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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 17TH DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.371 of 2013

M/s.Metroplitan Transport Corporation
(Chennai) Ltd.,
Rep. By its General Manager,
Pallavan House, Anna Salai,
Chennai - 600 002.

. . . Petitioner

Versus

1. Sowil Limited,
Rep. By its Secretary,
Good Will Avenue,
Plot No.1, Sector No.40,
First Floor, Nerul,
Navi Mumbai - 400 706.

2. Hon'ble.J.Kanakaraj,
Arbitrator,
No.7, Justice Ramanujam Road,
Thiruvanmiyur, Chennai - 600 041.

. . . Respondents

O.P.No.371 of 2013

Original Petition praying that this Hon'ble Court be pleased to set aside the Award passed by the 2nd Respondent dated 25.01.2013.

This Original Petition coming on this day before this court for hearing in the presence of Mr.S.R. Raja Gopal Senior Counsel for Mr.M. Chidambaram Advocates for the Petitioner herein and Mr. P.S. Raman, Senior Counsel for Mr.C. Seethapathy, advocates for the first respondent herein and upon reading the petition and the Award dated 25/01/2013 filed



herein and this court having observed that though, no argument was placed before this court as to the merits of the Counsel this court itself gone through the award and found that the arbitrator in fact taking note of the various correspondence between the parties and admissions in the counter and passed an Award only in respect of the admitted liability and not in respect of compensation. Therefore, in merit also this court does not find any perversity or infirmity to contend that the Award is vitiated by any of the ground contemplated under section 34 of the Arbitration and Conciliation Act. In such a view of the matter this court do not find any ground to interfere the well reasoned Award passed by the learned Sole Arbitrator and **it is ordered as follows:-**

That the O.P. No.371 of 2013 be and is hereby dismissed.

WITNESS, THE HON'BLE MR.JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT OF MADRAS AFORESAID, THIS THE
17TH DAY OF SEPTEMBER 2021.

Sd/-

ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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08.10.2021
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O.P. No.371 of 2013

ORDER
DATED 17/09/2021

THE HON'BLE MR. JUSTICE
N. SATHISH KUMAR

FOR APPROVAL: 20/10/2021

APPROVED ON: 20/10/2021



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.09.2021

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.P.No.371 of 2013

M/s.Metroplitan Transport Corporation
(Chennai) Ltd.,
Rep. By its General Manager,
Pallavan House, Anna Salai,
Chennai - 600 002.

.. Petitioner

Vs.

1. Sowil Limited,
Rep. By its Secretary,
Good Will Avenue,
Plot No.1, Sector No.40,
First Floor, Nerul,
Navi Mumbai - 400 706.

2. Hon'ble J.Kanakaraj, Arbitrator,
No.7, Justice Ramanujam Road,
Thiruvanmiyur, Chennai - 600 041.

.. Respondents

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award passed by the 2nd Respondent dated 25.01.2013.

For Petitioner : Mr.S.R. Rajagopal
Senior Counsel for
Mr.M. Chidambaram

For 1st Respondent : Mr.P.R.Raman
Senior Counsel for
for Mr.C.Seethapathy

**ORDER**

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Aggrieved over the Award passed by the learned Arbitrator, the present Original Petition has been filed. For the sake of convenience the parties are arrayed as per their own rankings before the Arbitral Tribunal.

2. The brief facts leading to file this Petition is as follows:

2.(a) The Respondent by notice dated 17.01.2006 invited offers from reputed consultancy agencies for rendering advisory services to the Respondent in the selection of a successful bidder to design, develop, construct, finance, operate and transfer an elevated MMRTS project for the Chennai City. The Claimant, submitted a technical and financial bid dated 30.01.2006. The Financial bid of the Claimant was opened on 07.02.2006. Final negotiations took place on 17.02.2006 and the bid amount was agreed upon as Rs.1,58,32,001/- plus service tax. The Respondent also approved the bid of the Claimant by letter dated 17.02.2006. The claimant also furnished bank guarantee for Rs.7,91,000/-. The Claimant prepared an agreement, signed the same and sent to the Respondent for signature. However, the same was returned for some correction. Again the Claimant sent back the agreement duly corrected and signed.



