



O.P.Nos.82 to 84 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2023

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THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

O.P.Nos.82 to 84 of 2021

S.Krishnamoorthy,
Proprietor,
M/s.Sriram Engineering Company,
G1, Kala Flats,
24, Bujangarao Street,
Saidapet, Chennai 600 015.

... Petitioner in all OPs

Vs.

M/s.Engineering Projects India Limited,
Represented by its Executive Director,
Core-3, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110 003
Also at
No.3, EC Chambers,
92, G.N.Chetty Road,
T.Nagar, Chennai 600 017.

... Respondent in all OPs

Common Prayer:

Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint an independent sole arbitrator to



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adjudicate the disputes arising between the petitioner and the respondent pursuant to the work order Nos.SRO/PMD/683/041 dated 06.05.2013, SRO/PMD/686/044 & SRO/PMD/686/045 both dated 19.06.2013 respectively and Clause 76 of the General Conditions of Contract for the appointment of sole Arbitrator and to direct the respondents to pay the cost of this petition.

For petitioner in all Ops : Mr.Adarsh Subramaniam
For Respondent in all Ops : Mr.Agil Vatchalam,
for Mr.P.J.Rishikesh

COMMON ORDER

These petitions have been filed under Section 11(5) of Arbitration and Conciliation Act, 1996, (hereinafter referred as “the Act”), seeking to appoint an independent sole arbitrator to adjudicate the disputes arising between the petitioner and the respondent pursuant to the work order Nos.SRO/PMD/683/041 dated 06.05.2013, SRO/PMD/686/044 & SRO/PMD/686/045 both dated 19.06.2013 respectively and Clause 76 of the General Conditions of Contract for the appointment of sole Arbitrator and to direct the respondent to pay the cost of this petition.



2.Both the learned counsel appearing for the respective parties would submit that the present dispute is arising out of the work order Nos.SRO/PMD/683/041 dated 06.05.2013, SRO/PMD/686/044 & SRO/PMD/686/045 both dated 19.06.2013 respectively. They would further submit that the present dispute is arbitrable in terms of Clause 76 of the General Conditions of Contract, which reads as follows:

“76.0 ARBITRATION

76.1 Before resorting to arbitration as per the clause given below, the parties if they so agree may explore the possibility of conciliation as per the provisions of Part-III of the Arbitration and Conciliation Act. 1996. When such conciliation has failed, the parties shall adopt the following procedure for arbitration:

i) Except where otherwise provided for in the contract, any disputes and differences relating to the meaning of the Specifications, Design, Drawings and Instructions herein before mentioned and as to the quality of workmanship or materials used in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, Designs, Drawings, Specifications, Estimates, Instructions, or these



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conditions, or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Sole Arbitration of the Chairman and Managing Director (CMD) of Engineering Projects (India) Limited (EPI), or any other person discharging the functions of CMD of EPI and if CMD or such person discharging the functions of CMD of EPI is unable to act, to the sole Arbitration of some other person appointed by CMD of EPI or such other person discharging the functions of CMD of EPI. There will be no objection if the arbitrator so appointed is an employee of Engineering Projects (1).Ltd. waver, such an employee shall not have directly dealt with the said Contract or the works there under on behalf of EPI. Such Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of arbitration duly satisfying the requirements of this clause.

(ii) If the arbitrator so appointed resigns or is unable or unwilling to act to in reason whatsoever, or dies, the Chairman & Managing Director area his absence the person discharging the dies of the CMD of EPI may appoint now arbitrator in accordance



will these terms and condone of the contract to act in his place and the new arbitrator so appointed may proceed from the stage at which it was left by his predecessor.

iii) It is a term of the contract that the party invoking the arbitrator she specify the dispute/differences or questions to be referred to the Arbitrator under this cause together with the amounts claimed in respect of each dispute.

iv) The Arbitrator may proceed with the arbitration ex-parte, if either party, in spite of a notice from the arbitrator, fails to take part in the proceedings.

v) The work under the contract shall continue as directed by the Engineer-in-Charge, during the arbitration proceedings.

vi) Unless otherwise agreed, the venue of arbitration proceedings shall be at the venue given in the Memorandum to the 'Form of Tender'.

vii) The award of the Arbitrator shall be final conclusive and binding on both the parties



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viii) Subject to the aforesaid the provisions of the Arbitration and Conciliation Act 1996 or any statutory modifications or re-enactment thereof and the Rules made there under and for the time being in force shall apply to the arbitration proceedings and Arbitrator shall publish his Award accordingly.

