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Arb.O.P.(Com.Div).No.48 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

Arb.O.P.(Com.Div).No.48 of 2023

M/s.Shah Technical Consultants Pvt. Ltd.,
Old No.43/2, New No.24/6, Ground Floor,
Vijayaraghava Road, T.Nagar,
Chennai – 600 017,
Rep.by its Director Mr.Prasana M Shah.

... Petitioner

VS.

Department of Tourism,
Government of Tamil Nadu,
Tamil Nadu Tourism Complex,
No.2, Wallajah Road, Chennai – 600 002,
Rep.by its Principal Secretary/Commissioner
of Tourism and Project Director, IDIPN TN.

...Respondent

Prayer: Arbitration Original Petition (Commercial Division) filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole arbitrator as this Hon'ble Court may deem fit under Section 11(6) of the Arbitration and Conciliation Act, 1996 in accordance with Clause 49(1) of the Special conditions of Contract under Agreement dated 04.10.2013 vide



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Contract No.TN/IDIPT/PMC/01 to resolve the disputes that have arisen between the petitioner and the respondent.

For Petitioner : Mr.E.Senthil Kumar
For Respondent : Mr.A.Edwin Prabhakar
Special Government Pleader

ORDER

This petition has been filed under Section 11 of 'the Arbitration and Conciliation Act, 1996' [hereinafter referred to as 'A and C Act'] seeking for appointment of an Arbitrator by this Court.

2. The petitioner was appointed as a service provider by the respondent under a contract dated 04.10.2013. The petitioner claims that they acted as a consultant for the respondent.

3. There seems to be a dispute between the petitioner and the respondent under the contract dated 04.10.2013. The petitioner has claimed consultant fees from the respondent. They have sent letters/notices to the respondent calling upon them to pay their alleged dues. Since the claim of the petitioner was not settled, the petitioner had invoked the arbitration



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agreement in the contract dated 04.10.2013 by its letter dated 03.05.2019.

The said letter was not responded by the respondent. One more reminder was also sent on 13.09.2021. Thereafter, since the respondent did not respond, the petitioner-company appointed an Arbitrator through their letter of reference dated 23.5.2022. They had named a former Judge of this Court as their Arbitrator. The arbitration agreement under the contract dated 04.10.2013 is found in clause 49 which is extracted hereunder :

"49. Disputes shall be settled by arbitration in accordance with the following provisions :

1. Selection of Arbitrators Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three (3) arbitrators, in accordance with the following provisions :

(a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by



*the Party who initiated the proceedings, either Party may apply to **International Federation of Consulting Engineers (FIDIC)** for a list of not fewer than five (5) nominees and, on receipt of such list, the Parties shall alternately strike names there from, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, FIDIC shall appoint, upon the request of either Party and from such list or otherwise a sole arbitrator for the matter in dispute.*

(b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and the Consultant shall each appoint one (1) arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two(2) arbitrators named by the Parties has been appointed, the third arbitrator shall at the request of either Party, be appointed by FIDIC.

(c) If, in a dispute subject to paragraph (b) above, one Party falls to appoint its arbitrator within thirty (30)



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days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the [name the same appointing authority as in said paragraph (b)] to appoint a sole arbitrator for the matter in dispute, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute."

4. Since the respondent has not appointed its Arbitrator as per the aforementioned arbitration clause, the petitioner had earlier filed a petition under Section 11 of A and C Act before this Court in Arb.O.P.(Comm.Div) No.370 of 2022. Since the dispute resolution mechanism provided under clause 49 of the contract dated 04.10.2013, which is extracted supra mandates the petitioner to approach International Federation of Consulting Engineers (FIDIC) before approaching this Court, the petitioner had withdrawn Arb.O.P.(Comm.Div).No.370 of 2022 and by an order dated 25.8.2022, this Court had dismissed the said O.P as withdrawn by giving liberty to the petitioner to once again approach this Court, if the request of the petitioner to the International Federation of Consulting Engineers (FIDIC) for appointment of an Arbitrator has not been acceded to. In terms

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of the order dated 25.08.2022 passed in Arb.O.P.(Comm.Div).No.370 of 2022 the petitioner had sent a communication to the Chief Executive Officer, FIDIC - International Federation of Consulting Engineers, Geneva, Switzerland on 08.11.2022 requesting FIDIC to appoint an Arbitrator. The petitioner has also produced an acknowledgment card for having served the notice dated 08.11.2022 requesting for an appointment of an Arbitrator on FIDIC. Since FIDIC has not appointed an Arbitrator, the petitioner has once again filed this application under Section 11 of A and C Act seeking for appointment of an Arbitrator.

