



Arb.O.P.(Com.Div.) No.50 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2023

CORAM

THE HON'BLE Mr. JUSTICE ABDUL QUDDHOSE

Arb.O.P (Com.Div.) No.50 of 2023

M.Rajkumar

... Petitioner

Versus

1.The Superintending Engineer (NH),
No.5, Besant Nagar,
Chinna Chokkikulam,
Madurai – 625 002.

2.The Divisional Engineer (NH),
Door No.29,
Hanifa Nagar,
Sellapadi Panchayat,
Dindigul – 624 005.

... Respondents

Prayer: Arbitration Original Petition (Commercial Division) filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an independent and impartial Arbitrator to adjudicate the disputes between the petitioner and the respondents in terms of the Contract Agreement having C.R. Agreement No.20/2020-2021, dated 11.12.2020 as set out under details of claims in Para No.5 above and to direct the respondents to pay the costs of this petition.



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Arb.O.P.(Com.Div.) No.50 of 2023

For Petitioner : Mr.A.Vikash

For Respondents : Mr.A.Edwin Prabakar,
Special Government Pleader (C.S.)

ORDER

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking for an appointment of an Arbitrator.

2.The petitioner is a Contractor with the respondents. He had entered into a Contract on 11.12.2020 with the respondents. There seems to be a dispute between the petitioner and the respondents arising out of the said Contract. The petitioner had also given a Performance Bank Guarantee in favour of the respondents subsequent to the date of the Contract, i.e. on 11.12.2020. There is an Arbitration Agreement in the Contract dated 11.12.2020.

3.The respondents claim that the petitioner has committed breach of contract. They have also attempted to invoke the Performance Bank Guarantee given by the petitioner. On receipt of the said information, the petitioner had filed an Application under Section 9 of the Arbitration and



Conciliation Act before the District Court at Madurai in Arb. A.No.23 of 2022 to restrain the respondents from invoking the Bank Guarantee.

Admittedly, an order of interim injunction has also been granted in favour of the petitioner in the said Application and the interim injunction is still in force. Since under Section 9(2) of the Arbitration and Conciliation Act, the petitioner will have to invoke Arbitration within a period of three months, the petitioner has filed this Petition under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator.

4.A Dispute Resolution Mechanism is provided for in Article 26 of the Contract dated 11.12.2020. The petitioner had also sent a Communication to the respondents on 01.10.2022 seeking for conciliation as per the dispute resolution mechanism. According to the petitioner, despite making requests for conciliation, the respondents had not responded to the same by appointing a Conciliator. In the aforementioned circumstances, the petitioner has contended that he has been constrained to file a petition under Section 11 of the Arbitration and Conciliation Act.



5.A counter affidavit has been filed by the respondents denying the contentions of the petitioner. They would submit that there is a separate procedure provided under the Contract for the dispute resolution. According to them, the procedure contemplated under Article 26 of the Contract has not been followed by the petitioner before filing the petition under Section 11 of the Arbitration and Conciliation Act. They would state that there is a three tier procedure for dispute resolution under Article 26 of the contract. According to them, the petitioner will have to first approach the Conciliator and if the Conciliation has failed, he will have to approach the Chief Engineer/Board of Directors and if it also fails, only then an Arbitral Tribunal can be constituted. Therefore, according to them, having not followed the procedure contemplated under Article 26 of the Contract, the present petition filed under Section 11 of the Arbitration and Conciliation Act is premature and is not maintainable. They would also state that on 09.01.2023 they have informed the petitioner that he will have to adhere to the procedure with regard to the dispute resolution mechanism provided under Article 26 of the Contract. But despite the said Communication, the petitioner has filed this petition under Section 11 of the Arbitration and



Conciliation Act for appointment of an Arbitrator by this Court, which according to them is not maintainable.

Discussion

6. Admittedly, a request has been made by the petitioner to the respondents on 01.10.2022 as per the dispute resolution mechanism provided under Article 26 of the Contract requesting the respondents to appoint a Conciliator to resolve the dispute between the petitioner and the respondents. Though the letter dated 01.10.2022 sent by the petitioner seeking for an appointment of a Conciliator is acknowledged by the respondents, the respondents have neither appointed a Conciliator nor they have stated anything about the procedure for initiating conciliation proceedings in their reply dated 29.11.2022 sent to the petitioner's letter dated 01.10.2022. Only for the first time through their reply dated 09.01.2023, the respondents have informed the petitioner about the requirement of conciliation proceedings under the dispute resolution mechanism provided under Article 26 of the Contract. Even prior to that date, the respondents had attempted to invoke the Bank Guarantee, which necessitated the petitioner to file an Application under Section 9 of the



