

**THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**

**ARBITRATION APPLICATION No. 22 OF 2014**

**ORDER :**

This application is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (*for short 'the Act'*) seeking Appointment of Sole Arbitrator to resolve the disputes between the Applicant and the Respondent raised under applicant's letter dated 14.08.2012.

2. The case of the applicant is that the applicant was awarded the contract for Construction of Main Block (Hospital) for the proposed Nizam's Institute of Medical Sciences – University Campus (NIMS-UC) at Rangapur Village, Bibinagar Mandal, Nalgonda District, vide Notification of Award No.028/07-NIMS/U.C/1/2006/Ping, dated 15.04.2008; and that a formal Contract Agreement was entered into between the Applicant and Respondent vide Agreement No.Nil, dt.27.06.2008 for an amount of Rs.97, 68, 14,895/- (revised). In terms of the said contract, the date of commencement of work was 23.05.2008 and the scheduled date of completion was 22.08.2009. During the course of execution of the said work, subsequent to the aforesaid agreement, disputes arose with regard to payment of amount to the Applicant. As such, the applicant issued notice dt.28.06.2012 showing the total amount due and payable as Rs.19,65,10,017/- and also requested to pay the said amount. In response to the said notice the respondent sent reply dt.16.07.2012 disputing the claims. As such, the Applicant again issued notice dt.14.08.2012 invoking Clause 67.1

of the General Conditions of the Contract (GCC) regarding settlement of disputes. As the respondent failed to respond to the said notice, the Applicant issued notice dt.05.01.2013 intimating its intention to refer the matter in dispute for Arbitration in terms of Clause-67.3 of the GCC. As there was no response from the respondent, the Applicant issued further reminders dt.23.01.2013 and 28.02.2013, and finally the respondent issued reply vide letter dt.08.03.2013, stating that the request for appointment of sole arbitrator for settlement of disputes cannot be acceded due to non-compliance of the procedural requirements by the Applicant. As such, the present application is filed.

3. Counter affidavit is filed by the respondent disputing the claims of the petitioner. The existence of arbitration clause in the agreement is not disputed by the respondent in the counter.

4. The respondent at para-16 of the counter stated as follows;

“In reply to paras 18, 19 and 20, it is submitted that the respondent institute never refused to appoint an arbitrator but intimated the petitioner to follow the prescribed procedure for appointing sole arbitrator by the respondent institute. As the petitioner neither complied with the requirements nor adhere to the procedure of appointment of arbitrator, the present application for appointment of sole arbitrator is not maintainable and is liable to be dismissed. Furthermore, it is relevant to submit that there is no lapse on the part of the Respondent Institute.”

5. This Court after hearing the parties on 29.04.2019, referred the matter for conciliation in terms of Clause-67.2 of the Agreement dt.27.06.2008.

6. In pursuance to the same, the Mediator filed a Mediators Final Report dt.27.08.2019 stating that the parties have entered into a Memorandum of Settlement dt.29.05.2019; that subsequently mediation was held on 17.06.2019, 03.07.2019, 26.07.2019, 31.07.2019, 14.08.2019, 16.08.2019, 23.08.2019 and 27.08.2019; and that as the respondent did not pay the balance amount as per the Memorandum of Settlement dt.29.05.2019, Mediation has been unsuccessful.

7. Learned counsel for the Applicant submits that since the mediation failed, in view of the existence of arbitration clause in the agreement dt.27.06.2008, which is not disputed by the respondent, this Court has to invoke its jurisdiction under 11(4) of the Act and appoint an independent arbitrator. He further submits that though as per the claim of the petitioner, the respondent has to return an amount of Rs.19,65,10,017/- and Bank Guarantee of Rs. 6.5 crores, the respondent has paid only 2.57 crores and that they have not returned the Bank Guarantee. He also submits that the procedure envisaged for appointment of Arbitrator has been followed.

8. On the other hand Sri G.Anandam, learned Standing Counsel for respondent submits that since the parties have entered into

Memorandum of Understanding on 29.05.2019, no live dispute exists for appointment of Arbitrator and only 31,000/- has to be paid to the Applicant and the same will be paid after foreclosure of the agreement. He also relied on the Judgments rendered by the Supreme Court in ***ONGC Mangalore Petrochemicals Limited v. ANS Constructions Limited [(2018) 3 Supreme Court Cases 373]*** and ***Union of India and Others v. Onkar Nath Bhalla and Sons [(2009) 7 Supreme Court Cases 350]***.

