

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 14.02.2018

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P.No.869 of 2017

M/s. P & C Projects (P) Ltd.,
(Formerly M/s.P&C Constructions (P) Ltd.,)
Rep.by its Director,
S.P.Chinnasamy,
P&C Garden,
Nollambur, Mogappair West,
Chennai – 600 037

... Petitioner

Versus

1.The Executive Engineer,
Buildings and Roads (South) Division,
Public Works Department,
Government of Puducherry,
Puducherry.

2.The Superintending Engineer,
Circle I,
Public Works Department,
Government of Puducherry,
Puducherry.

3.The Chief Engineer,
Public Works Department,
Government of Puducherry,
Puducherry.

... Respondents

Prayer: Petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 to appoint an arbitrator to adjudicate the disputes between the petitioner and the respondents as set-out in this petition and to direct the respondents to pay the cost of this petition.

For Petitioner : Mr.V.P.Sengottuvel
For Respondents : Mr.J.Kumaran
Government Advocate (Puducherry)

ORDER

This Application is filed praying for the appointment of an arbitrator to adjudicate upon disputes between the petitioner and the respondents arising from out of Agreement dated 23.02.2007 as well as for costs of this petition.

2. Pursuant to a tender notification dated 18.08.2006 issued by the first respondent in which the petitioner participated, the petitioner was declared as the successful bidder and its tender accepted on 18.08.2006. A work order was issued to the petitioner on 05.01.2007. Thereafter, the petitioner and respondents entered into Agreement dated 23.02.2007 for the work of 'Construction of, High Level Bridge across Penniyar River at Suriyan Kuppam in Bahour Commune, Puducherry'.

3. The work commenced on 04.02.2007, and the period of completion

was 15 months i.e., on 03.05.2008. However, the work was ultimately completed, according to Mr.Sengottuvel, learned counsel for the petitioner only on 03.08.2011 after periodical extensions granted by the respondents. The respondents, in counter, state that the work was completed on 31.03.2011. As such, the factum of delay is not disputed though the case of the petitioner is that the delay was occasioned by factors not attributable to it. This is disputed by the respondent who states that the delay was entirely attributable to slow progress on the part of the petitioner.

4. Disputes thus arose between the parties and the petitioner sent a series of requests for settlement of the amounts due and payable to it. The Security Deposit is itself stated to have been returned by the respondents only in March, 2016. The claim for pending payments was reiterated by the petitioner by letters dated 12.04.2016 and 26.12.2016 and the petitioner specifically indicates resort to the process of arbitration in the event the claims were kept outstanding by the respondent, in both communications.

5. In response, the petitioner was called for a discussion on 19.01.2017. After discussions, the first respondent, vide letter dated 10.02.2017, proceeds to reject the claim on the ground that the same has not been raised within the time

6. The petitioner, on 28.02.2017 addresses a letter to the 3rd respondent seeking intervention in the matter for settlement of the dispute. Two reminders were issued that saw no response from the respondent. Thus, on 25.04.2017, the petitioner calls upon the third respondent to appoint an Arbitrator for the resolution of disputes. Though the communication has been duly received by the respondent and despite a reminder dated 07.06.2017, there has been no response till date.

7. Mr.V.P.Sengottuvel, learned counsel for the petitioner, submits that a dispute has arisen as between the parties in the settlement of claims and clause 25 (ii) of agreement dated 23.02.2007 provides for reference of such disputes to an Arbitrator for resolution. He thus seeks the appointment of an Arbitrator in terms of section 11 (6) of the Arbitration and Conciliation Act, 1996.

8. Mr.Kumaran, learned Government Advocate appearing for the respondents, objects to the prayer arguing that the final bill submitted by the petitioner was pre-checked and passed on 25.11.2015 and the same was intimated to and received by the petitioner on 21.12.2015. According to Mr.Kumaran, the period for reference to Arbitration was only 120 days from the date of receipt of intimation of final bill from the Engineer-in-Chief and the time provided had expired as early as on 23.03.2016. The present petition was thus,

according to him, barred by limitation.

9. He would point out that it was only in the reference to dispute dated 25.04.2017, that the subject matter of the communication was '*Balance pending payments - settlement of Disputes Notice to Chief Engineer to appoint Arbitrator*'. Thus, according to him, the reference had been made only on 07.06.2017, which is beyond the period of 120 days as set out in the agreement.

10. Heard Mr.V.P.Sengottuvel, learned counsel for the petitioner and Mr.J.Kumaran, learned Government Advocate (Puducherry), learned counsel for the respondents.

11. Agreement dated 23.02.2007 undisputedly provides for the reference and resolution of disputes inter se the parties to arbitration in terms of clause 25 (ii) thereof.

12. The existence of a clause for dispute resolution is thus unambiguous and admitted by both parties.

13. The petitioner has also been in communication with the respondents continuously from 2007 seeking settlement of its demands. The sole argument taken is that the procedure as set out in the Agreement and that too, only in regard to the period for Arbitration, has not been adhered to by the petitioner.

