

A.No.5623 of 2019

M.SUNDAR.J.,

Read this in conjunction with and in continuation of the earlier proceedings made on 08.01.2020, which reads as follows:

'Mr.K.Vijayaragavan, learned counsel on record for the applicant and Mr.K.S.Jeyaganeshan, learned Senior Panel Counsel (Central Government) on behalf of sole respondent are before this Court.

2. There is no dispute or disagreement that arbitration between the parties to instant application is underway and that it is at an advanced stage. There is also no dispute or disagreement that the Arbitral Tribunal is constituted by a sole arbitrator, namely Mr.KK.Gupta, IDSE. This Court is informed that 'IDSE' stands for 'Indian Defence Service Engineer'. Communications dated 16.10.2018, 23.10.2018, 21.12.2018 and 28.01.2019 exchanged between the parties reveal that the parties agreed that the learned sole Arbitrator will continue as an arbitrator even post superannuation.

3. *Instant application has been moved by the claimant before Arbitral Tribunal seeking a direction to the respondent (respondent before Arbitral Tribunal also) to pay the costs of arbitration to the Arbitrator.*

4. *Read this in conjunction with and in continuation of earlier proceedings made by Hon'ble predecessor Judge dated 13.11.2019 and 26.11.2019, which read as follows:*

'Proceedings dated 13.11.2019

This application is taken out by the applicant for paying the costs of Arbitration to the Presiding Arbitrator.

The learned counsel for the applicant states that the costs has not been paid so far by the respondent.

3. *The learned counsel for the respondent says that he has already instructed the respondent to pay the costs to the learned Arbitrator and it is only delayed due to procedural lapse.*

4. *Hence, the respondent is directed to pay the costs of Arbitration to the learned Arbitrator on or before 26.11.2019.*

5. *Post the matter on 26.11.2019.'*

'Proceedings dated 26.11.2019

Learned counsel for the respondent states that the Controller of Defence Accounts, Chennai has addressed a letter to Senior Accounts Officer, Chennai seeking copy of the order of this Court directing the respondent to pay the Arbitration Fee. The respondent is directed to file an affidavit in this regard.

Post the matter on 3.12.2019'

4. Adverting to 26.11.2019 proceedings made by Hon'ble predecessor Judge, learned State counsel for respondent submits that the affidavit has been served on the applicant and seeks time to file it in the Registry and bring it on Board.

5. Be that as it may, one significant aspect that unfurled in the hearing today is, instant application has been filed by the applicant under Section 9(1)(e) of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', hereinafter A & C Act for brevity. It was pointed out that the prayer in the instant application will not fall within the

contours of Section 9(1)(e) of A and C Act. Learned counsel made a plea that the instant application may please be treated as one under Section 39(2) of A & C Act. Law is too very well settled that quoting wrong provision of law will not denude the Court of its power to entertain the application if the Court otherwise has powers to entertain the application under some other provision. Therefore, this request of learned counsel for applicant is acceded to and instant application shall henceforth be treated as one under Section 39(2) of A and C Act.

In the light of request of State counsel to bring on Board affidavit pursuant to 26.11.2019 proceedings made by Hon'ble predecessor Judge, list this matter on 13.01.2020'.

2. To be noted, earlier proceedings refers to Section 39(2) of the Arbitration and Conciliation Act, 1996 (hereinafter 'A & C' Act for brevity). This is a typographical error and it should be read as Section 38 (2) of A & C Act.

3. In the light of earlier proceedings of this Court, instant application on hand is one now under Section 38(2) of A & C Act. Section

38(2) of A & C Act reads as follows:

38. Deposits.-(1).....

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

4. In continuation of earlier proceedings dated 08.01.2020, (to be noted, which in turn refers to 26.11.2019 proceedings made by Learned Predecessor Judge) respondent has filed an affidavit dated 18.12.2019 which is as follows:

AFFIDAVIT OF THE RESPONDENT

I, Lt. Col. Mandeep Singh Virk, S/o. Col. Manna Singh Virk, aged about 35 years, working as Garrison Engineer, having office at Fort St. George, Chennai-600009 do hereby solemnly and sincerely state as follows:

1. I am the respondent herein and I am authorized to file this affidavit on behalf of the respondent and as such I am well acquainted with the facts of the case from the relevant records available with this respondent.
2. I respectfully submit that as per the directions of this Hon'ble Court this respondent had submitted a hand receipt bearing voucher number 22/1084 dated 19.11.2019 for Rs. 3,25,000/- duly supported by statement of case for passing the payment to the Controller of Defence Accounts, Teynampet, Chennai 600016 through AG-GE, Chennai.
3. I respectfully submit that the office of the controller of Defence accounts, Chennai (Engineering Section), Teynampet by a letter in No: E/III GE (CHS) Arbitration dated 20.11.2019 has returned the letter on the ground that the copy of the court order directing the Government to pay the arbitration fee is not submitted.
4. I respectfully submit that this respondent has taken steps to implement the directions of this Hon'ble Court.

Under these circumstances it is humbly prayed that this Hon'ble Court may be pleased to grant further time for compliance and pass such further or other orders as this Hon'ble Court may be deem fit and thus render justice.

Solemnly affirmed and signed

Before me at Chennai on this

The 18th Day of December 2019

BEFORE ME

14.12.19
304, New Law Road,
ADVOCATE CHENNAI

5. In the light of the aforesaid affidavit filed by respondent, second proviso to sub-section (2) of Section 38 assumes immense significance.

6. The first proviso to sub-section (2) of Section 38 of A & C Act provides for one party of arbitral proceedings to pay the share of the fee of the other party when such other party fails to pay his share.

7. In the light of first proviso to sub-section (2) of Section 38, Mr.K.Vijayaragavan, learned counsel on instruction from Mr.D.Mohan, Partner of Shivalaya Engineering who is present in Court submits that the applicant is willing to pay the respondent's share of arbitration fee and cost of arbitration, but makes a request that the question of who should ultimately bear this burden shall be left open to the Arbitral Tribunal to be decided in the main award.

8. This Court finds the aforesaid stand of learned counsel for applicant to be a fair stand. This Court also finds that it would not be detrimental to any of the parties if this request is acceded to.

9. Therefore, without dilating further on facts and without embarking upon any discussions on other legal aspects, instant application is disposed of by passing the following orders:

a) Applicant shall pay respondent's share of cost of arbitration (in accordance with first proviso to sub-section (2) of Section 38 of A & C Act) within a fortnight from the date of receipt of copy of this order.

b) Aforesaid payment made by the applicant being the respondent's share of cost of arbitration shall be subject to any directions that can be given by learned Arbitral Tribunal in the award that is ultimately passed.

c) In other words, it is open to the Arbitral Tribunal to make it clear as to who should deserve this share of cost of arbitration proceedings depending on the view the Arbitral Tribunal takes on the merits of the matter.

10. Application is disposed of on above terms.

20.01.2020

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