

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.01.2019

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

O.P.NO.649 OF 2017
AND O.A.NO.710 OF 2017

M/s.Abiram Infra Projects Pvt.Ltd.,
Represented by its authorized signatory
Mr.Anji Reddy,
Flat No.B-302, Utsav, Seenappa Layout,
New EBL Road, Bangalore 560 094. .. Petitioner

-VS-

The Chennai Metropolitan Water Supply
and Sewage Board,
Represented by its Superintending Engineer,
Contracts and Monitoring,
No.1, Pumping Station Road, Chintradripet, Chennai - 600 002. .. Respondent

Prayer: Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint an arbitrator on behalf of the respondent.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.N.Ramesh

ORDER

This application has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator.

2. The respondent floated a tender for providing underground sewerage scheme in various places of Chennai. The applicant has become a successful bidder in the said tender. As per Clause 31 of the Notification, Award of contract will be made after acceptance of the bid. Clause 31.2 deals with the Notification of Award and signing of the Agreement. Clause 33.3 deals with Agreement between the Employer and Successful Bidder, and Performance Security in accordance with provision of Clause 34.

3. In compliance with Clause 33, the applicant has executed a performance bank guarantee, on being notified as a successful bidder. Thereafter, there was a delay in commencing the work. The respondent vide letter dated 27.05.2015 requested the applicant to complete the execution of the agreement and commence the work immediately. The period of contract is 30 months. But by

the time the respondent called the petitioner to execute the agreement, almost 12 months had lapsed and there was escalation in prices of materials in the meantime. The applicant requested the respondent to consider these aspects, to which the respondent, by his letter dated 16.06.2015, rejected the request, stating that there is no provision available in the bid document for revising the price already quoted before the completion of the agreement and commencement of work. Further, necessary provision towards price escalation while execution has already been incorporated in the agreement. Therefore, the respondent called upon the applicant to complete the execution of the agreement on or before 24.06.2015 and to commence the work immediately, failing which, action would be initiated as per bid conditions. Thereafter, it appears that the respondent sought to invoke the bank guarantee, which prompted the applicant to approach this Court by way of Section 9 of the Act, 1996, for injunction, restraining the respondent from invoking the Bank Guarantee. This Court granted interim injunction and the same was periodically extended. The applicant, pursuant to the talks held with the Managing Director of the respondent Board, withdrew the application, with liberty to reopen the case, in the event the

respondent does not release the bank guarantee. Thereafter, the applicant has approached the respondent on several occasions, but by letter dated 14.06.2017, the respondent invoked the arbitration clause and appointed Mr.Rajagopal Nadimuthu as their nominee Arbitrator.

4. The respondent in its letter dated 14.07.2017 had invoked the bank guarantee against the applicant. The applicant preferred another application under Section 9 seeking interim relief. Thereafter, the applicant issued another letter dated 24.07.2017, invoking arbitration clause, to which the respondent had issued a reply stating that there is no contract existing between them and the applicant's request for appointment of Arbitrator would not be considered. The applicant has approached this Court with the present petition for appointment of an Arbitrator.

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5. The respondent denied all the averments in the above petition and contended that they were always ready and willing to award the contract to the applicant for execution, provided he signs all the agreements, containing four volumes and four copies.

Believing the words of the applicant, they have also released the bank guarantee. The applicant had failed to come forward to sign the agreements. Eventhough, the respondent has repeatedly requested the applicant to come and sign the agreement and carryout the work, the applicant has failed to perform his part of contract. Furthermore, the contract of the applicant is not existing as he had already withdrawn from two other contracts after having been declared as the successful bidder. The applicant habitually withdrawing from all the contracts after having declared as the lowest bidder.

6. Therefore, action was initiated to blacklist the applicant and to impose penalties. Since the applicant has not signed the agreement there cannot be any binding contract between the parties and the applicant is not entitled to maintain this petition. Therefore, the application for appointment of Arbitrator is liable to be dismissed.

7. The learned counsel for the respondent relied on the judgment of the Delhi High Court reported in **[2016 SCC ONLINE DEL 6203] VIRGOZ OIL & FATS PTE. LTD. VS. NATIONAL AGRICULTURAL**

CO-OPERATIVE MARKETING FEDERATION OF INDIA LTD. The

relevant portion is extracted here under.:-

“18. It is amply clear from paragraph 2 of Article II of the New York Convention that an agreement in writing would include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in exchange of letters or telegrams. It is not Virgoz's case that the arbitration agreement between Virgoz and NAFED is contained in any exchange of letters or telegrams; Virgoz relies upon the arbitration clause as included in documents (the Contracts) which Virgoz asserts are the contracts between the parties. The Contract clearly indicates that the same have not been signed by NAFED. Although, NAFED has been described as a buyer and a place for the signatures of the buyer is spherically provided. However, no signatures of the buyer appear at designated place (or anywhere else in the document). The contention that the broker had signed the Contracts on behalf of NAFED also cannot be accepted as the Contracts clearly indicate that the Broker

signed the Contracts in his own capacity and not for and on behalf of NAFED."

