

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.09.2020

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.287 of 2020

M/s.Sainath Constructions,
rep.by its Managing Partner
Mr.B.Bhavanisankar,
having its present address at
Old No.388/1, New No.852,
Anna Salai, Saidapet,
Chennai 600 015

... Petitioner

The Chief Engineer,
Tamil Nadu Water Supply and
Drainage Board (TWAD),
Northern Region,
No.8, I East Main Road,
Gandhi Nagar, Vellore 632 006.

... Respondent

Vs.

PRAYER: Petition filed under Section 11(5) of Arbitration and Conciliation Act, 1996 praying to appoint an impartial and independent Arbitrator in terms of Clause 25.3 of the agreement dated 24.12.2008 and bearing number CE/NR/17/2008-2009 entered between the petitioner and the respondent and direct the respondent to pay the costs of this petition.

For Petitioner : M/s.T.Gowthaman

For Respondent : M/s.S.Thamizharasi
Standing Counsel

ORDER

This petition has been filed to appoint an impartial and independent Arbitrator in terms of Clause 25.3 of the agreement dated 24.12.2008 bearing number CE/NR/17/2008-2009 entered between the petitioner and the respondent and also to direct the respondent to pay the costs of this petition.

2. The learned counsel for the petitioner submitted that though original contract was awarded to M/s.BBIPL Infrastructure India Private Limited by the respondent in the year 2008, the petitioner was provided sub contract in the year 2011, whereas the original contractor in the M/s.BBIPL Infrastructure went for liquidation. Based on the letter of award and sub contract executed in favour of the petitioner, the petitioner continued to carryout the work as admitted in the original contract. When the petitioner has completed 60% of the work and also sought permission before the Company Court at High Court of Karnataka, Bangalore, the High Court of Karnataka, Bangalore has permitted the petitioner to carry out the remaining work. The respondent appeared before the High Court of Karnataka and accepted that the work was done by the petitioner thereby the petitioner was permitted to continue the work and accordingly the petitioner completed the work in April 2016 and defect liability period was also over in May 2017. Thereafter, the petitioner has made a claim with regard to the price escalation and unbilled amount and extra work, whereas the respondent has considered only one claim namely the price variation and rejected the other claims, therefore, the petitioner has sent a communication for seeking reference

to arbitration. As there was no response, this original application is filed.

3. The learned counsel for the respondent submitted that there is no privity of contract between the parties to refer the matter to arbitration. The work was carried out only by the authorised representative of the original contractor, therefore, respondent officer has given no objection to complete the remaining work before the Company Court. The main contention of the respondent is that even the main contract did not provide for awarding a sub contract work as long as there was no such provision in the original contract, the factum of the sub contract is not binding on them. At any event, even as per the letter of award the sub contract executed is not binding on the respondent. As long as there is no privity of contract between them, the matter cannot be referred to arbitrator, without prejudice to their contention. It is their further contention that they originally agreed to have an adjudicator namely Mr.Sampath Kumar, Contractor. Clause 4 of the original contract provides for referring the matter for adjudicator within 24 days. If any body is not agreeable for the decision of the adjudicator, the matter has to go before arbitrator, whereas in this case such a procedure has not been followed. Therefore, reference of arbitration is not maintainable. Unbilled amount has been paid and there is no amount payable to the petitioner.

