

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.226 of 2019

1. M/s.Globe Detective Agencies Pvt. Ltd.,
Agurchand Mansion,
152, Mount Road,
Chennai-600 002.
 2. M/s.G.D.A. Security Pvt. Ltd.,
Agurchand Mansion,
152, Mount Road,
Chennai-600 002.
- .. Petitioners

Vs.

M/s.Gammon India Ltd.,
(Chennai Metro Rail Project),
Veer Savarkar Marg,
Prabhadevi,
Mumbai-400 025.

.. Respondent

Prayer : Petition filed under Section 11(6)(c) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to arbitrate the dispute between the petitioners and the respondent based on agreement dated 01.01.2014, 01.01.2015 and 01.04.2015.

* * *

For Petitioners : Mr.C.A.Diwakar
For Respondent : Mr.P.J.Rishikesh

ORDER

This Original Petition is filed seeking for appointment of an Arbitrator to arbitrate the dispute between the petitioners and the

respondent based on agreements dated 01.01.2014, 01.01.2015 and 01.04.2015.

2. The petitioners are engaged in the business of security services agencies and other allied services. The respondent availed its services in their project work of construction of Chennai Metro Rail stations to protect its men, machineries, materials and the site, by entering into an "Agreement with Security Agency" dated 01.01.2014 (in short, "the Agreement") for a period of one year till 31.12.2014. It was extended for three months followed by one year, i.e., till 31.03.2016. The petitioner deputed requisitioned number of Security Guards at the rates specified in the agreement. The petitioners claimed that in terms of Clause 4 of the Agreement, the respondent has to make payments within 30 days of raising the bill to enable them to disburse the wages on or before 10th of every month. Since there was a delay in payment of the bills at every month by the respondent, the petitioner decided to withdraw the security guards. However, based on the assurance of the respondent, they continued to adhere to its obligations under the Agreement.

3. The petitioner claimed that the respondent has to pay a sum of Rs.47,49,852/- as on 11.12.2015, but paid Rs.13,88,593/- on

different dates till 15.10.2016. The respondent cited their pending dispute with the principal, i.e., CMRL, for non-payment of the dues to the petitioners. The petitioners filed a suit for recovery of the outstanding money with interest in C.S.No.176 of 2017 along with A.No.1602 of 2017 seeking an order of attachment. In the suit, the respondent filed an application in A.No.3127 of 2017 under Section 8 of the Arbitration and Conciliation Act, 1996 (in short, "A & C Act") praying to refer the dispute to arbitration. In the said circumstances, the petitioners are before this Court under Section 11 of the A & C Act seeking appointment of an Arbitrator.

4. Resisting the prayer of the petitioners, the respondent filed a counter-affidavit dated 28.06.2019. It is stated that since the petitioners failed to fulfill their obligations of providing requisite number of trained and skilled personnel, they were constrained to withhold certain amounts in order to adjust the same in the subsequent bills and excepting that there is no other due, as claimed by the petitioners and as such, there is no arbitrable dispute at all prevailing between the parties. It is also claimed that when Clause 27 of the Agreement provides for arbitration of disputes, without invoking the same, the petitioners filed a suit before this Court for recovery of money.

5. Heard the learned counsels on either side and perused the materials placed before this Court.

6. The existence of the Agreement dated 01.01.2014 is admitted by both sides. The existence of arbitration clause for resolution of the disputes under Clause 27 of the Agreement is also admitted. There are also two more agreements with the petitioners dated 01.01.2015 and 01.04.2015, both of which also contain the arbitration clause for resolution of the disputes. The petitioners had to provide requisitioned the number of security guards at the rates specified at various Chennai Metro Rail Sites. The petitioners have also submitted their bills on monthly basis, which were admitted and accepted by the respondents. However, according to the petitioners, the respondents were not very regular in respect of payment of bills and delayed in settling the petitioners the dues in full, citing various reasons, like delayed payments from the CMRL etc. Many a times, the petitioners were forced to withdraw their security guards, due to non-payment of bills. As the outstanding amounts were salaries and wages paid to the petitioners' security guards payable at various sites, the non-payment or the delayed payment was causing loss to the petitioners.

7. The question that now arises for consideration is whether the preliminary objection of the respondent that the instant petition filed as such is not maintainable for want of notice under Section 21 of the A & C Act, 1996 is sustainable ?

8. Before the same is discussed, it would be useful to deal with some more facts in this case. The petitioners also had filed a suit against the respondent in C.S.No.176 of 2016 before this Court. After service of notice, the respondent/defendant in the suit, had entered appearance and filed an application in A.No.3127 of 2017 under Section 8 of the A & C Act. In the affidavit filed in support of the said application, the respondent herein had vehemently disputed the claim of the plaintiffs/petitioners. The respondent also had pointed out that Clause 27 of the Security Agency Agreement provided for a dispute resolution by getting the dispute adjudicated by a Single Arbitrator appointed by the parties. As the agreement has already provided for a dispute resolution by appointing an Arbitrator, the said application under Section 8 of the A & C Act was filed for referring the dispute to arbitration and it is stated that the said application is still pending. In the very same application, the applicant, who is the respondent herein, had contended that the liability due to the petitioner herein was admitted and there is a dispute only with respect to the quantum

to be paid. From the act of the parties and also emails exchanged between the parties, it is clear that there has been a dispute if not on the liability, at least, on the quantum payable.

