

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :14.03.2018

CORAM

THE HON'BLE JUSTICE DR.ANITA SUMANTH

O.P. No.657 of 2017

M/s.Apex Buildsys Limited
(previously known as
M/s.Era Buildsys Ltd.),
B-24, Sector-3, Noida (UP)-201301 ... Petitioner

Versus

KALS Breweries Pvt. Limited,
23/5, Thanikachalam Road,
T.Nagar, Chennai-600 017. ... Respondent

Prayer: This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to refer the disputes to the Arbitral Tribunal by appointing the nominee of the petitioner herein as the Sole Arbitrator.

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For Petitioner : Mr.P.Rajadurai for
M/s.A.P.R.Associates

For Respondent : Mr.Madhan Babu

ORDER

This original petition is filed seeking the appointment of a sole arbitrator in terms of section 11(6) of the Arbitration and Conciliation Act 1996 ('Act').

2.The brief submissions of Mr.P.Rajadurai, learned counsel appearing for the petitioner are as follows:

(i)The petitioner is engaged in steel building business in India and provides services in relation to the manufacture and supply of metal products and pre-engineered buildings.

(ii)A tender was floated by one Nirman Consultants Pvt. Ltd. (in short and hereinafter 'Consultant') on 07.10.2010 for the design, supply and erection of pre-engineered buildings for the proposed manufacturing facility of the respondent at Trichy, Tamil Nadu.

(iii)The petitioner responded to the tender and submitted a bid on 29.10.2010 for a sum of Rs.7.9 crores.

(iv)The petitioners' bid was accepted and a work order and letter of intent both dated 08.11.2010 were issued awarding the tender to the petitioner for the quoted price of Rs.7.9 crores.

(v) The scope of work under the contract was completed, albeit with a delay.

(vi) According to the petitioner, as against the total invoices raised for Rs.7,60,45,963/-, only a sum of Rs.5,97,70,396/- have been paid.

(vii) Repeated requests and demands for the outstanding amount were made by the petitioner.

(viii) Vide email dated 25.09.2017, the CEO of the respondent initially rejected the demands.

(ix) Upon the insistence of the petitioner the respondent issues a subsequent mail dated 25.09.15 assuring the petitioner that he would discuss the issue with the team and revert to the petitioner.

(x) However, there was no response thereafter from the respondent.

(xi) On 01.02.2017 the petitioner invoked the arbitration clause, being clause 4.61 of work order dated 25.11.2010. The notice of invocation of arbitration was duly received by the respondent, but no reply was forthcoming.

(xii) Hence, the present petition praying for the appointment of an Arbitrator to resolve the disputes that have arisen inter se the parties.

3.Mr.Madhan Babu, learned counsel for the respondent raises the following defences:

(i) Mainly, he would deny the existence of an arbitration agreement. Though the tender document contains an arbitration agreement at 4.61 thereof, Mr.Babu would point out that it was not signed by both parties and thus did not satisfy the ingredients of section 7 of the Act. He then draws attention to Work Order dated 25.11.2010, the enclosed terms and conditions of which do not contain an arbitration clause. Thus, according

to him, neither the tender documents nor the work order contain valid arbitration agreements.

(ii) Without prejudice to the above, he would make the following three submissions.

(a) That the dispute raised is wholly barred by limitation.

(b) That the procedure as set out under the Arbitration clause has not been followed by the petitioner.

(c) That, in any case, the procedure set out for the appointment of arbitrator in the arbitration agreement has to be followed by the court. In this context, he relies upon the judgements of the Supreme Court in *Geo-Group Communications Inc. vs. IOL Broadband Limited* ((2010) 1 SCC 562), *Deep Trading Company vs. Indian Oil Corporation and others* ((2013) 4 SCC 35) and *Northern Railway Administration, Ministry of Railways, New Delhi vs. Patel Engineering Company Ltd* ((2008) 10 SCC 240).

