

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:10.04.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM**

O.P. No.384 of 2013

V.Subbarami Reddy

.. Petitioner

Vs

1.General Manager,
Southern Railway,
Park Town,
Chennai – 600 003.

2.Principal Chief Engineer,
Southern Railway,
Part Town, Chennai – 600 003.

3.Senior Divisional Engineer,
Chennai Division,
Southern Railway,
Park Town, Chennai -3.

.. Respondents

Prayer :-Petition filed under Section 11 (4) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator under Section 11(4) of Arbitration and Conciliation Act, 1996 and pass such further or others as deem fit.

For petitioners .. Mr.V.Sivakumar

For Respondent .. Mr.V.Haribabu

ORDER

Heard Mr.V.Sivakumar, learned counsel appearing for the petitioner and Mr.V.Haribabu, learned counsel appearing for the respondents.

2. This petition has been filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator under Section 11(4) of Arbitration and Conciliation Act, 1996

3. The petitioner was awarded work for execution for making up of cess between between KM 122/25 -124/17 (upline) and KM 133/27 – 134/11 (upline) between Naidupetta and Gudur. As per the agreement, the value of the work is more than Rs.1,00,00,000/- and the period of completion was stipulated upto 13.01.2009. It is further stated that the agreement provided for compensating the contractor with Price Variation Clause vide clause 44.0.0 of special conditions of contract and as per sub-clause (i) of clause 44, Price Variation Clause shall be applicable for tenders of value of more than Rs.1,00,00,000/- irrespective of the contract completion period. The petitioner would further state that the agreement provides for Price Variation in clause 37 of the Special Conditions of contract. The petitioner is said to have commenced work on 09.05.2008 and the contract appears to have

expired and which has resulted in filing a claim petition dated 08.02.2013. On the petitioner making a representation/claim petition dated 08.02.2013, the respondents sent a reply to the petitioner on 25.02.2013. In the said reply after referring to clause 63 & 64(1)(i), advised the petitioner that his representation is being forwarded to the concerned Divisional Office for taking appropriate action to settle the claim within 120 days from the date of receipt of the representation and in case the petitioner is not satisfied with the decision of the Railways on his application, he may after 120 days but within 180 days of presenting his final claim on the disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. Further, it was informed to the petitioner that his demand for arbitration shall be processed by the Railways for appointment of Arbitrator, provided the petitioner's representation/demand in writing with quantified final claims on disputed matters with details of amounts claimed, item wise, is submitted within the specified time as per the General Condition of Contract. In response to that, the petitioner has also submitted another representation dated 13.03.2013,

4. From the facts placed before this Court, it is evidently clear

that the respondent does not dispute the existence of a valid and binding the Arbitration Agreement. From the reply dated 25.02.2013, referred supra, it is clear that the respondents were agreeable to refer the matter for arbitration provided the petitioner quantifies the final claims.

5. The learned counsel appearing for the petitioner submitted that the claim petition has been submitted by the petitioner on 08.02.2013, and in any event, before the Arbitrator a detailed claim petition would be filed. So far as the option which would be available for the respondent Railway Administration to appoint an Arbitrator, the issue is no longer *res integra*, in fact, the Hon'ble Chief Justice in ***C.A.Abdul Kadhar Vs. Union of India, Ministry of Railways, in O.P.No.769 of 2010, dated 14.08.2014*** considered a similar objection raised by the Railway Administration as raised by the learned counsel in the present case and while dealing with the contention, it held as follows:-

*5.Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in **Datar Switchgears Ltd., vs. Tata Finance Ltd., 2000 (8) SCC 151**, to contend that the respondents had lost the opportunity to appoint the Arbitrators in terms of the arbitration clause, as neither did the respondents within thirty days from service of*

notice nor right till filling of the present petition appoint anyone. He submits that apart from the fact that this judgment has been followed subsequently. He submits that apart from the fact that this judgment has been followed subsequently in **National Insurance Co., Ltd., vs. Mastan, 2006 (2) SCC 641**, a Division Bench of this Court also elucidated the position in **The General Manager (Telecom) Madurai Secondary Switching Area, Department of Telecommunication vs. Sesa Seat Information Systmes Ltd., 2005 4 MLJ 210**. The principles were culled out by the Division Bench in para 23 of the judgment. Had the respondent appointed the Arbitrator prior to filing of the petition under Section 11 of the said Act, its legality would not have been questioned; but once the petition for appointment is filled before the Court, the other party abdicates his right to appoint the Arbitrator as per the provision stipulated in the agreement or in terms of the arbitration clause and the Court alone has the power to appoint.

6. On the other hand, learned counsel for the respondents referred to the judgment of **Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limitted, 2008 10 SCC 240** and **Indian Oil Corporation Limited vs. Raja Transport Private Limited, 2009 8 SCC 520** to emphasize that in case of invocation of provision of Section 11(6) of the said Act, it has to be seen whether the appointing authority failed to exercise jurisdiction within a reasonable period of time, as thirty days time period is not stipulated unlike Section 11(5) of the said Act. He submits that the intent is to give effect to the arbitration clause.

7. In my view, the legal principle is quite clear given that the petition in the present case is one under Section 11(6) of the said Act in view of what is stated aforesaid. The cut-off point for the respondents to exercise the jurisdiction squarely arises when the petition is filed before the Court invoking this jurisdiction and not the expiry period of thirty days. Unfortunately for the respondents, they slept over the matter for quite some time and the petitioner filed the petition before this Court, whereafter the respondents awoke to the situation, thus losing out their right to appoint the Arbitrator.

6. The above decision passed after referring to the decisions of the Hon'ble Supreme Court and the Hon'ble Division Bench sets at rest the legal position and this Court has no hesitation to hold that the respondent Railway Administration have lost their right to appoint an Arbitrator as per their choice under the agreement.

7. In the light of the above, Original Petition is allowed and I appoint Mr.J.Krishnamoorthy, a retired District Judge, 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 this order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne

equally by both the parties.

10.04.2015

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Index :Yes/No

Internet:Yes/No

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T.S.SIVAGNANAM, J.
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