14. There is no dispute on the date of settlement of final bill being dated

21.12.2015. The period of 120 days set out in clause 25(ii) would run till 26.04.2016. The petitioner has in this case made the reference of the dispute to Arbitration on 12.04.2016. The communication seeks early redressal of the claims failing which the petitioner puts the respondent to notice that it will seek legal action 'as per agreement clause'. The Agreement contains, inter alia the Arbitration clause. As such, I am of the view that communication dated 12.04.2016 constitutes the reference to Arbitration and is well within the period of 120 days as set out under the clause. The reference is, thus in time.

15. Even assuming that the same were belated, the Supreme Court in the case of *Grasim Industries Ltd Vs. State of Kerala* (2017 SCC OnLine SC 877), dealing with a scenario where the clause in the contract imposes a time frame of 30 days for raising disputes and having the same settled by appointing an Arbitral Tribunal, considers the provision of section 28 of the Contract Act holding thus: -

"8. Having perused clause 9 of the supplementary agreement dated 27.10.1988, we are of the view, that the interpretation placed by the High Court on clause 16, was wholly misconceived. The aforesaid clause, did not postulate the period within which a claim could have been raised by the parties to the contractual agreements. Even otherwise, we are of the view, that in terms of Section 28 of the Indian Contract Act, 1872, such a stipulation in a contractual obligation would not be valid and binding. Section 28 of the Act is reproduced below:

"28 Agreements in restraint of legal proceedings, void.-Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Exception 1.

Exception 2.

Exception 3.

9. Section 28(b) unequivocally provides, that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for (as was determined, in the impugned order), the same would have to be treated as void.

10. In view of the legal position expressed hereinabove, the limitation with reference to the claim raised by the appellant, would have to be determined only under Article 137 of the Limitation Act.'

16. On the facts of the present case, I conclude that the reference to Arbitrator made on 25.04.2017 is within time. That apart and even assuming that the same had been beyond the period provided, the reference would still be within time, in the light of the rationale of the judgement extracted above.

17. As suggested by the respondents, to which no objection is expressed by Mr.V.P.Sengottuvel, learned counsel for the petitioner, Mr.K.Subash Chandra Bose, Retired Chief Engineer, P.W.D, Pondicherry is appointed as Arbitrator.

his consent for the appointment, his date of retirement being 31.10.2002.

18. I, thus, appoint, Mr. K.Subash Chandra Bose, residing at No.8 Vallalar Salai, Venkata Nagar, Pondicherry – 605 011, as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award, preferably within a period of six months from date of receipt of this order. The Arbitrator is at liberty to fix his remuneration and other incidental expenses.

19. The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

14.02.2018

Speaking/Non-Speaking order: Yes/No

Index: Yes/No

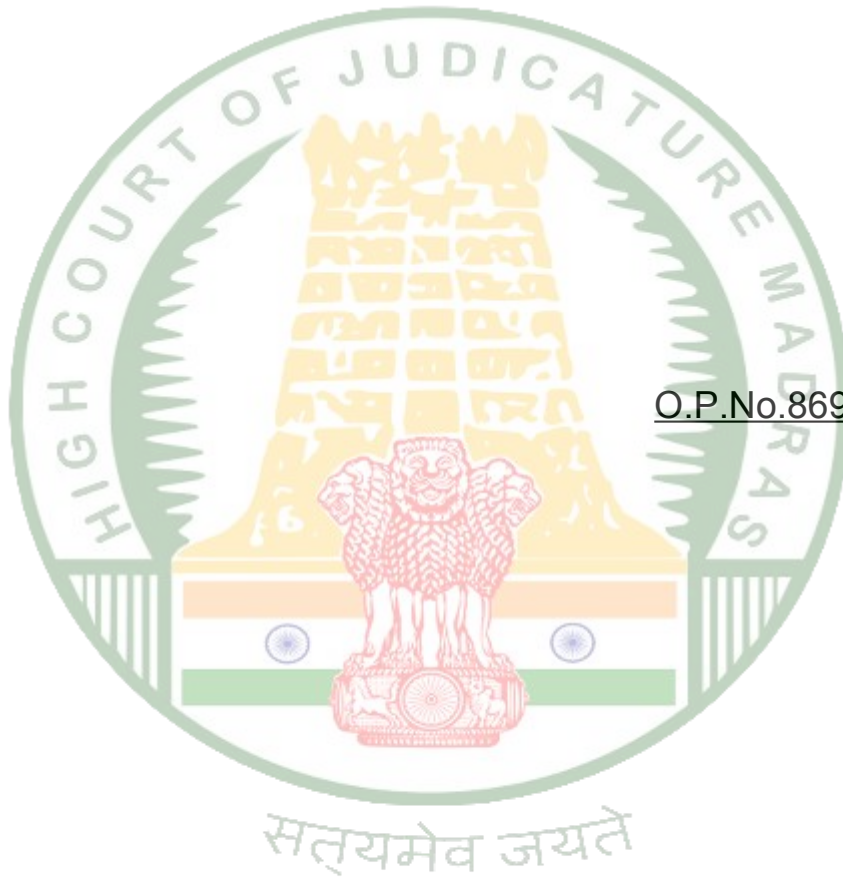
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Dr.ANITA SUMANTH,J.

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