

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.02.2019

PRONOUNCED ON : 10.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE **R. SURESH KUMAR**

**O.P. No.626 of 2018
& Appl.No.5659 of 2018**

The Executive Engineering
IITMPD-II, CPWD,
IITM Project Circle,
IITM Campus, Chennai – 36.

.. Petitioner

-VS-

1. M/s. IVRCL Ltd.,
Mihir, 8-2-350/5/A/24/1B,
Road No.2, Panchavati Colony,
Banjara Hills,
Hyderabad – 500 034,
Andhra Pradesh.

2. Shri.P.Velu
Arbitrator

.. Respondents

Prayer: Petition filed under Sections 14,15 and 11(6) of the Arbitration and Conciliation Act, 1996, for termination and substitution of a new Arbitrator to remove the 2nd respondent as Arbitrator and appoint another Arbitrator in his place to resolve the dispute between the petitioner and the 1st respondent with reference to the Agreement No.01/IITMPD/2012-13.

For Petitioner : Mr.N.Rajan
Senior Central Govt. Standing Counsel
For Respondent : Mr.Preethi Mohan

ORDER

This Original Petition has been filed under Sections 14, 15 and 11(6) of the Arbitration and Conciliation Act, 1996, for terminating the mandate of the present Arbitrator and for substitution of a new Arbitrator.

2.The case of the petitioner is that, on behalf of the Government of India, the petitioner entered into a contract award Agreement No.01/II TMPD/2012-13, dated 25.09.2012 with the 1st respondent (in short 'Agreement'). The said contract was awarded for the construction of an Academic complex and Canteen Building, including internal water supply, sanitary installations, drainage and internal electrical installations at IIT Madras, Chennai for the cost of Rs.75,65,36,398/- which includes both Civil and Electrical works.

3. As per the said contract, which was accepted by the first respondent on 25.09.2012, the work has to be commenced on 17.10.2012 and it has to be completed on or before 16.04.2014. As per the terms and conditions of the contract, the first respondent has to submit a performance guarantee of 5% of the agreed value of the work and a Bank Guarantee of 110% towards mobilization advance and

also earnest money deposit (EMD) amounting to Rs.58,82,772/-. The first respondent in fact, had complied with all those conditions.

4. Though a time schedule had been given to complete the work, according to the petitioner, the first respondent did not perform the work to the satisfaction of the petitioner and there had been immense delay in execution of the work, which resulted in huge loss to the petitioner, therefore, the petitioner was constrained to terminate the contract on 31.08.2015.

5. By virtue of the order of termination of the contract, the performance guarantee and the security deposit already recovered were forfeited.

6. In order to resolve the said dispute between the parties, i.e., the petitioner and the first respondent, under Clause 25 of the Agreement, the matter has been referred to Arbitration, under clause 25(II) since the Chief Engineer CPWD can appoint sole Arbitrator to constitute the Arbitral Tribunal to resolve the issue referred to them, the second respondent was appointed as Sole Arbitrator on 09.10.2017.

7. It is the further case of the petitioner that, in the meanwhile, the first respondent had filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 in short 'The Act', before the Commercial Court at Hyderabad seeking for an interim order of injunction against the petitioner herein and the Project Manager, CPWD, Chennai and Chief Engineer, South Zone and three other banks i.e., Corporation Bank, Andhra Bank and Canara Bank, restraining them from invoking the Bank Guarantee given by the first respondent to the petitioner.

8. After hearing the parties, the Commercial Court at Hyderabad disposed the said application in C.O.P No.133 of 2017 both for want of jurisdiction as well as on merits.

9. Thereafter, the first respondent, consequent upon the dismissal of their application filed under Section 9 of the Act by the Hyderabad Commercial Court, had moved an application before the second respondent Arbitrator, seeking for a direction to the petitioner herein not to encash those performance guarantee mobilization advance, EMD and security deposit, as an interim measure, under Section 17 of the Act.

10. The second respondent, in the said application filed by the first respondent, had passed an interim order on 20.02.2018, directing the petitioner herein not to take any coercive action on the invocation of the Bank Guarantee mentioned in the application.

11. In this context, it is the grievance of the petitioner that, the said order was passed on 20.02.2018 by the second respondent Arbitrator without even satisfying with the prima facie case and also without considering the balance of convenience, which is the basis for grant of interim injunction similar to that of prohibitory order of injunction being issued or granted by the Law Courts at their sole discretion invoking Order 39 Rule 1 of CPC.

12. Thereafter, on 23.02.2018, the second respondent had a sitting as on 22.02.2018 itself counter was filed by the petitioner, thereafter, the second respondent directed the first respondent to file written arguments on 24.02.2018 and the second respondent extended the interim order till 24.02.2018 and thereafter, on 25.02.2018 the interim order granted by the second respondent was extended until further orders and a direction was also issued to the first respondent, to extend the Bank Guarantee before its expiry/ prior to its due date.