5. A counter affidavit has been filed by the respondent raising two defences:

(a) The procedure for approaching FIDIC has not been followed by the petitioner for seeking appointment of an Arbitrator, as the petitioner has not paid the requisite fees for the same and has also addressed its letter dated 08.11.2022 to the Chief Executive Officer instead of the President.

(b) As per the agreement, an Arbitrator will have to be from a



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Nationality to which either the petitioner or the respondent do not belong.

Therefore, the appointment of a former Judge of this Court as an Arbitrator by the petitioner is not permissible and is not in accordance with the contract.

6. The learned counsel for the petitioner drew the attention of this Court to the earlier order dated 25.08.2022 passed by this Court in Arb.O.P.(Comm.Div).No.370 of 2022, in the earlier round of litigations seeking for the very same relief and would submit that in terms of the said order, the petitioner had sent a communication to the International Federation of Consulting Engineers (FIDIC), Geneva, Switzerland on 08.11.2022 making a request to the said organization for appointing an Arbitrator for the purpose of adjudicating the dispute between the petitioner and the respondent arising out of contract dated 04.10.2013. He would submit that even though the notice dated 08.11.2022 has been duly acknowledged, as seen from the acknowledgment card, International Federation of Consulting Engineers (FIDIC) neither responded to the said



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communication nor have they nominated an Arbitrator.

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7. The learned counsel for the petitioner would further submit that the petitioner's claim is Rs.56,58,225/- together with interest and costs. According to him, if the procedure as suggested by the respondent for approaching FIDIC has to be followed, the petitioner will have to pay a cost of 3000 Euros to FIDIC, which is not practically viable considering the quantum of the claim. Having made a request in terms of the order dated 25.08.2022 passed in Arb.O.P.(Comm.Div).No.370 of 2022, he would submit that FIDIC should have at least responded to the said request, but, having not responded to the same, the petitioner is now constrained to file this application seeking for appointment of an Arbitrator by this Court. He would also submit that as per the arbitration agreement contained under the contract, despite the petitioner having nominated an Arbitrator on its side, the respondent has not till date appointed an Arbitrator, which they are bound to do so as per the arbitration agreement. Having failed to appoint an Arbitrator, he would submit that the respondent cannot raise any objection with regard to the petition filed by the petitioner under Section 11 of A and



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C Act seeking for appointment of an Arbitrator.

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8. On the other hand, the learned Special Government Pleader appearing for the respondent drew the attention of this Court to the arbitration agreement found in the contract dated 04.10.2013. He would submit that as seen from the arbitration agreement, the petitioner will have to first name an Arbitrator and request the respondent to name one on their side and if the respondent has not named an Arbitrator on their side, the petitioner will have to approach FIDIC for appointment of an Arbitrator. He also drew the attention of this Court to the clause found in the contract dated 04.10.2013, which stipulates that an Arbitrator will have to be from a Nationality to which neither the petitioner nor the respondent belong. Therefore, reiterating the contentions of the counter affidavit filed before this Court he would submit that the present petition is not maintainable.

Discussions:-

9. Arbitration is meant for speedy resolution of disputes between the parties. The technical objections raised by the respondent when they are at



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fault for not nominating any arbitrator on their side cannot be given much weightage by this Court while deciding an application under Section 11 of A and C Act.

10. Admittedly there is an arbitration agreement available under the contract dated 04.10.2013 entered into between the petitioner and the respondent. Till date, the respondent has not appointed any Arbitrator on their side, even though the arbitration agreement enables them to appoint an Arbitrator on their side after receipt of a claim from the petitioner. The petitioner claims that it has not been paid its remuneration/fees arising out of the contract dated 04.10.2013 entered into with the respondent. Infact, subsequent to the order dated 25.08.2022 passed by this Court in Arb.O.P. (Comm.Div). No.370 of 2022 under which the petitioner has been given liberty to approach this Court once again by filing a similar application, the petitioner had made a request to FIDIC by its notice dated 08.11.2022 seeking for appointment of an Arbitrator. The said notice dated 08.11.2022 has also been duly acknowledged by FIDIC on 21.11.2022. The acknowledgment card is also filed along with the typed set of papers filed

