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Arb.O.P(Com.Div.) No.63 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.03.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SAR AVANAN

Arb.O.P.(Com.Div.) No.63 of 2024

M/s.Laps N Tabs Technology Private Limited,
Represented by its Director

Devank Rastogi,
Registered Office at
C-187, Nirala Nagar, Lucknow – 226 020.

... Petitioner

Vs.

National Instructional Media Institute,
Ministry of Skill,
Post Box No.3142, CTI Campus,
Guindy Industrial Estate, Guindy,
Chennai – 600 032.

... Respondent

Prayer: Original Petition is filed under Section 11(6)(a) and (c) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to resolve the disputes between the petitioner and the respondent in terms of Clause 16 of the GTC and GEMC No.511687713884269.

For Petitioner : Ms.Anila.R
for Ms.Deepika Murali

For Respondent : No appearance



Arb.O.P(Com.Div.) No.63 of 2024

ORDER

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2. The petitioner has filed this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, after suffering an order of termination dated 21.10.2023 from the hands of the Zonal Micro and Small Enterprises Facilitation Council, Lucknow, Uttar Pradesh.

3. The petitioner appears to be a party from Lucknow, Uttar Pradesh, who had supplied Computers and Desktops Peripherals to the respondent under an Agreement/Contract (General Terms and Conditions on GeM 3.0 (Version 1.17)) dated 07.04.2021 pursuant to the tender floated by the respondent on 22.02.2021.

4. The dispute between the petitioner and the respondent is *prima facie* arbitrable under the aforesaid Agreement/Contract dated 07.04.2021.

It reads as under:-



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“Arbitration :

In the event of any question, dispute or difference arising under the terms and conditions of the contract placed through GeM, the same shall be referred to the sole arbitration by an officer nominated as Arbitrator by the Primary Buyer of the concerned Buyer Organization. It will be no objection that the arbitrator is a Government Servant and that he had to deal with the matters to which the contract relates or that in the course of his duties as a Government Servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to the contract. The arbitration shall be governed as per Indian Arbitration and Conciliation Act, 1996, as amended up to date. The place for arbitration shall be at the place from where contract has been placed by the Buyer or not the place of Primary Buyer as decided by the Primary Buyer.

In the event of the Arbitrator dying, neglecting or refusing to do so or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason, it shall be lawful for the Primary Buyer to appoint another Arbitrator in place of the outgoing Arbitrator in the manner aforesaid.

In respect of all contract placed through GeM, the dispute would not be referred or entertained by Micro and Small Enterprise Facilitation Council Consumer Forum or any other adjudication forum.

All disputes in connection with the Contract, shall be subject to the exclusive jurisdiction of the Court within the local limits of whose jurisdiction, the place from where Contract was issued is situated.

GeM SPV would not be a party to any such dispute/matter.

In case any Seller/Service provider makes GeM a party/respondent in any case involving any dispute between Buyer and Seller arising out of a concluded contract or



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arising out of bidding process initiated/concluded by the Buyer on GeM, it would be obligatory on the part of the Buyer to represent GeM also through their Counsel/Lawyer in the proceedings before the legal authority and ensure timely filling of replaces/affidavits etc provided by GeM also through their Counsel/Lawyer before the concerned legal authority during the course of litigation. A standard reply on behalf of GeM, covering following aspects shall be incorporated in all replies/affidavits filed by the Buyer in such cases:

“Government e-Marketplace is a National Public Procurement Portal; an end-to-end online Marketplace for Central and State Government Ministries/Departments, Central & State Public Sector Undertakings (CPSUs & SPSUs), Autonomous Institutions and Local Bodies, for procurement of common use goods & services. Prima facie, the dispute in the present case appears to be between the Buyer and Seller arising out a contract placed/bid credited by the Buyer and Government e-Marketplace. As per Clause 16, Clause 17 and Clause 22 of the General Terms and Conditions of Government e-Marketplace (duly accepted by the Buyer and Seller), GeM is not to be made a party to any dispute between the Buyer and the Seller. As such Government e-Marketplace is liable to be deleted from the array of parties.

In light of the above, we request your goodself to kindly delete Government e-Marketplace from the array of parties.”

5. Instead of invoking the above arbitration clause, the petitioner has



Arb.O.P(Com.Div.) No.63 of 2024

opted to file a petition before the Zonal Micro and Small Enterprises Facilitation Council, Lucknow, Uttar Pradesh on 20.08.2021, which has now culminated in the impugned Order dated 21.10.2023.

6. By the aforesaid order, the Zonal Micro and Small Enterprises Facilitation Council has dismissed the reference, which is not maintainable under the Micro, Small and Medium Enterprises Development Act, 2006 and the Arbitral Proceedings were terminated under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996. Following three issues were framed before the said Facilitation Council:

“(i) Whether the present claim is entertainable before the Facilitation Council in terms of Micro, Small and Medium Enterprises Development Act, 2006.

(ii) Whether the claimant/applicant/Supplier is entitled for the payment as claimed and further interest thereon for the delayed payment.

(iii) Whether the opposite party has failed to discharge its liabilities imposed under Section 15 of the Micro, Small and Medium Enterprises Development Act, 2006 when the opposite party has not paid the legitimate claim of the claimant as per the agreement under the work



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Arb.O.P(Com.Div.) No.63 of 2024

order issued to the claimant by the opposite party.”

