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P.T. ASHA, J,

A.No.992 of 2023
in
C.S.No.1424 of 1995

This application has been filed by the applicant/1st defendant invoking the provisions of Section 8 of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration on the ground that the genesis of the suit is the Articles of Agreement (hereinafter referred to as "Agreement") executed between the applicant/1st defendant and the respondent/plaintiff in the month of May 1974 relating to the widening and strengthening of pavements in 9 reaches of the National Highway No.7 Madurai, Kanyakumari Road from reaches 37/6 Kilometres to 146/4 Kilometers. Separate agreements have been entered into in respect of each of the reaches.

2. The applicant/1st defendant would submit that as per the terms of the Clause P.S.111 of the Agreement, any dispute between the parties were to be referred to arbitration. The applicant/1st defendant would further submit that during the pendency of the work, disputes arose between the parties which was referred to



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arbitration and ultimately an award came to be passed on 07.06.1977 by the Superintending Engineer National Highways against the applicant. This award was challenged by the applicant/1st defendant before the Subordinate Judge, Tirunelveli, where the appeal was dismissed and the award of the Arbitrator was confirmed. The subsequent appeals filed by the applicant/1st defendant right up to the Hon'ble Supreme Court were dismissed and the award attained finality.

3. Meanwhile, the respondent/plaintiff sought to terminate the contract on 07.09.1981 and attempted to enforce the bank guarantees. The 1st respondent/plaintiff had issued a suit notice on 22.09.1981 raising certain claims. The applicant/1st defendant had replied to the said notice vide letter dated 04.12.1981 contending that the termination was illegal and that that the dispute should be referred to arbitration.

4. The applicant/1st defendant thereafter filed O.P.No.9 of



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1990 under section 20 of the Arbitration and Conciliation Act, 1940

seeking a direction for appointment of an Arbitrator. The

respondent/plaintiff submitted their objection to the said application.

However, the Principal Subordinate Judge, Madurai was pleased

allow the petition and appointed one Mr.K.Ganesan as the

Arbitrator. The respondent/plaintiff challenged this order in

CMA.No.1371 of 1994 before this Court stating that the proceedings

were hit by the principles of *res judicata*. Ultimately the Court had

dismissed the appeal. This Court had also held that the cause of

action in the first award dated 07.06.1977 and the cause of action in

O.P.No.9 of 1990 are totally different and distinct. The

respondent/plaintiff has not chosen to challenge the order passed in

CMA No.1371 of 1977 and the same has attained finality.

5. While so, ignoring the pendency of these proceedings for arbitration, the plaintiff/respondent has instituted the present suit for recovery of certain amounts all of which emanate from the Agreement.

6. The applicant/1st defendant would submit that pursuant to



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the orders passed in CMA.No.1371 of 1977, the Arbitrator Mr.K.Ganesan did not enter reference and pending the proceedings he passed away. Therefore, the applicant had filed I.A.No.622 of 2005 in O.P.No.9 of 1990 for appointment of another Arbitrator. The respondent/plaintiff herein had filed a memo setting out the names of three persons from amongst their panel of Arbitrators. The applicant agreed to the 2nd name given therein i.e. Mr.M.Venkatesan, Chief Engineer (Retired) as the Arbitrator. Accordingly, the Principal Subordinate Judge, Madurai by order dated 20.11.2006 was pleased to appoint Mr. M.Venkatesan Chief Engineer(Retired) as the Arbitrator. Once again, the applicant/1st defendant had been requesting the Arbitrator to enter reference and proceed with the arbitration and the applicant/1st respondent had also personally contacted the Arbitrator and requested him to enter reference. However, the said gentleman was not in a position to enter reference as he was unwell for a considerable period of time and had ultimately passed away on 24.03.2017.

7. The applicant/1st defendant once again filed an application



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to appoint an Arbitrator, however, the application could not be numbered as the back bundles relating to O.P.No.9 of 1990 had been misplaced and the Registry were unable to trace the missing bundle.

8. The applicant/1st defendant would submit that though the respondent/plaintiff had filed the present suit, they had not taken any steps to list the same before the Court. Meanwhile, the Covid 19 lockdown had taken place. Ultimately, the applicant/1st defendant had obtained orders for re-constructing the bundle in CRP(MD).No.1284 of 2019. The application for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 was numbered as I.A.No.429 of 2022 and between July 2022 to December 2022, the respondent/plaintiff had sought several adjournments for filing their counter.

