

GAHC010024122024



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Arb.P./4/2024

OMEGA BIOTECH LTD.,
A COMPANY DULY REGISTERED UNDER THE PROVISIONS OF THE
COMPANIES ACT, 1956 AND HAVING ITS ADMINISTRATIVE OFFICE AT D-
10, KAVI NAGAR INDUSTRIAL AREA, SECTOR-17, GHAZIBAD- 201002,
UTTAR PRADESH, INDIA AND IS REPRESENTED BY ITS AUTHORISED
SIGNATORY AND MARKETING MANAGER, SHRI SHYAM MAINI.

VERSUS

THE MISSION DIRECTOR AND ANR
OFFICE OF THE MISSION DIRECTOR, SAIKIA COMMERCIAL COMPLEX,
SRINAGAR PATH, CHRISTIAN BASTI, G.S. ROAD, GUWAHATI-781005,
ASSAM

2:THE EXECUTIVE DIRECTOR

NATIONAL HEALTH MISSION
SAIKIA COMMERCIAL COMPLEX
SRINAGAR PATH
CHRISTIAN BASTI
G.S. ROAD
GUWAHATI-781005
ASSA

Advocate for the Petitioner : MR G N SAHEWALLA

Advocate for the Respondent : SC, NHM

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 05.06.2024

Heard Mr. G.N. Sahewalla, learned Senior counsel assisted by Mr. M. Sahewalla, learned counsel for the petitioner. Also heard Ms. A. Bora, learned Standing Counsel, NHM appearing for the respondents.

2. This petition is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996.

3. The petitioner and the respondents entered and executed an agreement for supply of drugs pursuant to the tender Notice No. NHM/PROC/RC-Drugs/2268/2014-15/13559 dated 11.11.2014. The said tender was awarded to the petitioner at his quoted price.

4. The learned Senior counsel for the petitioner submits that during the course of the execution of the tender certain disputes arose between the petitioner and the respondent in respect of the amount to be paid by the respondent authority. In spite of repeated attempts to resolve these disputes mutually, the same could not be resolved and ultimately a meeting was held between the petitioner and the respondents and on 05.02.2020, the respondent authorities held that a total amount payable to the writ petitioner would be Rs.2,29,15,123.00. This is reflected in the minutes of the meeting held between the petitioner and the respondent NHM vide minutes dated 05.02.2020.

5. The learned counsel for the petitioner submits that the full and final payment shown by the respondent in the minutes is not acceptable as the petitioners are entitled to be paid amount higher than the amount shown. Since

the respondents did not accede to the requests made by the petitioner, notice for referring the matter to arbitration was served on the respondents under Section 21 of the Arbitration and Conciliation Act, 1996 by notice dated 24.02.2023. It is submitted that in terms of the provisions of Section 21 of the Arbitration and Conciliation Act, 1996 since the respondents did not respond to the notice issued by the writ petitioner, the petitioners are before this Court seeking appointment of an arbitrator under the powers exercised by the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996.

6. The learned Senior Counsel for the writ petitioner submits that in terms of the agreement, the arbitration was to be referred to the Mission Director, National Health Mission, or to the sole arbitration of some person nominated by him. The learned Senior Counsel submits that in view of the amendment carried on to the Act of 1996 under Section 12 (5), the Mission Director is an authority, who is covered under schedule 7 of the Act and is therefore barred from acting as an arbitrator or even nominating an arbitrator under the amended provisions under Section 12 (5) of the Act. He refers to the judgment of the Apex Court in *Perkins Eastman Architects DPC and Another Vs HSCC (India) Limited* reported in (2020) 20 SCC 760. He, therefore submits that having no alternative, the application under Section 11(6) has been filed seeking an appointment of an arbitrator by this Court.