NOTE

NOTWITHSTANDING ANYTHING CONTAINED HEREINABOVE, THIS CLAUSE SHALL NOT BE APPLICABLE WHERE THE DISPUTE IS BETWEEN EPI AND ANOTHER CENTRAL PUBLIC SECTOR ENTERPRISE OR GOVT OF INDIA DEPARTMENT, FOR WHICH A SEPARATE ARBITRATION CLAUSE IS PROVIDED VIDE CLAUSE NO 76 2 GIVEN BELOW

76.2 ARBITRATION BETWEEN CENTRAL PUBLIC SECTOR ENTERPRISES INTER SE/GOVERNMENT OF INDIA DEPARTMENTS/ MINISTRIES

i) In the event of any dispute or difference relating to the interpretation and application of the provisions of the contract such dispute or difference



shall be referred by either party to the arbitrator as per the instructions (Office Memorandums/Circulars) issued by Govt of India from time to time with regard to arbitration between one Government Department and another, one Government Department and a Public Sector Enterprise-and Public Sector Enterprise Inter se.

ii) Subject to any amendment that may be carried out by the Government of India from time to time, the procedure to be followed in the arbitration shall be as is contained in D.O. No. DPE/4(10)/2001-PMA-GL-I dated 22.01.2004 of Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises, Government of India or any modification issued in this regard.

76.3 JURISDICTION

The courts mentioned in the 'Memorandum' to the 'Form of Tender' alone will have jurisdiction to deal with matters arising from the contract, to the exclusion of all other courts.”

3.Learned counsel appearing for the petitioner would submit that, an appointment of Sole Arbitrator in terms of Clause 76 of the General Conditions of Contract, is non-est in law since the Hon'ble Apex Court in



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the case of *Perkins Eastman Architects DPC and Ors. vs. HSCC (India) Ltd.*, reported in *(2020) 20 SCC 760*, has held that a person

having an interest in the dispute or in the outcome or decision thereof must not only be ineligible to act as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. Hence, the petitioner has approached this Court for appointment of Arbitrator.

4.Learned counsel appearing for the petitioner would further submit that since the conciliation proceeding was failed, the Bank Guarantee is expired and therefore, he prayed for appropriate direction restraining the respondent from encashing the Bank Guarantee as the Bank Guarantee expired today i.e 24.03.2023. Further, he undertakes to renew the Bank Guarantee on or before 13.04.2023.

5.Learned counsel appearing for the respondent has also submitted that the present dispute is arbitrable in terms of Clause 76 of the General Conditions of Contract and he fairly agreed for an appointment of Sole



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Arbitrator to resolve the disputes arisen between the petitioner and the respondent.

6.Heard the learned counsel appearing for the petitioner as well as the respondent and perused materials available on record.

7.Upon hearing and perusal of Clause 76 of the General Conditions of Contract, it is clear that in the event of any dispute, the same shall be referred to the Sole Arbitrator of the Chairman and Managing Director (CMD) of Engineering projects (India) Limited (EPI) or any other person discharging the functions of CMD of EPI and if CMD or such person discharging the functions of CMD of EPI is unable to act, to the sole Arbitration of some other person appointed by CMD or EPI, which is against the law laid down by the Hon'ble Apex Court in the ***Perkins Case***, (cited supra), unless and otherwise the parties agreed in written consent for appointment of those persons as Arbitrator, no Arbitrator can be appointed unilaterally. Under such circumstances, this Court feels that it would be appropriate to appoint an Arbitrator to



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adjudicate the dispute between the petitioner and the respondents and since the learned counsel appearing for the respective parties requested this Court to appoint the same Arbitrator in all the Original Petitions, this Court passes the following orders:

i) Accordingly, the **Hon'ble Mr.Justice K.Kalyana Sundaram, Former Judge, Madras High Court, residing at Flat No.406, 5th South Cross Street, Kapaleaswarar Nagar, Neelankarai, Chennai, Contact No.93810 11077**, is appointed as the Arbitrator in O.P.Nos.82 to 84 of 2021 to enter upon reference and adjudicate the disputes *inter se* the parties independently.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order without influencing any of the observations made by this Court in this order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed



by him and the same shall be borne by the parties equally.

iv) In the event of non-appearance of the petitioner/s herein, the respondents herein shall bear the entire remuneration and other expenses and thereafter, the respondents can recover the same directly from the petitioner/s herein.

8.Further, considering the submissions and undertaking given by the learned counsel appearing for the petitioner that the petitioner would renew the Bank Guarantee on or before 13.04.2023, the respondent is restrained from encashing the Bank Guarantee till the commencement of Arbitration Proceedings i.e (First Hearing of the Arbitration Proceedings). The petitioner is directed to renew the Bank Guarantee on or before 13.04.2023. Thereafter, the parties shall approach the learned Arbitrator for any further order regarding the extension of Bank Guarantee, etc.



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9. With the above directions, these Original Petitions are disposed

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of, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, it is open to the petitioner as well as the respondent to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996 before the Arbitrator.

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KRISHNAN RAMASAMY.J.,
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