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Arb.O.P (Com.Div.) No. 153 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No. 153 of 2022

M/s. Som Projects Pvt. Ltd.,
Represented by its Authorised Signatory
Mukul Garg
1201, Millenium Plaza, Gurugram
Haryana – 122 001

... Petitioner

Vs.

1.Engineer in Chief
Integrated HQ of Ministry of Defense (Army)
Kashmir House
Rajaji Marg
New Delhi – 110 011

2. Chief Engineer (FY) Hyderabad
Opp Parade Ground
Sardar Patel Road
Secunderabad (AP) – 500 003

3. Garrison Engineer (I) (P), Fy
Military Engineer Services
Avadi, Chennai – 600 054

... Respondents

Arbitration Original Petition filed under Section 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 as amended by Act 3 of 2016 to



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appoint a sole Arbitrator from the list of the empanelled arbitrators of Ministry of Defense as per letter dated 07.02.2022 to decide all the disputes arising out of or in connection with the Contract bearing "CA.NO.CE(FY)HYD/AVD/27 OF 2015-16" CONSTRUCTION OF TURRET SHOP AND HULL SHOP WITH SERVICES AT HVF AVADI, executed between the petitioner and respondents and to adjudicate on the disputes as per the conditions of I.A.F.W-2249(General Conditions of Contracts) herein.

For Petitioner : Mr.M.Sunil Kumar

For Respondents : Mr.A.Murugan
Addl. Central Govt. Standing Counsel

ORDER

This order will dispose of captioned matter.

2. This order has to be read in continuation of and in conjunction with proceedings made in the listing on 04.04.2022 in the captioned matter, which reads as follows:

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 08.03.2022 under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] with a prayer for appointment of sole Arbitrator from the list of empaneled arbitrators of Ministry of Defense.



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2. *Mr.M.Sunilkumar, learned counsel for sole petitioner who is before this Court submits that the captioned Arb OP pertains to a contract for 'construction of Turret shop & Hull shop with services at HVF Avadi' [hereinafter 'said work' for the sake of convenience and clarity] bearing reference No.'CA No.CE(FY)HYD/AVD/27 of 2015-2016'. Adverting to General Conditions of Contract [GCC] and more particularly clauses 70 and 72, learned counsel submits that the aforementioned clauses 70 and 72 of GCC serve as arbitration agreement between the petitioner and respondents i.e., Arbitration Agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.*

3. *Aforementioned clauses 70 and 72 read as follows:*

'70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of a [Serving Officer having degree in Engineering or equivalent or having passed final/direct final examination of sub-division II of Institution of Surveyor (India) recognized by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference



shall not take place until after the completion or alleged completion of the works or termination or determination of the contract under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the contract under Condition Nos.52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other contractor or contractors or agency or agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and



pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. [The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims].

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.

72. Jurisdiction of Courts - Irrespective of the place of issue of tenders, the place of acceptance of tenders, the place of execution of contract or the place of payment under the contract, the contract shall be deemed to have been made at the place from where the acceptance of tenders has



been issued and the work is executed/executable. The Courts of the place from where the acceptance of the tender has been issued or the place where the work is executed/under execution shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract.'

4. Learned counsel submits that Section 11 petition was originally filed in the Delhi High Court by the petitioner but the same was withdrawn on 13.01.2022 on the ground of territorial jurisdiction.

5. Learned counsel submits that arbitrable disputes have erupted qua said work and therefore, the aforementioned arbitration agreement was triggered by a letter dated 22.03.2021 for which there is no response necessitating the presentation of petition under Section 11 of A and C Act.

6. Prima facie case for issue of notice made out.

7. Issue notice to respondents returnable in a fortnight i.e., returnable by 18.04.2022. Private notice permitted. Learned counsel for petitioner is also permitted to serve on learned Assistant Solicitor General of India of this Court.

8. List on 18.04.2022.'

3. Before proceeding further, it is made clear that abbreviations, short forms and short references used in the earlier proceedings dated 04.04.2022



shall continue to be used in this order also for the sake of convenience and clarity.

4. Post aforementioned 04.04.2022 proceedings, all three respondents have been duly served, Mr.A.Murugan, learned Additional Central Government Standing Counsel, is before this Court on behalf of all three respondents. Learned State counsel has filed a counter affidavit which has been sworn to by the third respondent. Learned State counsel requests that this counter affidavit may please be treated as common counter affidavit of all the three respondents.

5. A careful perusal of the aforementioned counter affidavit brings to light that there is a reference to two orders of Hon'ble Supreme Court in Paragraph 13, namely an order in Civil Appeal No.3541 of 2011 {arising out of SLP (Civil) No.8162 of 2007} in ***Union of India Vs. Master Construction Company*** and judgment dated 29.03.2019 in ***Union of India Vs. M/s.Parmer Construction Company***.



6. To be noted, as regards Civil Appeal No.3541 of 2011, the date of the order has not been given. Furthermore, though the counter affidavit says copy enclosed, no copy has been enclosed to the counter affidavit. Therefore, this Court took it upon itself to go to the website and verify the orders.

