HIGH COURT OF JAMMU & KASHMIR AND LADAKH
(COMMERCIAL DIVISION)
AT SRINAGAR

Reserved on: 11.12.2024
Pronounced on: 20.12.2024

Arb P. No.30/2023

JAMKASH VEHICLEADS
KASHMIR PVT LIMITED & ANR **...PETITIONER(S)**

Through: - Mr. Areeb Kawoosa, Advocate, with
Mr. Aatir Kawoosa, Advocate.

Vs.

M/S WUERTH INDIA PVT. LTD. & ANR

....RESPONDENT(S)

Through:- Mr. A. R. Dhar, Advocate.

CORAM: **HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

JUDGMENT

1) The petitioners, through the medium of present petition under Section 34 of the Arbitration and Conciliation Act, have challenged award dated 10.04.2023 passed by the learned Arbitrator, whereby the respondent/claimant has been held entitled to recover an amount of Rs.25,20,969/ along with interest @8% per annum from 31.08.2021 till the date of its realization, from the petitioner company.

2) As per case of the petitioners, in the year 2015, they started purchasing automotive accessories from the respondent company. It has been claimed that without the authorization of the petitioner company, its previous

General Manager entered into an agreement on behalf of the petitioner company with the respondent company on 13th June, 2018. The agreement was valid for a period of two years from 1st October, 2017. According to the petitioners, the petitioner company continued to purchase the automotive accessories from the respondent company upto the year 2021. However, when the company did not make any profit on the goods and services supplied by the respondent company, they stopped doing business with it. It has been claimed that in the year 2021, it came to the knowledge of the petitioner company that its previous General Manager had unauthorizedly executed an agreement with the respondent company.

3) On 18.04.2023, the petitioner company is stated to have received the impugned award dated 10.04.2023, which has been passed by respondent No.2-Arbitrator. It has been submitted that the impugned award has been passed by respondent No.2 in exparte without any authority or jurisdiction.

4) The petitioners have challenged the impugned award on the ground that agreement dated 13th June, 2018, which contains the arbitration clause, has not been validly executed by the petitioner company, inasmuch as it has not been executed by an authorized person. It has been further contended that as per Clause (16) of the said agreement, the disputes were required to be referred to the sole Arbitrator mutually agreed upon by the parties or appointed by the Court under Arbitration and Conciliation Act, 1996 and it was further provided that the venue of arbitration would be at Srinagar, but in the instant case, respondent No.1 has unilaterally appointed respondent No.2 as the Arbitrator and the arbitration proceedings have been conducted at Greater Noida (UP). It has been further contended that as per Clause (18) of the agreement, the arbitration venue and courts in Srinagar were alone given jurisdiction to decide the unresolved disputes or differences between the parties but in the instant case, the aforesaid clause stands contravened. On these grounds, the petitioners have sought setting aside of the impugned award.

5) Respondent No.1 has filed its reply to the petition, in which it has been submitted that agreement dated 13.06.2018 was executed by the General Manager of the petitioner company and there is nothing on record to show that he was not having authorization to do so. It has been further submitted that the respondent company fulfilled all its obligations towards the petitioner company. It has also been submitted that after May, 2019, the petitioner company discontinued to procure the products from the respondent company. It has been contended that the petitioner company failed to clear the past dues, as a result of which the respondent company issued a legal notice of demand dated 31.08.2021 upon the petitioner company seeking recovery of any amount of Rs.25,20,969/ from it but in spite of receipt of the said notice, the petitioner company did not clear the outstanding dues. It has been further submitted that vide notice dated 29.09.2021, respondent No.1 invoked the arbitration clause and appointed respondent No.2 as the Arbitrator for adjudication of disputes between the parties. It has been further claimed that not only the notices issued by respondent No.1 to the petitioner company and the invocation letter were served upon the petitioner company but even the communications addressed by the Arbitrator to the petitioner company were duly received by it but the petitioner company failed to respond to the same. Therefore, the petitioners cannot now turn around and raise any grievance against the impugned award.

6) I have heard learned counsel for the parties and perused record of the case.

7) Before testing merits of the rival contentions of the parties, it would be apt to notice as to in what circumstances the award passed by an Arbitrator can be set aside. In this regard, sub-section (2) of Section 34 of the Arbitration and Conciliation Act is relevant to the context and the same is reproduced as under:

> *(2) An arbitral award may be set aside by the Court only if--*
>
> *(a) the party making the application [1][establishes on the basis of the record of the arbitral tribunal that]--*
>
> *(i) a party was under some incapacity, or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
>
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*
>
> *(b) the Court finds that--*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
>
> *(ii) the arbitral award is in conflict with the public policy of India.*
>
> *Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--*

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

8) From a perusal of the aforesaid provision, it is clear that an application for setting aside of award passed by an Arbitral Tribunal can succeed if it is established that a party was under some incapacity or the arbitration agreement is not valid, or the party making the application was not given a proper notice of appointment of Arbitrator or of the arbitral proceedings, or the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters not submitted to arbitration or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. An arbitral award can also be set aside if the Court finds that the subject matter of the dispute is not capable of settlement by the arbitration or the arbitral award is in conflict with public policy of India. It has been explained that an award would be in conflict with public policy of India if making of the award was induced or affected by fraud or the same is in contravention with the fundamental policy of Indian law or it is in conflict with most basic notions of morality or justice.

9) With the aforesaid legal position in mind, let us now test the grounds of challenge raised by the petitioners for impugning the arbitration award dated 10.04.2023. The first ground of challenge raised by the petitioners is that the agreement, which contains the arbitration clause, was executed by a person who was not authorized to do so. In this regard, if we have a look at agreement dated 13.06.2018, a copy whereof is on record, it is revealed that the same has been signed by the General Manager of the petitioner company on its behalf.