4. Learned counsel also states that a reply had been issued to the notice invoking arbitration on 21.02.2017. However the notice, admittedly, was addressed to a third party. That apart, an acknowledgment card is produced on 24.10.2017 contending that the reply notice, though incorrectly addressed, has been served upon the address of the petitioners' counsel.

5. Heard Mr.P.Rajadurai, learned counsel for the petitioner and

6. Let me first address the argument relating to the absence of an arbitration agreement. Admittedly, though the work order does not contain an agreement for arbitration, the tender documents do contain an arbitration clause. The specific argument raised is that the tender document is not signed and as such the arbitration clause contained therein would not satisfy the ingredients of section 7 of the Act. Even assuming that the arbitration agreement in the tender document was valid it has not been incorporated in the work order and thus is of no assistance to the petitioner.

7. Work Order dated 25.10.2010 has been issued pursuant to a letter of intent (LOI) dated 08.12.2010. The LOI is extracted below:

. . . .

Sub: LOI for PEB for our brewery – Trichy

Ref: Your quote and mails to NIRMAN Consultants, Delhi

Various Discussions held at Delhi and Chennai on 27.10.10 and 08.11.10

We have pleasure in issuing this Letter of Intent for supply and erection of PEB buildings in accordance with the specifications mentioned in our tender Documents dated 07.10.2010 and our clarification dated 12.10.2010. The scope of the order would also include supply and erection as per the discussion.

The price

A detailed Purchase Order would follow.

Thank you

. . . .

8. The PO reads as follows:

. . . .

Sub: Work Order for PE for .

Ref: Your Offer EBSL/MKT/VI.

Our different stage discussions at Delhi and Chennai during Oct and Nov/2010

Our LOI KBPL/PEB/LOI/2010-11 dtd 08.11.10

We refer to our discussions at our office and your final agreed price on 08th Nov 2010 as mentioned above. We are pleased to confirm the order with you for the supply and erection of PEB in accordance with the specifications mentioned in our Technical Documents dated 07.10.2010 and as per our 12th Oct 2010 clarifications at our Brewery Project at Kunnathur Village, Illuppur Tk, near Tiruchy, T.N., India.

Scope of Work, Price, Terms & Conditions and Delivery Terms – Refer Annexures

Please send us a signed copy of our purchase order as a token of your acceptance of all terms & conditions.'

.....'

9. There is no quarrel with the position that the terms and conditions annexed to the work order do not, per se, contain an arbitration clause. However, the petitioner would argue that the tender documents that contain an arbitration clause stand specifically incorporated into the work order and as such the arbitration agreement contained in the tender would stand attracted and applicable. The defence that is put forth is two pronged – firstly that the dispute resolution clause contained in the tender is not a valid arbitration agreement and secondly, that in any event, it has not been incorporated in the work order.

10. I first proceed to examine whether the arbitration agreement contained in the tender documents constitutes a valid agreement as between the parties.

11. It is an admitted position that the tender notice dated 07.10.2010 contains a clause for arbitration at clause 4.61 which forms part of the general instructions to tenderers. The tender notice itself is one complete and comprehensive volume that encompasses the following documents:

1. *Tender notice*
2. *General instructions to tenderers*
3. *Definitions*
4. *General conditions of contract*
5. *Annexure-I (Special conditions of contract)*
6. *Annexure-II-Safety code*
7. *Technical specifications*
8. *Schedule of requirements and rates*
9. *Project reference drawings*

12. Clause 2.2 of the tender sets out the details of the documents to accompany the tender in order to render it complete and enforceable and reads thus:

'2.2 Bidding documents

The bid shall be complete with all the documents set out in these instructions and elsewhere in the bid documents. In particulars the bidder shall submit the following with his bid for the bid to be considered as bonafide.

a) Bid letter from the contractor.

b) Complete set of Tender Document (original) as sold duly filled in and signed by the Tenderer as prescribed in different clauses of the Tender Document.

c) Earnest money in the manner specified in the respective clause.

d)Power of Attorney or a true copy thereof duly attested by a Gazetted Officer in the case an authorized representative has signed the tender.

e)Employees Provident Fund Account, Group Insurance (if any), ESI, copies of labor license should also be submitted.'

