

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

Arbitration Application No.95 of 2017

ORDER:

This application is filed, under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator.

A memorandum of understanding was entered into, between the respondent and the applicant on 06.03.2013 at Kakinada, to implement and facilitate the Centre of Excellence for e-Resource Development and Deployment project. The respondent expressed its intent to enter into a partnership with private organizations possessing experience of working with Universities/their affiliated colleges as also Government Education Department, particularly and exclusively in the areas relating to (1) facilitating e-learning programs; (2) employability skill development, and (3) industry interfacing initiatives. The aforesaid memorandum of understanding provides for a supplemental agreement to be entered into. The clause, relating to the validity of the memorandum of understanding, specifically provides that the terms and conditions of the memorandum of understanding can be changed or modified, by mutual consent of both the parties, by way of addendums duly signed by both the parties. An addendum, to the earlier memorandum of understanding, was signed by the applicant and the respondent on 04.06.2014 which, in Clause 8 thereof, contains the arbitration clause and reads as under:

“In the event of disputes between the parties i.e, JNTUK and GTPL, such disputes shall be resolved by mutual deliberations, failing which such disputes to be referred to sole arbitrator appointed by JNTUK. In any event such arbitration award/finding not acceptable to the other party, who is being aggrieved may invoke judicial remedy having territorial jurisdiction

(JNTUK, Kakinada) Kakinada Courts at Kakinada alone having jurisdiction.”

On termination of the memorandum of understanding by the respondent, by their letter dated 26.06.2015, the applicant addressed a letter to the respondent on 24.08.2015 requesting them to release payments. As there was no response thereto, the applicant addressed another letter on 02.07.2015 requesting the respondent to organize a meeting to discuss the issue. As no response was forthcoming, the applicant invoked the jurisdiction of this Court filing W.P.No.29786 of 2016; and this Court, by its order dated 02.09.2016, directed the respondent to dispose of the petitioner’s representation. Pursuant thereto the respondent, by their letter dated 16.11.2016, informed the applicant that, if they had any disputes with the respondent, they could approach them through the proper Court of law having jurisdiction to try the dispute. In reply thereto the applicant, by their letter dated 06.12.2016, informed the respondent that their letter dated 16.11.2016 did not amount to compliance of the orders of the High Court. Thereafter, by their letter dated 19.06.2017, the applicant requested the respondent to refer the issue to the sole arbitrator (preferably appointing one of the sitting or retired Judges of the High Court) within a month of receipt of the notice. As no response was forthcoming thereto, the applicant has invoked the jurisdiction of this Court.

In their counter-affidavit, the respondent has stated that the arbitration clause requires the parties to make mutual deliberations; as no such deliberations took place, the application filed by the applicant seeking appointment of an arbitrator was contrary to the arbitration clause of the agreement; failure on the part of the respondent-University, to comply with the requirement of mutual

deliberations or to appoint an arbitrator, would only enable the applicant to avail their judicial remedies; and an application, for appointment of an arbitrator, could not have been filed before the High Court.

Sri M.Surender Rao, Learned Senior Counsel appearing on behalf of the applicant, would contend that the applicant had, by their letter dated 02.07.2016, specifically requested the respondent to organize a meeting to discuss the issues; and it is only because the respondent failed to do so, that the applicant filed W.P.No.29786 of 2016. On the other hand Sri T.Rajeswara Rao, Learned Standing counsel for the respondent-University, would submit that, even if this letter were to be treated as an attempt at mutual deliberations, the remedy which the applicant had, on failure of the respondents to act upon the said letter, was only to approach the competent Civil Court.

Clause 8 of the addendum, to the memorandum of understanding, requires the parties, in the first instance, to resolve their disputes by mutual deliberations. As noted hereinabove, the applicant's attempt to have the issues mutually deliberated and discussed, as sought for by them in their letter dated 02.07.2015, was of no avail. On failure to have the disputes resolved by mutual deliberations, the arbitration clause required the disputes to be referred to the sole arbitrator to be appointed by the respondent. The arbitration clause requires the aggrieved party to invoke the judicial remedy of approaching Courts, having territorial jurisdiction over the respondent, i.e. Kakinada Courts, only in the event the arbitration award/finding is not acceptable to other party. It is evident, therefore, that the arbitration clause obligates the respondent-University to appoint an arbitrator; after such appointment, for an award to be passed by the arbitrator; and for either of the parties,

aggrieved by the award, to invoke the jurisdiction of the competent Civil Court at Kakinada. In the present case, the respondent had failed to perform its obligations, under the arbitration clause, to appoint a sole arbitrator. As a result the applicant had no choice but to invoke the jurisdiction of this Court.

Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 stipulates that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, a party may request the High Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. While the appointment procedure, prescribed in the addendum to the memorandum of understanding, required the respondent-University to appoint an arbitrator, the applicant had perforce to invoke the jurisdiction of this Court, under Section 11(6)(a) of the Act, as the respondent had failed to act as required under that procedure, and had failed to appoint an arbitrator.

The feeble submission of Sri T.Rajeswara Rao, Learned Standing Counsel for the respondent-University, that the applicant did not request the respondent to appoint an arbitrator, and had only sought appointment of a sitting or retired Judge of the High Court as an arbitrator, which is contrary to the arbitration clause of the agreement, is only to be noted to be rejected. By their letter dated 19.06.2017 the applicant requested the respondent to refer the disputes to a sole arbitrator, and preferably appoint one of the sitting or retired Judge of the High Court as an arbitrator. While the applicant had indicated its preference, the request was for appointment of a sole arbitrator which accords with the arbitration clause of the addendum to the memorandum of understanding. It is

clear, therefore, that the respondent had failed to act as per the agreed procedure to appoint an arbitrator necessitating the applicant having to invoke the jurisdiction of this Court under Section 11(6)(a) of the Arbitration and Conciliation Act.

I consider it appropriate to appoint Sri Justice C.Y. Somayajulu, (Retired Judge of this High Court), R/o.Flat Nos.301 & 302, 4th Floor, Sanali Residency, Near Hotel Katriya, Somajiguda, Hyderabad – 82, as the sole arbitrator to resolve the disputes between the parties. The Learned arbitrator shall fix his remuneration, and incidental charges for the arbitration proceedings, in consultation with the parties. The Learned Arbitrator is requested to complete the arbitration proceedings, and pass an award at the earliest, preferably within a period of six months from the date of commencement of arbitral proceedings.

The Arbitration Application is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, ACJ

Date:23.02.2018.
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