

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19.03.2018

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P. No.365 of 2017

&

A.Nos.5056, 5286 and 4812 of 2017

M/s.Ramcons
represented by its Proprietor,
Mr.K.Ramanujam,
having its office at
Old No.28, New No.80, Josier Street,
Nungambakkam, Chennai 600 034 .. Petitioner

-VS-

1. M/s.Vishranthi Sabari Constructions,
represented by its Partner,
Mr. M.R. Varija,
No.39, Kavi Bharathidasan Road,
Teynampet, Chennai 600 018.
also at
M/s.Vishranthi Sabari Constructions,
represented by its Partner,
Mr.M.R.Varija,
No.351, Avvai Shanmugam Salai (Lloyds Road),
Vadhiraja Centre, 3rd Floor,
Gopalapuram, Chennai 600 086.

(vide A.No.5286 of 2017 allowed dated 19.03.2018)

2. Mr.M.R.Rajkumar Reddy,
Managing Partner,
No.351, Avvai Shanmugam Salai
(Lloyds Road),
Vadhiraja Centre, 3rd Floor,
Gopalapuram,
Chennai 600 086.

.. Respondents

Prayer: Petition filed under Section 11(4) of the Arbitration & Conciliation Act, 1996 to appoint an independent and impartial Arbitrator on behalf of the respondent in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 to resolve the disputes between the petitioner and the respondents arising out of the Agreement dated October, 2006.

For Petitioner : Mr. P.J. Rishikesh

For Respondent : Ms. P.T.Asha
for M/s.Sarvabhauman Associates

ORDER

This order disposes of O.P.No.365 of 2017 and all connected applications.

2. The Original Petition is filed seeking appointment of an Arbitrator in terms of section 11(6) of the Arbitration and Conciliation Act 1996 (the Act) to adjudicate upon the disputes that have arisen between the parties arising out of an agreement (undated) of the month of October 2006.

3. Heard Mr. P.J. Rishikesh, learned counsel appearing for the petitioner and Ms.Asha, learned counsel appearing for the respondent.

4. The parties had entered into a construction agreement in October 2006 for the construction of a residential apartment project in Old Mahabalipuram Road, Sholinganallur, Chennai 600 119.

5. The scope of work was for a total value of Rs.6,70,50,000/-

and the project was to be completed and handed over within 10 months from the effective date, being 9.10.2006.

6. According to Mr. Rishikesh, the total value of the work effected by the petitioner and duly certified by the Architect is Rs.8,03,27,235/- and the difference remaining to be paid by the respondent is thus to the tune of Rs.1,18,74,207/-. There is no dispute that the project has been successfully completed and taken over by the respondent and as such the petitioner raised a demand on 21.9.2011 for the amount of Rs.1,18,74,207/-, the break up being as follows:

S.No.	Description	Amount (Rs.)	Remarks
1	Cumulative value of tendered and non-tendered items of work done in the site	8,03,27,235/-	Upto running Bill No.RAB 58 dated 21.10.2009
2	Add-Service Tax on work value @ 4.12%	33,09,482/-	
	A	8,36,36,717/-	
3	Less - Material supplied by the 1 st of you as per RAB 56	26,56,086/-	
4	Less - Payments received from the 1 st of you including all advances and running bill payments, TDS and WCT payments		
	B	7,17,62,510/-	
5	Amount Due (A-B)	1,18,74,207/-	

7. There was no response from the respondents. Upon follow-up, an e-mail dated 25.2.2014 was received calling for a meeting after 10 days. On 27.10.2014, after a round of discussions, there was a categorical denial of the liability to clear the dues as computed by the petitioner. However, the respondent admitted to liability of an amount of Rs.47,88,924/- as against the claim of Rs.118,74,267/- by its communication dated 27.10.2014.

8. Further communications ensued in the course of 2014, 2015 and 2016, but the liability, even to the extent admitted, remains outstanding.

9. The Arbitration Agreement reads as under:

'21. Arbitration.

In case of any dispute or difference in reference to the drawings and specifications/quantity/quality, such issues shall be referred to FIRST PARTY's Project-in-charge officially within 14 days, and if either party is not satisfied with the decision of FIRST PARTY's Project-in-charge, then the same could be referred to the Architect.'

