

In the High Court of Judicature at Madras

Dated : 30.01.2015

Coram :

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

O.P.No.469 of 2012

M/s.Paily & Company

Rep. By its Managing Partner, N.P.Paily.

.. Petitioner

-VS-

- 1.State of Tamil Nadu,
Rep. By Principal Secretary to Govt.,
Public Works Department, Secretariat,
Chennai.
- 2.The Chief Engineer, PWD WRO,
Pollachi Region, Town Hall,
Coimbatore.
- 3.Engineer-in-Chief, WRO
& Chief Engineer (General)
PWD, Chepauk, Chennai-5.
- 4.The Project Director,
Implementation Unit, IAM WARM Project,
MDPU, Chennai-5.
- 5.The Superintending Engineer,
PWD, WRO, Parambikulam Aliyar
Basin Circle, Pollachi.
- 6.The Chairman,
The Institute of Engineers,
Tamil Nadu State Center,
No.19, Swami Sivananda Salai,
Chepauk, Chennai-5.

.. Respondents

Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator to in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996, to resolve the disputes between the petitioner and the 4th respondent arising out of the Arbitration Agreement dated 15.03.2008.

For Petitioner : Mr.M.T.C.Sajith Babu

For Respondents : Mr.Venugopal, Spl.G.P.
for RR 1 to 3 and 5

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O R D E R

A World Bank loan assistance was made available for left out reaches in Parambikulam Main Canal under the Tamil Nadu Agriculture Modernization and Water Bodies Restoration and Management and thus, tenders were invited and the work was awarded to the petitioner, post negotiations. An Agreement No.17PABC/2007-2008 was, thus, executed on 15.03.2008 inter se the parties, which contains an arbitration clause for resolution of disputes through arbitration. The relevant portion of which reads as under:

4.Arbitration (GCC Clause 25.3). - The procedure for arbitration will be as follows:

25.3(a) In case of Dispute or difference arising between the Employer and a domestic contractor relation to any matter arising out of or connected with this agreement, such disputes or difference shall be

settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman, The Institution of Engineers, Tamil Nadu State Centre, Chennai.

- (b) In the case of dispute with a Foreign Contractor the dispute shall be settled in accordance with provisions of UNCITRAL, Arbitration Rules. The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman, The Institution of Engineers, Tamil Nadu State Centre, Chennai.*
- (c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the*

appointment of its arbitrator by the other party, then Chairman, The Institution of Engineers – Tamil Nadu State Centre, Chennai, both in cases of the Foreign Contractor as well as Indian Contractor, shall appoint the arbitrator. A certified copy of the order of Chairman, The Institution of Engineers – Tamil Nadu State Centre, Chennai, making such an appointment shall be furnished to each of the parties.

- (d) Arbitration proceedings shall be held at Office of the Superintending Engineer, Parambikulam Aliyar Basin Circle, Pollachi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*
- (e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.*
- (f) When the value of the contract is Rs.50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely, the 'Indian*

Council of Arbitration /President of the Institution of Engineers (India) / The International Centre for Alternative Disputes Resolution (India).

- g) *Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings."*

2.It is the case of the petitioner that he was called upon to perform additional work and yet, liquidated damages were recovered from the petitioner. Suffice to say that the petitioner claims disputes having arisen out of the contract, the petitioner claimed Rs.5,41,89,709.97 along with interest and costs.

3.The matter was first referred to the Adjudicator in view of the following clause :

"24. Disputes.

24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision."

However, the Adjudicator vide letter dated 25.11.2010 informed that it was not possible for him to adjudicate since final bill had been paid and thus, it was observed that the petitioner was free to approach other mandatory provisions available like arbitration, etc. It is, in view thereof, that the present petition has been filed by the petitioner under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act').

4.The petition has been opposed and the only plea raised by the learned counsel for the respondents is that as per clause 25.2, once the matter was referred to the Adjudicator and the contractor was aggrieved by the decision of the Adjudicator, the arbitration had to be claimed within 28 days.

5.Learned counsel for the petitioner refers to the judgment of Supreme Court in **Union of India vs. M/s.L.K.Ahuja & Co., (AIR 1988 SC 1172)**, to contend that even whether the claim. which was barred by time, was an issue to be adjudicated by the Arbitrator. There is also a moot point whether the time period for invocation of arbitration can be curtailed by incorporation of a clause, which may be examined by the Arbitrator (**Biba Sethi and Nitin Sethi vs. Dyna Securities Limited, MANU/DE/1325/2009**).

6. Agreeing with the aforesaid submissions and In view of the existence of disputes, there being an arbitration clause and the jurisdiction of this Court not being questioned, disputes are liable to be referred to arbitration.

7. I, thus, appoint **Mr.K.Venkataraman, a Retired Judge of this Court**, 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.

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

(S.K.K., CJ.)
30.01.2015

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The Hon'ble Chief Justice

(sra)

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