

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 31.07.2015

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

O.P.Nos .127 & 805 of 2013

Reha Enviro Private Limited

Having its Registered Office at
No.18C, I-B Main Road, HSR Layout,
Sector 6, Hosur Sarjapur Road,
HSR Layout (Near Silk Board)
Bangalore - 560 034. ..Petitioner in both OPs.

Vs.

1.Government of Puducherry,
Represented by its Secretary,
Local Administration Department,
II Floor, Chief Secretariat,
Gubert Avenue,
Puducherry-605 001. ...1st Respondent in both OPs

2.Local Administration Department,
Represented by its Director,
No.2, Eveche Street,
Puducherry - 605 001. ...2nd Respondent in both OPs

3.Puducherry Urban Development Agency,
Rep. by its Project Director,
16, Suffren Street,
Puducherry - 605 001. ...3rd Respondent in both OPs

4.The Commissioner,
Puducherry Municipality,
No.1, Dumas Street,
Puducherry - 605 001. ...4th Respdt in O.P.No.127/2013

5.The Commissioner,
Oulgaret Municipality,
Jawahar Nagar,
Opp. to Town & Country Planning Department
Puducherry - 605 005. ...5th Respdt in O.P.No.127/2013

6.The Commissioner
Villianur Commune Panchayat,
Villupuram Main Road,
Villianur, Puducherry. ..6th Respdt in O.P.No.127/2013

7.The Commissioner,
Ariankuppam Commune Panchayat,
Cuddalore Main Road,
Ariankuppam, Puducherry. ..7th Respdt in O.P.No.127/2013

Common Prayer:Original Petition filed under Section 11(5&6) of the Arbitration and Conciliation Act, 1996 praying to appoint a Retired Judge of the Honourable High Court as the Arbitrator, required to be appointed by the respondent as under the Clause 11.2 of the Concession Agreement dated 18.10.2010, so as to enable the Arbitrators to proceed with the appointment of the Arbitration proceedings to adjudicate and resolve the disputes between the petitioner and respondents that have arisen between the petitioner and the respondents in respect of Concession Agreement dated 18.10.2010 entered between the petitioner and the respondents.

For Petitioner : Mr.Anirudh Krishnan

For Respondents : Ms.N.Mala
Additional Government Pleader [Pondy]
[R1 to R7 in O.P.No.127 of 2013]
[R1 to R3 in O.P.No.805 of 2013]

C O M M O N O R D E R

These petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for appointment of an arbitrator to arbitrate upon the dispute between the petitioner and the respondents arising out of a Concession Agreement, dated 18.10.2010.

2. Both these petitions arise out of a single contract and the necessity for the petitioner to file two Original Petitions is that the petitioner during subsistence of the Concession Agreement dated 18.10.2010, made a request to the respondents to effect certain payments which according to them, were due and payable to the petitioner. Since the claim was not settled, the petitioner requested for arbitration for which the respondents sent a reply on merits of the matter stating that the petitioner is not entitled for the amount claimed.

3. With regard to the request made by the petitioner for referring the matter for arbitration, two reasons were stated in the reply notice sent by the respondents dated 18.07.2012 viz., :-

1. That the validity of the tender and the contract awarded in the petition was a subject matter of challenge in WP.No.3122 of 2010 and the Court while entertain the Writ Petition stated that the permission granted to the petitioner was subject to the outcome of the Writ Petition. Therefore it is stated that unless the Writ Petition is disposed of, the question of invoking arbitration clause does not arise.

2. The second objection being that the petitioner without invoking Article 11.1 of the Agreement, is attempting to invoke the Article 11.2.

4. After receiving the reply dated 18.07.2012, the petitioner has filed OP.No.127 of 2013 for Arbitrator to be

appointed, to enable the arbitrator to adjudicate and resolve the dispute which has arisen between the petitioner and the respondents in respect of Concession Agreement dated 18.10.2010.

5. During the subsistence of O.P.No.127 of 2013, the contract awarded in favour of the petitioner was terminated by order dated 13.08.2013, for which the petitioner sent a reply on 02.09.2013 stating that the order of termination was unjustified and also requested that the matter be referred for Arbitration in accordance with Clause 11.2 of the Concession Agreement.

6. Since this demand was not met, the petitioner has filed OP.No.805 of 2013, to appoint a retired Hon'ble Judge of this Court as Arbitrator to arbitrate upon the dispute between the petitioner and respondent, in respect of the Concession Agreement dated 18.10.2010.

7. The learned counsel appearing for the petitioner after referring the various communications, submitted that the stand taken by the respondent in reply notice dated 18.07.2012 is wholly untenable and the Writ Petition challenging the award of contract in favour of the petitioner was dismissed and the pendency of the writ petition was no grounds to refuse to refer the matter for arbitration.

8. It is further submitted that merely because the petitioner had not tried to negotiate with the respondent, that by itself will not take away the right of the petitioner to invoke Clause 11.2 of the Concession Agreement to initiate arbitration proceedings.

9. The learned counsel appearing on behalf of the respondents made elaborate submissions on the factual aspects and referred to the common counter affidavit filed, wherein there is a reference to the order passed in the Writ Petition challenging the award of the contract in favour of the petitioner. It is further submitted that inspite of notice being sent to the petitioner, to have a discussion with the respondents, the petitioner did not reply to the said notice dated 02.05.2012 and therefore the respondent was justified in taking a stand that the petitioner is not entitled to invoke the Arbitration Agreement.

