

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.02.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.54 of 2020

M/s.High End Quality Construction (P) Ltd.

PWD & CPWD Contractors rep by its

Managing Director T.Sudha

A3, VGP Layout, 3rd Street

Behind VGP Golden Beach

Injambakkam, Chennai - 600 115.

.. Petitioner

Vs.

1.The Chief Engineer

Public Works Department

Government of Puducherry

Puducherry.

2.The Superintending Engineer Circle-II

Public Works Department

Government of Puducherry

Puducherry.

3.The Executive Engineer

Public Works Department,

Mahe, Union of Puducherry.

.. Respondents

This Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to appoint an independent Sole Arbitrator to adjudicate upon the claims of the petitioner as per the Arbitration Application dated 17.08.2019 submitted by the petitioner to the 1st respondent herein viz., the Chief Engineer, Public Works Department, Government of Puducherry as per the Agreement No.107/M 2015-16 dated 24.02.2016 and as per Clause 25 of

the General Conditions of the Contract for Public Works 1996 and as amended Act 2015 and award cost of this petition and pass such further order or orders as deem fit and proper in the circumstances of the case and render justice.

For Petitioner : Mr.N.Thiagarajan

For Respondents : Mr.C.T.Ramesh
Additional Govt. Pleader (Puducherry)

ORDER

Mr.N.Thiagarajan, learned counsel on record for petitioner and Mr.C.T.Ramesh, learned Additional Government Pleader (Puducherry) on behalf of all the three respondents are before this Court.

2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) is under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, clarity and convenience and instant OP is obviously with a prayer for appointment of an arbitrator.

3. Before proceeding further with instant OP, this Court reminds itself of ***Duro Felguera principle*** and ***Mayavati Trading principle*** laid down by the Hon'ble Supreme Court in ***Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in ***(2017) 9 SCC 729*** and ***Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman*** reported in ***(2019) 8 SCC 714*** respectively.

4. Relevant paragraphs in **Duro Felguera** case law are Paragraphs 47 and 59 and the same read as follows:

'47. What is the effects of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the 2015 Amendment') with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'

*'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. (supra)* and *Boghara Polyfab (supra)*. 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 minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected. '*

5. Relevant paragraph in **Mayavati Trading** case law is Paragraph 10 and the same reads as follows:

'10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.'

(underlining made by this Court to supply

emphasis and highlight)

6. From the aforementioned two principles i.e., ***Duro Felguera*** and ***Mayavati Trading***, it emerges clearly that the scope of instant OP is limited to this Court being *prima facie* satisfied about the existence of an arbitration agreement.

7. Arbitration agreement between the parties in instant case being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is in the form a clause in an agreement being Agreement No.107M/2015-16, dated 24.02.2016 and the description of the work is 'Development of River side Walkway at Mahe (Phase-II)', hereinafter 'said contract' for the sake of clarity.

8. Clause 25 of said contract is the arbitration agreement between the parties and clause 25 reads as follows:

'CLAUSE 25. Settlement of Disputes and Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on 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, orders 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 cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instructions or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, P.W.D., in charge of the work or if there be no Chief Engineer, the administrative head of the said PWD. If the arbitrator so appointed is unable or unwilling to act or resigns

his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer P.W.D. or the administrative head of the PWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contract does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provision of the Arbitration and Conciliation Act, 1996 (26 of 1996) and as amended in January or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceed Rs.1,00,000/- the arbitrator shall give reasons

for the award.

It is also a term of this contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties or in such other manners as may be determined by the arbitrator.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties or in such other manners as may be determined by the arbitrator. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.'

9. Learned counsel for petitioner and State Counsel submit that there is no dispute or contestation about the existence of the aforementioned clause i.e., clause 25 in said contract, which is the arbitration agreement between the parties. This makes the task of disposal of instant OP simple.

