THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NO.49 OF 2013

ORDER

M/s. Sri R.R. Construction, Madurai, Tamilnadu, a partnership firm, filed this application under Section 11(2), (5) & (6) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), seeking appointment of an Arbitrator to resolve its claim for a sum of Rs.1,77,10,791/-, along with interest thereon from 18.11.2009, raised against M/s. Madhucon Projects Limited, Hyderabad.

The case of the applicant firm is that the respondent company was awarded work by the National Highways Authority of India in relation to the four-laning, widening and strengthening of the existing NH-45 B from KM 130+800 to KM 264+500 in the 'Madurai to Tuticorin' section in the State of Tamilnadu. The respondent company, in turn, awarded a sub-contract on 03.05.2007 to the applicant firm in relation to the road works between KM 138+800 and KM 160+000.

Disputes having arisen in relation to this sub-contract in the context of payments allegedly due to the applicant firm, it addressed letter dated 06.03.2009 explaining its financial difficulties and requesting the respondent company to clear its bills so that it could complete the work. However, by letter dated 14.05.2009, the respondent company terminated the contract citing the failure of the applicant firm to complete the project within time. The applicant firm claimed that it submitted its final bill on 18.11.2009 to the respondent company for a sum of Rs.1,56,08,617/- but by letter dated 20.05.2010, the respondent company disputed the same and asked the applicant firm to resubmit its bill. Despite exchange of correspondence, there was no amicable settlement of the issue and the applicant firm finally got addressed legal notice dated 22.08.2012 to the respondent company calling upon it to clear its dues of Rs.1,63,57,160/-, with accrued interest thereon @ 8% per annum from 18.11.2009, within fifteen days, failing which it threatened to take appropriate legal action against the respondent company and its assets. As there was no response to this legal notice, the applicant firm addressed letter dated 04.02.2013 to the respondent company invoking the arbitration clause in the sub-contract dated 03.05.2007 and informing the respondent company that it had decided to appoint a third-party Arbitrator, *viz*., Sri P.Velu, Chief Engineer (Retired), PWD, Tamilnadu, and that he had consented to accept the assignment. The applicant firm requested the respondent company to accept its nomination and inform its consent forthwith so that arbitration proceedings could be commenced without further delay.

The respondent company replied, *vide* letter dated 09.03.2013, denying the claim of the applicant firm and pointing out that as per the arbitration clause in the sub-contract dated 03.05.2007, appointment of the Arbitrator was to be made only by its Managing Director. The respondent company therefore informed the applicant firm that it was not accepting the nomination of Sri P.Velu as the Arbitrator and called upon the applicant firm to come for mutual negotiations to solve the differences between them. It further stated that in the event the applicant firm chose to invoke arbitration proceedings after the mutual discussions, then its Managing Director would appoint a sole Arbitrator to resolve the issues.

It is however significant to note that two days prior to issuance of the aforestated reply, the respondent company addressed letter dated 07.03.2013 to the applicant firm stating that, owing to the delay in completion of the work, it had to incur expenditure to the tune of Rs.18.05 crores and called upon the applicant firm to pay the amount.

Thereupon, on 04.04.2013, the applicant firm filed this application.

Notice was ordered upon this application and Sri Avinash Desai, learned counsel, entered appearance for the respondent company. He filed a counter-affidavit on its behalf. Therein, the authorised signatory of the respondent company adverted to the merits of the dispute raised by the applicant firm, which would be irrelevant for the purposes of this application and therefore need no mention. He referred to Clause 22 of the sub-contract dated 03.05.2007, which dealt with 'Differences or Disputes' and asserted that the applicant firm did not choose to abide by the procedure prescribed therein. He pointed out that the applicant firm straightaway issued arbitration notice dated 04.02.2013, ignoring the agreed procedure and therefore, no failure could be attributed to the respondent company, warranting invocation of Section 11 of the Act of 1996. He accordingly prayed for dismissal of the application.

The case on hand would have to be dealt with as per the unamended provisions of the Act of 1996 as the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) came into force from 23.10.2015, long after institution of this application.

In terms of Section 11(2) of the Act of 1996, the parties are free to agree on a procedure for appointing the Arbitrator(s). Section 11(6) provides for intervention by the Chief Justice or any person or institution designated by him in the matter of appointment of an Arbitrator in a case covered by Section 11(2), where a party fails to act as required under that procedure or the parties, or the two appointed Arbitrators fail to reach an agreement expected of them under that procedure, or a person fails to perform any function entrusted to him under that procedure.

