

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.07.2018

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.912 of 2017

Infoplus Technologies Pvt. Ltd.,
61, Developed Plot Estate, Perungudi,
Chennai, represented by its Director,
Mrs.Sakunthala Devi .. Petitioner

Vs.

Pondicherry University represented
by its Registrar,
Puducherry-605 014. .. Respondent

* * *

Prayer : Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to go into the demands of the petitioner in respect of their long-pending dues of Rs.191.46 Lakhs towards 90% of the payment as per Clause 6.2.1.d of the Agreement (without prejudice to further claim at 10%) towards final invoice payment amounting to Rs.21.90 Lakhs inclusive of applicable GST as per Clause 6.2.1.e of the Agreement based on extension /expiry of the Contract Agreement) of the service rendered and appropriate interest thereof for the delay in payment, return of the Bank Guarantee for Rs.21 Lakhs submitted, since expired and continuation of the service as per the Contract Agreement entered into with relevant extension thereon, since the delay for phase-2 onwards is solely on the part of the respondent University.

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For Petitioner : Mr.D.Nellaiappan

For Respondent : Ms.A.V.Bharathi

ORDER

This Original Petition is filed seeking appointment of a Arbitrator to arbitrate upon the disputes arisen between the petitioner and the respondent.

2. The case of the petitioner company is as follows :

2.1. The petitioner company is providing e-learning solutions for effective graduate engineering and other technical education. It participated in an open tender called by the respondent for providing visual e-learning solutions and was awarded the contract on 27.04.2015. The petitioner has also submitted a Performance Bank Guarantee for Rs.21,00,000/- on 10.06.2015, which was valid till 09.06.2017.

2.2. Pursuant to the same, the respondent entered into an agreement with the petitioner on 07.07.2015 for providing visual e-learning solutions for 150 subjects of four years courses. Clause 2.1. states that the tentative time for delivery is upto May 2016 and the period of agreement shall be for four years from the date of agreement. Subsequently, the petitioner delivered 32 subjects of phase-1 duly verified by the Professors of the respondent and

submitted invoices for Rs.84.74 lakhs towards the subjects so supplied at 40% as per clause 6.2.1.d of the Agreement. But till date, the University has not honoured the invoice.

2.3. The petitioner sought extension of time, as there was a delay on the part of the respondent in providing the subjects.

2.4. The petitioner also raised further invoices to the value of Rs.106.72 lakhs, which is the 90% of the value of the subjects delivered and 10% of the invoice has to be paid at the end of the contract, as per clause 6.2.1.e of the Agreement. The petitioner also sent letters to the respondent requesting to honour the invoices in vain.

2.5. The petitioner sent a notice dated 31.08.2017 to the respondent seeking to pay the invoices raised by it to the value of Rs.191.46 lakhs. The petitioner also stated in the said letter that if the respondent failed to make payment, it will take steps to initiate arbitration proceedings as per clause 9 of the Agreement. But there is no response from the respondent.

2.6. In these circumstances, the petitioner is before this Court in this petition with the aforesaid prayer.

3. Mr.Stalin Abhimanyu, who originally appeared for the respondent University, on 06.02.2018 waived his right to file a counter

affidavit. However, with the permission of the Court, a counter affidavit dated 11.06.2018 has been filed by the respondent at the request of Ms.Bharathi, learned counsel for the University.

3.1. It is the case of the respondent in the counter affidavit that the e-learning contents supplied by the petitioner were found to be not up to the expected quality, as per the opinion of the experts, making the agreement void, which necessitated the respondent to put on hold the receipt of further materials. The process of verification and rectification consumed enormous time in getting the standard material. It is the claim of the respondent University that the agreement entered into with the petitioner was not approved by the competent authority of the University and as such, it cannot be enforced as per the guidelines issued by the Ministry of Human Resources and Development (MHRD). It is also stated that since there was an internal turmoil in the University, in the absence of the Vice-Chancellor, no steps could be taken to cancel or make the agreement null and void.

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4. Learned counsel for the petitioner submitted that the petitioner company delivered 32 subjects in phase-1 even in the month of July/August 2015, but till date, they have not been paid any amount, though the subject materials were duly verified by the

Professors of the respondent University. It is further submitted that there is no delay on the part of the petitioner even to supply phase 2 of the study material.

5. Learned counsel for the respondent submitted that the materials supplied by the petitioner are not qualitative, as mandated by the experts of the respondent University. Learned counsel also submitted that as per Clause 9.3. of the Agreement, the University only has the right to appoint an arbitrator.