10. Furthermore, adverting to petitioner's application dated 17.08.2019 *inter alia* being application for appointment of arbitrator vide aforesaid arbitration agreement, learned counsel for petitioner and learned State counsel submit that Thiru S.Raghunathan, M.Tech, Chief Engineer (Retd) -

P.W.D., Plot No.20, Sivaji Street, Shanthi Nagar, Lawspeth, Puducherry - 605 008. E-mail : ragu.pwdpy@gmail.com, Mobile: 094863-06033, who has been indicated as one of the choices to be nominated as arbitrator may please be appointed as sole arbitrator. This request makes the disposal of instant OP simpler.

11. Therefore, Thiru S.Raghunathan, M.Tech, Chief Engineer (Retd) - P.W.D., Plot No.20, Sivaji Street, Shanthi Nagar, Lawspeth, Puducherry - 605 008. E-mail : ragu.pwdpy@gmail.com, Mobile: 094863-06033 is appointed as sole arbitrator for entering upon reference qua arbitral disputes that have arisen between the parties with regard to said contract i.e., contract dated 24.02.2016 for work described as 'Development of River side Walkway at Mahe (Phase-II)'. Sole arbitrator is requested to enter upon reference, adjudicate arbitrable disputes between parties and pass an award in accordance with A and C Act.

12. OP is disposed of on above terms. There shall be no order as to costs.

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Speaking/Non-Speaking order

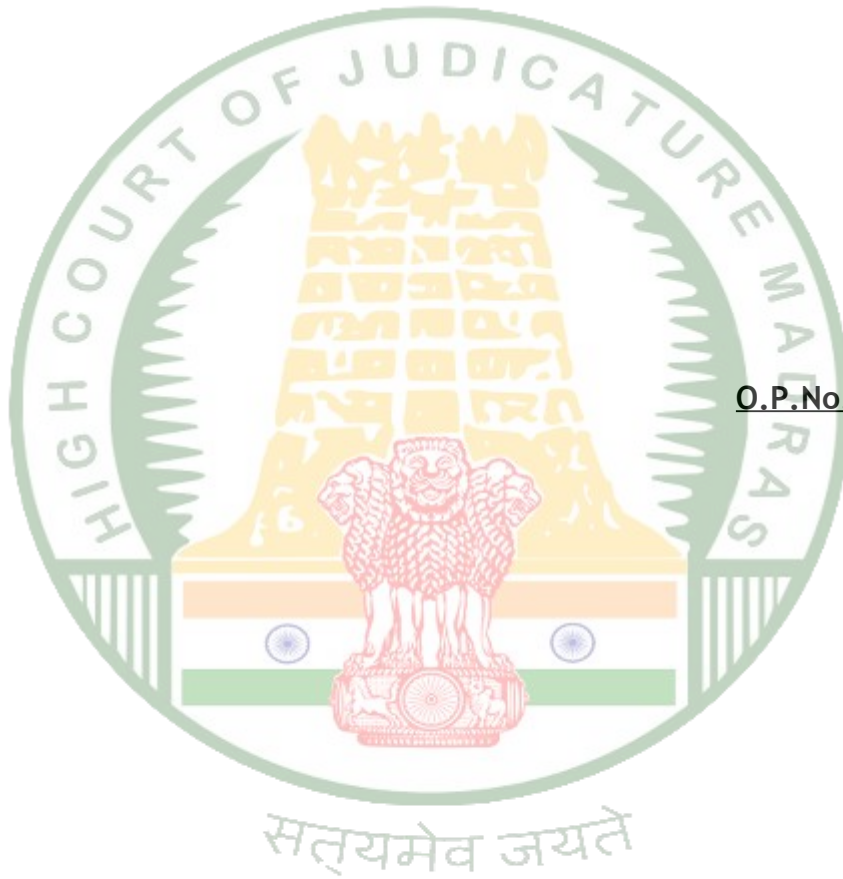
Index : Yes/No

Internet: Yes/No

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Note: Registry is directed to communicate this order to Thiru S.Raghunathan, M.Tech, Chief Engineer (Retd) - P.W.D., Plot No.20, Sivaji Street, Shanthi Nagar, Lawspeth, Puducherry - 605 008. E-mail : ragu.pwdpy@gmail.com, Mobile: 094863-06033.

M.SUNDAR, J.
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