

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:18.02.2022

+ **O.M.P. (COMM) 470/2019**

SHINE TRAVELS & CARGO PVT. LTD. Petitioner

versus

**MITISUI PRIME ADVANCED COMPOSITE
INDIA LTD.** Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Manashwy Jha & Mr A.K. Pandey,
Advocates.

For the Respondent: Mr R. Jawaharlal, Mr Siddharth Bawa, Mr
Anuj Garg and Mr Mohit Sharma, Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. Shine Travels and Cargo Pvt. Ltd. (hereafter '**Shine**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an arbitral award dated 06.08.2019 (hereafter '**the impugned award**') delivered by an Arbitral Tribunal comprising of Justice (Retired) K.S.P. Radhakrishnan as the Sole Arbitrator (hereafter '**the Arbitral Tribunal**').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Service Agreement dated 09.08.2011, whereby the petitioner had agreed to manage and operate a warehouse for the respondent company (hereafter '**Mitsui**') in Neemrana, Rajasthan.

3. Shine claims that Mitsui had set up a factory at Neemrana, Rajasthan in the year 2008 for manufacturing plastic components used in automobiles. It had approached Shine for managing and operating a warehouse for its factory. According to Shine, the controlling unit for managing the warehouse required specialized workers and domain knowledge.

4. The parties entered into a Service Agreement dated 01.09.2008 for the aforesaid purpose, which was extended by the parties on 16.09.2010. Shine claims that, thereafter, the parties extended their agreement by entering into a fresh Service Agreement dated 09.08.2011 (hereafter the '**Agreement**'). In terms of the Agreement, Shine agreed to render the services for a period of three years with effect from 01.09.2011.

5. The term of the Agreement expired on 31.08.2014. However, Shine claims that on the strength of the Agreement, Mitsui continued to avail the services even after 31.08.2014.

6. Shine claims that it repeatedly requested Mitsui to enter into a fresh agreement with increased charges. However, the parties did not execute any further agreement. Notwithstanding the same, Shine

continued to render the services and Mitisui continued to avail of the same till 15.01.2015. Shine claims that it was understood between the parties that the services rendered after 31.08.2014 would be at a consideration increased by 30%.

7. Shine claimed that it raised twenty-seven invoices for an aggregate amount of ₹1,25,03,633.58/-, against which Mitisui paid an amount of ₹98,23,706.36/- but failed and neglected to pay the balance amount of ₹26,79,927.22/-. In addition, Shine claimed that Mitisui breached the 'Confidentiality Clause' under the Agreement and recruited Shine's trained employees and human resources, who were involved in providing the services, on the payrolls of their newly appointed contractor. This adversely affected Shine's business and resulted in it incurring losses.

8. In addition, Shine claimed that it had, on the strength of its employees, hired warehouses in Mumbai, Delhi, Bangalore and Calcutta and paid huge rentals from the year 2009 to 2015. However, eighteen of its employees, who were engaged in providing the specialised services, left their employment with Shine and joined Mitisui resulting in Shine suffering a loss of ₹3,24,46,422/-.

9. Shine invoked the arbitration agreement as embodied in Clause 14 of the Agreement by its notice dated 29.09.2015. It, thereafter, approached this Court by filing an application under Section 11(6) of the A&C Act. Mitisui opposed the said application. However, this Court passed an order dated 27.07.2016 appointing an Arbitrator. Mitisui

impugned the said order before the Supreme Court and the Supreme Court passed an order dated 15.01.2018 appointing Justice (Retired) K.S.P. Radhakrishnan as the Sole Arbitrator.

Arbitral Proceedings

10. Shine filed the Statement of Claims before the Arbitral Tribunal raising four claims: (i) a claim of ₹26,79,927.22/- as amount due towards the services rendered from 01.09.2014 to 15.01.2015 (Claim A); (ii) interest at the rate of 18% per annum on the aforesaid amount of ₹26,79,927.22/- (Claim B); (iii) a claim of ₹3,24,46,422/- on account of loss on investments made in respect of warehouses in Delhi, Kolkata, Bangalore and Mumbai (Claim C); and (iv) a claim of ₹18,53,00,000/- towards loss and damages suffered on account of breach of the Confidentiality Clause (Claim D).

11. The Arbitral Tribunal had rejected the aforesaid claims by the impugned award.

Submissions

12. At the outset, Mr Jha, learned counsel appearing for Shine, confined the challenge to the impugned award to the extent that the Arbitral Tribunal had rejected Shine's claims (Claim A, Claim B and Claim D). He stated that Shine was not challenging the decision of the Arbitral Tribunal to reject Shine's claim for recovery of an amount of ₹3,24,46,422/- (Claim C).

