

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED: 27.10.2017****CORAM****THE HONOURABLE Dr. JUSTICE ANITA SUMANTH****O.P.No.108 of 2017**

Sivaswathi Constructions Pvt. Ltd.,
Plot No.303/A, MLA Colony,
Road No.12, Banjara Hills,
Hyderabad – 34.

...Petitioner

-Vs-

The Superintending Engineer,
PWD, WRO,
Middle Cauvery Basin Circle,
Trichy 620 020
...Respondent

Prayer: Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1966 seeking to appoint an arbitrator in the manner set out under section 11(6) of the Arbitration and Conciliation act, 1996, to decide the disputes arising out of the contract dated 09.02.2009 between the petitioner and the respondent.

For Petitioner

: Mr. V. Lakshminarayanan

For Respondents

: No appearance

ORDER

This petition is filed in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, 'Act') praying for the appointment of an arbitrator to decide and adjudicate the disputes arising out of contract dated 9.2.2009 between the petitioner and the respondent.

2. The parties entered into an agreement for construction of a barrage across the River Cauvery, vide agreement dated C.R.No:90LS/Floods/2008-09. This scheme was envisaged as the first phase towards the interlinking of rivers and also to provide for a passage for the flow of excess of water in the Cauvery river during rains to the Vaigai and Manimuthur rivers.

3. No appearance for the respondent, despite the matter having been listed on several occasions when the names of the respondent were printed in the cause list.

4. Disputes arose during the execution of the agreement and the arbitration clause was invoked by the petitioner vide letter dated 22.09.2015. The relevant clauses are as follows;

'CLAUSE 3 OF ARTICLES OF AGREEMENT:-

'3. The arbitrator for fulfilling the duties set forth in the arbitration clause of General Conditions of Contract shall be

(i) Upto Rs.50000 : Superintending Engineer,
PWD, WRO, Lower Cauvery
Basin Circle, Thanjavur.

(ii) Rs.50,000 and above : Competent Civil Court.'

CLAUSE 38 OF THE GENERAL CONDITIONS OF CONTRACT:-

"In case of any dispute of difference between the parties for the contract either during the progress (or) after the completion of the works or after determination, abandonment or breach of the contract as to any other matter or thing arising there under except as to matters left to the self discretion of the Executive Engineer of the clause 18,20,25-3, 27(1) 34, 35 and 37 of the General Conditions of Contract as to the works holding Executive Engineer of the payment of any items on which the contractor may claim to be entailed them either party shall forthwith give to the other notice or such dispute or difference shall be and is hereby referred to the arbitration of the Superintending Engineer, of the nominated circle mentioned in the article of the agreement hereinafter called the arbitrator, in cases where the value of claim is less than and upto Rs.50,000/- in cases where the value of claim more than Rs.50,000/- the parties will seek remedy through the competent Civil Court".

5. The parties have agreed and adopted a two tier approach for the appointment of an arbitrator. All disputes up to the sum of Rs.50,000/- are to be referred to the Superintending Engineer, PWD, WRO, Lower Cauvery Basis Circle, Thanjavur and disputes in excess of the monetary

limit of Rs.50,000/- would come within the purview of the competent City Civil Court.

6. The defence taken by the respondent while admitting to the factum of disputes is that the dispute in the present case is over Rs.50,000/- and as such, the petitioner would only have to approach the Civil Court for resolution of the same.

7. A plain reading of clause 38 of the General Conditions of contract supports this submission. The Supreme Court in the recent judgment in *M/s. Duro Felguera, S.A. Vs. M/s. Gangavaram Port Limited* (2017 SCC Online SC 1233) has considered the scope of Section 11(6A) of the Act introduced vide 2015 amendment.

8. The conclusion of both learned Judges, reiterated vide separate opinions, is to the effect that after amendment, the power vested in the court under section 11(6A) would be confined solely to the examination of the existence of an arbitration agreement. The judgment, at para 62 states thus:

'62. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists – nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as

incorporated in section 11(6A) ought to be respected.'

Section 11(6 A) is extracted below:

' 11. Appointment of arbitrators.-

.....

.....

6-A. The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section(4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.'