10) As per Annexure-4 to the said agreement, the permit assigns of the petitioner company are:

(1) Majority shareholding promoter or promoters;

(2) Any Director authorized by the majority shareholding promoter or promoters;

(3) Any Director authorized by Board of Directors;

(4) Internal Controller;

(5) Head of Finance;

The aforesaid permitted assigns had the authority to sign or amend the agreement and to add annexures to the agreement. It is also provided in terms of the agreement that any two assigns should sign the agreement.

11) In the instant case, as already stated, the agreement on behalf of the petitioner company has been signed by the General Manager only. Even if we interpret the 'internal controller' who is a permitted assign, to mean 'General Manager' of the petitioner company, still then one more assign had to put his signatures on the agreement, which is not the case here. Thus, the contention of learned counsel for the petitioners that agreement dated 13.06.2018 has not been signed by a proper authority on behalf of the petitioners, appears to be well founded.

12) But then there is another aspect of the matter which is required to be noticed. As per own case of the petitioners, they continued to purchase automotive accessories from the respondent company till 2021, meaning thereby that the petitioners, by entering into transaction with the respondent company for all these years, have ratified the acts of the General Manager even though he was not authorized to sign the agreement singularly. Therefore, it does not lie in the mouth of the petitioners to say that they are not bound by the terms and conditions of agreement dated 13.06.2018.

13) That takes us to the second contention of the petitioners that the Arbitrator was ineligible to enter upon the reference because his appointment is in contravention to Clause (16) of the agreement. In this regard it would be apt to notice Clause (16) of the agreement, which reads as under:

> **16.Resolution of Disputes**: All disputes and differences of any kind whatsoever, arising out of or in connection with this offer or in the discharge of any obligation arising under this offer (whether during the course of execution of any order or after the completion and whether beyond or after termination, abandonment or breach of agreement) shall be resolved amicably. In case of failure to resolve the disputes and differences amicably, the matter may be referred to a sole arbitrator mutually agreed upon between the parties or appointed by court under Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be governed by Arbitration and Conciliation Act, 1996. The venue for such arbitration will be Srinagar.

14) From a perusal of the aforesaid clause, it is clear that the differences and disputes between the parties were to be referred to the sole Arbitrator mutually agreed between the parties or appointed by the Court under Arbitration and Conciliation Act.

15) In the instant case, respondent No.1 has, vide its letter dated 29.09.2021, invoked the arbitration clause and appointed respondent No.2 as an Arbitrator. In the said letter, it has been stated by respondent No.1 that its authorized signatory, being personally designate and having powers to act as per arbitration clause, invokes arbitration clause and appoints respondent No.2 as Arbitrator to adjudicate upon disputes between the parties.

No consent has been given by the petitioner company to the aforesaid action of the respondent company. The arbitration clause nowhere authorizes the authorized signatory of the respondent company to appoint an Arbitrator unilaterally. It is not a case where respondent No.1 had sought consent from the petitioner company about the appointment of a particular person as an Arbitrator before appointing the Arbitrator but it is a case where the respondent company has unilaterally appointed respondent No.2 as an Arbitrator and informed the petitioner to participate in the arbitration proceedings. Not only this, it has been conveyed to the petitioner company that the Arbitrator so appointed has also conveyed his acceptance and, in fact, a perusal of the copy of letter dated 29.09.2021 placed on record by respondent No.1, shows that it even contains the acceptance of respondent No.2. Thus, everything has been done by respondent No.1 unilaterally without seeking prior consent of the petitioners. This is in gross violation of the terms of Clause (16) of the agreement (supra). Thus, respondent No.2, having not been appointed as an Arbitrator in accordance with the terms of Clause (16) of agreement dated 13.06.2018, was ineligible to enter upon the reference and pass the impugned award.

16) Learned counsel for the respondents has argued that a series of notices were received by the petitioner company from the respondent company as well as from the Arbitrator but it did not respond to these notices. On this basis, it is being contended that from the conduct of the petitioner company, it can be inferred that it has expressed its no objection to the appointment of Arbitrator and the arbitration proceedings conducted pursuant thereto.

17) I am afraid, the contention of learned counsel for the respondents cannot be accepted because once an Arbitrator is held to be disabled or ineligible to act, it is not even necessary to examine the question whether the party in disagreement with the appointment had raised any objection to his appointment even if such a party had participated in the arbitral proceedings. Thus, the argument of the respondents that the petitioner company had waived its right by its conduct by not responding to the notices of the respondent company or to the notices of respondent No.2, cannot be countenanced in law. In my aforesaid view, I am supported by the ratio laid down by Delhi High Court in the case of **Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat,** 2023 SCC OnLine Del. 3148. The award passed by an ineligible Arbitrator is liable to be set aside.

18) Apart from the above, the arbitral proceedings in the instant case were conducted at Greater Noida (UP) whereas, in terms of Clauses (16) and (18) of agreement dated 13.06.2018, the proceedings were to be conducted at Srinagar only and the Courts other than the Courts at Srinagar were excluded from exercising their jurisdiction in respect of the disputes between the parties. Therefore, neither the composition of Arbitral Tribunal was in accordance with the terms of the agreement executed by the parties nor the arbitral procedure was conducted in the manner as provided in the terms of the aforesaid agreement. In view of the provisions contained in clause (v) of sub-section (2) of Section 34 of the Arbitration and Conciliation Act, the impugned award passed by the Arbitrator is not sustainable in law, on this ground as well.

19) For the foregoing reasons, the petition is allowed and the impugned award passed by respondent No.2 is set aside.

(SANJAY DHAR)
JUDGE

Srinagar,
20.12.2024
"Bhat Altaf-Secy"

Whether the order is reportable: **Yes**