It is not in dispute that in the case on hand, the parties specifically provided for a dispute resolution mechanism in Clauses 22 and 23 of the sub-contract dated 03.05.2007. These Clauses read as under:

'22.0 DIFFERENCES OR DISPUTES

22.1 Mutual Settlement of Disputes

22.1.1 Except where otherwise provided for in the contract, all disputes shall in the first place be resolved through mutual discussions, negotiations, deliberations and consultations associating senior executives of both the parties to dispute.

22.2 Conciliation

22.2.1 If the efforts to resolve all or any of the disputes through mutual settlement fail, such disputes shall be referred to the sole conciliator to be appointed by the Project Company/MPL under the Arbitration and Conciliation Act, 1996.

22.2.2 The settlement agreement shall be final and binding on the parties. The settlement agreement shall have the same status and effect of an arbitration award.

23.0 Arbitration

23.1 If the efforts to resolve all or any of the disputes through conciliation fail, such disputes shall be referred to the sole Arbitrator to be appointed by the Managing Director, Project Company. There shall be no objection to the PRC if the sole Arbitrator so appointed is an employee of Project Company. In case the Arbitrator so appointed is unable to act for any reason, Chairman of Project Company, in the event of such inability, shall appoint another person to act as an Arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with reference from the stage at which it was left incomplete by his predecessor.

23.2 Subject to the afore stated conditions, the provision of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the conciliation and arbitration proceedings under this clause.

23.3 Pending resolution of disputes and differences, the work shall continue without hindrance as per schedules and shall not be either slowed down or stopped. If the work is slowed down or stopped during the period of dispute, the PRC shall be responsible for the loss of work or delays and any loss sustained by Project Company due to such actions by the PRC, shall be made good by the PRC either by direct payment or through deductions from any payments due to the PRC.'

Perusal of the above Clauses manifests that all disputes had to be resolved in the first instance through mutual discussions, negotiations, deliberations and consultations by associating senior executives of both the parties (Clause 22.1.1). If such efforts to resolve the disputes through mutual settlement as per Clause 22.1.1 failed, Clause 22.2.1 provided that such disputes should be referred to a sole conciliator, to be appointed by the respondent company under the Act of 1996. Clause 22.2.2 prescribed that the conciliator's settlement would be final and binding on the parties and would have the same status and effect as an arbitration award. Clause 23.1 however provided for the remedy of arbitration in the event efforts to resolve the disputes through conciliation also failed. In such an event, the disputes were to be referred to a sole Arbitrator, appointed by the Managing Director of the respondent company. The Clause also recorded that there would be no objection to the appointment of an employee of the respondent company as the sole Arbitrator. Clause 23.2 made it clear that subject to the aforestated conditions in Clause 23.1, the provisions of the Act of 1996 applied to the arbitration proceedings.

In the light of the aforestated agreed scheme spelt out by the parties themselves, any dispute between the parties first had to be subjected to the process of mutual settlement by way of discussions, negotiations, deliberations and consultations through the senior executives of both parties and in the event of failure thereof, such disputes had to be referred to a sole conciliator appointed by the respondent company, whose settlement was to be final. It was only in the event of failure of such conciliation process that a sole Arbitrator could be appointed by the Managing Director of the respondent company.

The facts of the case, as set out *supra*, demonstrate that without taking recourse to the prescribed progression of the dispute resolution mechanism, as agreed upon in terms of Clauses 22 and 23 *supra*, the applicant firm straightaway issued an arbitration notice on 04.02.2013 nominating an Arbitrator, contrary to the procedure contemplated under Clause 23.1. In its response dated 09.03.2013, the respondent company rejected the nomination made by the applicant firm and specifically requested it to come for mutual negotiations to solve their differences. This was in keeping with Clauses 22.1.1, which required the parties to first try and resolve their disputes through mutual discussions, negotiations, deliberations and consultations. Significantly, it was only if a mutual settlement through discussions failed to materialise that the parties were to refer the disputes to a sole conciliator under Clause 22.2.1 and thereafter, it was only if such conciliation failed that recourse could have been taken to appointment of an Arbitrator in terms of Clause 23.1.

The applicant firm however did not choose to comply with the procedure, as contemplated in the agreement, but straightaway filed the present application. Having agreed to the procedure as set out in Clauses 22 and 23 *supra*, it was not open to the applicant firm to devise its own procedure and independently nominate an Arbitrator, contrary to what was stated in Clause 23.1, and then complain of inaction on the part of the respondent company so as to justify filing of this application.

The Arbitration Application is therefore misconceived in its very inception and is accordingly dismissed. No order as to costs.

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SANJAY KUMAR, J

20th JUNE, 2019
PGS