6. It is to be stated that the respondent claimed that the agreement entered into between the petitioner and the respondent was not approved by the Executive Council / Academic Council of the University and as such, the same is invalid as per the instruction of the MHRD. Since the agreement was signed by the authority, who has no right or approval to enter into such agreement on behalf of the respondent University, the same cannot be enforced. The said submission cannot be accepted at this stage and the same is rejected *in limine*.

7. Secondly, the contention of the respondent University that the materials supplied by the petitioner are all substandard. It is open to

the respondent to raise all such submissions before the learned Arbitrator.

8. Finally, the claim of the respondent University that it alone has the right to appoint the Arbitrator cannot be accepted at this stage for the simple reason that the respondent having failed to respond to the notice of the petitioner dated 31.08.2017 invoking the arbitration clause, within the stipulated period, lost its right to appoint the Arbitrator as per Clause 9.3. of the Agreement. At this juncture, it is relevant to refer to Section 11 (6) of the Arbitration and Conciliation Act, 1996 (the 1996 Act), which reads as follows :

"(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

Having received the notice dated 31.08.2017, the respondent University opted not to reply to the said notice. Even in the counter-

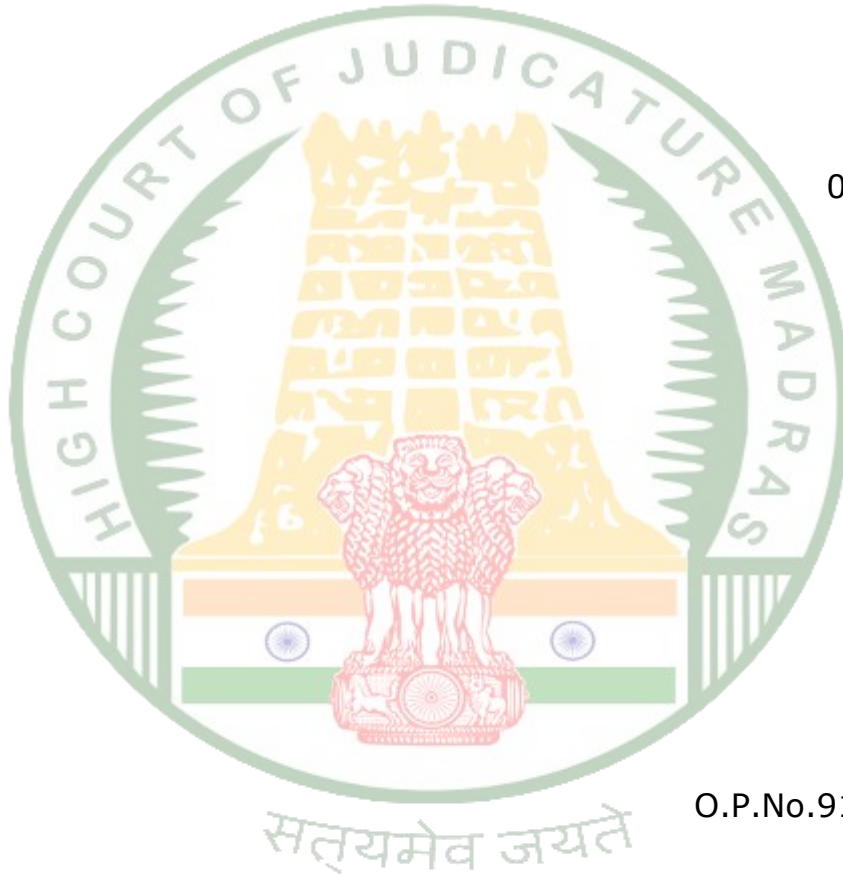
affidavit dated 11.06.2018 filed before this Court, the respondent University has not named any Arbitrator. Though it is merely stated therein that there was an internal turmoil in the University with respect to the removal of the then Vice-Chancellor and in the absence of the Vice-Chancellor, immediate action could not be taken by the University, the failure of the respondent to act as per the provisions of the 1996 Act, takes away their right to invoke Clause 9.3. of the Agreement and the petitioner is entitled to approach this Court for appropriate relief.

9. Thus, this Court appoints Hon'ble Mr. Justice K. Mohanram, a retired Judge of this Court, residing at No.3, Sivakamipuram, II Cross Street, Thiruvannamiyur, Chennai-600 041, as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator 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 the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

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

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