

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2019

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

O.P.NO.1061 OF 2018

M/s.RAUS Constructions Pvt. Ltd.,
Rep. by Managing Director Srinivasa Rao
4-10-30 Street No.7, Nacharam,
Hyderabad - 500 076.

.. Petitioner

-vs-

The Commissioner
Salem City Municipal Corporation
Salem - 636 007.

.. Respondent

PRAYER: Petition filed under Section 11 of the Arbitration & Conciliation Act, 1996 to appoint a Sole Arbitrator and to refer all the disputes arising between the parties as per Clause 4 of the Arbitration (GCC - Clause 25) accepted by the petitioner and respondent.

For Petitioner : Mr.M.A.Abdul Wahab
for M/s.K.V.Subramanian Associates

For Respondent : Mr.M.Karthikeyan

ORDER

This Original Petition is filed by the petitioner seeking to appoint a Sole Arbitrator and to refer all the disputes arising between the parties as per Clause 4 of the Arbitration (GCC - Clause 25) accepted by the petitioner and respondent.

2. The parties entered into an agreement to execute certain works. As per clauses 24 and 25 of the agreement, the disputes shall be resolved by adjudication, failing which, by arbitration. Clauses 24 and 25 of the Agreement reads as follows:

"24. Disputes

24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

25. Procedure for Disputes

25.1. The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2. The Adjudicator shall be paid only at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Date and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract."

3. According to the petitioner, they requested the respondent for appointment of Arbitrator to resolve the disputes that arose between them pursuant to the arbitration agreement. The response from the respondent was that as per the procedure laid down in Clause 24 and 25 of the agreement, the decision of the Engineer shall be first referred to the Adjudicator, for his decision, and if it is not agreeable, then arbitration can be resorted to. However, the petitioner has sent a communication seeking the report of the Engineer against which, he can file his objections

to the Adjudicator and also to name the Adjudicator. But the respondent failed to respond the communication sent by the petitioner dated 25.05.2017. Therefore, the petitioner is before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996.

4. The learned counsel for the respondent would submit that the procedure for referring the dispute to arbitration has not been complied with by the petitioner and therefore, the present Original Petition is not maintainable.

5. Heard the rival submissions and perused the materials available before this Court.

6. From the perusal of Clause 24 and Clause 25 of the agreement, the dispute, at the first instance, shall be communicated to the Engineer of the respondent Corporation. If the decision taken by the Engineer is beyond his jurisdiction or authority or if the contractor pleads that it was wrongly taken, it shall be referred to Adjudicator within 14 days of the notification of the Engineer's decision. On such referral, the Adjudicator shall give a decision within 28 days of the receipt of notification of the report. If the decision taken by the Adjudicator is not

acceptable, it shall be referred to an Arbitrator within 28 days of of the Adjudicator's written decision.

7. Thus, it is very clear that the decision shall be taken by the Engineer at the first instance. Even though the petitioner has raised the dispute on so many occasions, there is nothing on record to show that it was referred to Engineer's decision and that Engineer's decision was notified by the respondent. In the absence of Engineer's decision, the next step of referring the dispute to the Adjudicator as per Clause 25 of the agreement does not arise. When the petitioner caused a legal notice to the respondent, the respondent replied that the contract was terminated by them on several grounds. The breach of contract was attributed to the petitioner herein.

8. It is also seen that the respondent has not specifically stated that the decision was taken by an Engineer and that the petitioner failed to comply with the requirement of referring the same to the Adjudicator. The Adjudicator himself was not named. When such is the situation, the failure to communicate or notify the Engineer's decision and referring it to an Adjudicator, is attributable to the respondent. Having failed to perform their part, they cannot now take a stand that the

procedure for referring the matter for arbitration has not been complied with by the petitioner. The petitioner in fact invoked the arbitration clause and named his choice of Arbitrator. Even to this, there is no response from the respondent and non-appointment of Arbitrator compelled the petitioner to approach this Court for appointment of an Arbitrator. It is very clear that there exists an arbitration clause and the respondent has failed to comply with the procedure laid down thereunder. In such circumstances, the request of the petitioner for appointment of Arbitrator is very much justified and this Court is inclined to appoint an Arbitrator.

9. Accordingly, this Court, by consensus of the parties, appoints ***the Hon'ble Mr. Justice K. Mohan Ram, (Judge, Retired) No.3, Sivakamipuram II nd Cross Street, Thiruvannamiyur, Chennai - 600 041, Mobile: 9444464646*** as the Sole Arbitrator, to enter upon reference and adjudicate the disputes *inter se* the parties. He 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.

10. The Original Petition is ordered accordingly, leaving the parties to bear their own costs. Consequently, connected application is closed.

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