8. He would also rely on the judgment of this Court reported in **[2015 4 LW 417] NSK INDIA SALES COMPANY PRIVATE LTD., VS. PROACTIVE UNIVERSAL TRADING COMPANY PRIVATE LTD.**, wherein this Court has held that *"an arbitration document which is unsigned cannot be construed as arbitration as there is no agreement whatsoever inter se the parties and therefore, Arbitrator cannot be appointed, as it is not valid and binding"*. He also relied on the judgment of the Honble Supreme Court in **[1996 (2) SCC 667] U.P.RAJKIYA NIRMAN NIGAM LTD., VS. INDURE PVT.LTD., AND OTHERS** wherein it was held that *"the draft agreement signed, will not evoke commencement as a bidder on the material terms of the contract. Mere proposal and counter-proposal will not render the contract binding between the parties. Its should emerge as an agreement signed by both the parties. Then only, the arbitration clause can be invoked"*.

9. I have perused the judgment relied on by the respondent. The judgment of Delhi High Court reported in **[2016 SCC**

Online Del 6203] VIRGOZ OIL & FATS PTE. LTD. VS. NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING FEDERATION OF INDIA LTD. proceeds on the basis that there was no arbitration agreement between the parties and exchange of letter, telegrams and E-mails would not prove that such agreement was entered between the parties. There was no correspondence between the parties, which should establish the meeting of minds and an agreement to refer any dispute to arbitration.

10. But in the instant case, the respondent Board has floated a bid, identified the bidder and awarded the contract. Pursuant to the notification of the award of contract, the respondent also executed the performance bank guarantee, as per Clause 33 of the Bid document. Further, it is seen from the information given under RTI Act that the signing of the agreement was in progress. Therefore, it is clear that there is a binding contract between the parties, pursuant to which, the applicant executed a Performance Bank Guarantee. In fact, the respondent sought to invoke the performance bank guarantee as per tender conditions as reflected in the correspondence dated 14.05.2017.

11. In that event, it is crystal clear that there exists an agreement between the parties and clause 24 and 25 provides for disputes resolution methods and the procedure to be followed. According to which, the contractor shall write to the engineer of his objection and the engineer belonging to the respondent Board shall take a decision. If the decision taken was unacceptable, then the contractor, within 14 days, shall refer the decision to the adjudicator. The adjudicator shall, in turn, within 28 days from the date of receipt of the notification of dispute, give a decision. If the decision of the adjudicator is not acceptable, either of the parties can refer the decision to an Arbitrator within 28 days.

12. Clause 25.3 of the contract specifically provides for the procedure for conducting Arbitration. According to which, each of the parties will refer one arbitrator and in turn the nominee arbitrators will select the Presiding Arbitrator. Further, it is pertinent to note that even though the respondent claims that the applicant has not signed any contract, much less an arbitration agreement, the materials produced on behalf of the respondent would reveal that the arbitration agreement was signed between the parties, and each and

every page of the agreement has been signed in the said agreement. Therefore, reliance placed by the respondent so far as the judgment of the Delhi High Court as well as the Honble Supreme Court, are not applicable to this case.

13. The learned counsel for the applicant would rely on the judgment of the Hon'ble Supreme Court reported in **[2017 (9) SCC 729] DURO FELGUERA, S.A. VS. GANGAVARAM PORT LIMITED**, wherein it is held as under:

"59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [2005 (8) SCC 618] and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

14. The contention of the learned counsel for the applicant is acceptable. In the instant case, a perusal of the document would show that the parties have entered into an agreement which contains an Arbitration Clause and the said contract has been signed by both the parties at every page. Further, the exchange of communication shows that there exists certain agreement to award the principal work. Further more, the respondent invoked the bank guarantee on the basis of the tender condition. When an Arbitration Clause is existing in the tender conditions, this Court is of the considered view that there exists an arbitration agreement. In spite of the request made by the applicant to appoint an Arbitrator, it was rejected by the respondent on the ground that there was no arbitration agreement between the parties. Such contention is not sustainable. In view of the facts discussed above, in fine, this Court is inclined to appoint the Arbitrator.

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15. Therefore, this Court is of the considered view that arbitration agreement and the matter is preferable to an Arbitrator. The applicant has nominated Mr. Rajagopal Nadimuthu as his nominee. As per procedure laid down in the contract, the respondent Board has

