

**O.A. No.12 of 2022**

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M.SUNDAR,J.

Mr.P.J.Rishikesh, learned counsel for the applicant and Mr.K.Hari Shankar, learned counsel for the first respondent are before this Court.

2. To be noted, the second respondent is a bank which issued the bank guarantee which has since been invoked and therefore it is only a formal party insofar as the captioned application is concerned. It may be a garnishee qua arbitration but not a party within the meaning of Section 2 (1)(h) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity]. Therefore, the captioned application can be disposed of in the presence of aforementioned two counsel.

3. Aforementioned two learned counsel submit in unison in one voice that the scope of the contract between the parties is as articulated in para 3 of the support affidavit which reads as follows:

"3.During its course of its business the applicant participated in the tender floated by the 1st respondent for



the work of "Civil and Architectural Works of Coal handling Plant area of Package 1 at 2 x 660 MW Udangudi Super Critical Thermal Power Project, Kallamoli, Tiruchendur Taluk, Tuticorin District, Tamil Nadu" (hereinafter referred to as "said Works"). The applicant submitted its bid/offer on 04.07.2019 and the 1st respondent accepted the offer by issuing a Letter of Intent (LOI) dated 15.07.2019. It is relevant to note that pursuant to the LOI dated 15.07.2019 the 1st respondent had issued a detailed LOI dated 07.08.2019. Thereafter, a Contract Agreement was executed on 30.09.2019. The parties herein are governed by the Drawings, Specifications, General Conditions of Contract, Special Conditions of Contract, LOI and the Contract Agreement. All these agreements collectively constitute the 'Contract' between the parties."

4. Learned counsel also submit that there is a set of conditions captioned General Conditions of Contract (hereinafter referred as 'GCC for the sake of convenience and clarity) dated 01.06.2012 and that also has to be read along with the aforementioned contract.

5. Both learned counsel submit that there is no dispute or disagreement about the existence of arbitration agreement between the parties qua aforementioned contract and both learned counsel go on to submit, on instructions that the applicant and the first respondent have agreed to nominate Hon'ble Mr. Justice K. Mohan



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Ram, Former Judge of Madras High Court, ISHANA, Plot No.15B, Radiant Avenue 5th Street, VGP Golden Beach Layout, Injambakkam, ECR, Chennai - 600 115 as sole arbitrator.

6. As arbitration agreement is a creature of contract in the light of the common submission made in unison by the applicant and first respondent, the aforementioned request is acceded to. Now that the Arbitral Tribunal has been constituted, sub-section 3 of Section 9 of 'A and C Act' kicks in.

7. Therefore, it is open to the applicant to make similar/same prayer before the Arbitral Tribunal qua captioned application. If the applicant takes this route, the Honourable Arbitral Tribunal shall consider the same on its own merits and in accordance with law uninfluenced by this order. Though obvious, it is made clear that this Court has not expressed any view or opinion on the merits of the matter.

8. It is made clear that all the questions including the questions raised in the captioned application are left open to be decided by the Honourable Arbitrator. To be noted, the question regarding invocation of arbitration clause also falls for consideration.



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9. Arbitration shall be conducted in Madras High Court Arbitration Centre under the aegis of Madras High Court by Hon'ble Mr. Justice K. Mohan Ram, Former Judge of Madras High Court, as per the Madras High Court Arbitration Proceedings Rules, 2017 and the Madras High Court Arbitration Centre (Administrative Cost and Arbitrator's Fees) Rules, 2017.

10. Captioned application is disposed of in the aforesaid manner.

28.02.2022

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Captioned matter is listed under the cause list caption 'FOR BEING MENTIONED' at the instance of learned counsel for both sides.

2. While recording the facts, an error has crept in para paragraph 2 wherein it has been recorded that bank guarantee 'has since been invoked'.

3. Learned counsel for both sides i.e., Mr.P.J.Rishikesh,



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learned counsel for applicant and Mr.K.Hari Shankar, learned counsel for first respondent submit that this is factually incorrect as the bank guarantee has not been invoked, it is alive and it stands extended.

4. Therefore, in the first sentence (second line) in paragraph 2, the expression '*has since been invoked*' will now stand replaced by '*is alive*'. This proceedings made today (07.03.2022) shall be read not only as addendum but also as integral part and parcel of the earlier order dated 28.02.2022.

5. Registry to issue certified copy of the order suitably and upload the order in the official website.

07.03.2022

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P.S.: Registry to communicate a copy of this order to

1. Hon'ble Mr.Justice K. Mohan Ram,
Former Judge of Madras High Court,
ISHANA, Plot No.15B, Radiant Avenue 5th Street,
VGP Golden Beach Layout, Injambakkam,
ECR, Chennai - 600 115
2. The Director,
Tamil Nadu Mediation and Conciliation Centre,
cum-Ex Officio Member
Madras High Court Arbitration Centre,



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Madras High Court, Chennai-600 104.

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