13. Mr Jha submitted that the Arbitral Tribunal had rejected Shine's claim for payments due after 31.08.2014 on the ground that the same were not arbitrable as they were beyond the term of the Agreement. He submitted that the Arbitration Agreement would survive the termination of the principal Agreement and therefore, the Arbitral Tribunal was required to adjudicate the disputes even though the same related to the period after the expiry of the term of the Agreement. He referred to the decisions of the Supreme Court in *N. Srinivasa v. Kuttukaran Machine Tools Limited: (2009) 5 SCC 182* and *Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd.: (2008) 1 SCC 503*, in support of his contention. He submitted that the Arbitral Tribunal also failed to consider the material on record including the testimony of Shine's witness (CW-1). The said witness had affirmed that the outstanding arrears of ₹26,79,927.22/- (claimed as Claim A) also included arrears for the period prior to 01.09.2014 but the same were not mentioned in the legal notice issued on behalf of Shine. He contended that the Arbitral Tribunal had rejected Shine's claim on the basis of forged bills produced by Mitisui. He stated that Shine's second witness (CW-2) had clearly stated that he had not signed the bills produced by Mitisui. CW-2 was not cross-examined on the said aspect and there was no adjudication as to whether the invoices produced by Mitisui were genuine or forged.

14. Insofar as Shine's Claim D – being a claim for loss on account of breach of the Confidentiality Clause by Mitisui, is concerned – Mr Jha submitted that the Arbitral Tribunal had failed to appreciate the

evidence on record and Mitisui's reply dated 29.09.2015 to Shine's legal notice. He submitted that a plain reading of the said response would indicate that Mitisui had not disputed that the employees of Shine had joined the new contractor engaged by Mitisui. This, according to him, established that Mitisui had breached the Confidentiality Clause in the Agreement.

Reasons and Conclusion

15. The controversy in the present petition, essentially, relates to the claim made by Shine for recovery of an amount of ₹26,79,927.22/- (Claim A) and its claim for a sum of ₹18,53,00,000/- as loss and damages for breach of the Confidentiality Clause (Claim D). Claim B is for interest on the amount as claimed under Claim A. Since the Arbitral Tribunal had rejected Shine's claim for recovery of an amount of ₹26,79,927.22/- (Claim A), the question of awarding any interest did not arise.

16. The first question to be examined is whether the decision of the Arbitral Tribunal to reject Claim A is patently illegal. It is important to examine the averments made by Shine, in support of its claim for an outstanding amount of ₹26,79,927.22/-. Shine had stated that Mitisui had availed the services after 31.08.2014 on the strength of the Agreement, even though the same had come to an end. Shine acknowledged in unambiguous terms that the term of the Agreement had come to an end. However, it claimed that it had requested Mitisui to execute a fresh agreement with an increase in prices but the same was

not done. Shine pleaded that “*admittedly no fresh agreement came into existence but it is a matter of record that the Respondent [Mitsui] availed the services of the Claimant (Shine) till 15.01.2015*”.

17. Shine claimed that Mitsui had conveniently availed the services “*without finalising any new Agreement*”.

18. A plain reading of the Statement of Claims indicates that Shine had asserted that it was entitled to be paid for the services rendered after 31.08.2014 at an increased price of 30% above the rates, as agreed under the Agreement. Shine claimed that it had issued as many as twenty seven invoices for a total consideration of ₹1,25,03,633.58/- and against the same, Mitsui had paid an amount of ₹98,23,706.36/- leaving a balance of ₹26,79,927.22/-.

19. Claim A, as articulated by Shine in its Statement of Claims, is reproduced below:

“Claim A

Recovery of amount of Rs.26,79,927.22 (Rs. Twenty Six lacs Seventy Nine Thousand Nine Hundred Twenty Seven and Paise Twenty Two Only). This amount is towards the service rendered from 01st September 2014 to 15th January 2015.”

20. It is clear from the above that Shine had not made any specific claim for the amounts due for the services rendered under the Agreement. However, it had pleaded that it had raised invoices ₹1,25,03,633.58/- and against the same, Mitsui had paid an amount of ₹98,23,706.36/- leaving a balance of ₹26,79,927.22/-.