7. Answering the issues, the Facilitation Council has held as under:-

“After delivery of computers, the opposite party sent an email on 05.07.2021, stating that during validation, the configuration and component of the system it was found that all the internal part like Mother Board, SMPS, HDD are local and unknown brand. Some of the essential component such DVD/RW and Graphic Card-4GB were also not supplied and the quality of cabinet, key board and mouse are not as per OEM brand standards.

It also transpires from the correspondences that since the opposite party raised objection in writing within 15 days from receiving of supply, in the view of Section 2(b) but the aforesaid objection were not removed within time by the claimant/applicant, hence the claim is not maintainable against the opposite party. As such in view of Section 2(b) of the Micro, Small and Medium Enterprises Development Act, 2016, there is no acceptance of goods by the opposite party, hence the present Reference is not maintainable under MSME Act, 2006. Hence issue no.(i) is decided against the applicant.”

8. In this background, the petitioner has now invoked the Arbitration Clause once again under Section 21 of the Arbitration and Conciliation Act, 1996 on 29.08.2023, which has been followed by reminders dated 12.09.2023 and 12.12.2023.



Arb.O.P(Com.Div.) No.63 of 2024

WEB COPY

9. The learned counsel for the petitioner has drawn attention to a reply dated 09.01.2024 of the respondent, wherein, it has been stated that the Facilitation Council has held that there was no acceptance of goods by the respondent in view of Section 2(b) of the Micro, Small and Medium Enterprises Development Act, 2006. The issue of maintainability of the very reference was negatived, as the rejection of goods/objection was made by the buyer Institute within the time frame of 15 days.

10. It has been further stated that since the reference was dismissed under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996, and therefore, the question of invoking the Arbitration Clause does not arise.

11. The learned counsel for the petitioner has drawn attention to a decision of the High Court of Delhi at New Delhi rendered in **PCL Suncon Vs. National Highways Authority of India**, (2021) 1 Arb LR 308.

12. A specific reference was made to the ratio laid therein in the context of Section 32(2)(c) of the Arbitration and Conciliation Act, 1996. The learned counsel for the petitioner would draw further attention to the



Arb.O.P(Com.Div.) No.63 of 2024

WEB COPY

decision of the High Court of Bombay rendered in **Anuptech Equipments Private Limited Vs. Ganpati Co-operative Housing Society Limited, Mumbai and others**, (1999) 3 Arb LR 231.

13. Specifically, a reference was made to the decision of the High Court of Delhi at New Delhi rendered in **Rhiti Sports Management Private Limited Vs. Power Play Sports & Events limited**, 2018 SCC Online Del 8678, wherein, it was held as under:-

“16. A plain reading of Section 32 of the Act indicates the fact that the final award would embody the terms of the final settlement of disputes (either by adjudication process or otherwise) and would be a final culmination of the disputes referred to arbitration. Section 31(6) of the Act expressly provides that an Arbitral Tribunal may make an interim arbitral award in any matter in respect of which it may make a final award. Thus, plainly, before an order or a decision can be termed as 'interim award', it is necessary that it qualifies the condition as specified under Section 31(6) of the Act: that is, it is in respect of which the arbitral tribunal may make an arbitral award.”

14. I have considered the arguments advanced by the learned counsel for the petitioner.



Arb.O.P(Com.Div.) No.63 of 2024

WEB COPY

15. The petitioner has unilaterally invoked the jurisdiction of the Zonal Micro and Small Enterprises Facilitation Council, Lucknow, Uttar Pradesh, which had in turn rejected the reference under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996, in view of explanation to Section 2(b) of the Micro, Small and Medium Enterprises Development Act, 2016. The order passed by the said Facilitation Council, Lucknow, Uttar Pradesh is not an Award which can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996.

16. By the aforesaid order, the Facilitation Council has stated that the Award was incapable of being passed and the Facilitation Council has therefore terminated the Arbitral proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996.

17. That being the case, it cannot be said that the petitioner was precluded from invoking the Arbitration Clause under the Agreement/Contract between the parties.



Arb.O.P(Com.Div.) No.63 of 2024

WEB COPY

18. The remedy under the Facilitation Council is an independent remedy available under the Micro, Small and Medium Enterprises Development Act, 2006. However, the petitioner would have invoked the jurisdiction of the MSME Council only at Chennai, if the petitioner was so aggrieved.

19. Considering the above, this is a fit case for appointing an Arbitrator notwithstanding the fact that the order came to be passed on 21.10.2023 by the Zonal Micro and Small Enterprises Facilitation Council, Lucknow, Uttar Pradesh as the proceedings before the aforesaid Forum was without jurisdiction and in any event, the Arbitral proceedings has been terminated on the ground that there was no supply of goods within the meaning of Section 32(2) of the Arbitration and Conciliation Act, 1996.

20. Considering the above, **M/s.Shirijha, Advocate, Enrollment No.MS/1036/1992, residing at No.2/669A, River View Colony, 1st Main Road, Manapakkam, Chennai – 600 125, Mobile No.99401 95896, is**



Arb.O.P(Com.Div.) No.63 of 2024

WEB COPY

appointed as the sole arbitrator to enter upon reference to resolve the *inter se* dispute between the parties.

21. 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 29A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

22. 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 respondent remains *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondent subject to the Final Award to be passed by the learned



Arb.O.P(Com.Div.) No.63 of 2024

Arbitrator.

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23. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.

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

04.03.2024

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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Arb.O.P(Com.Div.) No.63 of 2024

Arb.O.P.(Com.Div.) No.63 of 2024

04.03.2024