7. The first order i.e., **Master Construction Company** case law [Civil Appeal No.3541 of 2011] is dated 25.04.2011 and is therefore obviously prior to 23.10.2015. Section 11 jurisprudence has undergone a sea of change thereafter, more particularly owing to introduction of sub-section (6A) on and from 23.10.2015. To be noted, under Amending Act 33 of 2019 vide Section 3(v), sub-section (6A) was proposed to be omitted but it has not been omitted as Section 3 of Amending Act, 33 of 2019 has not been notified vide sub-section (2) of Section 1 of Amending Act 33 of 2019, though some other Sections of this Amending Act were notified on 30.08.2019 vide S.O 3154 (E). Therefore, after 30.08.2019, to be precise on 05.09.2019, Hon'ble Supreme Court rendered **Mayavati Trading Pvt.** Case law [**Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman** reported in



(2019) 8 SCC 714)]. Relevant paragraph in **Mayavati Trading case law** 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. Paragraph 10 of **Mayavati Trading case law** takes us to **Duro Felguera SA** i.e., **Duro Felguera, S.A. versus Gangavaram Port Limited** reported in (2017) 9 SCC 729. Relevant paragraphs in **Duro Felguera case law** are paragraphs 47 and 59, which read as follows:

'47. What is the effects of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the 2015 Amendment') with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'



*'59. The scope of the power under [Section 11](#) (6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co.* (supra) and *Boghara Polyfab* (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in [Section 11](#) (6A) ought to be respected. '*

9. Therefore, a Section 11 legal drill will now have to perambulate within the statutory perimeter sketched by sub-section (6A) of Section 11. In other words, a Section 11 legal drill is confined to examination of 'existence of an arbitration agreement' between the parties (to be not even 'valid arbitration agreement' as in a Section 8 legal exercise) which is the expression used in Section 11. Therefore, paragraph 13(i) of the counter affidavit is of no help to respondents.

10. As regards 29.03.2019 case law [*Union of India Vs. M/s.Parmer Construction Company*] the same turns on the agreed mechanism not being



adhered to. Therefore, the facts are completely different and it does not come to the aid of the respondents in the case on hand.

11. To be noted, the respondents themselves have come before this Court on similar arbitration agreements i.e., clauses 70 and 72 of General Conditions of Contract. One such case is O.P.No.854 of 2019 and an order dated 18.02.2020 was made by this Court in the same acceding to the request for appointment of arbitrator under Section 11 of A and C Act.

12. That draws the curtains qua paragraph 13 of the counter affidavit of the State.

13. As regards the other parts of the counter affidavit, in paragraph 12 there is a reference to dismissal of a Section 11 application by the Delhi High Court but the counter affidavit itself makes it clear that this is owing to lack of territorial jurisdiction and therefore that has no bearing on the case on hand. It is a dismissal simplicitor owing to Delhi High Court not being curial Court i.e., Supervisory Court. Other paragraphs of counter affidavit turn on merits of the matter and that is clearly beyond the statutory

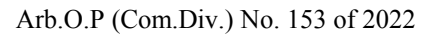


perimeter within which a Section 11 legal drill should perambulate details of which has been alluded to and delineated supra.

14. This takes this Court paragraph 14 of the counter affidavit, which reads as follows:

'14. It is submitted that, in case this Hon'ble court is inclined to appoint an arbitrator, it is prayed that the appointing authority (i.e.) Engineer-in-chief, New Delhi may be directed to appoint an arbitrator from the panel of arbitration as approved by MoD as per letter No.13600/ARB/MoD(POA)/98/E8 dt.07 February 2022.'

15. The letter dated 07.02.2022 bearing reference 13600/ARB/MoD(POA)/98/E8 referred to in Paragraph 14 of the counter affidavit is as follows:





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19.	Shri Widyoot Kumar Pradhan	Chief	Mech	Engg	Railways
17.	Shri Upendra Malik	(ORM)			
18.	Shri Jagdish Rao Garg	Sd DG			CPWD
19.	Shri Sukesh Kumar Sharma	DG(Pers)			MES
20.	Shri Bhuvnesh Prakash Khare	AGM			Railways
21.	Shri Ramkishan Chandra	GM			Railways
		GM			Railways

4. These 21 Arbitrators, in addition to the Standing Panel of Arbitrators of MES serving Officers, will constitute the MoD Panel of Arbitrators comprising of 25 Arbitrators. The empanelled Arbitrators will be available for nomination as Presiding Officer/Member of the Arbitral Tribunal or Sole Arbitrator.

5. It is imperative that for appointment of Arbitrators from the MoD Panel of Arbitrators, the Condition 70 of Contract is amended as per Appx B of the Guidelines forwarded vide this HQ letter under reference. Therefore, necessary amendments to the contract may be carried out wherever applicable.

6. It is requested to take immediate necessary action to enable this HQ to appoint the Arbitrators from the newly constituted MoD Panel of Arbitrators.

(Bhavesh Gupta)
Dir (Contracts)
for Engineer-in-Chief

Copy to :-

MOD/DMA (Wks) - With reference to this office Service Note No 13600/ARB/MoD (PoA)/92/EB dated 26 Jan 2022, a copy of Ink signed Board Proceedings of the Governing Committee meeting held on 20 Jan 2022 is forwarded herewith for your reference and record please.

CGDA - For info with reference to this HQ letter No 13600/ARB/MoD (PoA)/08/EB dated 12 Feb 2021 please.

DG MAP - For info please.

Internal :-

TS to E-in-C

TS to DGW

E2W (PPC)

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16. Therefore, this Court respectfully follows ***Mayavati Trading*** and ***Duro Felguera*** principles / case laws and proceeds to appoint a sole Arbitrator from the respondents' panel.

17. Shri.B.Poiyaamozhi, Development Advisor (Ports), Ministry of Shipping is appointed as the sole Arbitrator. Sole Arbitrator is requested to enter upon reference, adjudicate the arbitrable disputes that have arisen between the parties qua said work in accordance with Clauses 70 and 72 of GCC and render an award.

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

07.06.2022

gpa

Index: Yes/no

Internet: Yes



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gpa

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