

ORDER SHEET
AP/801/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

EVEREST INDUSTRIES LTD.
VS
SIDDHARTH LOGISTICS CO. PVT. LTD.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 26th February, 2025.

Appearance:
Mr. Soumabho Ghose, Adv.
Mr. Zulfiqar Ali, Adv.
Ms. Tiasha Gupta, Adv.
...for the petitioner

Mr. Krishnaraj Thaker, Sr. Adv.
Mr. Supratik Basu, Adv.
Mr. Shuvam Shaw, Adv.
Mr. Arpan Ghosh, Adv.
...for the respondents

The Court:

1. This is an application for appointment of an Arbitrator on the strength of Clause 10 of the agreement between the parties dated June 1, 20217. The petitioner entered into an agreement with the respondent. As per the agreement, the respondent was to act and function as its Custom House Agent (CHA). The rights and liabilities of the parties have been enumerated under Clause 2 of the agreement. Clause 6 deals with representation and warrantees. Clause 7 is the indemnity clause. The term of the agreement was from June 1, 2017 till May31, 2018.

Admittedly, the agreement was not terminated earlier. The dispute resolution clause states as hereunder:

“10. Disputes

10.1 In the event of any dispute between the parties regarding the provisions of this agreement or any transaction effected pursuant to this agreement or otherwise arising out of this agreement including any claim of one against the other for money will be referred to arbitration of a common arbitrator if agreed upon otherwise to two arbitrators, one to be appointed by each party and the Arbitration shall be governed by the Arbitration and Conciliation Act, 1996.

2. According to the petitioner, during subsistence of the said agreement, two import consignments of the petitioner, were received by the respondent, corresponding to invoices dated December 15, 2017 and January 12, 2018 respectively. The respondent had kept the said consignments in its custody and supervision, at the warehouse situated at 28 Taratala, Kolkata – 700 088. It is the specific case of the petitioner that, out of the total goods received, 370 MT of the goods were taken out of the warehouse and transported to the petitioner. Such invoices have been annexed to this application as Annexure-B thereto. Further case of the petitioner is that, an email was received on March 13, 2018 from the respondent, inter alia, stating that the warehouse was sealed by the Kolkata Port Trust and the goods could not be released in favour of the petitioner. The email also, inter alia, stated that a litigation was going on at the Alipore Court. According to the petitioner, access to the goods

were denied. The petitioner had the right to be indemnified the losses and damages, suffered on account of non-delivery of the goods by the CHA, which were stored at the warehouse of the respondent. Accordingly, the petitioner invoked arbitration. The respondent denied such invocation on the ground that the dispute was not covered by the arbitration clause.

3. Mr. Thaker, learned Senior Advocate, appearing on behalf of the respondent relies on the affidavit-in-opposition filed by the respondent and submits that the specific case of the respondent was that the agreement did not pertain to warehousing. The dispute, if any, between the parties was with regard to the warehousing of the goods and non-delivery of the same from the warehouse of the respondent. Reliance is placed on Clause 1.1 of the said agreement in support of the contention that, the agreement pertained to clearing of the goods imported by the company from time to time from Kolkata Port. The job of the CHA originated and ended with the activities within the port, which included receipt of the goods, receipt of requisite documents and other compliances with the customs department and also transportation of the goods. Clause 2.3 is referred, to demonstrate the exact nature of the functions of the CHA. The CHA was required to do all the necessary filing and assessment of import documents with the customs authorities, arrange for customs examinations and complete all formalities at the port and also clear the cargo.

4. According to Mr. Thaker, the respondent was to coordinate with the nominated transporters of the company for timely despatch of the materials cleared at the port. The CHA would arrange for de-stuffing of cargo and loading into the trucks of the nominated transporters of the company. The documents pertinent to such import consignment were to be handed over to the nominated transporter. After de-stuffing of cargo and loading the same into the trucks of the nominated transporters of the company, the CHA was to intimate the company that the goods imported were cleared from the customs barrier. If goods were withheld by the customs or by any other authority for infringement of any law, the CHA was required to give intimation to the company to enable to company to take necessary action. Such mechanism has been provided in Clause 2.8. Clause 3.1 has been specifically emphasised by Mr. Thaker in support of his contention that, the storage was to be made with World Window CFS, a custom bonded freight Station and not at the respondent's warehouse.
5. Taking the Court through the pleadings, Mr. Thaker submits that the grievance of the petitioner arose out of non-compliance of Clause 6 of the said agreement. Clause 6 of the said agreement deals with representations and warrantee. The nature of grievance and the disputes raised by the petitioner do not indicate that the petitioner suffered any loss or injury on account of breach of the subject agreement. The petitioner cannot demonstrate from the facts that the

respondent had breached the representations and warranties as laid down in the said agreement.

