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Arb.O.P.(Comm.Div.) No.93 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.10.2022

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR
RAMAMOORTHY**

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M/s.P.S.T.Engineering Construction
Represented by its Managing Partner,
V.S.Thennarasu
2/352, Vavipalayam, Kolaram (Po)
Paramathi Velur Tk,
Namakkal District 637 201.

.. Petitioner

vs.

1. Water Resources Department
Government of Tamil Nadu,
Pennayar Basin Circle
Represented by its Superintending Engineer/
Special Chief Engineer
Thiruvannamalai 606 603.

2. The Executive Engineer
Water Resources Department,
Public Works Department,
Lower Pennayar Division,
Villupuram 605 602.

... Respondents

PRAYER: Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, prayed to appoint a Sole Arbitrator



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to adjudicate upon the disputes arising between the petitioner and the respondent under the Articles of Agreement (LumpSum) dated 4.01.2019 and General Conditions of Contract of Tamil Nadu Building Practice.

For Petitioner : Mr.M.S.Krishnan, Senior Counsel
for Mr.S.Senthil

For Respondents : Mr.Edwin Prabhakar, Spl. G.P.

ORDER

Pursuant to a tender floated by the respondents for the construction of an Anicut across Pennaiyur River at Enderimangalam Village, Panruti Taluk, Cuddalore District, the petitioner was the successful bidder. Consequently, a contract was executed between the petitioner and the respondent.

2. By citing clause 3 of the Articles of Agreement dated 24.01.2019 and clause 69 of the General Conditions of Contract, learned senior counsel for the petitioner contends that the intention of parties to resolve disputes through arbitration is beyond dispute. In view of the unequivocal intention to submit disputes for arbitration, he submits that an arbitral tribunal should be constituted especially keeping in mind the fact that this is a dispute arising out of a complex construction contract.



3. By drawing reference to the judgment of this Court in the

Chairman, Tamilnadu Urban Habitat Development Board and Others v.

M/s.P.S.T. Engineering Construction, order dated 28.01.2022 in A.No.4793

of 2021 in C.S.C.D.No.108 of 2021, he submitted that the arbitration clause

in the said matter was unambiguous. By contrast, with specific reference to

the fourth paragraph of clause 69, he submitted that the said clause indicates

that the jurisdiction of the arbitral tribunal extends to matters of monetary

value in excess of Rs.1,00,000/-.

4. These contentions were refuted by learned Special Government

Pleader for the respondents. He submitted that the work carried out by the

petitioner was defective and that the respondents intend to raise a monetary

claim of about Rs.5.43 crore in respect thereof. As regards the arbitration

clause, he contended that the express intention of the respondents is to

resolve disputes by arbitration only if the claim is up to Rs.50,000/-. In

relation to disputes wherein the monetary claim is higher than the

prescribed threshold, he submitted that the policy decision of the

respondents is to resolve such disputes through the public court system.



5. In order to decide this dispute, it is necessary to extract the relevant arbitration clause. Accordingly, clause 3 of the Articles of Agreement and clause 69 of the General Conditions of Contract are set out below:

“3. The arbitrator for fulfilling the duties set forth in the arbitration clause of the General Condition of the Contract shall be as follows:-

- a. Up to Rs.50,000/- - Superintending Engineer of PWD., WRO., Vellar Basin Circle, Cuddalore.*
- b. Rs.50,000/- and above - Competent Civil Court*

J.SETTLEMENT OF DISPUTES

69. Arbitrations

69.1 In case of any dispute or difference between the parties to the contract either during the progress or after – the completion of the works or after the determination, abandonment or breach of the contract, or as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under clauses 18,20,25-3,27,34,35 and 37 of “General conditions of contract” or as to the withholding by the Executive Engineer of payment of any bill to which the contractor may claim to be entitled, then either party shall up to Rs.50000/-.



The Arbitrator shall give detailed reasons in their awards for their findings and conclusion.

Subject as aforesaid to the provisions of the arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the Arbitration proceeding under this clause.

Upon every and any such reference, the costs of and incidental to the reference and award respectively shall be discretion of the arbitrator, subject to the condition that the amount of such costs to be awarded to either party shall not, in respect of a monetary claim exceed the percentage set out below of any such award irrespective of the actual fees, cost and expenses incurred by either party provided that where a monetary claim is disallowed in full the said percentage shall be calculated on the amount of the claim. The arbitrator may determine the amount of the costs to be awarded or direct the same to be fixed as between solicitor and client or as party and shall direct by whom and to whom and in what manner the same shall be borne and paid.

The percentage above referred to in this clause are 5% on any such monetary award which does not exceed Rs.10,000.3% on the next Rs.40,000 or any part thereof 2% on the next Rs.50,000 or any part thereof and 1% on any excess over Rs.1,00,000/- provided that the government shall not be liable to any claim in respect of any such dispute or difference until the liability and the amount thereof shall have been referred to and



decided by the Arbitrator.

69.2 The fees for Arbitrators shall be levied based on the value of claims referred to for arbitration. The fees shall be calculated at 5% of the first Rs.10000/- at 3% of the next Rs.40000/- ”

6. Clause 3 of the Articles of Agreement clearly provides for the resolution of disputes through the Superintending Engineer of PWD, WRO., Vellar Basin Circle, Cuddalore, if the claim is up to Rs.50,000/-. If the claim is above Rs.50,000/-, it provides for resolution through the competent civil court. The said clause however draws reference to the arbitration clause in the General Conditions of Contract.

7. The first paragraph of clause 69 indicates that reference to arbitration is limited to disputes of monetary claim up to Rs.50,000/-. The fifth paragraph, which deals with the fees of the arbitral tribunal, reinforces the conclusion that arbitration is restricted to claims up to Rs.50,000/-. By relying on the fourth paragraph, learned senior counsel contended that the said paragraph indicates that the jurisdiction extends to claims that exceed Rs.1,00,000/-. On examining the fourth paragraph in the context of the other



paragraphs, it appears that the fourth paragraph deals with monetary awards in excess of Rs.1,00,000/-, whereas the other paragraphs deal with claims up to Rs.50,000/-.

8. More importantly, near identical clauses were interpreted by the Hon'ble Supreme Court in *State of A.P. and another v. Obulu Reddy (2001) 10 SCC 30*, and by a Division Bench of this Court in *Rajam Engineering Contractors v. The State of Tamil Nadu, 2006 (1) CTC 796*. In the said judgments, the Court concluded that the dispute cannot be referred to arbitration and that the party should approach the jurisdictional civil court.

9. Although I concur with the contention of learned senior counsel for the petitioner that the contract does disclose the intention of parties to resolve disputes through arbitration, the language of such clause, which restricts reference to arbitration to disputes where the monetary claim does not exceed Rs.50,000/-, cannot be disregarded. It should also be noticed that in response to a specific question, learned Special Government Pleader



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stated that the respondents are not agreeable to the resolution of this dispute through arbitration.

10. In the above circumstances, Arb.O.P.(Com. Div.) No.93 of 2021 is dismissed without any order as to costs by leaving it open to the petitioner to institute appropriate civil proceedings. The respondents will do well to revisit the arbitration clause at least for the limited purpose of re-fixing the threshold for reference of disputes to arbitration since such threshold is set at a such a low level as to render the said arbitration clause otiose.

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SENTHILKUMAR RAMAMOORTHY,J

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