9. In the above conspectus, learned counsel for the respondent raised an objection that the petitioner cannot maintain this petition without issuing a notice under Section 21 of the A & C Act. The suit was filed by the petitioner herein for recovery of a sum of Rs.33,61,259/- with interest. It is the respondent, who had pointed out that there is an arbitration clause provided in the agreement and filed the application under Section 8 of the A & C Act. Whether the notice under Section 21 of the A & C Act is mandatory or not, when the respondent itself has already filed an application under Section 8 of the A & C Act seeking to refer the dispute to arbitration.

10. Section 21 of the A & C Act reads as follows :

"21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

A reading of Section 21 makes it crystal clear that except where the parties have agreed to the contrary, the date of commencement of the

arbitration proceedings, as per the said provision, would be the date on which the notice was received by the respondent. The intention of the Legislature for including such a notice is only for the party to the arbitration agreement, against whom the claim is made, to know what are the claims are. Secondly, the parties having agreed on a procedure for appointment of an arbitrator, there should be a notice invoking the same. Therefore, Section 21 assumes importance for the purpose of facilitating a consensus on the appointment of an Arbitrator.

11. Further, the petition is filed under Section 11(6) of the A & C Act, which says that a person, including an institution, after agreeing upon to a procedure for appointment, fails to perform any function entrusted to him or it under that procedure, then the party may request the Court to take necessary measure for appointment of an Arbitrator. While so, if the notice under Section 21 is not issued, then the occasion contemplated under Section 11(6)(c) will not arise. In other words, a party seeking appointment of an Arbitrator will not be able to put forth his case before the Court that there was failure on the part of the respondent to act as per the Agreement.

12. In the light of the above discussion, learned counsel for the respondent pressed into service the judgment of the Delhi High Court in **Alupro Building Systems Pvt. Ltd. V. Ozone Overseas Pvt. Ltd., 2017 SCC OnLine Del 7228**. A learned Single Judge of the Delhi High Court in the said decision has held as follows :

"25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond."

12.1. In the very same decision, it was observed that the waiver of notice also has been discussed in the following manner :

"29. of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of

commencement of arbitration proceedings for the purpose of Section 43(1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law."

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12.2. Thus, the above decision cited by the respondent makes a notice under Section 21 of the A & C Act by the claimant invoking the arbitration clause mandatory. The above decision of the Delhi High

Court arrived at its conclusion to hold that Section 21 notice is mandatory for the following reasons :

- (i).To make the other party know what the claims are.
- (ii).Whether the claims made in the notice are within the purview of limitation or barred by any law.
- (iii).The notice facilitates the parties to arrive at consensus for appointing an Arbitrator.
- (iv).It enables the parties to know whether the proposed arbitrator named by one party is acceptable for the other or he is otherwise qualified or disqualified.
- (v).Unless the notice is issued, the application under Section 11(6) of the Act cannot be filed.

13. While this Court is of the view that there is no second opinion with respect to the above reasoning, it is to be stated that the said decision was rendered in a petition filed under Section 34 of the A & A Act, whereas, in the case on hand, the petition is filed under Section 11 and the respondent herein had filed an application under Section 8 of the A & C Act in the suit for recovery pointing out that there is a clause which provides for referring the disputes to arbitration.

14. As outlined by the Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd.** (supra), if the intention of the notice under Section 21 of the Act is only for the above said purposes to enable the other party to take certain defences including that of the question of limitation, then in the present case, such a situation does not arise, as the stand of the parties are very clear in A.No.3127 of 2017 itself. Even clause 27 of the Agreement provides that the parties shall refer all the disputes or differences to arbitration and the same shall be adjudicated by a single Arbitrator appointed by the respondent. As the respondent had failed to refer the matter to arbitration by nominating/appointing a sole Arbitrator, the petitioner has invoked Section 11(6) of the A & C Act. In fact, the respondent had stoutly disputed the claim of the petitioners and also had stated that the entire monies were not paid to them and they were deliberately withheld by them for settlement of some other issue. Thus, by appointing an Arbitrator in accordance with Section 11, the procedure as to the claim, counter-claim, defence, etc. will be governed by Section 23 of the A & C Act. Therefore, the objection raised by the respondent that Section 21 notice is mandatory and non-issuance of the same would disentitle the petitioners in maintaining the petition under Section 11(6) of the Act has no legs to stand in the facts and circumstances of the present case and the same is rejected.

15. Considering the submissions of the learned counsels for the parties, so also the stand taken by the respondent in A.No.3127 of 2017 in C.S.No.176 of 2015, this Court appoints Mr.V.Vijayshankar, Advocate, having office at No.67, Law Chambers, High Court Buildings, Chennai-600 104 (Phone No.044-25342014) 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 shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

16. The Original Petition is ordered accordingly, leaving the parties to bear their own costs.

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Internet : Yes
Speaking Order/Non-Speaking Order
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PUSHPA SATHYANARAYANA, J.

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