

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED.19.03.2018

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P. No.63 of 2018

Karismaa Foundations Private Limited,
Represented by Its Managing Director
Mr.Rakesh P.Sheth,
No.340, I South Main Road,
Kapaleeswarar Nagar,
Neelankarai,
Chennai - 600 115 .. Petitioner

-VS-

S & P Foundation Limited,
TPL House, 2nd Floor,
No.3, Cenotaph Road,
Teynampet,
Chennai - 600 018 ..Respon-
dent

Prayer: Petition filed under Section 11 (6) of the Arbitration and conciliation Act, 1996, to appoint an presiding arbitrator to resolve the disputes arising out Turnkey Agreement dated 05.10.2012 between the petitioner and respondent.

For Petitioner : Mr.Nithyaesh Nataraj

For Respondent : Mr.W.M.Abdul Majeed

ORDER

This petition is filed seeking the appointment of a Presiding Arbitrator in terms of Section 11 (6) of the Arbitration and Conciliation Act, 1996 (in short 'Act'). The Dispute Resolution Agreement is clause 9 of Turnkey Agreement dated 05.10.2012, which provides for reference of matter to Arbitration in terms of Clause 2.35 of the Conditions of Contract (in short 'CC').

2.Clause 2.35.3 of the CC provides for the appointment of a sole Arbitrator, if mutually agreeable to both parties. In case the parties are unable to arrive at a mutual agreement, both parties, the petitioner, the contractor in the Agreement and the respondent, the developer, shall appoint an Arbitrator of their choice and the two appointed Arbitrators shall appoint a third Arbitrator who shall act as Presiding Arbitrator.

3. Mr.Nithyaesh Nataraj, learned counsel for the petitioner and Mr. W.M.Abdul Majeed, learned counsel for the respondent

concur on the position that the Arbitral Tribunal was originally constituted with Mr.Justice.N.V.Balasubramanian and Mr.Justice.Vallinayagam as members nominated by both parties. Initially Mr.Justice. K.Sampath had been appointed as the Presiding Arbitrator. Upon his unfortunate demise, Mr.Justice.K.M.Natarajan appears to have been nominated.

4. Certain difficulties appear to have transpired thereafter that I refrain from advertng to in detail since it is not relevant for the consideration of the prayer before me. Suffice it to say that Mr. Justice K.M. Natarajan thought it fit to recuse himself from the proceedings as did Justice E.Padmanabhan who was thereafter nominated by the two learned Arbitrators.

5. Thus, though the arbitration agreement provides for the appointment of the Presiding Arbitrator by the two arbitrators nominated by the parties, they have, on account of the events happening in the interim after the demise of the Presiding Arbitrator originally appointed, directed the parties to approach the High Court for appointment of Presiding Arbitrator as per email

dated 27.08.2017 from Mr.Justice.T.N.Vallinayagam to Mr.Justice.N.V.Balasubramaniam.

6.Both learned counsel concur on the position that it is for this Court to appoint the Presiding Arbitrator as per the request of the two learned Arbitrators.

7. In *Indian Oil Corporation Ltd. vs. Raja Transport (P) Limited* ((2009) 8 SCC 520), in para 21, the Supreme Court states thus:

21.....

.....

(vi) *The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*

(vii) *If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'*

8. In the light of the above discussion, I appoint Mr. Justice P.R. - Gokulakrishnan, Former Chief Justice, as the Presiding Arbitrator to constitute the Arbitral Tribunal along with Mr. Justice N.V. Balasubramaniam and Mr. Justice T.N. Vallinayagam.

8. The Arbitral Tribunal as constituted, is requested to adjudicate upon the disputes inter se the parties from the stage at which the Tribunal finds it expedient to continue the proceedings. The Tribunal is requested to conclude the proceedings as expeditiously as possible and is at liberty to fix its schedule of fees and expenses that both parties will bear equally.

9. This petition is ordered in the aforesaid terms.

19.03.2018

rkp/msr

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Dr.ANITA SUMANTH,J.

rkp/msr



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