4. Heard both sides and perused the materials available on record.

5. There is no dispute with regard to the allotment of work by the M/s.BBIPL Infrastructure (India) Pvt.Ltd., to the respondent for underground section work for which the contract was entered into between them in the year 2008. It is also not disputed that company went in liquidation. The letter of original contract entered into in the year 2002 is also not disputed. Similarly, the petitioner has moved an application before the Company Court seeking permission to continue the work and accordingly, permission was acceded. In fact, the above order was passed based on the affidavit filed by one of the officers when 60% of the work has been carried out by the petitioner. Taking note of the above affidavit the order has been passed. The Company Court proceedings makes it very clear that though there was no specific agreement between the respondent and the petitioner the fact remains that the substantial work has been done by the petitioner which was not objected at any point of time. In fact, the respondent allowed the petitioner to continue the work as per the original contract. Such view of the matter when the respondent has never objected nor raised dispute and allowed the petitioner to work it cannot be contended that any dispute arisen on account of completion of the work cannot be arbitrable merely on the ground that there is no agreement between the parties. It is to be noted that the respondent has permitted the petitioner to step into the shoes of the original contractor and allowed them to continue the work and conclude the project as per the Original contract. This Court is of the view that the dispute is to be referred to single arbitrator.

Further having regard to the dispute in this matter this Court is also of the view that technical assistance of the experts in the field is required. The petitioner may

nominate any one of the expert in the field and similarly, the respondent also nominate an expert on their side to assist the learned Presiding Arbitrator. Accordingly this Court appoints Mr.G.M.Akbar Ali, retired Judge of this Court as Presiding Officer. After issuing notice to the parties and upon hearing them the arbitrators shall pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of the order. The learned Arbitrators is at liberty to fix their remuneration and other incidental expenses.

6. The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

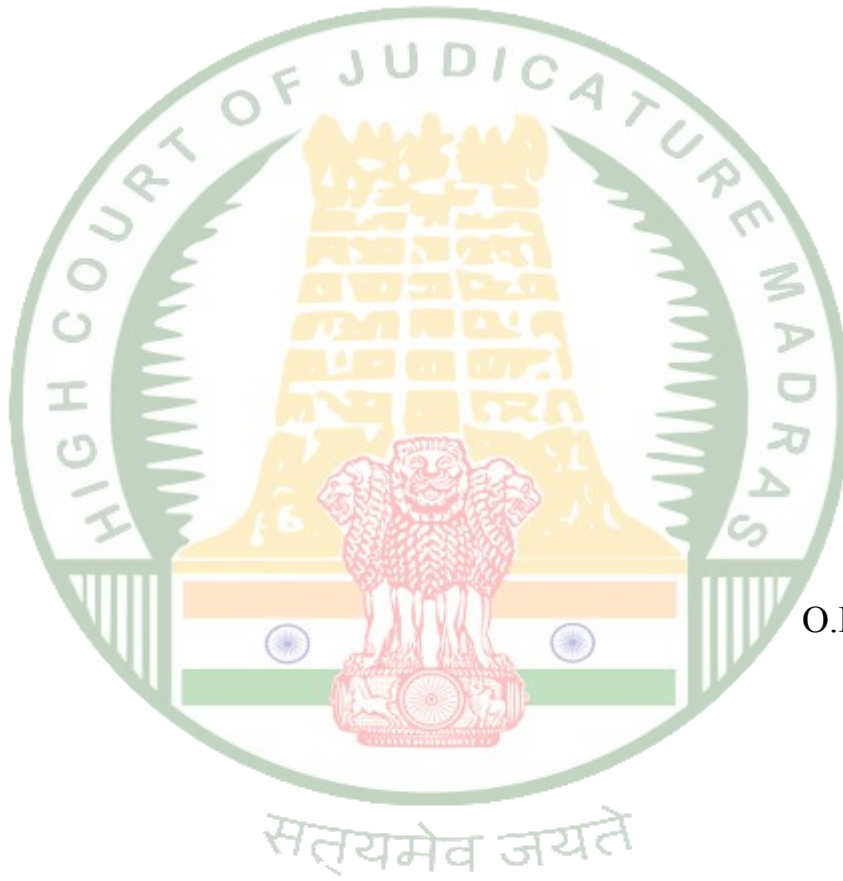
10.09.2020

Index : Yes/No
Internet : Yes/No
Speaking/Non Speaking
dpq

WEB COPY

N. SATHISH KUMAR, J.

dpq



O.P.No.287 of 2020

WEB COPY

10.09.2020