2.(b) The work of the Claimant comprised of evaluation of the bid of the boot bidders, which constituted three main activities of evaluation viz., (1) evaluation of the eligibility (2) technical evaluation of the bids and (3) financial evaluation of the bids. The Claimant started the work and raised the first bill for a sum of Rs.17,44,686 on 21.2.2006. The Respondent/Petitioner also paid a sum of Rs.10,00,000/- towards first Bill. However, on 08.03.2006 the Respondent requested the Claimant to execute a fresh agreement on adequate stamp paper. Accordingly the Claimant sent the agreement duly signed under cover of the letter dated 17.03.2006. Before opening the technical bids, the TamilNadu State Assembly Elections were announced on 09.03.2006. The claimants' team was disbanded temporarily. When the claimant has raised bill for the work done it is stated by the Respondent that the entire project of Mon Rail had been dropped by the Government in G.O.Ms.No.36 Transport (E) Department dated 5.7.2006. Despite request made by the Claimant for payment of money the same has not been paid. Hence, the Claimant made the following claims:

A) Direct the Respondent to pay the Claimant the following sums towards unpaid bills:

- i) Rs. 7,44,686/- (Rupees Seven Lakhs Forty Four Thousand six hundred and eighty six only),
(Bill amount of Rs, 17,44,686/- less 10,00,000/-
received) along with interest calculated at the*



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D)Direct the Respondent to pay the Claimant an amount of Rs. 50,00,000/- towards loss of opportunity.

E)Direct the Respondent to pay the Claimant an amount of Rs. 75,00,000/- towards loss of reputation and good will &

F)Pass such further or other order as deemed fit and proper in the nature and circumstances of the case and thus render justice.

3. The Respondent filed a counter, took a stand that the tender technical bid submitted by the Claimant was approved. It is the contention of the Respondent that letter of intent issued to the Claimant on 17.02.2006 at the 241st Meeting of the Board the Claimant's bid was accepted orally. It is the contention that after the elections were announced for State Assembly on 1.3.2006 at the meeting on 2.3.2006 it was announced that all further steps on the project work would be carried upon only after the election is completed, the respondent was unable to proceed further. Having admitted the facts upto this stage, it is their contention that the agreement has not been executed between the parties. Since the Government dropped the project all the funds have been transferred to the Government and the Respondent have no money to the Claimant. The Respondent is only agent



proceedings and submitted that there was no clause for reference to the arbitration. Their contention is that the Claimant have done the work without even signing the contract and respondents are not liable to pay any amount. Hence the participation of the Respondent in the meetings without the legally signed agreement will not convey any rights to the claimant. The Respondent also denied the claim of compensation and submitted that the claim is excessive and arbitrary.

4. On the basis of the above pleadings the following issues were framed by Arbitral Tribunal:

- 1. Is the Arbitration maintainable in as much as the Respondent did not sign the agreement?*
- 2. Is the Arbitration maintainable for non-joinder of the State Government as one of the respondent in the Arbitration dispute?*
- 3. Has the Claimant worked for /provided its services to the Respondent under the subject contract?*
- 4. Is the Claimant entitled to the reliefs sought for by them?*

- 5. Is the Claimant entitled to interest at the rate*



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of 18% p.a.?

6. *To what reliefs are the parties entitled to?*

5. After hearing both sides and entire evidence both oral and documentary, the learned Arbitration has passed the following Award:

“There will be an Award for a sum of Rs.76,03,136/- in favour of the claimants and payable by the respondents with interest at 9% p.a. From 2.5.2007 till the date of claim petition 27.5.2012. The interest amount works out to Rs.34,78,435/-. The Principal amount of Rs.76,03,136/- shall carry interest at the rate of 12% p.a. from the date of the award till date of payment. All other claims are rejected. Each party shall bear their respective costs.”

