

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01..07..2016

C O R A M

The Hon'ble Mr. **SANJAY KISHAN KAUL**, Chief Justice

Original Petition No.63 of 2016

M/s.Rockwell Automation India Pvt. Ltd.,
rep. By its authorised signatory/application
Centre Manager,
Mr.Anshuman Chatterjee,
A-66, Sector 64,
Noida 201301 (U.P)

.. Petitioner

versus

M/s.ETA Engineering Pvt. Ltd.,
rep. By its Managing Director
Mr.Ranganathlakshman Rao,
No.5, Moores Road,
Chennai 600 006.

also at
New No.71, Old No.63, Sterling Road,
Nungambakkam, Chennai 600034.

.. Respondent

*Prayer : Petition filed under Section 11 (5) of the Indian Arbitration
and Conciliation Act, 1996 for appointment of an Arbitrator(s) to
decide the disputes and differences between the parties in terms of the
Contract Agreement dated 24.05.2012/28.09.2013 and Contract
No.UAA No.06.*

For Petitioner : Mr.A.Abdul Hameed
for M/s.AAV Partners

For Respondent : Mr.Uma Maheswari Ganesh

ORDER

The Chennai Metro Rail Ltd., in its Phase-I of the Chennai Metro Rail Project, invited bidders for carrying on Design, Manufacture, Verification, Delivery, Installation, Testing, Commissioning etc., qua the Integrated Tunnel Ventilation System. The respondent herein was selected as a pre qualified bidder and was ultimately selected as successful bidder by award of the contract with the authority to assign, delegate the contract work to sub-contractors subject to the approval of the Chennai Metro Rail Limited. In furtherance of the project of sub-contracting of the work, the respondent obtained quotations from the petitioner, who is stated to have completed the work in respect of Dubai Metro and Delhi Airport Metro line. The quotation is stated to have been submitted on 04.04.2012 and the contract was ultimately entered into on 24.05.2012.

2. It is not necessary to go into the details of the execution of the work, but suffice to say that an amended contract was entered into on 28.09.2013 inter se the parties with the petitioner executing an advance

bank guarantee for Rs.57,89,434/- issued by the Bank of America valid till 31.12.2014.

3. There was also a further sub-contract agreement entered into between the petitioner and "12ST", on terms and conditions contained therein after approval of the respondent.

4. In the execution of the works, disputes have arisen inter se the parties in respect of payments to be made by the respondent to the petitioner and the petitioner actually puts the blame on the respondent which is equally true qua the petitioner in respect of stand of the respondent and the disputes could not be resolved amicably. There was exchange of correspondence inter se the parties with the petitioner claiming right to seek appointment of an Arbitrator to adjudicate the disputes inter se the parties. While on the other hand, the respondent took the stand that the settlement of dispute Clause inter se the Chennai Metro Rail Ltd., and the respondent was never incorporated in the agreement inter se the two parties. Thus, the occasion of appointing either the Adjudicator first followed by appointment of Arbitrator did not arise.

5. The petitioner preferred different Original Applications seeking interim reliefs under Section 9 of the Indian Arbitration and

Conciliation Act, 1996. Those applications are stated to be pending with no interim orders.

6. The respondent has resisted the present application filed by the petitioner under Section 11(5) of the Arbitration and Conciliation Act, 1996.

7. In a nutshell, the defence as set out therein is that there is no arbitration Clause inter se the parties.

8. Learned counsel for the petitioner, in the course of proceedings held on 17.06.2016, had contended that the Arbitration Clause stood incorporated into the agreement inter se the parties. To support this plea, learned counsel for the petitioner relied on Clause – 5.0 of the contract inter se the parties, which reads as under:

5.0.BASIS OF CONTRACT

The price for subject work shall be based on the enclosed document as given below and relevant scope of TVS SCADA system. The documents mentioned in this table including Annexure 6 shall form the CONTRACT AGREEMENT:

Volume 1	Invitation for Bids Instructions to Bidders Bid Data Sheet
Volume 2	Conditions of Contract: Part I – General conditions of Contract Part II – Special Conditions of Contract
Volume 3	Employer's Requirements -General Specifications including Appendices
Volume 4	Employer's Requirements - Particular Specifications including Appendices (Tunnel Ventilation System)
Volume 5	Not Used
Volume 6	Employer's Drawings
Volume 7	Pricing Documents

9. In the contract executed inter se the parties, amendments were incorporated to the General Contions of the Contract and Special Contions of Contract, and the submission of the learned counsel for the petitioner is that the Arbitration Clause is not one of the Clauses which stand modified or removed from the contract inter se the parties.

