

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.09.2015

CORAM

THE HONOURABLE Mr. **JUSTICE T.S.SIVAGNANAM**

O.P.No.889 of 2013

M/s.KTR Enterprises Pvt. Ltd.,
represented by its
Authorised signatory
Y.H.Nageshwar Rao. Petitioner

Vs.

M/s.MOS Metro India Private Limited ... Respondent

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a Sole, Independent and Impartial Arbitrator to adjudicate upon the disputes between the parties.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.A.Karthikeyan,
for Mr.Kochhar & Co.,

सत्यमेव जयते
ORDER

Heard Mr.P.J.Rishikesh, learned counsel appearing for the petitioner and Mr.A.Karthikeyan, learned counsel appearing for the respondent.

2. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of a sole Arbitrator to adjudicate upon the disputes between the parties.

3. The facts which are necessary for the disposal of the petition are, that a memorandum of agreement was entered into between the petitioner and the respondent during October, 2012 whereby the petitioner was appointed as a contractor to transport and dispose huge quantities of muck stock from the work spot at May Day Park at Chintadaripet and dump the same at the dumping yard at Pallkoradu Village, Tambaram. In terms of clause 24 of the agreement dated 1.10.2012, if any dispute or difference arises between the parties arising out of this agreement either as to the interpretation or meaning of any provision of the agreement, the same shall be referred to arbitration of a common arbitrator if agreed upon or to two arbitrators one to be appointed by each party and the arbitration will be governed by the provisions of the Arbitration Act, 1940. It appears that there is some dispute and difference between the parties and the petitioner by letter dated 8.10.2013 invoked the arbitration clause stating that the dispute broadly pertains to delayed payment and interest on delayed payment; damages and compensation towards minimum guarantee of quantity for the work to be executed by the petitioner; expenditure incurred with respect to minimum guarantee of much removal; loss of profit and interest etc. and several other claims which would be detailed before arbitration. The petitioner further stated that they have

invoked the arbitration clause and nominated a Hon'ble retired Judge of this Court as a sole Arbitrator to resolve the dispute. Further, it has been stated that since the Arbitration Act, 1940 was replaced by Arbitration and Conciliation Act, 1996, the parties to the arbitration would be governed by 1996 Act. The respondent was directed to give their concurrence to the name of the Arbitrator within three days failing which the petitioner will take appropriate legal action. The respondent vide reply dated 10.10.2013 while acknowledging the receipt of the arbitration notice dated 8.10.2013, denied the existence of any arbitrable dispute between the parties for referring the matter to arbitration. Further, the respondent also objected to the name of the Arbitrator as proposed by the petitioner. Having been faced with such a reply from the respondent, the petitioner moved this Court by way of this petition for appointment of a sole Arbitrator and the petition was admitted and notice was ordered to the respondent on 14.3.2015.

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4. The respondent filed counter affidavit and have stated about the facts in respect of the contract and so far as the claim for arbitration, it is stated that the agreement was concluded in accordance with law and the terms of the contract and the petitioner has confirmed the conclusion of the agreement on 25.10.2014 and therefore, it

is stated that there is no arbitrable claim and the petition has to be dismissed.

5. As stated above, the petitioner has raised a claim with regard to delayed payment and interest on the delayed payment, damages and compensation and other reliefs. According to the petitioner, the same will be placed in detail before the Arbitrator.

6. After hearing the learned counsels of the parties, the only legal issue which has to be considered in this petition is, as to whether the petitioner's rights to claim the relief before the Arbitrator could be foreclosed at the very threshold.

7. The tenor of the counter affidavit filed by the respondent would suggest that the payment was accepted by the petitioner without any demur and therefore, the contract itself has been concluded and the petitioner has also conformed their satisfaction. Thus, the issue would be whether there has been full and complete accord and satisfaction by the petitioner and whether this Court should deny the petitioner's claim for referring the matter to arbitration. This Court in the case of **M/s.Gimpex Ltd. v. M/s. Aanchal Cement Limited** reported in 2015-2-L.W.916, considered somewhat an identical issue and after taking note of the decisions in the case of **National Insurance Company Limited v. Boghara Polyfab Private Ltd.** reported in

2009-2-L.W.318 and in the case of **Swiss Timing Limited v. Organixing Committee, Commonwealth Games** reported in 2015-1-L.W.101, pointed out that the issue as to whether the parties have concluded the contract by recording satisfaction is also an arbitrable dispute since whether the contract has been discharged by performance or not is a mixed question of fact and law and if there is a dispute in regard to that question, the same is arbitrable. In the instant case, the petitioner's claim is with regard to delayed payment and interest on the delayed payment, damages and compensation, etc. and the respondent would state that the petitioner has accepted the payments without any demur. The issue as to whether there was full satisfaction by the petitioner is a disputed question of fact and this is definitely an arbitrable issue. In such circumstances, this Court would be fully justified in exercising jurisdiction under Section 11 and referring the matter for arbitration.

8. For all the reasons stated above and in the light of the decisions stated supra, I am of the view, the petitioner is entitled to succeed and I appoint

The Hon'ble Mr. Justice K. Govindarajan,

High Court Judge (Retired),

New No.8, Old No.5, Justice Ramanujam Road,

Malavia Avenue, Sastri Nagar, Chennai - 600 041.

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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. In the event of respondent not entering appearance, the same shall be borne by the petitioner at the initial stage to form part of the main cause.

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

sd/.T.S.S.J

18.09.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/21.12.2015

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From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.