10. The petitioner invoked the arbitration clause requesting M/s.KSM Consultants Pvt. Ltd. the Architects appointed for the project, to arbitrate upon the disputes inter se the parties. The letter was returned as unserved with endorsement of 'unclaimed' and 'left' respectively in respect to both the office locations of the respondent. In any event, by letter dated 10.2.2017, the Architect also expressed his inability to arbitrate upon the matter.

11. The petitioner thereafter appointed Mr. Justice G.M. Akbar Ali, retired Judge of this Court as its nominee Arbitrator and issued notices dated 18.4.2017 to all the available addresses of the respondent. All notices were returned by the postal department. Hence the present petition.

12. The crux of the defence put forth by Ms. Asha is that the issue raised by the petitioner is not an arbitrable dispute. According to her, the arbitration agreement would stand attracted only in a situation where the dispute or difference relates to drawings and specifications relating to quality and quantity of work executed and in the present case, the dispute does not fall within the ambit of the clause since the demand raised did not relate to the quantity or quality of the material supplied. Thus while she would not dispute, per se the existence of an arbitration clause, the benefit of the same could not, according to her, be availed of by the petitioner.

13. Both learned counsel have filed samples of documents executed, such as material advance bill, running account (RA) bill and copies of ledger extracts in support of their submissions, the petitioner to state that the dispute partly related to quantity/quality of the work done and the respondent to show otherwise.

14. Ms. Asha would argue that the demand raised by the petitioner related to a service tax liability which the petitioner was

attempting to pass on to the respondent that does not come within the ambit of disputes envisaged by the arbitration clause. However, the outstanding as per the petitioner is of an amount of Rs.1,18,24,207/- which does not correspond either to the service tax demand that, as can be seen from letter of the petitioner dated 14.02.2014 is of an amount of Rs.78,80,144/- or the admitted balance as per the respondent.

15. Despite a pointed query put to Ms Asha as to what the amount of Rs.47,88,924/- then relates to, there is no clarity forthcoming in this regard.

16. The running account bills produced by Mr. Rishikesh on the other hand, indicate that disputes have been raised by the respondent on the percentage of work as well as rate claimed by the petitioner. For instance, RA bill dated 27.06.2007 reveals that as against a request for payment of Rs.1,90,644/- only Rs.1,79,469/- has been sanctioned by the respondent. The figures relating to material have been modified and the rate lowered by the respondent – as against Rs.4053.35 for 20mm blue metal, Rs.1426.35 is sanctioned, as against Rs.129536/- for steel, Rs.124539.00 is sanctioned; as against Rs.17350/- for Bricks, Rs.13800 has been sanctioned. As regards RA bill dated 05.07.2007, the percentage of 38 and 27 claimed by the petitioner towards work in Blocks I and III has been lowered by the

respondent to 37.50% and 26% respectively. These are clearly disputes in the realm of quantity and quantity of work.

17. An explanation is offered by Ms.Asha to the effect that the differences and modifications effected in the RA bills will have been reconciled and finally settled in the drawing of final bills. But this is neither here nor there. If the submission is to the effect that the modifications have been ultimately reversed by the respondent, then some material should be produced to that effect but no such material has been placed on record. If the submission is that the modifications have been carried over to the final bill, then the disputes relating to quantity and quality clearly continue to exist. This submission is thus of no assistance to the respondent.

18. She also draws attention to the delivery challans which contain an endorsement to the effect that quality and quantity have been checked and are found ok. This, according to her, supports the argument that there is no dispute as regard quantity and quality of work. I find however that the aforesaid endorsements find place on third party documents and as such would not support the argument advanced as relating to the petitioners' case.

19. In view of the above discussion, I am of the considered view that an arbitrable dispute arises in this matter.

20. In line with the arbitration agreement in the construction

agreement, the petitioner has appointed Justice G.M.Akbar Ali as its nominee. What remains is for this Court to appoint an Arbitrator on behalf of the respondent.

21. Allowing the Original Petition and accepting the prayer for appointment of arbitrator, I appoint Mr.Ramakrishnan Viraraghavan, Senior Advocate, as the Arbitrator on behalf of the respondent. The two learned arbitrators, Mr.Justice G.M.Akbar Ali and Mr.Ramakrishnan Viraraghavan are requested to appoint a Presiding Arbitrator to adjudicate upon the disputes inter se the parties in accordance with the arbitration clause between the parties. The learned Tribunal is at liberty to fix the fee and schedule of expenses that shall be borne by the parties equally.