13.The tender, at clause 2.6 thereof, requires all pages to be initialled prior to submission. Clause 2.6 reads thus:

'2.6 All pages are to be initialled

All signatures in Tender Documents shall be dated, as well as, all the pages of all sections of Tender Documents shall be initialled at the lower right hand corner and signed wherever required in the tender papers by the tenderer or by a person holding power of attorney authorizing him to sign on behalf of the tenderer before submission.'

14.Since it was the specific case of the respondent that there was no agreement for arbitration that had been executed as between the parties, Mr.Madhan Babu was called upon to produce the original tender to show non-compliance by the petitioner with the aforesaid provision. However, Mr.Madhan Babu, upon instructions, reports to Court that the original tender is unavailable for production.

15. In the present case, the tender document, clause 2.2, specifically requires each page including the page containing the arbitration agreement, clause 4.61, to be initialled by a person duly authorised on behalf of the tenderer for the bid to be considered a bonafide and proper bid.

16.Evidently, the petitioner has executed the tender as required and the same has been accepted by the respondent. This is clear from clause

2.16 of the general instructions that form part of the tender document dealing with Right of Owner to accept or reject the tender stating thus:

2.16 Right of owner to accept or reject tender

The right to accept the Tender will rest with the Owner. The Owner (respondent herein), however, does not bind himself to accept the lowest tender and reserves to himself the authority to reject any or all the tenders received without assigning any reason whatsoever. The whole work may be split up between more than one contractors or accepted in part (not entirely) if considered expedient. Quoted rates should hold good for such eventualities.

Tenders in which any of the particulars or prescribed information are missing or are incomplete in any respect and/or the prescribed conditions are not are not fulfilled are liable to be rejected. The tender containing any uncalled for remarks or any additional conditions are liable to be rejected.

17. Clause 2.16 thus establishes, unequivocally, that had the respondent found the tender not proper or for any reason decided not to proceed with the transaction vis-a-vis the petitioner, its bid would have been rejected. This was admittedly not done and LOI dated 08.11.20 and 25.11.10 were both issued only in pursuance of the tender document itself. There can thus be no dispute on the position that both parties have consented to all terms of the tender documents, including the arbitration clause.

18. The provisions of section 7 of the Act set out the ingredients for a valid arbitration clause. 7(iii) and (iv) require that an arbitration agreement shall be in writing and shall be deemed to be in writing and valid if it is contained in a document signed by the parties. In the facts

and circumstances as noted by me above, I have no hesitation in holding

that the arbitration agreement as contained in clause 4.16 of the tender document is a valid agreement that binds both parties.

19. As regards the submission that the arbitration clause ought to have been incorporated in the work order, and as such incorporation has not occurred, there is no valid arbitration agreement inter se the parties, I am of the view that the same is misconceived. The LOI and work order have both been issued consequent to the tender itself and relate to a specific order placed for supply of materials and services. The accompanying terms and conditions relate, in my opinion, solely to the technical specifications and do not impact upon, modify or restrict the sweep of the terms of the tender documents itself, that include an arbitration clause.

20. This conclusion is supported by the language of the work order that, while referring to the broad technical specifications in the tender, sets out a separate set of detailed technical specifications for the deliverables under the work order. Thus, the work order is, clearly, only an adjunct to the main tender and does not seek to supplant the tender document in any way. The arbitration clause in the tender documents thus remains undisturbed and binds both parties.