9. The applicability of the amendment to this matter cannot be disputed insofar as the letter of invoking arbitration has been sent in November 2015 pursuant to introduction of sub clause (6A) in Section 11.

10. The Madras High Court in the case of *Rajam Engineering Contractor V. State of Tamil Nadu* (2001(1) CTC 769) had considered an identical question as in the present case. The petitioner had urged, upon its interpretation of a similar clause in that case, that while disputes below Rs.2.00 lakhs (in that matter) would be decided by departmental arbitration disputes in excess of Rs.2.00 lakhs would be arbitrated upon by an Arbitrator appointed by Court.

11. Learned Advocate General on behalf of the State of Tamil Nadu had however objected to the maintainability of the petition arguing that the phrase 'be referred to Court' relating to disputes in excess of Rs.2.00 lakhs (the phrase in the present case is 'seek remedy through the competent Civil Court') should be understood to mean that the claim should be filed before a Court having a competent jurisdiction to deal with the same. The petitions were dismissed accepting the argument of the State. The opinion of the learned Chief Justice is as follows:

'9. Having given anxious thought to the rival arguments made at the Bar, I am of the view that the interpretation suggested by the petitioners cannot be accepted and the petitions are liable to be dismissed. What is contemplated by the Governmental Order is that the existing system of referring the disputes between the contractors and the department to the arbitrator may be continued. The claims upto the value of Rs.2 lakhs may be referred to the departmental arbitration and claims above the value of Rs.2 lakhs will be referred to Court. The contention of the petitioners is that the words 'be referred to Court' means referred to the Court for appointment of the arbitrator where the value of contract is more than Rs.2 lakhs. In other words even claims of more than Rs.2 lakhs should be referred to arbitration through Court. In my opinion, the interpretation suggested by the petitioner's counsel is wholly impermissible. The term 'be referred' to Court could only mean that the party may be referred/directed to Court for adjudication. Learned Advocate General is right in contending that Section 20 of the old Act contemplates an application to be filed in a Court to file an arbitration agreement and then reference would be made by the Court to an arbitrator under Section 23 of the said Act. Therefore, the words reference to the Court cannot mean reference to the Court under Section 20 of the old Act. In any event, the existence

of arbitration agreement must be decided on the basis of the terms of the arbitration agreement and on a plain reading of arbitration clause it is clear that the claim should be filed before the Court having jurisdiction for decision and only with regard to claims less than Rs.2 lakhs the matter should be referred to departmental arbitrator, who shall be the Superintending Engineer.'

12. The matter was carried in Special Appeal and the Supreme Court in SLP.C.No.10479 of 2006 vide order dated 21.07.2008 appointed a former Judge of the Madras High Court as an Arbitrator to resolve the dispute between the parties. The said order reads as follows:

'Heard learned counsel for the parties.

Having regard to the facts and circumstances of the case, we appoint Justice E.Padmanaban, retired Judge of the Madras High Court as an Arbitrator to go into all the questions and resolve the dispute between the parties. The terms and conditions of remuneration shall be settled by the Arbitrator concerned.

All the questions of law and facts are left open to be decided by the Arbitrator.

The Special Leave Petitions are disposed of.'

13. In the light of the above view taken by the Supreme Court, the matter is referred to arbitration reserving the right of the parties to raise the issue of jurisdiction as a preliminary issue under Section 16 of the Act.

14. Accordingly, I appoint Mr.Justice S.Rajeswaran, former Judge of this Court, residing at No.AA-67, II Street, Anna Nagar, Chennai, as a

sole arbitrator to enter upon the reference, issue notice and hear the parties. He may, 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 requested to decide hearing on the preliminary issue, if raised by the parties, on priority before proceeding to hear the matter on merits, if at all.

15. The learned Arbitrator is at liberty to fix his remuneration as well as schedule of expenses which shall be borne by both parties equally. The request of Mr.Lakshmi Narayanan for the conduct of the proceedings under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules is accepted.

16.The petition is ordered in the above terms. No costs.

27.10.2017

Speaking order/Non-Speaking order

Index : Yes/No. Internet: Yes/No

msr/sl

Dr.ANITA SUMANTH, J.

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