6. Though various grounds have been raised under Section 34 of the Arbitration and Conciliation Act, Mr.S.R.Rajagopal, learned Senior Counsel appearing for the Petitioner herein mainly submitted that there is no Arbitration Agreement existing between the parties. It is his contention that merely because an arbitrator was appointed by this Court, the same cannot be a ground to presume that there is a valid agreement between parties. It is his further contention that if there is no signed contract between the parties arbitration clause cannot be invoked which has not been



taken into consideration by the learned Arbitrator. Otherwise it is his contention that merely because Arbitrator was appointed by the Chief Justice that cannot be a ground to presume that the agreement is in existence. Appointment order by this Court is only administrative nature, therefore, the same cannot be taken advantage by the Respondent herein. It is his further contention that for the work done the Respondent/Claimant is entitled to recover money only by way of Civil Suit and not by way of arbitration. According to him the contract has not signed between the parties, hence the matter ought not have been adjudicated by the Arbitrator and the Arbitrator has wrongly concluded that there is an agreement between the parties. Hence, prayed for setting aside the Award. In support of his contention he relied upon the following judgments:

1. *SBP & Co. vs. Patel Engineering Ltd., & Another [(2005) 8 SCC 618]*
2. *Mayavati Trading Pvt. Ltd., vs. Pradyuat Deb Burman [(2019) 8 SCC 714]*
3. *Avitel Post Studios Ltd., & Others. v. HSBC Pi Holdings (Maurititious) Ltd., [2020 SCC online SC 656]*



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4. S.M.R Nagarajan –Vs- Navamani [**O.P.No. 349 Of 2019**]

5. The Board Of Trustees Of The Port Chennai – Vs- X-Press Container Line (UK) Ltd.[**2020 SCC Online Mad 2484**]

6. SOWiL Limited –Vs- Metropolitan Transport Corporation (Chennai) Limited [***O.P.No. 136 Of 2009***]

7. Mr.P.R. Raman, Learned counsel appearing for the Respondent submitted that the objection with regard to the non existence of the agreement was considered by this Court while appointing Arbitrator in detail. It is his contention that the very notice inviting tender contained various conditions that itself provided for reference to the Arbitration. The Claimant's technical and financial bid were accepted and approved and work has been allotted by the Respondent. The first bill raised towards the work done by the Claimant also honoured in part by Repondent/Petitioner herein. Therefore, it is his contention that from the various documents particularly the notice inviting bid itself provided for reference to the Arbitration. This has been clearly considered by the Arbitrator. Therefore, his contention that there is no grounds made out to interfere well reasoned Award. Hence, prayed for dismissal of the Petition.



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8. In support of his contention, he relied upon the following judgments:

1. Shakti Bhog Foods Limited –vs- Kola Shipping Limited [(2009) 2 SCC 134]

2. Govind Rubber Limited –Vs- Louis Dreyfus Commodities Asia private Limited [(2015) 13 SCC 477]

3. Karan Ores & Specials –Vs- Endeka Ceramic India Pvt. Ltd. [(2019) 1 CTC 148]

4. Mahanagar Telephone Nigam Limited -Vs- Canara Bank and Others [(2020) 12 SCC 767]

9. Heard the learned Senior Counsels on either side and perused the materials on the record.

10. With regard to the first submission that there is no agreement between the parties. The Arbitration Agreement should be in the form of an Arbitration Clause in contract or in form of a separate agreement, as per Sub-Clause 2 of Section 7 of the Arbitration and Conciliation Act itself. It is undisputed fact that the Petitioner invited offers from reputed consultancy



30.1.2006. The bid itself contains the names of 26 key personnel to be engaged by the Claimant. After negotiations between the Claimant and Respondent the financial bid of the Claimant was opened on 7.2.2006. Final negotiations took place on 17.2.2006 and the bid amount was agreed upon as Rs.1,58,32,001/-plus service tax. Pursuant to the same, bank guarantee was also issued for a sum of Rs.7,91,000/-. These are all admitted facts. Besides, the Claimant has also sent an agreement signed by them, to the Respondent for signature. However, the Respondent did not sign the agreement due to the notification of election date.

11. The claimant has started the work as per the letter of intent dated 17.02.2006 issued by the Respondent. It is relevant to refer that the letter dated 17.01.2006 inviting offers from reputed consultancy agencies for rendering advisory services to the respondent in the selection of a successful bidder to design, develop, construct, finance, operate and transfer an elevated MMRTS Project for the Chennai city. In pursuance to the above invitation technical and financial bid was submitted by the Claimant on 30.01.2006. Thereafter, the Respondent invited the Claimant for negotiation and the financial bid of the claimant was opened on 7.2.2006 and final negotiations took place on 17.2.2006 and the bid amount was



accepted and approved by the Respondent vide letter dated 17.02.2006.