9. In this case, the existence of arbitration clause in the agreement is not in dispute and the said clause reads as follows;

*“67.Settlement of Distputes:*

*67.1 Engineer’s Decision*

*If a dispute of any kind whatsoever arise between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the works of after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. Not later than the eighty fourth day after the day on which he received such reference the Engineer shall give notice to his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.*

*Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Work with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer*

*unless and until the same shall be revised, as hereinafter provided in an amicable settlement or an arbitral award.*

*If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be give notice to the other party, with a copy for information to the Engineer of his intention to commence arbitration as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.*

*If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.*

#### *67.2 Conciliation*

*Where notice of intention to commence arbitration as to dispute has been given in accordance with Sub Clause 67.1, arbitration of such dispute shall not be commenced unless, the parties have explored the possibility of conciliation as per the provisions of Part-III of the Arbitration and Conciliation Act, 1996. When such conciliation has failed, the parties shall adopt the following procedure for arbitration:*

#### *67.3 Arbitration*

*67.3.1 Any dispute and differences relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used*

*in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof in respect of which:*

- a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub Clause 67.1 and*
- b) Conciliation has not been reached as per the provisions of Clause 67.2*

*Shall be referred to the Sole Arbitration of a person appointed by the Director, NIMS, Hyderabad from the panel of Arbitrators approved by Employer. Such Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of Arbitration duly satisfying the requirements of this clause.*

*67.3.2 If the Arbitrator so appointed resigns his appointment, is unable or unwilling to act due to any reason whatsoever, or dies, the Director, NIMS or in his absence the person discharging the duties of Director, NIMS may appoint a new Arbitrator in accordance with these terms and conditions of the contract, to act in his place and the new Arbitrator so appointed may proceed from the stage at which it was left by his predecessor.*

*67.3.3 It is a term of the contract that the party invoking the Arbitration shall specify the dispute/differences or questions to be referred to the arbitrator under this clause together with the amounts claimed in respect of each dispute.”*

10. The aforesaid clause in the agreement provides mechanism for settlement of disputes. The same is not disputed in the counter affidavit by the respondent. The respondent at para 16 of the Counter affidavit only stated that the petitioner failed to follow the procedure required for appointment of arbitrator.

11. In this case, the petitioner issued notice dt.14.08.2012 invoking Clause 67.1 of the General Conditions of the Contract for settlement of disputes. As there is no reply from the respondent, the petitioner issued letter dt.05.01.2013 intimating its intention to refer the matter in dispute to the Arbitrator and that the respondent issued letter dt. 08.03.2013 stating as follows;

“with reference to the subject cited, your request for appointment of a sole Arbitrator for settlement of disputes in construction of hospital building at Rangapur has not been acceded to due to non compliance to the procedural requirements.”

12. This Court has found that since there is no conciliation as per clause-67.2 of the Agreement, this Court has referred the matter for conciliation to the High Court Mediation and Arbitration Centre, High Court Building, Hyderabad. Though the conciliator filed report stating that conciliation failed, and though it is stated that a Memorandum of Settlement dt.29.05.2019 entered into between the parties and a copy of the same is filed before this Court, the petitioner states that he is entitled for payments, whereas respondent dispute the same stating that the agreement has to be foreclosed, which goes to show that the dispute is not settled between the parties and the dispute which arise out of the original agreement dt.27.06.2008 still exists and the same is required to be dealt with.

13. No doubt, unless there is live dispute for decision by the Arbitrator, no Arbitrator can be appointed as per the decisions relied

on by the respondent in *ONGC Mangalore Petrochemicals Limited v. ANS Constructions Limited [(2018) 3 Supreme Court Cases 373]* and *Union of India and Others v. Onkar Nath Bhalla and Sons [(2009) 7 Supreme Court Cases 350]*. But, this Court is of the view that since prima facie dispute exists and the procedure envisaged in the agreement is also followed, there is requirement of appointment of Arbitrator.

14. In view of the facts and circumstances of the case, the Arbitration Application is allowed appointing Hon'ble Sri Justice Madan B.Lokur, Former Judge of Supreme Court, as the sole Arbitrator for adjudication of the disputes that have arisen between the Applicant and the Respondent in respect of the claims raised under the Petitioner's letter dated 14.08.2012, in accordance with the provisions and mandate of the Act of 1996.

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**A.RAJASHEKER REDDY, J**

19-12-2019

Note:

Mark a copy to:

Honourable Sri Justice Madan B.Lokur,  
Former Judge of Supreme Court,  
A-26, First Floor,  
Gulmohar Park,  
New Delhi-110049.  
B/o.tk

**THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**

**Arbitration Application No. 22 of 2014**

**19.12.2019**

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