21. The documents filed by Shine along with its Statement of Claims it provided a break-up of the amount of ₹26,79,927.22/-. The tabular statement indicated that twelve invoices out of the twenty seven invoices as raised by Shine pertained to a period prior to 31.08.2014. According to Shine, the said invoices had not been paid in full.

22. Mitisui had contested the said claim. It had pointed out that Shine's contention that an amount of ₹26,79,927.22/- was outstanding, in respect of the services rendered during the period 01.09.2014 to 15.01.2015, was erroneous and inconsistent with the statement annexed by Shine along with the Statement of Claims. Mitisui pointed out that out of the sum of ₹26,79,927.22/-, an amount of ₹11,49,547/- pertained to the period June, 2013 to August, 2014 and the balance amount of ₹15,30,382/- was in respect of the period 01.09.2014 to 15.01.2015.

23. Thus, undisputedly, Shine's claim for a sum of ₹11,49,547/- was arbitrable.

24. Mitisui had produced invoices, which it claimed that it had received from Shine. It had also produced the statements of its bank accounts to show that it had paid the said invoices. The Arbitral Tribunal had accepted Mitisui's contention.

25. It is also apparent that there was a dispute as to whether the invoices produced by Mitisui for the services rendered prior to 31.08.2014 were genuine. Sh OM Dutt (CW-2) who is stated to have signed the invoices produced by Mitisui had affirmed that he had not signed those invoices and his signatures were forged. He was cross

examined and his testimony is consistent with the affidavit affirmed by him

26. This controversy has not been addressed by the Arbitral Tribunal. There is no finding to the effect that the invoices relied upon by Shine were not genuine and the invoices produced by Mitisui were the genuine invoices and not forged. A decision in this regard would be dispositive of whether any amounts of arrears would be due to Shine in respect of the services rendered prior to 31.08.2014.

27. In its rejoinder filed before the Arbitral Tribunal, Shine had asserted that Mitisui had forged the signatures of Sh. Om Dutt on various invoices and had committed the offence of perjury. It also asserted that Shine had carried forward the outstanding dues of the Financial Year 2013-14 to the Financial Year 2014-15.

28. It is, thus, clear that the Arbitral Tribunal has not addressed the principal dispute in respect of short payment of invoices for the services rendered prior to 31.08.2014.

29. Mr R. Jawaharlal, learned counsel appearing for Mitisui, submitted that the Arbitral Tribunal had not expressly referred to the dispute whether the invoices raised by Mitisui were genuine or forged. However, it is apparent from the impugned award that the Arbitral Tribunal had accepted the same as genuine and rejected Shine's contention that the same were forged. He referred to Paragraph 28 of the impugned award where the Arbitral Tribunal had referred to the copies of the invoices filed by Mitisui and noted that the same had been

cleared from Mitisui's bank accounts. The Arbitral Tribunal had concluded that the same established that Shine had received the payment for the period prior to 31.08.2014. He had also referred to the decision of the Supreme Court in *Dyna Technologies (P.) Ltd. v. Crompton Greaves Ltd.:* (2019) 20 SCC 1 and, on the strength of the said decision, submitted that even though the reasoning of the Arbitral Tribunal is not explicit, it is intelligible and therefore, no interference with the arbitral award would be warranted.

30. This Court is unable to accept the aforesaid contention. As noticed above, Shine had expressly pleaded that it had raised twenty seven invoices for an aggregate amount of ₹1,25,03,633.58/- and had received a payment of ₹98,23,706/- from Mitisui against the said invoices. Thus, an amount of ₹26,79,927.22/- was outstanding and payable. It had also provided the details of the invoices. Mitisui had produced a separate set of invoices for the services rendered prior to 31.08.2014, which were in variance with the invoices as relied upon by Shine. Shine had contested the said invoices and claimed that they were forged. Shine's witness (CW-2), who had purportedly signed the invoices as produced by Mitisui, had denied that he had signed the same and affirmed an affidavit that his signatures appearing on the invoices were forged.

31. In the given facts, it was necessary for the Arbitral Tribunal to address the said dispute. However, the Arbitral Tribunal neither adverted to the controversy regarding variance in the invoices nor returned a clear finding rejecting Shine's claim that the invoices

produced by Mitisui were forged. The Arbitral Tribunal did not advert to the evidence led by Shine in this regard or provided any reason for rejecting the same.

32. In view of the above, the Arbitral Tribunal's decision to reject Shine's claim for payment of amounts outstanding for the services rendered prior to 31.08.2014 (a sum of ₹11,49,547/-), cannot be sustained.