Therefore, when the bid itself submitted and approved pursuant to the specific conditions set out in the invitation dated 17.01.2006, same could be construed as contract for the work.

12. Clause 4.4 of the General Conditions of the Contract which is appended to the invitation dated 17.01.2006 indicate that within the maximum 7 days upon the receipt of the letter of Award by the Successful bidder, they shall prepare and submit the agreement format in line with the draft enclosed to the proposal document. On approval of the Employer the agreement shall be signed by both the bidder and the employer, after payment of stamp duties as may be necessary by the successful bidder. It is not in dispute that the letter of acceptance (LOA) has issued on 17.02.2006 and the signed agreement also sent to the Respondent as stipulated in Clause 4.4. However, the Respondent has not signed the Agreement on account of election notification.

13. Clause 4.13 appended to the invitation relates to the dispute between the Advisor and MTCL which provides for reference the dispute for Arbitration. The same is reads as follows:



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“4.13. Dispute between the Advisor and MTCL

In case of any dispute between MTCL and the advisor, all reasonable efforts to be made for an amicable settlement in the first instance. Unresolved dispute between the advisors and MTCL shall be in accordance with provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modifications thereto under jurisdiction of Madras High Court, Chennai, Tamil Nadu.”

14. The above clause governing the parties. Therefore, it cannot be said merely because the formal agreement has not signed after issuance of LOA there is no clause governing the parties to refer the dispute to the Arbitration. Pursuant to the very invitation which contain various clauses, Financial and Technical Bid of the Claimant was accepted and LOA issued on 17.02.2006, pursuant to the same the Claimant has started the work and the bill for Rs.17,44,686/- was raised which was also a not disputed fact. Towards the above amount the Respondent has paid a sum of Rs.1,00,000 as a part payment at the relevant point of time which is also not in dispute. Therefore, when the parties acted upon on the basis of invitation which contain the Arbitration Clauses same is binding on them. Therefore Respondent/Petitioner cannot take advantage of the fact that formal agreement not signed by them. The very nature of the invitations and



acceptance of the bid pursuant to the invitation by letter dated 17.02.2006 and issuance of Bank Guarantee on 20.02.2006 constitute valid concluded contract between the parties. Several meetings also took place between them and finally the work also started and the part of the payment was also paid, therefore, it cannot be said that there is no concluded contract between the parties. When the contract contained the Arbitration Clause that itself suffice for referring the dispute for Arbitration. Therefore, the contention of the learned counsel that there is no valid arbitration clause has no leg to stand.

15. It is further to be noted that while the petition filed under Section 11 of the Arbitration and Conciliation Act for appointment of Arbitrator in the subject matter, the similar defence has been taken with regard to the agreement. The Honourable Chief Justice has passed a detailed Order dated 17.02.2012, negated the contention made by the Respondent/Petitioner herein and concluded that Agreement was acted upon by the parties and the work was partially executed and also held that the parties are fully aware that excepting the terms specifically mentioned in the Contract, the rest of the terms were to be the same as were incorporated in the Standard Contract, which was supplied along with the notice inviting offers. Hence, it can safely be concluded that the contract between the parties contained arbitration clause. This order reached finality.



16. It is to be noted in ***SBP & Co. vs. Patel Engineering Ltd., & Another [(2005) 8 SCC 618]*** the Honourable Apex Court has held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act is not an administrative power. It is a judicial power. The Honourable Apex Court also held that the Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of the judgment. It is further held that the order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, hence an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

17. Therefore, at the relevant point of time when the Court itself gone into the existence of valid agreement and passed a detailed order which has reached finality, now the Respondent/Petitioner herein cannot take the same plea once again. Only the post amendment, the court has to look into existence of the agreement and not its validity. Therefore, the law stood at the relevant point of time that order passed by the Court appointing Arbitrator by deciding the validity of the Arbitration agreement is binding on the parties. The other judgments cited by the learned counsel for the Petitioner is not applicable to the facts of the present case.