10. On the other hand, the submission of the learned counsel for the respondent was that when Clause 5.0 itself is relatable only to the aspect of determination of price, how could the same come to the aid of the petitioner.

11. On hearing the learned counsel for the parties, by a short order dated 17.06.2016, the aforesaid controversy was recorded. It is quite obvious from a bare reading of Clause 5.0 that it refers to "the price for subject work". In fact, that Clause refers only to the mode of determination of the price stating that Annexure-6 forms part of the contract agreement. No doubt, Volume-2 incorporates certain parts of the principal contract inter se the parties and those parts are said to be included. That is only relevant for the purposes of price determination. In fact, faced with the aforesaid position, learned counsel for the petitioner had requested some time to examine the issue as to whether on the ground of rights and obligations in relation to the principal contract, there can be an implied arbitral clause inter se the two parties?

12. Learned counsel for the petitioner fairly concedes that there can be no arbitration clause by implication, but suggests once again by reference to Clause-5.0 that a broader view of the matter should be taken. He referred to the Judgment of the Hon'ble Supreme Court in *Pyrites, Phosphates and Chemicals Ltd., vs. Sebilan Compania and Another (2002) 9 SCC 353* to contend that where in a Bill of lading, the opening part specifically provided "all terms and conditions of the relevant charter party

are deemed to have been incorporated therein", Clause 47 of the Charter party containing the Arbitration Clause was held to be part of the terms of contract of the Bill of Lading.

13. The aforesaid Judgment is not of much assistance to the petitioner as the language therein is quite obvious. In fact, it is really an order and not a Judgment, as would be obvious from its perusal and it was on the given facts of that case.

14. Learned counsel for the petitioner also referred to the Judgment in *M.R.Engineers & Constructors Pvt. Ltd., vs. Som Datt builders Ltd. (2009(3) R.A.J - 448) (SC)*, more specifically paragraph-13. This paragraph dealt with the scope and intent of Section 7(5) of the said Act, which reads as under:

"7. Arbitration Agreement:(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

.....

(5)The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make arbitration clause part of the contract."

15. The aforesaid thus clearly shows that there can be an Arbitration Clause by incorporation where the reference is to such as to make the arbitration clause part of the contract. There is however no such contract inter se the parties in my view. Learned counsel for the petitioner while referring to the observations in sub-paragraph (v) of Paragraph-13, seeks to contend that being a Government contract, different parameters may apply. The observations are as under:

"Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties."

16. The aforesaid observations really in furtherance of the objective of having an Arbitration Clause by incorporation. Whether in a particular case, there is actually such an incorporation or not is a matter of fact. In the present case, Clause – 5.0 as relied upon by the learned counsel for the petitioner by reference to Volume-2 in the Clause does not assist the petitioner as the Clause itself is limited to the aspect of price.

17. The effect of all the aforesaid is that the arbitration Clause in the principal contract which was entered into by the respondent does not stand incorporated in the agreement inter se the parties.

18. It may be noted in the end that the learned counsel for the petitioner has pleaded that it would be appropriate if the respondent agrees to the mode of settlement of disputes through arbitration, which is always possible. However, learned counsel for the respondent states that he has instruction that the respondent is not willing for arbitration as a mode of resolution of dispute.

19. The original petition accordingly stands dismissed, leaving the petitioner to take appropriate legal recourse for recovery of any alleged dues.

(S.K.K., CJ.)

1st July, 2016

ksr

The Hon'ble the Chief Justice

(ksr)

O.P. No.63 of 2016

01.07.2016