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Arb.O.P (Com.Div) No.56 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.03.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div) No.56 of 2022

M/s.P & C Projects (P) Ltd.
Represented by its Authorized Signatory
Mr.M.A.Syed Sirajudeen
(Formerly known as P & C Constructions Pvt. Ltd.,)
P & C Towers, II Floor, 140 Perundurai Road
Erode - 638 011 ... Petitioner

Vs.

The Government of Tamil Nadu
Madurai Municipal Corporation
Represented by the Commissioner
Annamaligai, Alagar Kovil Road
Tallakulam
Madurai - 625 001 Respondent

Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator on behalf of the Respondent and direct such appointed arbitrator along with the nominee arbitrator of the petitioner to appoint a Presiding arbitrator and constitute the Arbitral Tribunal within 30 days from such appointment by this Hon'ble Court to adjudicate the disputes between the petitioner and the respondent in terms of the arbitration agreement dated 28.02.2007 and to direct the respondents to pay costs.



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Arb.O.P (Com.Div) No.56 of 2022

For Respondent : Mr.T.Shanmugam

ORDER

In the captioned 'Arbitration Original Petition' ['Arb.OP' for the sake of brevity] Mr.P.J.Rishikesh, learned counsel for sole petitioner and Mr.T.Shanmugam, learned Standing Counsel for Madurai Corporation on behalf of the lone respondent are before this Court.

2. This order shall be read in continuation of and in conjunction with earlier proceedings made in the previous listing on 14.02.2022 which reads as follows:

'Captioned 'arbitration original petition' ['Arb OP'] has been filed under Section 11 of of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity].

2. Mr.P.J.Rishikesh, learned counsel for petitioner submits that the captioned Arb OP is under Sub Section (6) of Section 11 of A and C Act, as the procedure for appointment of Arbitrator has been agreed. Therefore, captioned Arb OP is one under Section 11(6) of A and C Act.

3. Contract between petitioner and respondent is for 'Construction of Head Works & Break Pressure Tank, Raw Water & Clear Water Transmission Main, Feeder Main Package-I' [hereinafter 'said work' for the sake of convenience and clarity]. Learned counsel submits that the contract is dated 28.02.2007 and relevant clauses are Clause 3 of Special



Conditions of Contract and Clause 25 of Conditions of Contract which read as follows:-

Clause 3 of Special Conditions of Contract:

'3. Arbitration

The procedure for arbitration will be as follows:

(a) In case of Dispute or difference arising between the Employer and contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, presiding arbitrator shall be appointed by the President of Institution of Engineers (India), Chennai Chapter.'

Clause 25 of Conditions of Contract:

'25. Procedure for Disputes

25.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator.



Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of the Contract.'

4. Learned counsel submits that the trigger notice is dated 07.08.2021 (page No.263 of typed set of papers), respondent did not respond, therefore, petitioner approached the Institution of Engineers (India) in and by letter dated 11.12.2021 (page No.268 of typed set of papers) as per the agreed procedure and as that has not evoked any response in spite of reminder captioned Arb OP has been filed.

5. Issue notice to respondent. Private notice permitted. Private notice through electronic modes of service (subject to proof being demonstrated) also permitted. Learned counsel is also permitted to serve on learned standing counsel for Madurai Corporation, if any.

6. List on 28.02.2022.'

3. The short forms and abbreviations used in the aforementioned proceedings will continue to be used in the instant order also for the sake of convenience and clarity. The aforementioned proceedings shall be read as integral part and parcel of this order.

4. There is no dispute or disagreement before this Court that the



aforementioned proceedings capture the factual matrix, the trajectory the matter has taken thus far and the bone of contention as between the parties i.e., bone of contention to the extent necessary for a legal drill under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity.

5. In the case on hand, there is no disputation or disagreement about the existence of arbitration agreement between the parties i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

6. The scope of a legal drill under Section 11 of A and C Act is largely controlled by sub-section (6A) of Section 11 which reads as follows:

'(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section(4) or sub-section(5) or sub-section(6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.'

7. This Court reminds itself of the principle laid down in **Mayavati Trading** being ratio laid down in **Mayavati Trading [Mayavati Trading Pvt. Ltd., Vs. Pradyuat Deb Burman** reported in **(2019) 8 SCC 7961]**. Relevant paragraph in **Mayavati Trading** is paragraph 10 and the same reads as follows:

'10. This being the position, it is clear that the law prior to



the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.

(underlining made by this Court to supply emphasis and highlight)

8. This Court deems it appropriate to not to burden this order with further excerpted portions from ***Duro Felguera, S.A. [Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in ***(2017) 9 SCC 729I]***. In the light of there being no disputation or disagreement about the existence of arbitration agreement between the parties, this Court is now left with the question of downsizing the 'Arbitral Tribunal' ['AT' for the sake of convenience and clarity]. Arbitration agreement between the parties provides for a three member AT. Learned counsel for petitioner makes a request that this Court may please consider downsizing the AT and refer the matter to sole Arbitrator. That a Section 11 Court can downsize an Arbitral Tribunal is not in dispute.

9. This Court carefully considered the nature of the claim and the parties. The point involved is broadly on one facet of the transaction and



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the quantum of the claim is in the region of 4.67 Crores (INR). Therefore, this Court taking into account interest of all concerned i.e., petitioner, respondent and ease of arbitral proceedings, considers it appropriate to accede to the request to downsize the AT and refer the matter to a sole Arbitrator.



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10. Though obvious it is made clear that all questions are left open to be decided by the Arbitral Tribunal. It is also made clear that this Court has not expressed any view or opinion on the merits of the matter in this order. Hon'ble Mr. Justice T.Ravindran (Retd.), a former Judge of this Court at New No.27, Old No.12, 3rd Avenue, Indira Nagar, Adyar, Chennai - 600 020 [Mob: 9941350926 & 9444399700] is appointed as the sole Arbitrator to enter upon reference and adjudicate qua the arbitral disputes that have arisen between the parties. Hon'ble Arbitrator is requested to conduct arbitration in the 'Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and Hon'ble Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

Captioned Arb.OP is disposed of in the aforesaid manner. There shall be no order as to costs.

07.03.2022

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M.SUNDAR.J.,

gpa

To

1. Mr. Justice T.Ravindran (Retd.),
New No.27, Old No.12,
3rd Avenue, Indira Nagar,
Adyar, Chennai - 600 020
[Mob: 9941350926 & 9444399700]

2. The Director

Tamil Nadu Mediation and Conciliation Centre
- cum- Ex-Officio Member
Madras High Court, Arbitration Centre
Chennai - 104

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