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by the petitioner. The respondent in their counter affidavit have also not disputed that FIDIC has not received the notice sent by the petitioner dated 08.11.2022. However, the respondent contends that the procedure for approaching FIDIC for appointment of an Arbitrator has not been followed by the petitioner by paying the requisite fees and also by addressing the request to its President instead of Chief Executive Officer. When FIDIC has received the notice dated 08.11.2022 sent by the petitioner requesting for appointment of an Arbitrator, it should have replied to the same by directing the petitioner to address the communication to the President and should have requested the petitioner to pay the requisite fees, but as seen from the papers/documents placed on record before this Court, there has been no communication from FIDIC sent either to the petitioner or to the respondent stipulating the procedure for appointment of an Arbitrator.

11. It is also submitted by the learned counsel for the petitioner that the claim of the petitioner is only Rs.56 lakhs and odd together with interest and costs, whereas, as seen from the website, the costs to be incurred by the petitioner for nomination of an Arbitrator by FIDIC will be 3000 Euros,



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which is a huge amount. Therefore, the payment of 3000 Euros by the petitioner to FIDIC to recover the claim of Rs.56 lakhs and odd is not practically viable.

12. The next ground raised by the respondent is that under the contract dated 04.10.2013, in case of any dispute, the arbitrator will have to be from a Nationality different from that of the petitioner or the respondent and therefore, according to the respondent the present petition is not maintainable. The said contention has to be rejected for the following reasons :

(a) Arbitration is meant for speedy resolution of disputes between the parties and it is not for dragging on the litigations forever. The petitioner, who had earlier approached this Court under Section 11 of A and C Act seeking for appointment of an Arbitrator, the very same defence was raised by the respondent that the petitioner will have first approach FIDIC before approaching this Court for appointment of an arbitrator. The earlier petition was dismissed as withdrawn by granting liberty to the petitioner to re-agitate the issue, if the organization (FIDIC) fails to appoint an Arbitrator. The

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petitioner has also made a request on 08.11.2022 to FIDIC seeking for appointment of an Arbitrator which has been duly acknowledged by FIDIC on 21.11.2022. FIDIC has also not responded to the communication of the petitioner dated 08.11.2022. Therefore, it can be inferred that FIDIC is not interested in nominating an Arbitrator. If FIDIC was really interested in deciding the claim of the petitioner, they ought to have at least responded to the communication of the petitioner dated 08.11.2022 by sending a suitable reply. Having not done so, it is clear that FIDIC is not interested in nominating an arbitrator with regard to the request made by the petitioner under its communication dated 08.11.2022.

13. When there is a reference to arbitration in any agreement, necessarily this Court will have to interpret that clauses in a favourable manner favouring early resolution of disputes between parties through arbitration. The petitioner cannot be made to run from pillar to post that too when admittedly there is a valid arbitration agreement contained in the contract. The defences raised by the respondent are too technical in nature, which do not deserve any merit considering the conduct of the respondent in



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not nominating its arbitrator despite a specific request for the same having been made by the petitioner.

14. For the foregoing reasons, this application filed by the petitioner under Section 11 of A and C Act is maintainable before this Court and this Court is having power to appoint an Arbitrator in view of the non-appointment of an Arbitrator by the respondent and in view of FIDIC not appointing an Arbitrator or sending any reply to the petitioner's communication dated 08.11.2022.

15. In the result, this Court appoints Mr.V.P.Raman, Advocate of this Court as a Sole arbitrator to decide the dispute between the petitioner and respondent arising out of contract dated 04.11.2013. Accordingly, this Arbitration Original Petition is allowed as prayed for by issuing the following directions:

(a) This Court appoints Mr.V.P.Raman, Advocate, who is having office at Flat-02, 4th Floor, Ajay Apartments, New No.15, Old No.7,



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Hanumantha Road, Balaji Nagar, Royapettah, Chennai – 600 014, Mobile No.9840885757, E.mail ID – vpr1810@gmail.com., as a sole Arbitrator to decide the dispute between the petitioner and the respondent arising out of the contract dated 04.10.2013.

(b) The Arbitrator shall be paid his remuneration / fees in accordance with the 4th schedule of the Arbitration and Conciliation Act, 1996.

(c) Both the parties shall equally share the arbitrator's fees.

(d) The Arbitrator shall conduct the arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and shall complete the arbitration within the specified time as prescribed under the said Act.

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Speaking Order/Non-Speaking Order
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