13. Thereafter, on 19.03.2018, before the second respondent Arbitrator, the said certified copy of the order passed by the Hyderabad Court in Section 9 Application, dated 07.02.20107, was submitted by the first respondent and in this context, the petitioner objected before the second respondent that, the said application filed by the first respondent invoking Section 17 of the Act would not be entertainable, in view of the application filed by the very same first respondent, before the Commercial Court at Hyderabad invoking Section 9 of the Act has already been decided on merits also.

14. In this context, it is the further case of the petitioner that, even though written arguments were filed and arguments were heard in the said application filed by the first respondent under Section 17 of the Act, till the petitioner filed this Original Petition, no orders have been passed in the said application filed by the first respondent.

15. Since there had been no communication from the bank indicating the petitioner that, the first respondent whether or not extended the Bank Guarantee which would have been expired by the time, as has been directed by the second respondent Arbitrator as early as on 25.02.2018, the petitioner approached those Banks, to get the

details about the extension of Bank Guarantee, but nothing was forthcoming from the first respondent for such extension of Bank Guarantee as has been instructed, or intimated by the banks to the petitioner.

16. Thereafter, there had been some communications between the first respondent and the second respondent Arbitrator and since the Bank Guarantee seems to have been not extended, despite the direction given by the first respondent, nor the second respondent had disposed the application filed by the 1st respondent under Section 17 of the Act seeking all those directions against the petitioner and the Banks, the petitioner filed a petition on 04.04.2018 before the second respondent, seeking to vacate the order passed on 20.02.2018 and 25.02.2018. Subsequently, the first respondent also filed yet another application on 18.04.2018, before the second respondent seeking for a direction to the petitioner to re-deposit the amounts withdrawn by them from the bank alleging that, the petitioner had violated the interim order passed by the second respondent Arbitrator.

17. Thereafter, the second respondent had convened a sitting on 21.04.2018 where, arguments were heard from both the

counsel representing the parties, thereafter, the second respondent directed the parties to file written arguments and the petitioner also had filed written arguments on 27.04.2018 itself.

18. Though such written arguments had been filed in the said applications filed both by the petitioner as well as the first respondent as stated above, the second respondent Arbitrator, till the petitioner moved this Original Petition before this Court, did not pass any order. Therefore, it triggered the petitioner to approach this Court, by filing this Original Petition invoking Section 14, 15 as well as 11(6) of the Arbitration Act, seeking to terminate the mandate of the second respondent Arbitrator by replacing an independent Arbitrator. That is how, this Original Petition has been filed.

19. I have heard Mr.N.Rajan, the learned Senior Central Government Standing Counsel appearing for the Central Government, represented the petitioner herein and also Ms.Preethi Mohan, learned counsel appearing for the first respondent.

20. It is an admitted case that, contract work was awarded by the petitioner to the first respondent in the year 2012 and according to the agreement, there has been a time schedule to complete the

work and since the time schedule was not strictly adhered to by the first respondent, according to the petitioner, and also the work undertaken by the first respondent was, according to the petitioner, not to the satisfaction of the petitioner, the agreement/contract was terminated by the petitioner on 31.08.2015 thereby, the dispute arose between the parties.

21. Since there has been an Arbitration clause in the agreement under clause 25, especially under clause 25(II), the issue can be referred to the Arbitral Tribunal consisting of sole Arbitrator to be appointed by the Chief Engineer, CPWD. Accordingly, the second respondent has been appointed as sole Arbitrator.

22. However, if we look at the order of appointment of the second respondent as sole Arbitrator by order dated 09.10.2017, it reveals some other facts. According to the said order dated 09.10.2017, originally one Rajiv Kumar of Ministry of Urban Development, Mumbai, was appointed as sole Arbitrator on 15.07.2016, since he has vacated his office consequent to his retirement on Superannuation on 30.09.2016, another order placing one G.C.Kabir, Ministry of Urban Development, Mumbai was appointed as Sole Arbitrator by order dated 17.10.2016. Thereafter, since the

first respondent has consented for switching over to amended Arbitration and Conciliation Act, 2015 and consented for appointment of an independent Arbitrator for adjudication of disputes, one K.Srinivasan of Chennai was appointed as Sole Arbitrator, by order dated 30.12.2016. However, the said arrangement was not agreeable to the first respondent, hence, the appointment of K.Srinivasan, Chennai as sole Arbitrator was withdrawn.

23. Subsequently, the first respondent proposed one Dr.M.S.Srinivasan, to be appointed as sole Arbitrator and who had given his consent, as per the VIth Schedule of the Act, he was appointed as Sole Arbitrator by order dated 01.08.2017. However, the said Dr.M.S.Srinivasan had withdrawn by his letter dated 24.08.2017. Thereafter, the first respondent seems to have sought for some time from the Chief Engineer, CPWD on 28.08.2017 for further action, however, they had not responded immediately therefore, by order dated 09.10.2017, the Chief Engineer, South Zone-I, CPWD, Chennai in exercise of power under Clause 25 of the Agreement appointed the second respondent as the sole Arbitrator, to resolve the dispute between the parties.