22. The counter filed admits to liability as regards the sum of Rs.47,88,924/- and this has prompted the petitioner to file application A.No.5056 of 2017 praying for furnishing of security.

23. A.No.5286 of 2017 seeks amendment of cause title from M/s.Vishranthi Sabari Constructions, Rep. by its Managing Partner Mr.M.R.Rajkumar Reddy to M/s.Vishranthi Sabari Constructions, Rep. By its Partner Mrs.M.R.Varija and A.No.4812 of 2017 seeks impleadment of Mrs.M.R.Varija, wife of Mr.M.R.Rajkumar Reddy and Mrs.Aruna Ramani in the application and the original petition. The

amendment prayed for in A.No.5286 of 2017 is ordered.

24. In the light of the fact that the Original Petition is allowed and the matter referred to the Arbitral Tribunal for resolution, the interim prayer sought as well as the prayer for impleadment may well be considered by the Arbitral Tribunal in line with the provisions of newly introduced 9(3) of the Act.

25. A.Nos.5056 and 4812 of 2017 are closed granting the parties liberty to move the Arbitral Tribunal for appropriate interim relief as well as any other prayers as may be considered necessary and the Tribunal is requested to consider and decide the same on priority and in accordance with law.

19.03.2018

Index : Yes/No

Speaking order/non-speaking order

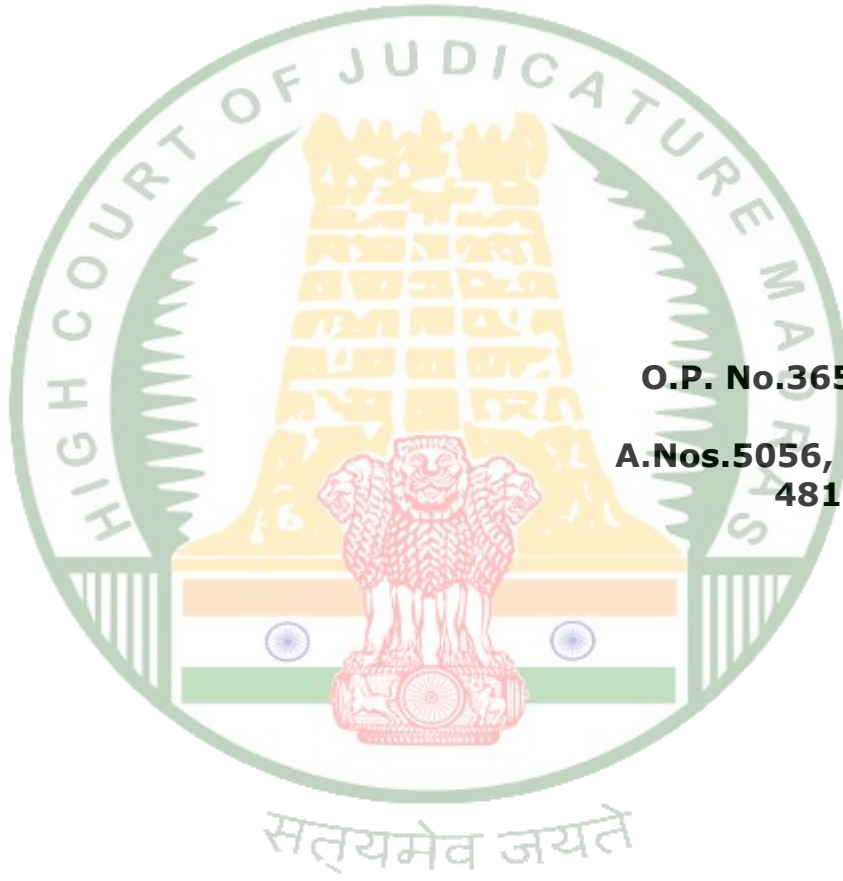
msr/sl

Note: Amendment to be carried out on or before 22.03.2018.

Registry is directed to issue a copy of the order only upon carrying out the amendment.

DR. ANITA SUMANTH, J.

msr/sl



**O.P. No.365 of 2017
&
A.Nos.5056, 5286 and
4812 of 2017**

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