7. Ms. A. Bora, learned Standing Counsel, NHM appearing for the respondents has referred to the counter affidavit filed by the respondent. According to the respondents there is no violation of any procedure and in terms of the minutes recorded on 05.02.2020, the petitioner has agreed to the amount mutually calculated by both parties and therefore, there is no dispute. That apart, she submits that in terms of the agreement executed by and between the parties

under Clause 27 arbitration is to be referred to the Mission Director, NHM or to the sole arbitration of some persons nominated by him.

8. Learned counsels for the parties have been heard. Pleadings available on record are carefully perused.

9. The provisions of the Arbitration and Conciliation Act, 1996, more particularly Section 12 (5) is taken note of. Section 12 (5) of the Arbitration and Conciliation Act, 1996 provides as under:-

“12(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing”.

10. The arbitration clause as available in the arbitration agreement is also extracted and the same provides for arbitration as under:-

“27. ARBITRATION

Any dispute whatsoever in any way arising out of or relating to the contract shall be referred to arbitration of the Mission Director, National Health Mission, Assam or to the sole arbitration of some person nominated by him. There shall be no objection if the arbitrator so appointed happens to be an employee of National Health Mission, Assam. The award of the arbitrator shall be final, conclusive and binding on all parties”.

11. Pursuant to the amendments brought in Section 12 incorporating Section 12 (5) with effect from 23.10.2015, it is abundantly clear that notwithstanding any prior agreement to the contrary, any person who has relationships with the

parties or the counsel of the subject matter of the dispute and who falls under any of the categories specified under the 7th schedule shall be eligible to be appointed as an arbitrator.

12. In terms of the agreement executed by and between the parties, arbitration is to be referred to the Mission Director, NHM or to the sole arbitration of some other person referred to or nominated by the Mission Director, NHM. From an examination of the pleadings available on record, it is seen that the tender for supply of drugs on behalf of NHM is called for by the Mission Director, NHM. The position held by Mission Director is not specifically provided for in the agreement, but from the arguments made before the Court and from a careful perusal of the pleadings, it is apparent that the Mission Director, is an authority of the management, who has a controlling influence over the organization with whom the petitioner has entered into the agreement for supply of products in terms of the agreement for supply of drugs pursuant to the tender Notice No. NHM/PROC/RC-Drugs/2268/2014-15/13559 dated 11.11.2014.

13. That being so, as per the prescription of the Seventh Schedule, arbitration is prohibited to be conducted by, or even a reference is prohibited to be made by, a person who is a Manager, a Director or a part of the management, or a similar controlling influence. This aspect has been elaborately dealt with by the Apex Court in the judgment referred to in *Perkins Eastman Architects DPC and Another (supra)*.

14. Under such circumstances, it is evident that the Mission Director is precluded under Section 12(5) read with schedule 7 of the Arbitration and Conciliation Act, 1996 to act as an arbitrator in any dispute that had arisen

between the petitioner and the respondent, or even to refer arbitration to any other person as an arbitrator.

15. Under such circumstances, as had been held by the Apex Court it is the Court under Section 11(6) that an arbitrator has to be appointed. In such view of the findings arrived at by this court, this Court is of the view that since the disputes stated to be there between the parties have not been shown to have been resolved mutually in the meantime, and there is no material available on record which has been pointed out to the Court to show that the amount stated to be payable by the respondent to the writ petitioner has been accepted without any grievance, I, as a Court under exercise of the powers conferred under Section 11 (6) Arbitration and Conciliation Act, 1996 appoint Hon'ble Mr. Justice H.K.Sharma, Judge (retd.) to act as a sole arbitrator and to decide the disputes arising out of the agreement executed by and between the parties and for supply of drugs pursuant to the tender Notice No. NHM/PROC/RC-Drugs/2268/2014-15/13559 dated 11.11.2014. The appointment, however, is subject to the consent to be given by the learned arbitrator and subject to fulfilment of all the terms and conditions by both parties.

16. The arbitrator will also decide the arbitrability of the dispute if the needs so arises.

17. Arbitration petition, is accordingly, disposed of in terms of the order.

JUDGE

Comparing Assistant