

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 13.07.2017

PRONOUNCED ON: 30.08.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P.No.666 of 2016

M/s. NAPC Limited,
a Company incorporated under the
companies Act, 1956,
having its registered office at
184/214, Royapettah High Road,
MMPDA Tower 2nd Floor,
Royapettah,
Chennai 600 014. Petitioner

Versus

1. The Executive Director,
Tamilnadu Road Infrastructure Development
Corporation, 4th Floor, LLA Building, 735,
Anna Salai, Chennai 600 002.
2. The Engineer,
Tamilnadu Road Infrastructure Development
Corporation, 4th Floor, LLA Building,
735, Anna Salai, Chennai 600 002. Respondents

Prayer: Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 praying to appoint an arbitrator to arbitrate over the disputes regarding settlement of claims between the petitioner and the respondents arising out of the agreement No.3/2008-209 dated 30.06.2008.

For Petitioner : Mr.Arun C. Mohan

For Respondents : Mr.V. Ayyadurai, AAG-II

for Mr. M.Venugopal SGP (CS)

O R D E R

This Original Petition is filed by M/s. NAPC seeking the

<https://hcservices.ecourts.gov.in/hcservices/> appointment of an Arbitrator to decide upon disputes between

the petitioner and the respondents arising out of Agreement No.3 of 2008-09, dated 30.06.2008.

2. Heard Mr. Arun C. Mohan, learned counsel appearing for the petitioner and Mr.V.Ayyadurai, learned Senior Counsel and Additional Advocate General, II appearing for Mr.M.Venugopal, Special Govt. Pleader (CS) on behalf of the respondents, Tamilnadu Road Infrastructure Development Corporation and another, who puts forth serious objection to the maintainability of this petition.

3. A contract dated 30.06.2008 was entered into between the petitioner and the respondents for the work of improvements (4 laning) to Vandalur - Wallajabad Road (S.H.48) Km 34/0-47/0 Package III. Admittedly disputes arose between the parties that were referred to the Engineer, Tamilnadu Road Infrastructure Development Corporation, (in short TNRIDC), R2. Since there was no response from the Engineer within 30 days as provided for in clause 50 of the contract, the matter was carried to the Executive Director of the TNRIDC, R1, vide letter dated 03.07.2012 in terms of clause 50 of the General Conditions of Contract. R1 conveyed its decision, dated 24.07.2012 to reject the claim in full granting opportunity to submit further evidence to substantiate the claims in terms of clause 50 of the contract.

4. Thereafter, the petitioner approached the Board vide

<https://hcservices.courtsgov.in/hcservices/> 17.8.2012. The Board, vide letter dated

09.10.2012 conveyed its decision to reject the claims granting opportunity to the petitioner to offer more evidence to substantiate the same if available. Vide a detailed letter dated 26.12.12 the petitioner made extensive submissions in relation to the claims to be considered by R1. The aforesaid appeal petition was considered and rejected by letter dated 17.3.2014. R2 offered an opportunity to the petitioner to reconsider its claim and furnish a reply within 30 days failing which the matter would be placed before the Board in terms of clause 51 of the contract for its consideration and settlement.

5. On 23.3.2014, the petitioner escalated the matter to the Board that, vide letter dated 19.12.2014, conveyed its decision to settle the claims partially, that is, to the extent of a sum of Rs.22,04,048/- as against the total claim of Rs.27,08,05,389/-. This determination by the Board is stated to be in terms of clause 51 of the contract between parties.

6. The petitioner, vide letter dated 20.1.2015, reiterated its claims and TNRIDC, vide letter dated 21.1.2015 conveyed the finality of its decision dated 19.12.2014 passed in terms of clause 51 of the contract. By letter dated 15.6.2015, the petitioner sought recourse to a consultative process raising various revised claims. Interestingly, the

to approach the civil courts by way of suit if the claims are not settled. The delay in response on the part of the petitioner was, according to Mr.Arun, on account of its relocation to a different address. Vide letter dated 10.7.2015, TNRIDC rejected all claims including the additional claims and, in accordance with the request of the petitioner, referred the claims to the TNRIDC Board for resolution in terms of clause 51 of the contract. By an order dated 3.3.2016, the decision of the Board rejecting all claims was conveyed to the petitioner.

7. The present petition has been filed in the background of the aforesaid sequence of facts. Since the prayer in the petition revolves upon an interpretation of Clauses 50 and 51 of the agreement, the same are extracted hereunder:

'50. SETTLEMENT OF DISPUTES

If any, dispute or difference of any kind whatsoever shall arise between the Engineer or Employer the Contractor in connection with, or arising out of the contract of the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred , to and settled by the Engineer who shall, within a period of thirty days after being requested by the contractor to do so, give written notice of his decision to the contractor. Upon receipt of the written notice of decision of the contractor shall promptly proceed without delay to comply with such notices of decision.

If the Engineer fails to give notice of his decision in writing within a period of thirty days after being requested, or if the contractor is dissatisfied with the notice of decision of the Engineer, the contractor may within thirty days after receiving the notice of decision appeal to the Employer who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. Subject to arbitration, as hereinafter provided, such decision of the Employer in respect of every matter so referred shall be final and binding upon the contractor and shall forthwith be given effect to by the contractor, who shall proceed with the execution of the works with all due diligence whether he requires arbitration, as hereinafter provided, or not. If the Employer has given written notice of his decision to the contractor and no claim to arbitration has been communicated to him by the contractor within a period of thirty days from receipt of such notice, the said decision shall remain final and binding upon the contractor.

