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Arb. O.P(Com.Div). No.46 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.04.2023

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THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb. O.P(Com.Div). No.46 of 2023

Simplex Infrastructures Ltd.,
Represented by its authorised signatory,
Registered Office at
Simplex House No.27, Shakespeare Sarani,
Kolkata – 700 017.
Chennai branch office at
Unit C. First Floor, “Heavitree Building”,
No.47, Spurtank Road,
Chetpet, Chennai – 600 031.

... Petitioner

Vs.

KG Foundations Pvt Ltd.,
Rep. by its Managing Director,
Kishorkumar Gokaldas,
Ground Floor, 5,
Bishop Wallers Avenue East,
Mylapore, Chennai – 600 004.

... Respondent

PRAYER : Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to pass an order of appointing a sole, independent and impartial arbitrator to adjudicate the disputes which have arisen between the petitioner and the respondent pursuant to Clause D.68.0 of the general conditions of the contract dated 22.04.2013 entered into between the petitioner and the respondent.



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For Petitioner : Mr.Solaiappan
For Respondent : Mr.E.Senthilkumar
for Mr.D.Sairam Kumar

ORDER

This petition has been filed under Section 11(6) of Arbitration and Conciliation Act, 1996, seeking to appoint Sole arbitrator to decide the dispute and differences between the petitioner and respondents pursuant to Clause D.68.0 of the general conditions of the contract dated 22.04.2013 entered into between the petitioner and the respondent.

2.Learned counsel appearing for the petitioner would submit that the respondent had issued a notice inviting tender dated 03.11.2012. Pursuant to which, the petitioner has submitted its offer. Subsequent to the negotiation between the parties, a letter of intend dated 24.12.2012 was issued by the respondent to the petitioner and thereafter, a contract agreement was entered between the parties on 22.04.2013 and the respondent awarded the petitioner the Civil, Structural and Finishing works for Blocks F and G of 'KG Signature City' Phase II project at Mugappair, Chennai. In terms of the said contract, the estimated value of the work was Rs.36,07,27,511/-. The petitioner completed the work envisaged under the contract in all respects and handedover all the



flats to the respondents' customer relationship manager at the project site. The final bills for the main work and Non-tendered items were also submitted by the petitioner to the respondent for scrutiny and certification. The petitioner and the respondent had thereafter held a contract closure meeting at the respondent's office on 24.10.2019. During the contract closure meeting, the respondent confirmed that they have received the final bills which were duly certified by the Project Management Consultant. Thereafter, the petitioner has also submitted the final reconciliation statement for all the free issue materials as requested by the respondent. Despite various promises of the respondent, the contract formalities were not completed and the respondent never released any payment to the petitioner.

3.He would further submit that since the respondent time and again failed to act in accordance with the promises made by them, the petitioner constrained to invoke the arbitration clause enshrined in Clause D.68.0 of the General Condition of contract dated 22.04.2013. On 30.09.2022, the petitioner sent a notice to the respondent by invoking the said arbitration clause, for which there was no reply from the respondent. As per Clause D.68.0 of the General condition of the contract, the constitution of the arbitral tribunal is to be made from its panel. However, since the Hon'ble Apex Court in 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, the petitioner approached this Court for appointment of Arbitrator.

4.Learned counsel appearing for the respondent would submit that, the respondent has no objection to appoint Sole Arbitrator in terms of Clause D.68.0 of the General Condition of contract dated 22.04.2013.

5.Heard the learned counsel appearing for the petitioner as well as the respondent.

6.For better appreciation, Clause D.68.0 of the General Condition of contract dated 22.04.2013, is reproduced hereunder:

D.68.0 ARBITRATION

D.68.1

All disputes or differences of any kind whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof of this contract of the rights touching



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or concerning the works or the execution of maintenance thereof of this contract of the construction remaining operation or effect thereof or to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after determination foreclosure of branch of the contract (other than those in respect of which the decision of any 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 and to the Employer hereinafter mentioned be referred for adjudication to a sole Arbitrator to be appointed as hereinafter provided.

D 68.2

For the purpose of appointing the sole Arbitrator referred to above, the Employer will send within thirty days of receipt of the notice, to the Contractor a panel of three names of persons who shall be presently unconnected with the organization for which the work is executed.

D.68.3

The Contractor shall on receipt of the names as aforesaid, select any one of the persons name to be appointed as a sole Arbitrator and communicate his name to the Employer within thirty days of receipt of the names. The Employer shall thereupon without any delay appoint the said person as the Sole Arbitrator. If the Contractor fails to communicate such selection as provided above within the period specified, the competent authority shall make the



selection and appoint the selected person as the Sole Arbitrator.

D.68.4

If the Employer fails to send to the Contractor the panel of three names as aforesaid within the period specified, the Contractor shall send to the Employer a panel of three names of persons who shall all be unconnected with either party. The Employer shall on receipt of the named as aforesaid select any one persons name and appoint him as the Sole Arbitrator. If the Employer fails to select the person and appoint him as the Sole Arbitrator within 30 days of receipt of the panel and inform the Contractor accordingly, the Contractor shall be entitled to appoint one of the persons from the panel as the Sole Arbitrator and communicate his name to the Employer.

D.68.5

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another Sole Arbitrator shall be appointed as aforesaid.

D.68.6

The work under the Contract shall, however, continue during the arbitration proceedings and no payment due to or payable to the Contractor shall be withheld on account of such proceedings,



D.68.7

The Arbitrator shall be deemed to have entered on the reference on the date he issued notice to both the parties fixing the date of the first hearing

D.68.8

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him. The Arbitrator shall decide each dispute in accordance with the terms of the contract and give a reasoned award. The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

D.68.9

The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award including the fees, if any, of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof shall be paid and may fix of settle and amount of costs to be so paid.

D.68.10

The award of the Arbitrator shall be final and binding on both the parties. Subject to aforesaid the provisions of the Arbitration Act 1940 or any statutory modification or reenactment thereof and the rules made there under and for the time being in force, shall apply to the arbitration proceeding under this clause.



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D68.11

The Employer and the Contractor hereby also agree that arbitration under clause shall be condition precedent to any right to action under the contract with regard to the matters hereby expressly agreed to be so referred to arbitration.”

7.In view of the above submissions made by the learned counsel appearing for either parties and a perusal of Clause D.68.0 of the General Condition of contract dated 22.04.2013, it is clear that the present dispute is arbitable in terms of the said agreement. Hence, this Court is inclined to appoint an Arbitrator to adjudicate the dispute between the petitioner and the respondent.

i) Accordingly, **The Hon'ble Mr.Justice V.Bharathidasan, (Retired), Madras High Court, residing at No.22(L-45), 2nd Main Road, Kamaraj Nagar, Thiruvananthipur, Chennai – 600 041. (Mobile No.9444383139),** is appointed as the Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

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.



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iii) Learned Arbitrator is requested to conduct arbitration proceedings in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and the fee of the learned Arbitrator shall be fixed in accordance with Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

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.This Original Petition is ordered accordingly, 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.

13.04.2023

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Note: Issue Order Copy on 19.04.2023



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KRISHNAN RAMASAMY. J.,
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