10. The learned counsel further submitted that in terms of Clause-J of the Concession Agreement, the approved capital grant for the project is Rs.49.66 crores wherein the Central Sanctioning and Monitoring Committee of the Ministry of Urban Development, Government of India, has approved a capital grant with Central Share of Rs.39.7289 crores being 80% of the

grant and the rest being the state share. It is submitted that the funds which were realized by the Central Government was paid to the petitioner along with the State's share and therefore, the petitioner has to refund the said amount at the first instance and only thereafter, the state can take a view of arbitration proceedings. Further it is submitted that the contract was abandoned by the petitioner on 12.04.2012 and the question as to whether there will be a binding arbitration/an agreement is itself, in issue.

11. On the above grounds, the learned counsel appearing for the respondents submitted that the stand taken by the respondent is fully justified.

12. Heard the learned counsel appearing for the parties and perused the material placed on record.

13. Though elaborate submissions were made by the learned counsel appearing for the respondents on the factual matrix, this Court while considering an application under Section 11(6) of the Act, would not go into those aspects, touching the merits of the claim and facts which are required to be gone into are only for the purpose to ascertain whether there is a binding arbitration agreement and there is an arbitral dispute arising under the said Concession Agreement.

14. For the aforesaid purpose, this Court took note of the relevant clauses of the Concession Agreement. Clause 11.2 of the Agreement states that subject to Clause 11.1, any dispute, which is not resolved amicably shall be finally settled by binding arbitration under the Act, and the Arbitration by a panel of three arbitrators, one each to be appointed by each of the party and third to be appointed by the parties. Further the procedure being that it should be in writing with information to the other party about the appointment and within 30 days of receipt of such intimation, if the other party fails to appoint its arbitrator, the party seeking appointment of arbitrator may take steps for appointment, in accordance with the Act.

15. The petitioner by their notice dated 12.06.2012 to the respondents while raising several issues, invoked the Arbitration Clause No.11.2, appointed Hon'ble Justice K.Shivashankar Bhat, Retired Judge of High Court of Karnataka, as arbitrator on their side and called upon the respondents to nominate their arbitrator within 30 days as stipulated in Clause No.11.2(a) of the Concession Agreement.

16. The respondents sent a reply to the petitioner on 18.07.2012 and as noticed above, the two contentions were raised in the reply notice; firstly about the pendency of a

Writ Petition and secondly that the petitioner did not endeavour to amicably resolve the issue prior to seeking reference for arbitration.

17. As far as the Writ Petition is concerned, there was no prohibitory order prohibiting the petitioner or the respondents, from proceeding with the contract and the award of contract in favour of the petitioner was subject to the outcome of the Writ Petition. It is not in dispute, the Writ Petition was dismissed.

18. Under such circumstances, the stand taken by the respondent stating that on account of the pendency of the Writ Petition, they are not inclined to nominate an arbitrator in accordance with the agreement cannot be countenanced and deserves to be rejected.

19. The second ground is that the petitioner has not exhausted the amicable mechanism under Clause 11.1. On a perusal of Sub Clause A of Clause 11.1, it states that at the first instance, the parties should attempt to resolve the issue amicably in accordance with procedure set out in Sub Clause B of the Clause 11.A.

20. In my view, an attempt could be made for

settlement, but there cannot be a compulsion for the parties to settle a dispute. If the parties feel that there is no possibility of amicable resolution merely because the agreement provides for an opportunity for the parties to resolve the issue without resorting to Arbitration, that by itself cannot foreclose the right of the party to seek for Arbitration as provided under Clause 11.2(A). Hence the second contention raised by the respondent also stands rejected.

21. Perusal of the counter affidavit filed by the respondents reveals that the same proceeds entirely on merits of the claim and the only relevant paragraph to the present petition is paragraph 42. In the said paragraph, it has been stated that in the light of Section 7(1) of the Arbitration Act, there is no Arbitral agreement existing.

22. Section 7 of the Arbitration Act deals with the "Arbitration Agreement" which means an agreement between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not. It is relevant to point out that Sub Section 2 of Section 7 of the Act states that the Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The Hon'ble Supreme Court in **Firm Ashok**

Traders v. Gurumukh Das Saluja (2004) 3.S.C.C. 155, held that the arbitration clause constitutes an agreement by itself.

23. Under such circumstances it cannot be stated that there is no binding arbitration agreement between the parties and this was not the case of the respondents at any earlier point of time, sought to be raised for the first time in the counter affidavit, which stands rejected on more than one ground.

24. As far as the other factual issues pointed out by the respondents in the counter affidavit, which cannot be adjudicated in the present proceedings, and are left open to be raised in the arbitration proceedings.

25. In the light of the above, it is held that a binding arbitration agreement exists between the parties; the reasons cited in the reply notice dated 18.7.2012 and the contentions raised in Paragraph 42 stands rejected.

26. As regards the power of the respondents to appoint their arbitrator in accordance with Clause 11.2(a), the power to nominate the arbitrator of their choice in accordance

with Clause 11.2(a) would survive, if only such right was exercised by the respondents within the time provided and even during the pendency of these petitions before this Court, no such attempt is made. Therefore, the right of the respondent to nominate the Arbitrator or seek for the nomination of the Arbitratral Tribunal in terms of Article 11.2(a) stands forfeited.

27. In the result, I appoint,

Hon'ble Mr. Justice K. Mohan Ram

Former Judge, Madras High Court,
No.3, Sivakamipuram II Cross Street,
Thiruvanniyur,
Chennai - 41

Mobile No. 9444464646

as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally. In the event of respondents not entering appearance, the same may be borne by the petitioner at the initial stage to form part of the main cause.

The Original Petitions are, accordingly, allowed,
leaving the parties to bear their own costs.

Sd/T.S.S.J
31.07.2015

//Certified to be a true copy//

Dated this the day of 2017.
S.s/10.03.2017

COURT OFFICER

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