33. Insofar as Shine's claim for services rendered for the period 01.09.2014 to 15.01.2015 is concerned, the Arbitral Tribunal had found that the said disputes were not arbitrable. This Court concurs with the aforesaid view. Admittedly, the term of the Agreement had ended. Thus, the claim for payment for the services rendered after 31.08.2014 was clearly outside the scope of the Agreement. In terms of Clause 14 of the Agreement, the Arbitration Clause is confined to matters arising out of or under the Agreement. Thus, clearly the Arbitral Tribunal had no jurisdiction to decide any claim for services rendered after the term of the Agreement had elapsed on 31.08.2014.

34. There is no cavil to the proposition that the Arbitration Agreement would survive termination of the Agreement. Thus, notwithstanding that the term of the Agreement had expired by efflux of time, the disputes between the parties arising out of or in connection with the Agreement, would fall within the scope of the Arbitration Agreement. However, that does not mean that the scope of the Arbitration Agreement would also include disputes that had not arisen

under the Agreement or in connection thereto. The scope of the Arbitration Clause is determined on the terms of the Arbitration Agreement, which in this case was confined to the disputes arising out of or in connection with the Agreement.

35. The decision in *N. Srinivasa v. Kuttukaran Machine Tools Limited* (*supra*) and *Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd.* (*supra*) as relied upon by Mr Jha has no application in the facts of the present case.

36. The second question to be addressed is whether the decision of the Arbitral Tribunal to reject Shine's claim for a sum of ₹18,53,00,000/- as loss and damages caused due to breach of the Confidentiality Clause, is illegal or unsustainable.

37. Shine had premised its claim on Clause 6 of the Agreement, which reads as under:-

“6. CONFIDENTIALITY

In performing the Service SHINE and their respective employees shall at all times safeguard all information in relation to prices, customers profile, manufacturing equipments, materials, guidelines, processes, techniques, and resources that may be conveyed by ACI directly or indirectly to SHINE and shall not disclose or divulge it to any other party for the Duration of this Agreement and after the expiry thereof.

Each party shall keep in strict confidence the terms and conditions of this Agreement as well as any information relating to the other which has come to the knowledge of such party in the execution or performance of this

Agreement and shall not disclose or divulge it to any other party for the Duration of this Agreement and after the expiry thereof.”

38. Shine had claimed that its skilled employees, who were employed in providing specialised services of operating and managing the warehouse, had joined the employment of Mitisui or the new contractor engaged by it. This, according to Shine, violated the Confidentiality Clause as set out above.

39. Shine had also asserted that it had incurred a loss amounting to ₹18,53,00,000/- as a result of breach of the Confidentiality Clause.

40. The Arbitral Tribunal had rejected the aforesaid claim on, essentially, three grounds. First, the Arbitral Tribunal found that the allegation that its employees had joined Mitisui and/or a new contractor did not violate any of the obligations undertaken by Mitisui, in terms of Clause 6 of the Agreement (Confidentiality Clause). Second, it found that there was no material to prove that any of the erstwhile employees of Shine had joined the employment of Mitisui and were on its payrolls. And third, that Shine had failed to establish that it had suffered any loss as claimed by it.

41. None of the aforesaid three grounds can be faulted.

42. The contention that the Arbitral Tribunal had overlooked Mitisui's letter dated 29.09.2015 wherein it had acknowledged that some employees of Shine had joined the new vendor, is also unmerited. In its letter dated 29.09.2015, Mitisui had merely stated that some of the

employees of Shine “*might have joined the new vendor*”. However, it had also asserted that any such act of the employees or workers seeking alternate employment was a voluntary act on their part and may have been triggered by the decision of Shine to terminate their employment. The said letter does not in any manner establish that Mitisui had breached the Confidentiality Clause as claimed by Shine.

43. In view of the above, the impugned award to the extent that it denies Shine’s claim for short payment of its invoices to the extent of ₹11,49,547/- for the services rendered prior to 31.08.2014, is set aside. The findings of the Arbitral Tribunal on the merits of Shine’s claim for services rendered after 31.08.2014 is also set aside in view of the Arbitral Tribunal’s decision that it had no jurisdiction to adjudicate the said disputes. Clearly, if the claims in respect of the services rendered after 31.08.2014 fell outside the scope of the arbitration agreement any observation by the Arbitral Tribunal on the merits of the said claim is wholly without jurisdiction.

44. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

FEBRUARY 18, 2022
RK/v