21. In the view that I have taken as above, no further reference need be made to the judgments of the Supreme Court in the case of *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited* ((2009) 7 SCC 696) and *UNISSI (India) Private Limited vs. Post*

Graduate Institute of Medical Education and Research ((2009) 1 SCC 107) cited by learned counsel on the question of incorporation of arbitration clause in the work order.

22. The next issue raised relates to the whether the procedure for appointment of Arbitrator has been adhered to by the petitioner. Clause 4.61 sets out the frame work for the settlement of disputes for arbitration. I extract the clause hereunder:

'4.61 Settlement of disputes by Arbitration

All disputes and differences of any kind whatever arising out of or in connection with this Contract of the carrying out of the works (whether during the progress of the works or after their completion and whether to) and settled by the Engineer-in-charge who shall state his decision in writing. Such decision may be in the form of Final Certificate or otherwise. The decision of the Engineer-in-charge with respect of any of the excepted matters shall be final and without appeal as stated in the said Clause. But if the Contractor be dissatisfied with the decision of the Engineer-in-charge on any other matter, question or disputes of any kind (except any of the excepted matters) or as to the withholding by the Engineer-in-charge of any certificates to which the contractor may claim to be entitled then and in any such case, may within twenty-eight days after receiving notice of such decision give a written notice to the Engineer-in-charge requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be referred to the Arbitrated and final decision of a sole Arbitrator being a Fellow of the Indian Institute of Architects/Indian Institute of Engineers to be agreed upon and appointed by both parties. The Arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to the preceding clause and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference, the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitrator who may determine the amount thereof, between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to Arbitration without the meaning of the Indian Arbitration Act 1995 or any statutory modification or re-enactment thereof. The Award of the Arbitrator shall be final and binding on the

parties. Such reference except as to the withholding by the Engineer-in-charge of any certificates under the Clause 4.52.1 to which contractor claims to be entitled, shall not be opened or entered upon until after the virtual completion of the works or until after the practical cessation of the works arising from any cause unless otherwise agreed to in writing by the Owner and the Contractor. Provided always that except with the consent in writing of the Engineer-in-charge the Contractor shall not in any way delay the carrying out of the works by reason of any such matter, questions or disputes being referred to Arbitration, but shall proceed with the works with all due diligence and shall until the decision of the Arbitrator to be given, abide by the decision of the Engineer-in-charge and no award of the Arbitrator or Arbitrators or the Umpire shall relieve the contractor of his obligation to adhere strictly to the Engineer-in-charge's instruction with regard to the actual carrying out of the works. The owner and the contractor hereby also agree that Arbitration under this Clause shall be a condition precedent to any right of action under the contract. The Arbitration proceedings shall be held at Chennai.'

23. Disputes are first to be raised before the Engineer-in-charge for resolution. If a party is aggrieved with such decision, then, within 28 days of receipt of such decision the dispute is to be referred to a sole Arbitrator being a Fellow of the Indian Institute of Architects/Indian Institute of Engineers to be agreed upon and appointed by both parties.

24. Mr.Madhan would argue that if at all a reference to arbitration was to be made, it ought to have been made done within 25 days from rejection of the claim by the Engineer-in-charge. However, the reference was made only on 25.09.2017 and as such was beyond the limit prescribed by the clause.

25. However in doing so, he look loses sight of the email from the respondent also dated 25.09.2015 where the respondent assures the petitioner of a response to the claim after verification. Admittedly and till

date, there has been no response after email dated 25.09.2017 sent at 3.22 pm.

26. An issue that arose in the course of the hearing also related to who the Engineer-in-charge was in order to determine if and when the disputes had been referred to him. As per clause 3.2 of the definition clause, *'the Engineer-in-charge refers – M/s Kals Breweries Pvt. Ltd (Kals in all future references in tender documents) who performs the functions connected with engineering works.'* To a specific query put to Mr. Madhan as to who the designated Engineer-in-charge was, no reply was forthcoming and learned counsel confirms that the information is not available with the respondent.

