

In the High Court of Judicature at Madras

Dated : 25.09.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.803 of 1998

Part and Deal & Co.,
Rep. by its Partner, Mr.R.D.Mangrolia. .. Petitioner

-VS-

M/s.Sterling Holiday Resorts (India) Ltd.,
154, Eldams Road, Chennai-600 018. .. Respondent

Petition filed under Section 11 (4) (a) of the Arbitration and Conciliation Act, 1996, to appoint any Chartered Engineer as Arbitration to resolve disputes that have arisen between the petitioner and the respondent pursuant to the arbitration agreement dated 31.10.1995.

For Petitioner : Mr.S.D.S.Philip

For Respondent : No appearance

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O R D E R

The manner of the proceedings in the present petition filed under Section 11 (4) (a) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the said Act') appears to be a comedy of errors. It appears that the very fundamental issue of reference of disputes to arbitration was lost sight of, in view of O.A.No.834 of 1998 being filed in the present proceedings, which actually partake the character of relief under Section 9 of the said Act. This original application was allowed restraining the first respondent therein, M/s.Sterling Holiday Resorts (India) Ltd., from invoking the bank guarantee pending arbitration, while the first respondent was called upon to file a counter in the original petition. In fact, a separate O.P. was required to be filed for this petition.

2.Be that as it may, none of the parties took any steps to have the main O.P. in the present matter for appointment of an Arbitrator disposed of. The matter has now arisen from the grave on account of an application being filed by the petitioner seeking variation of the order granted on 09.03.1999 to the extent that security of immovable property may be given instead of bank

guarantee.

3.A perusal of the records shows that no response has been filed to the present petition, a fact confirmed by the learned counsel for the petitioner.

4.Learned counsel states that the respondent is no more represented by the earlier counsel and as a consequence thereof, notice was taken to the party and it is stated to have been duly served, but none has put in appearance. It is, in these circumstances, that the petition along with the documents filed therewith have been examined.

5.The respondent, M/s.Sterling Holiday Resorts (India) Ltd., is stated to have invited tenders on 02.09.1995 for its project known as "Heritage Holiday Resort" at Shirdi, Maharashtra, to be completed within a period of nine months. The petitioner participated in the bid and its bid was accepted and a work order dated 31.10.1995 was issued by the respondent to the petitioner.

6.The execution of the work commenced on 01.12.1995 for an estimated cost of Rs.1,20,33,840/- and the date of completion was

specified as 15.08.1996. The petitioner also submitted a performance guarantee of 10% of the total cost.

7.The petitioner claims that on account of various omissions and commissions by the respondent, the contractual work could not be executed. However, it is not necessary to go into the disputes in the present proceedings. Claims arose inter se the parties and the petitioner requested the respondent to settle their claim of Rs.18,20,178.77 vide their letter dated 23.06.1997, which was acknowledged by the respondent by their letter dated 07.07.1997.

8.The respondent decided to invoke the bank guarantee of Rs.6 lakhs vide their letter dated 16.07.1997. In fact, that was the issue which gained prominence and was raised by the application filed in the O.P. and came to be decided as referred to aforesaid. The prayer made in the present petition is for appointment of any Chartered Engineer as Arbitrator, in view of the arbitration agreement dated 31.10.1995.

9.The parties agreed to settlement of disputes through the mode of arbitration in terms of Clause 4.57 of the Work Order dated 31.10.1995, which reads as under:

"4.57.DISPUTE AND ARBITRATION

4.57.1. All disputes and differences of any kind whatever arising out of or in connection with or touching with the contract or the carryin gout of the works whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract, shall be referred to arbitration and final decision of a single arbitrator being a Chartered Engineer in the relevant discipline, to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single arbitrator, to the arbitration of two arbitrators both being Chartered Engineers in the respective discipline, one to be appointed by each party, which arbitrators shall, before taking upon themselves the burden of reference appoint at Umpire.

The Arbitrator, the Arbitrators or the Umpire shall have power to open up, review & revise any Certificate, opinion, decision, requisition or notice, and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the reference and award respectively Arbitrator or Arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between attorneys and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to Arbitration within the

meaning of the Indian Arbitration Act, 1940, or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire shall be final & binding on the parties.

Such reference shall not be opened or entered upon until after the completion of the works or until after the practical cessation of the Works arising from any cause unless with the written consent of the Employer and the Contractor, provided always that the employer shall not withhold the payment of an interim certificate, nor the Contractor except with the consent in writing of the Employer in any way delay the carrying out of the Works by reason of any such matter, question, dispute, being referred to Arbitration, but shall proceed with the work with all due diligence and no Award of Arbitrator or the Umpire shall relieve the Contractor of his obligations to other strictly to the Employers instructions with regard to the actual carrying out of the Works. The Employer & the Contractor hereby also agree that Arbitration under clause shall be a condition precedent to any right of action under the contract.

4.57.2. The venue of Arbitration will be at Madras. The competent Court of the City of Madras shall alone have exclusive jurisdiction to try any matter pertaining to this contract."

10. The facts set out aforesaid, specifically in the absence of any reply to the petition, make it a case of no return and it is not in question that the work contract inter se the parties contains an

arbitration clause, disputes have arisen, the venue of arbitration has to be at Madras (Clause 4.57.2). None has put in appearance for the respondent, though name is printed in the cause list.

11.As agreed and proposed by the learned counsel for the petitioner, I, thus, appoint **Mr.K.V.Rupchand, a retired Civil Engineer**, residing at 7B, 'Govind I', Kannappa Nagar Extension, Thiruvanmiyur, Chennai 600 041, Ph:94440 10339, as the Sole Arbitrator to enter upon the reference and adjudicate the disputes inter se the parties. As requested by the learned counsel for the petitioner, the arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

12.The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

(S.K.K., CJ.)
25.09.2015

sra

The Hon'ble Chief Justice

(sra)

Note: 1) Mark a copy to

- (i) The Addl. Registrar-Vigilance
Madras High Court Arbitration Centre,
Madras High Court Campus, Chennai.
- (ii) The Arbitrator, as referred above.

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