6. Having heard learned counsel for the respective parties, this Court finds that the dispute resolution clause is wide enough to bring within its ambit, all disputes arising out of the agreement or any transaction effected pursuant to the agreement or otherwise, arising out of the said agreement, including any claim of one against the other for money.
7. The invocation is not in dispute, but the dispute is with regard to arbitrability. According to Mr. Thaker, this Court should make a prima facie enquiry as to whether the dispute resolution clause would cover the nature of claim of the petitioner. It is an admitted fact that, during the subsistence of the said agreement, the consignments were received at the Port. Although Mr. Thaker has urged that the warehousing arises out of a separate agreement, nothing transpired from the affidavit-in-opposition that was filed, as to the existence of any such further agreement entered into between the parties. It is also an admitted fact that, the warehouse has been used to store those two consignments which were imported by the petitioner and which were to be cleared by the respondent as the CHA under the said agreement. There is nothing on record to show that any other subsequent agreement had been entered into by the parties, with regard to warehousing of goods and that the goods which were stored were not part of the consignments which were to be cleared under the subject agreement. The submission

of Mr. Thaker on this issue of warehousing of goods other than those covered by the subject agreement has to be proved by leading evidence.

8. The contention of Mr. Ghose that, between the period of de-stuffing and loading of the goods on the vehicles of the transporters provided by the company, the goods were stored at the warehouse and the respondent was bound to indemnify any loss, damage or delay caused in the delivery of the goods, again is a matter of evidence. Whether the same goods which were received and cleared in terms of the CHA agreement were temporally stored in the warehouse and whether such process was the usual practice being followed prior to loading the trucks, is again a matter of evidence. Clearance of cargo is one of the obligations of the CHA which is available from the agreement. Storage at the custom bonded freight station occurs when the goods are stopped by the customs authorities or by any other department. What happens to the goods upon clearance from customs and until loading of trucks are matter of evidence. The fact that some of the goods which were received at the port were cleared out of the warehouse, is evident from the record and the invoices have been annexed to this application. The existence of an arbitration clause is satisfied in this regard. Further probe into the terms and conditions of the agreement, whether the terms and conditions would also cover the issue of storage at the warehouse and the effect of non-delivery of the goods on account of the premises being sealed by Kolkata Port Trust, are all matters of evidence and are to be adjudicated by the learned Arbitrator.

9. Mr. Thaker relies on the decision of *Indian Oil Corporation Limited versus NCC Limited* reported at (2023) 2 SCC 539. It was held that the scope of restricted and limited review by the referral court was essentially to check and protect parties from being forced to arbitrate, when the matter was demonstrably non-arbitrable. The referral Court should cut off the deadwood. However, the Court, by default, should refer the matter when contentions relating to non-arbitrability were plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts were contested; when the party opposing arbitration adopted delaying tactics or impaired the conduct of arbitration proceedings.
10. The facts as narrated hereinabove and the observation of the Court clearly indicate that the issue of non-arbitrability is arguable. This is not the stage to hold an elaborate investigation by weighing evidence. It would be usurping the jurisdiction of the Arbitral Tribunal. The parties agreed to refer the disputes to arbitration. Moreover, further enquiry would also amount to the Court attempting to interpret the contract and as to how the parties understood the same. This, in my view, is again within the domain of the learned Arbitrator and the duty of the referral court is to affirm and uphold the integrity and efficacy of arbitration, as an alternative dispute resolution mechanism.
11. Under such circumstances, the contentions of Mr. Thaker at this stage are not gone into further and are left open to be taken before the learned Arbitrator.

12. All issues with regard to the jurisdiction, arbitrability, limitation etc. can be raised before the learned Arbitrator.
13. Accordingly, the application is disposed of by appointing Mr. Suman Kumar Dutt, learned Senior Advocate as the learned Arbitrator to arbitrate upon the disputes between the parties. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.
14. The learned Arbitrator shall fix his remuneration in terms of the Schedule of the Act.
15. AP/801/2022 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)