27. The exchange of emails produced reveals that the petitioner was corresponding with the respondent regularly on the amounts stated to be outstanding. The responses from the side of the respondent were issued by the Group Chief Financial Officer and the same gentleman, on 25.09.2015, assures the petitioner that he will discuss the issue of pending payments with the management team and revert to the petitioner. This was however never done. I am thus of the view that the requirements of the arbitration agreement in regard to reference of dispute have been adequately met by the petitioner.

28. Be that as it may, I am of the view that the 28 days period set out in clause 4.61 cannot over write the provisions of the Limitation Act,

of *Grasim Industries Ltd. V. State of Kerala* (2017 SCC OnLine SC 877) wherein the Supreme Court, invoking the provisions of section 28 of the Contract Act holds that any internal timeline set out in the arbitration clause cannot override the provisions of the Limitation Act.

29. Thus, the period of 28 days mentioned thereunder is clearly only by way of recommendation and cannot be enforced so as to defeat the larger right of the party to avail of the remedy of arbitration itself. Thus, de hors my observation to the effect that the reference to arbitration has been properly made in the absence of a conclusive response from the respondent, the larger issue of non-adherence to the internal time limit set out in the arbitration clause itself is held against the respondent.

30. As regards the reply to the notice invoking arbitration, while Mr. Madhan on the one hand, admits that the reply though intended for the petitioner has been addressed to a third party, he produces an acknowledgment card which, curiously, is not referred to in the counter affidavit. The acknowledgment card itself frankly inspires no confidence insofar as there is only a scrawl in place of a signature, with neither a name nor a seal of the receiving authority in support of the same.

31. Though I eschew reply notice dated 02.12.2017 for the reasons given in the paragraph above, incidentally, I could not but help note that the respondent does not deny therein the existence of an arbitration clause. In fact, it refers to the tender conditions '*forming an integral part*

parcel of the letter of intent and work order issued to your client' and objects to the claims raised, solely on the ground of limitation. I hasten to add that this observation does not impact in the least my conclusion on the existence of the agreement and is made solely as a reflection on the contradictory stands adopted by the respondent.

32. As far as maintainability is concerned, the only point raised is one of limitation. Normally, in the light of the limited mandate imposed upon this Court under section 11(6A) of the Act, any contest to the merits, including the bar of limitation will be considered by the Arbitrator. The exception is if the bar is patent and based on undisputed facts. In the present case, the most recent communication from the respondent to the effect that the petitioners' claim was being looked into, is dated 25.09.2015 and as such limitation under section 129 of the Limitation Act is alive as on the date of reference, being 01.02.2017. This contention is thus rejected.

33. In the above facts and circumstances, I am of the view that the notice invoking arbitration dated 01.02.2017 has not been responded to and as such the respondent forfeits its right to the appointment of an Arbitrator. What is left is for a decision on whether an independent Arbitrator be appointed by the Court or whether the named Arbitrator, being a fellow of the Indian Institute of Architects/Indian Institute of Engineers, be appointed.

34. In the present case, admittedly, the dispute that has arisen inter se parties is the non-settlement of bills and the claim is thus a money claim, simpliciter. The correspondence that has been placed before the Court does not reveal any dispute with respect to technical matters warranting the appointment of an expert in that area. In these circumstances, I proceed to appoint an independent Arbitrator.

35. I thus appoint Mr.Justice D.Hariparanthaman, former Judge of this Court as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. He is requested to, 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 first hearing of the proceedings for Arbitration. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses.

36.The Original Petition is ordered leaving the parties to bear their own costs.

14.03.2018

Index:Yes/No

Speaking Order/Non-speaking order

Vga/sl

Mr.Justice D.Hariparanthaman,
Retired Judge,
No.2, First Main Road,
Kamaraj Nagar,
Thiruvanmiyur,
Chennai – 41.

DR.ANITASUMANTH, J.

Vga/sl



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