Arb.O.P.(Com.Div.) No.50 of 2023

Arbitration and Conciliation Act before the District Court, Madurai in

Arb.A. No.23 of 2022. The petitioner was also granted an order of interim injunction in the said application in his favour by order of the District Court dated 06.12.2022. As per Section 9(2) of the Arbitration and Conciliation Act, whenever a party obtains an interim order in his favour under Section 9 of the Arbitration and Conciliation Act, the said party will have to initiate arbitration within a period of three months or within a further period as extended by the Court. The petitioner has also stated in his petition that he was constrained to file this present petition under section 11 of the Arbitration and Conciliation Act only due to the fact that he had the benefit of an interim injunction granted by the District Court, Madurai as early as on 06.12.2022. Therefore, he had to file this petition within a period of three months as per section 9(2) of the Arbitration and Conciliation Act. Even though the dispute resolution clause, contained in Article 26 of the contract, stipulates a two-tier procedure before invoking arbitration, this Court, after giving due consideration to the reasons given by the petitioner for filing this petition under section 11 of the Arbitration and Conciliation Act, has to allow this petition for the following reasons:



a) A specific request was made by the petitioner to the respondents on 01.10.2022 requesting for appointment of a Conciliator as per the dispute resolution clause contained in Article 26 of the Contract;

b) Even though a reply was sent by the respondents on 29.11.2022 to the aforesaid notice, they have not informed the petitioner about the appointment of a Conciliator nor have they stated anything about the conciliation proceedings as per the dispute resolution mechanism available under the Contract;

c) Only for the first time in their reply dated 09.01.2023, the respondents have informed the petitioner about the requirement of conciliation under Article 26 of the Contract;

d) Admittedly, the respondents had attempted to invoke the performance Bank Guarantee given by the petitioner. The petitioner had also filed Arb.A.No.23 of 2022 before the District Court at Madurai under Section 9 of the Arbitration and Conciliation Act seeking for an interim



injunction restraining the respondents from invoking the Bank Guarantee.

Admittedly, an interim injunction was also granted in favour of the petitioner in the said Application and the injunction is also still in force. Having obtained an order of interim injunction, necessarily the petitioner, who is having the benefit of the said order, will have to invoke Arbitration as per Section 11 of the Arbitration and Conciliation Act, within a period of three months. Only under those circumstances, the petitioner was constrained to file this petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator within a period of three months from the date of the interim injunction order granted in his favour from invocation of Bank Guarantee;

e)The second respondent has not replied to the petitioner immediately on receipt of the Communication from the petitioner dated 01.10.2022 seeking for appointment of a Conciliator. Hence, this Court is of the view that the petitioner, having the benefit of an order of interim injunction against the respondents from invoking the Bank Guarantee, was right in approaching this Court under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator. Since Arbitration will have to be initiated within a period of three months from the date when the petitioner had obtained an



order of interim injunction in his favour under Section 9 of the Arbitration and Conciliation Act, it cannot be construed to be premature as contended by the learned Special Government Pleader for the respondents. Admittedly, there is a valid arbitration agreement between the parties, contained in Article 26 of the Contract, which is extracted hereunder:

'In the event of any Dispute between the parties, either party may call upon the Authority's Engineer, or such other person as the parties may mutually agree upon (the 'Conciliator') to mediate and assist the parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either party may require such dispute to be referred to the Chief Engineer (NH) Chennai of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the dispute. If such meeting does not take place within the 30 (thirty) business day period or the dispute is not amicably settled within 30 (thirty) days of the meeting or the dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the parties, either party may refer the dispute to arbitration in



accordance with the provisions of Clause 26.3 but before resorting to such arbitration, the parties agree to explore conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments. In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the conciliators would authenticate the same. Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. In case of failure of the conciliation process even at the level of the Conciliation Committee, either party may refer the dispute to arbitration in accordance with the provisions of Clause 26.3.'

7.In fact, under Section 77 of the Arbitration and Conciliation Act, 1996, even during the Conciliation Proceedings, a party to the dispute may initiate arbitral or judicial proceedings, where in his opinion, such proceedings are necessary for preserving his rights. Section 77 of the Arbitration and Conciliation Act is extracted hereunder:

'77. Resort to arbitral or judicial proceedings.—The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that



is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.'

8.In the instant case, though the dispute resolution mechanism provided under Article 26 of the Contract talks of conciliation proceedings, it is not mandatory in nature, but is only directory. Having not appointed a Conciliator despite the petitioner having made a specific request for the same, the respondents are estopped from contending that the petitioner has not followed the dispute resolution mechanism by initiating conciliation proceedings as per Article 26 of the Contract. Further the petitioner, having obtained an order of interim injunction from the District Court restraining the respondents from invoking the Bank Guarantee, has no option left, but to file this petition under Section 11 of the Arbitration and Conciliation Act as any delay beyond the period of three months from the date when the petitioner had obtained an interim injunction order from the District Court, Madurai from invoking the Bank Guarantee may result in the interim injunction order getting vacated. Necessarily the petitioner, who is having



Arb.O.P.(Com.Div.) No.50 of 2023

the benefit of an interim order, will have to initiate Arbitration as per

Section 9(2) of the Arbitration and Conciliation Act.

9.For the foregoing reasons, this Arbitration Original Petition is allowed as prayed for by issuing the following directions:

(a)This Court appoints the Hon'ble Mr.Justice V.Parthiban, No.5069, 12th Street, Z Block, Anna Nagar, Chennai - 600 040, Mobile No. 9444094401, Former Judge of this Court as a Sole Arbitrator to adjudicate the dispute between the petitioner and the respondents arising out of the agreement for Works CR.Agreement No.20/2020-2021 dated 11.12.2020.

(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



Arb.O.P.(Com.Div.) No.50 of 2023

provisions of the Arbitration and Conciliation Act, 1996 and shall complete the arbitration within the specified time as prescribed under the said Act.

11.07.2023

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Index:Yes/No

Speaking/Non-speaking orders



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Arb.O.P.(Com.Div.) No.50 of 2023

ABDUL QUDDHOSE, J.

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Arb.O.P.(Com.Div).No.50 of 2023

11.07.2023