

THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NO.92 OF 2017

O R D E R

M/s.Aravind Constructions (P) Ltd., Secunderabad, the applicant company, seeks appointment of a sole Arbitrator to adjudicate its disputes with the Chief Engineer, Hyderabad Zone (Projects) MES, FY Medak, Parade Grounds, Secunderabad; the Garrison Engineer (1) (FY), Ordnance Factory Project, Eddumailaram, Sanga Reddy District; and the Union of India represented by its Engineer-in-Chief, MES, Integrated Head Quarter of MOD (Army), Kashmir House, Rajaji Marg, New Delhi, the respondents.

The applicant company's claim is valued at above Rs.1.50 crore.

The applicant company's case is as follows: It executed works at the Ordnance Factory Project, Eddumailaram, Sanga Reddy District, under several contract agreements but its final bills were not cleared. On the other hand, the respondents withheld its security deposits, retention money, bank guarantees, etc. Further, without allowing it to raise its own claim, the respondents appointed a departmental Arbitrator for their own claim but the arbitration proceedings failed due to withdrawal and resignation of the departmental Arbitrators. Thereupon, the applicant company filed O.P.No.52 of 1995 before the learned III Senior Civil Judge, City Civil Court, Secunderabad, with regard to one of the contract agreements, viz., Contract No.16 dated 18.12.1987, seeking appointment of an Arbitrator to resolve its disputes with the respondents. By order dated 16.06.2004, the trial Court appointed a retired surveyor whose name found mention in the standing panel of Arbitrators available with the respondents. This order was subjected to challenge by the respondents in

C.R.P.No.6455 of 2005 before the High Court, but to no avail. However, while dismissing the said CRP *vide* order dated 19.08.2010, the High Court appointed Sri Justice Vaman Rao, Retired Judge, as the sole Arbitrator. Though disputes existed between the parties in relation to eight contract agreements, the arbitration was held only with regard to Contract No.16 dated 18.12.1987. The other disputes were not taken up by the sole Arbitrator. In relation to another contract agreement, being Contract No.7 of 1986-87, separate arbitration proceedings were initiated before the sole Arbitrator, Sri Justice K.Ramaswamy, Retired Supreme Court Judge. In spite of several reminders from the applicant company, the respondents neither paid the amounts claimed by it nor took recourse to the dispute resolution mechanism of arbitration.

It is in these circumstances that the present application came to be filed seeking appointment of an Arbitrator to resolve the applicant company's disputes in connection with Contract Nos.5/1987-88, 30/1985-86, 43/1985-86, 19/1985-86, 28/1987-88, 33/1986-87, 07/1986-87 and 16/1987-88.

The Assistant Garrison Engineer (Independent) Fy, Eddumailaram, filed a counter-affidavit on behalf of the respondents. Therein, he admitted that the applicant company had executed works during 1987-88 under different contract agreements but asserted that the claims raised in relation thereto, after nearly 30 years, would be time-barred. He also adverted to various issues on the merits of the claims. He pointed out that in relation to two of the contracts, arbitration proceedings had already been held and matters were pending in various Courts. According to him, the applicant company itself was liable to pay a sum of Rs.37.03 lakhs

along with interest to the department in relation to one of the arbitration awards. He concluded by stating that the demand for arbitration could be made 90 days after presentation of the final bill and that the claims raised by the applicant company after such a long period were not tenable. He accordingly sought dismissal of the arbitration application.

Heard Sri P.Venugopal, learned senior counsel appearing for Sri B.Mayur Reddy, learned counsel for the applicant company, and Sri Raghavender, learned counsel appearing for the learned Assistant Solicitor General for India representing the respondents.

Clause 70 of the General Conditions of Contract, which would automatically form part and parcel of the contract agreements executed by and between the applicant company and the respondents, provides for arbitration. It states to the effect that all disputes between the parties to the contract (other than those for which the decision of the C.W.E. or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

The respondents do not dispute either the existence or the applicability of the aforestated arbitration clause. They however seek to contest the arbitration application on the ground that the claims raised by the applicant company are barred by limitation and are otherwise untenable on merits.

However, it may be noted that the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016), with effect from

23.10.2015. Thereby, a sea change was brought about in Section 11 dealing with appointment of Arbitrators. Significantly, Section 11(6-A) was inserted in the Act of 1996 with effect from 23.10.2015. This provision states to the effect that the High Court, while considering an application under Section 11(5) & (6) of the Act of 1996, shall confine itself to examination of the existence of an arbitration agreement and no more.

In *DURO FELGUERA, S.A. V/ s. GANGAVARAM PORT LIMITED*¹, summing up the changes made by Act 3 of 2016, the Supreme Court observed that as per Section 11(6-A), the power of the Court has now been restricted only to examination of the existence of an arbitration agreement, while earlier, the Chief Justice was given the power to examine other aspects as well, i.e., limitation, whether the claims were referable for arbitration, etc., in terms of the judgments of the Supreme Court in *SBP AND CO. V/ s. PATEL ENGG. LTD.*² and *NATIONAL INSURANCE CO. LTD. V/ s. BOGHARA POLYFAB (P) LTD.*³. According to the Supreme Court, all preliminary issues have now been left to the Arbitral Tribunal to be decided in terms of Section 16 of the Act of 1996.

In the light of this recent judgment dealing with the amended provisions of Section 11, reliance placed by Sri Raghavender, learned counsel, on earlier case law to the contrary is of no avail. As pointed out by the Supreme Court itself, the earlier precedents and the law laid down therein stand eclipsed by the amendments brought about in the Act of 1996 and the insertion of sub-section 6-A in Section 11.

¹ (2017) 9 SCC 729

² (2005) 8 SCC 618

³ (2009) 1 SCC 267

Though M/ S.RAITANI ENGINEERING WORKS PVT. LTD. V/ s. UNION OF INDIA⁴ was a decision delivered after Act 3 of 2016 came into force, it turned upon the unamended provisions of the Act of 1996 and the Court had no occasion to consider the import and impact of Section 11(6-A) which was inserted in the Act of 1996 with effect from 23.10.2015.

As the existence of the arbitration agreement between the parties under the General Conditions of Contract, *vide* Clause No.70, is a matter of record, this Court need not examine any other issue, given the embargo posited by Section 11(6-A) of the Act of 1996.

The Arbitration Application is accordingly ordered appointing Sri Justice G.Bhavani Prasad, Retired Judge, erstwhile High Court of Andhra Pradesh, residing at Door No.6-3-1219/24, Flat No.202, First Floor, Ujwal Bhavishya Complex, Above Karnataka Bank Ltd., Street No.4, Umanagar, Begumpet, Hyderabad-500016, as the sole Arbitrator for resolution of the disputes between the applicant company and the respondents arising out of the contract agreements, mindful of the arbitrations already undertaken, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

SANJAY KUMAR, J

27th FEBRUARY, 2019

Sv

⁴ Arbitration Petition No.4 of 2016 dated 02.06.2016