18. In ***MSP Infrastructure Limited vs. Madhya Pradesh Road***

Development Corporation Limited [(2015) 13 SCC 713] the Honourable

Apex Court has held as follows:

“13.

... A party is bound, by virtue of sub-section (2) of [Section 16](#), to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

14. Shri Divan, the learned senior counsel for the Respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the Court which decided the matter, since the order of such a Court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this position of law has been well settled in relation to civil disputes in Courts and not in relation to arbitrations under the [Arbitration Act](#), 1996. Parliament



has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the Respondent.”

19. Similarly in ***Durga Charan Rautray vs. State of Orissa and Another [(2012) 12 SCC 513]*** it is held as follows:

“16. Thirdly, it was no longer open to the respondents to contest the claim of the appellant on the instant issue after the appellant had obtained the court order dated 15.5.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The Court order dated 15.5.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained uncontested at the hands of the respondents. The respondents were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to



contend that arbitral proceedings were not maintainable.”

20. In ***National Agricultural Coop. Marketing Federation India Ltd., vs. Gains Trading Ltd., [(2007) 5 SCC 692]*** the Honourable Supreme Court has held as follows:

*“6. Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide : Heymen vs. Darwins Ltd - 1942 (1) All ER 337, [Union of India vs. Kishori Lal Gupta & Bros.](#) - AIR 1959 SC 1362 and [The Naihati Jute Mills Ltd. vs. Khyaliram Jagannath](#) - AIR 1968 SC 522]. This position is now statutorily recognized. Sub-section (1) of [section 16](#) of the Act makes it clear that while considering any objection with respect to the existence or validity of the *arbitration agreement*, an arbitration clause which forms part of the contract, has to be treated as an*



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agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected. “

21. Therefore, when the terms and conditions appended to the invitation itself is a contract, pursuant to the same bid has been approved, LOA has been issued, certainly there is a concluded contract as far as the work is concerned. Therefore, the contention of the learned Senior Counsel that the matter is not arbitrable cannot be countenanced. The very clause appended to the invitation itself independent than other terms. Further no objection has been raised under Section 16 of the Arbitration and Conciliation Act. In such a view of the matter now same ground cannot be raised before this Court while challenging the award passed by the sole Arbitrator appointed by this Court.

22. With regard to the merits though the damages also claimed by the Claimant, learned Arbitrator in fact, negatived the Claim relating to damages. What was ordered, only admitted amount i.e., the bills raised for the work actually carried out by the Claimant. Exs.C-6, C-27 to C-34 are the letters seeking for payment for the work. Ex.C-35 is the letter from the



respondent to the State Government seeking adequate funds for payment of the Claimant's bill of Rs.40,79,417/-. Learned Arbitrator considered these letters and found that the very letter of the Respondent itself proved the fact that the Respondent has accepted the bill for the work done by the Claimant. In the above amount the Claimant has also given a break ups in Ex.C-36. The same has not been denied. However, the Respondent has in fact indicated that no amount payable to the Claimant. Their only stand was that since the project has been dropped by the State Government, taking into above circumstances and very admission of the applicant in the counter statement, learned Arbitrator passed an Award for the admitted work.

23. The nature of the amount claimed was never disputed. But what was stated in the counter is that the entire project was started based on the funds provided by the State Government of Tamil Nadu. After dropping the project the entire amount was returned back to the Government of Tamil Nadu. Hence, the Respondent does not have any fund to pay the Government. As the above said amount has not been disputed by the Respondent the learned Arbitrator awarded the amount. Though, no argument was placed before this Court as to the merits of the Award, this Court itself gone through the Award and found that the Arbitrator in fact



admissions in the counter and passed an Award only in respect of the admitted liability and not in respect of compensation. Therefore, in merit also this Court does not find any perversity or infirmity to contend that the Award is vitiated by any of the ground contemplated under Section 34 of the Arbitration and Conciliation Act.

24. In such a view of the matter, this Court do not find any ground to interfere the well reasoned Award passed by the learned sole Arbitrator. Accordingly, the Original Petition is dismissed.

Sd/- N.S.K.J.

17/09/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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