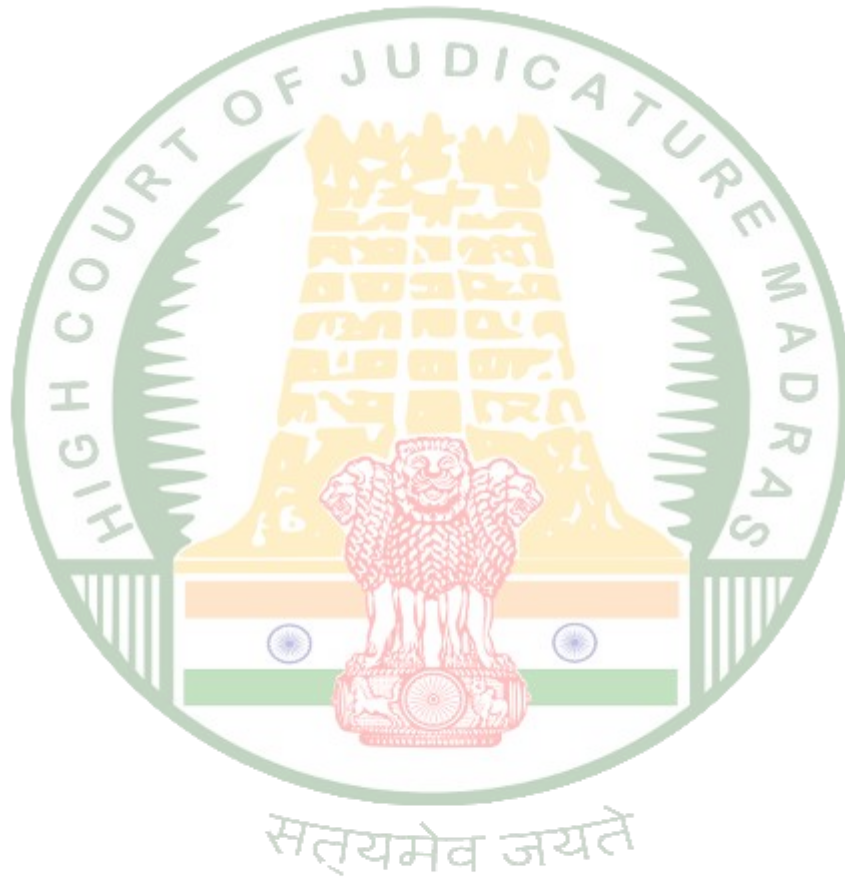
to nominate one Arbitrator from its side, which it had failed. Now, that a proposal is made that Hon'ble Mr.Justice M.Jeyapaul [Judge, Retired] to be appointed as a nominee Arbitrator.

16. Accordingly, the *Hon'ble Mr.Justice M.Jeyapaul [Judge, Retired] residing at No.17, 2/759, Raahat Enclave, II nd Street, Kazura Garden, Neelankarai, Chennai - 600 041, Mobile: 07837049202* is appointed as nominee Arbitrator. The nominee arbitrators will select the presiding Arbitrator. Further, arbitration shall take place in Chennai. The remuneration for the Arbitrators shall be borne out by both the parties, equally. The arbitrators are requested to complete the proceedings within the time stipulated under the Arbitration and Conciliation Act, 1996.

17. This Original Petition is ordered accordingly. No costs. Consequently, connected original application is closed.

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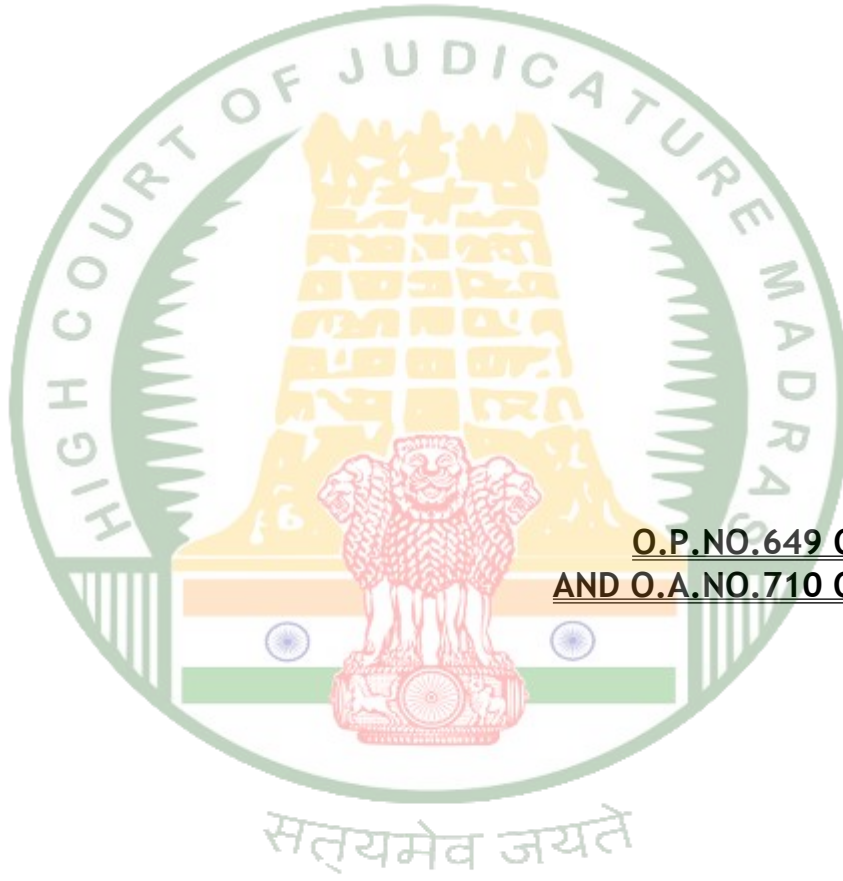
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