbitration clause but all have been dealt in one arbitration proceedings which is not correct; hence the petitioners seek to set aside the arbitral award passed by the learned Arbitrator by allowing this petition.

3. Ms.A.Dipthi Munoth, learned counsel for the petitioners, submitted that the arbitration proceedings are *per se* illegal in view of the fact that there is no arbitration agreement between the parties; the respondent did not prove before the Arbitrator that the consignment notes are relevant to the petitioners' company; the respondent had unilaterally appointed an Arbitrator and the objection raised by the petitioners have not been considered in a proper manner and the arbitration agreement has been passed on fabricated documents; the arbitral award has been passed without following the fundamental principles of law and hence that cannot bind the petitioners. The arbitral award has been challenged by the petitioners primarily on three grounds:



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- i) Non-existence of arbitration agreement;
- ii) Unilateral appointment of Arbitrator; and
- iii) Composite reference.

In support of her above contention, the learned counsel for the petitioners cited the following judgment:

i) The judgment of High Court of Delhi in Taipack Limited and Ors. Vs. Ram Kishore Nagar Mal reported in MANU/DE/8199/2007

ii) The judgment of Hon'ble Supreme Court in Perkins Eastman Architects DPC and Ors. Vs. HSCC (India) Ltd., reported in MANU/SC/1628/2019

iii) The judgment of High Court of Bombay in Lite Bite Foods Pvt. Ltd., Vs. Airports Authority of India reported in MANU/MH/3423/2019

iv) The judgment of Hon'ble Supreme Court in Duro Felguera S.A. Vs. Gangavaram Port Limited reported in MANU/SC/1352/2017

4. Though Court notice as well as private notice has been served upon the respondent, he did not appear before the Court either by himself or through any counsel.



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5. On perusal of the arbitral award passed by the learned Arbitrator, it is seen that the respondent / claimant is involved in a transportation business and the first petitioner company had availed transportation services for taking their consignment. But the freight charges as claimed by the respondent is due to be paid along with interest and with extra charges of Rs.25,000/- under several heads. The documents relied by the respondent are the consignment notes and they have been marked as Exs.A1 to A6 before the learned Arbitrator. The arbitration clause is said to be found on the backside of the consignment notes and hence it is claimed by the respondent that a valid arbitration agreement exists. However, the consignment notes are seen to be issued in the names of various persons.

6. The main contention of the learned counsel for the petitioners is that the arbitration clause found on the reverse side of the consignment notes cannot be considered as a valid arbitration clause binding upon both the parties. The consignment notes produced by the respondent is seen to have got Clause 10 wherein it is stated that the dispute between the parties shall be referred to a sole Arbitrator nominated by the respondent himself. The signature seen in the Consignment Notes in the box meant for the signature of the consignee are not similar. Unless the respondent had made



out that there is a valid arbitration agreement, the dispute could not have been referred to the Arbitrator. The arbitration clause cannot be held to be a valid arbitration agreement unless there are reasons to believe that there was a consensus between the petitioner and the respondent for agreeing to an arbitration clause. Also, the Arbitration Clause printed on the reverse of the consignment notes and signed by various persons cannot be construed as a valid arbitration clause.

7. As per Section 7(4) of the Arbitration and Conciliation Act, the Arbitration agreement should be in writing and it should be a document signed by both the parties. In this regard it is relevant to extract Section 7:

“7. Arbitration agreement. –

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the



existence of the agreement is alleged by one party and not denied by the other.

(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

So the consignment notes produced by the respondent alleged to be having the arbitration clause does not fit into the stipulations prescribed under Section 7 of the Act.

8. Before going into the merits of the binding nature of the consignment notes in respect of the consignments alleged to have been sent to the petitioners, it has to be confirmed whether the Arbitral Tribunal itself has got jurisdiction to deal with the dispute. In the case on hand, the arbitration clause does not have any binding effect on the petitioners. The authorized signatory of the first petitioner's firm did not subscribe his signature on the document containing the arbitration clause. Further the said printed clause on backside of the consignment notes does not have the signatures of the respondent also.



9. As held by the Delhi High Court in ***Taipack Limited and others***

Vs. Ram Kishore Nagar Mal reported in ***MANU/DE/8199/2007*** that the signature of a consignee or his agent found on the back side of the consignment note can be considered only as an acknowledgment of receipt of goods. So without any valid arbitration agreement, the petitioners could not be subjected themselves to the arbitration proceedings. The learned Arbitrator has been appointed unilaterally by the respondent by reserving such right upon himself through the printed clause found on the backside of the consignment notes.

10. The Hon'ble Supreme Court has held in ***Perkins Eastman Architects DPC and Ors. Vs. HSCC (India) Ltd.***, reported in ***MANU/SC/1628/2019***, that a person who is interested in the outcome of a dispute cannot be disentitled from appointing an Arbitrator. In the case on hand, the petitioners have raised objection for the unilateral appointment of the Arbitrator at the beginning of the proceedings itself.

11. The petitioners have also filed a petition under Section 16(1) (5) of the Arbitration and Conciliation Act, 1996, challenging the validity of the arbitration agreement, the constitution of the Arbitration Tribunal and the



maintainability of the arbitral proceedings and that was rejected by the learned Arbitrator. Unless the appointment of Arbitrator and the arbitration proceedings are proved to be valid, the learned Arbitrator ought not to have continued the arbitration proceedings. Despite the petitioners have submitted that they did not receive Section 21 notice, the Arbitrator had proceeded to record that the petitioners did not raise any objection for the constitution of the arbitral proceedings. Only after the petitioners came to know about the constitution of the Arbitral Tribunal, they have raised their objections and that was not appreciated.

12. The fundamental fact that there cannot be any consensus *ad idem* between the petitioners and the respondent in respect of the arbitration clause present at the backside of the consignment notes itself not considered by the Arbitrator. As held by the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC's case (cited supra)***, the petitioners are the persons who has interest in the outcome of the decision of the dispute. But the petitioners have been deprived of the power to appoint an Arbitrator on an understanding with the respondent.



13. It is the submission of the learned counsel for the petitioners that despite several transactions, only one arbitration reference has been made.

In this regard the judgment of the Hon'ble Supreme Court held in ***Duro Felguera S.A. Vs. Gangavaram Port Limited***, reported in ***MANU/SC/1352/2017***, it is held that if each agreement contains a provision for arbitration, there has to be an Arbitral Tribunal for the dispute pertaining to each agreement. Despite the respondent has raised a claim against the six consignment notes on the basis of the consignment clause alleged to be found in each of the consignment note, only one reference for arbitration has been made. Even before adverting into composite reference, adversity is seen to be existing on the penultimate stage of proving the presence of an arbitration Clause. In other words, without showing a binding arbitration clause, the existence of the arbitration agreement cannot be presumed and that itself would affect the very root of the arbitral proceedings. Hence it has to be necessarily held that the award passed by the Arbitrator is without jurisdiction and that will not bind the petitioner. In view of the reasons stated above, I feel that the award dated 23.03.2023 passed by the learned Arbitrator in Claim Petition No.BSA2/2022, is liable to be set aside.



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WEB COPY 14. Accordingly, this Original Petition is allowed and the award dated 23.03.2023 passed by the learned Arbitrator in Claim Petition No.BSA2/2022, is hereby set aside.

25.08.2023

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R.N.MANJULA, J.

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