24. Therefore, the second respondent, as a 5th appointee, had been appointed as Sole Arbitrator to resolve the dispute, therefore, it become clear that, from the year 2016 till 2017 though 5 Arbitrators have been one after another appointed, the resolvment of the issue got delayed.

25. With this factual matrix and background alone, the second respondent had been finally appointed as Sole Arbitrator before whom, an application under Section 17 of the Act for an interim measure was made by the first respondent. An interim order was passed by the second respondent Arbitrator. Subsequently, though counter has been filed, no order has been passed finally in the said application. In this context, despite the petitioner had moved an independent application on 04.04.2018, before the second respondent to vacate the order dated 20.02.2018 and 25.02.2018, the second respondent though directed the parties to file written arguments, which were also complied with by the parties as early as on 27.04.2018, no orders seems to have been passed by the second respondent, till the petitioner approaches this Court by way of this Original Petition as claimed by the petitioner.

26. However, subsequently, it has been brought to the notice of this Court that, on 06.07.2018, the second respondent Arbitrator passed an order in I.A.Nos.1 & 3 of 2018 filed by the first respondent herein, allowing those applications and consequent upon the same, the I.A.No.2 of 2018 filed by the petitioner herein has been rejected. Though the said order is dated 06.07.2018, it seems that, before the petitioner approached this Court and filed this Original Petition on 17.07.2018, the said order seems to have not been communicated and that is how, the Original petition had been filed by the petitioner, with the aforesaid prayer making the said allegation against the second respondent that, he has delayed the matter unnecessarily even to dispose of the application, filed by the parties seeking for interim arrangements.

27. In this context, it is the further case of the petitioner that, the second respondent finds it very difficult to appreciate the legal intricacies involved in the case between the petitioner and the first respondent and on account of misconception of laws relevant to the issues the second respondent passed an ex parte order of injunction in one line without even satisfying himself as to whether the first respondent had a prima facie case.

28 .Only in this circumstance the petitioner has approached this Court, with this Original Petition to terminate the mandate of the second respondent Arbitrator and replace him, with an appointment of an independent Sole Arbitrator by this Court.

29. Under Clause 25 of the agreement as referred to above, there is jurisdiction and power vest with the petitioner i.e., Chief Engineer, CPWD, South Zone, Chennai to appoint the sole Arbitrator. As has been mentioned above, by exercising the said power, atleast 5 Arbitrators had been appointed till the appointment of the second respondent.

30. By one reason or other, all the earlier four Arbitrators appointed in this regard, whose mandate either have been terminated or they voluntarily withdrawn from such mandate.

31. It is to be noted that, in the meanwhile, the first respondent also has consented for switch over to amended Arbitration and Conciliation Act 2015, by consent, for appointment of independent Arbitrator for adjudication of disputes.

32. This factor would go to show that, though it is fit in under Section 15(2) of the Arbitration and Conciliation Act, that, even though the contract was entered into between the parties in the year 2012 and the amendment in the Act came into force from 23.10.2015 with the amendment Act 2015, since the parties agreed upon to switch over to the amendment Act 2015, there can be no impediment for appointing the sole Arbitrator by this Court.

33. Further, though under Clause 25(II) of the agreement, such power has been vested with the petitioner department i.e, Chief Engineer, CPWD, since the very same petitioner has approached this Court, by filing this Original Petition seeking indulgence of this Court to terminate the mandate of the second respondent, i.e., the present Arbitrator and to replace him by appointing an independent Arbitrator, and for the said move, the 1st respondent also does not have any serious objection, this Court is inclined to pass the following order:

(1) That the mandate of the Sole Arbitrator i.e., the second respondent herein appointed in this regard by order of appointment dated 09.10.2017, is hereby terminated.

(2) In view of the said termination, in order to substitute the second respondent, an independent sole Arbitrator is to be

appointed. Accordingly, Hon'ble Mr. Justice D. Murugesan, Former Judge of this Court and Former Chief Justice of Delhi High Court, is hereby appointed as Sole Arbitrator to resolve the issue arising out of the contract Agreement No.01/IITMPD/2012-13 dated 25.09.2012, between the petitioner and the 1st respondent.

(3) The Sole Arbitrator now appointed shall enter upon to the reference immediately and to commence the Arbitration Proceedings in accordance with law.

(4) The Sole Arbitrator so appointed shall be at liberty to fix his remuneration as well as the expenses arising thereto in connection with the Arbitration Proceedings, which shall be borne by both the parties equally.

With these directions, this Original Petition is disposed of accordingly. Consequently, connected miscellaneous application is closed.

10.04.2019

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R. SURESH KUMAR, J.

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