If the Employer shall fail to give notice of his decision, as aforesaid, within a period of thirty days after being requested as aforesaid, or if the Contractor be dissatisfied with any such decision, then and in such case the contractor within thirty days after the expiration of the first named period of thirty days, as the case may be, required that the matter or matters in dispute be referred to TNRIDC.

51. RESOLUTION OF DISPUTES:

The disputes will be settled by consultation between the employer and the contractor. TNRIDC board may intervene. The arbitration clause of any kind are not applicable to this contract. The dispute may be settled by the TNRIDC Board.'

8. While Mr. Arun Mohan would maintain that Clause 50 entitles the parties to the appointment of an arbitrator,

Mr.Ayyadurai would vehemently deny the same pointing straight

away to Clause 51 of the agreement between parties that provided expressly for the settlement of disputes only by way of mutual consultation that further confirmed emphatically that arbitration clauses of any kind were not applicable to the contract. Thus according to him, a combined reading of clauses 50 and 51 of the General Conditions of Contract reveals that agreement No.3 of 2008-09 dated 30.6.2008 does not provide for arbitration in terms of the Arbitration and Conciliation act 1996 (in short 'Act') as a means of dispute resolution.

9. Mr.Ayyadurai, learned AAG, would rely upon the following judgments to state that there is, in the present case, no valid arbitration agreement between the parties in terms of section 7 of the Act.

(i) *State of Rajasthan and Ors. V. SPML Infra Ltd. and another* - 2016 (2) R.A.J.111 (Raj.)

(ii) *M/s. P-Kal Infotech Pvt. Ltd. V. M/s.Perto S.A. & Ors.* - 2015(2) R.A.J. 258 (Del)

(iii) *NSK India Sales Company Private Ltd. V. Proactive Universal Trading Company Private Ltd.* - 2014-4-L.W.417

10. In reply, Mr. Arun Mohan would refer to paragraphs 2 and 3 of Article 50 that specifically use the word 'arbitration'. According to him, the proper interpretation of Article 50 and 51 is as follows:

- Dispute or difference to be referred to and settled by the Engineer within 30 days from request
- Upon failure of Engineer to decide within 30 days, or if contractor is dissatisfied with the decision of the Engineer, an appeal may be filed to the employer who shall, in accordance with the principles of natural justice, decide the same.
- The decision of the employer is final except in the event of the contractor resorting to arbitration and communicating such decision to the employer within a period of 30 days from the date of receipt of the decision of the employer.
- If the employer does not forward notice of his decision within 30 days or if the contractor, being dissatisfied with the decision, decides to pursue the dispute further, he may, within 30 days from the date of receipt of the decision, seek reference of the dispute to the TNRIDC for resolution.

11. According to him, it is only at this stage that Article 51 would stand triggered, whereby the dispute between the contractor and TNRIDC would be settled by consultation between the parties and reference to arbitration stands specifically excluded. The exclusion of 'arbitration' is thus only at this stage and not elsewhere and reference to

12. I cannot agree. The entire sequence of events between the parties points one to the conclusion that Arbitration as understood under the Act was never contemplated by the parties as a method of dispute resolution. The process involved a two tier approach, whereunder the disputes were to be raised for resolution by the Engineer and thereafter to the Board by consultation. This is the process followed by the parties over the period 2012 to 2015 and the petitioner in fact, by letter dated 15.06.2015 reveals its hand when it threatens legal action by way of a civil suit if its claims are not met.

13. The Supreme Court, in the case of *Mallikarjun V. Gulbarga University* (2004) 1 SCC 372, while considering the existence of an arbitration agreement between the parties refers to the judgement in the case of *Bihar State Mineral Development Corporation and Another vs. Encon Builders (I) (P) Ltd* ((2003) 7 SCC 418) laying down the following principles:

'In Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (p) Ltd., reported in [2003] 7 SCC 418, laid down the essential elements of the arbitration agreement, which are as follows:

- (i) There must be a present or a future difference in connection with some contemplated affair;*
- (ii) There must be the intention of the parties to settle such difference by a private tribunal;*
- (iii) The parties must agree in writing to be bound by the decision of such tribunal; and*

(iv) The parties must be ad idem.'

14. If one were to construe Clauses 50 and 51 of the contract in the light of the above principles, it seems apparent that the parties never intended that the process of dispute resolution be conducted in accordance with the provisions of the 1996 Act. In fact, clause 51 would specifically exclude application of all arbitration clauses to the contract. 'Ad idem' or 'meeting of the minds' in this case is apparently to exclude all references to the Arbitration and Conciliation Act.

15. What then could be the import of the reference to the term 'arbitration' in paragraph 2 of Article 50? As I see it, the term seems to have been used, and should be given its natural meaning, as that of a consultative process of dispute resolution. Arbitration, as a statutory means of dispute settlement has to be consciously availed of by the parties and in the present case, has been specifically eschewed.

16. Quoting from John P.H.Soper's, *A Treatise on the Law and Practice of Arbitrations and Awards* 1 (David M.Lawrence ec., 5th ed. 1935), 'Arbitration may be defined as a method for the settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specially nominated for the

purpose, either instead of having recourse to an action at