9. Meanwhile, the Commercial Courts jurisdiction of the Hon'ble High Court was determined under the Commercial Court Act, 2015 and all commercial suits of a specified value was directed to be listed before the Commercial Court. Meanwhile, the



applicant/1st defendant would submit that they were directed to take out an application under Section 8 of the Arbitration and Conciliation Act by this Court in the instant suit and accordingly, in February 2023, the present application was filed and numbered. It appears that I.A.No.429 of 2022 was dismissed for default on 31.07.2023.

10. The learned counsel appearing for the applicant/1st defendant would submit that the plaintiff/respondent has filed an application to restore the I.A. which was dismissed for default. The chronology set out above has not been disputed by the respondent/plaintiff. However, the respondent/plaintiff would oppose the petition under Section 8 of the Arbitration and Conciliation Act, on the ground that a reading of the provisions of Section 8 would state that a petition under Section 8 has to be taken before the filing of the 1st statement of defense. Therefore, it is his further contention that with the coming into effect of the Commercial Court Act, the timeline for filing the written statement was 30 days extendable by a further period of 90 days from the date



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of receipt of the summons. Therefore, since the written statement has not been filed on the 120th day, the defendant has forfeited its right to file the Written Statement.

11. He would rely upon the Judgment of the Division Bench of the Delhi High Court reported in **2022 SCC OnLine Del 1914 – SPML Infra Ltd Vs. Trisquare Switchgears Pvt. Ltd.** and he would draw the attention of the Court to para. No.25 in support of his contention that failure to file the written statement within the given time frame would also result in the defendant being unable to file the application under Section 8 of the Arbitration and Conciliation Act, 1996.

12. Heard the learned counsels.

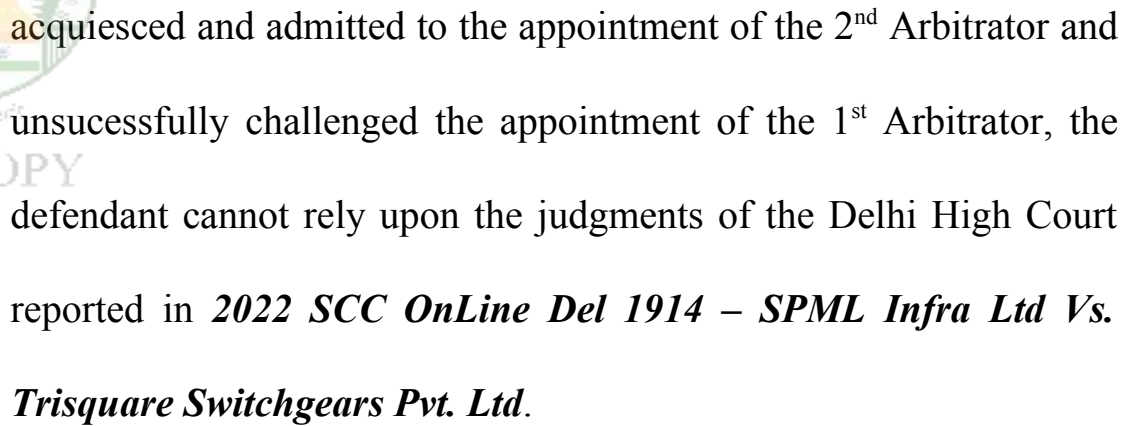
13. Unlike, in the case before the High Court of Delhi cited supra, in the instant case, the respondent/plaintiff has actively participated in the earlier proceedings seeking to appoint an Arbitrator. In the first instance, the plaintiff had challenged the



appointment of the Arbitrator Mr.K.Ganeshan but later they had not challenged the appointment of the 2nd Arbitrator Mr.Venkatesan.

Admittedly, the entire cause of action for the suit originates from the Agreement which contains the arbitral clause. The list of dates which have been given by the applicant/1st defendant would clearly show that it is only in the year 2017 that the 2nd Arbitrator had passed away and thereafter, on coming to know about the same, they have filed I.A.Dr.No.18563 of 2018 to appoint a substitute Arbitrator. At this juncture, the bundle relating to the Section 11 petition had gone missing and was ultimately re-constructed only pursuant to the orders of this Court in CRP(MD).No.1284 of 2019. The Section 11 application which was subsequently numbered as I.A.No.429 of 2022 had been dismissed for default on 31.07.2023 and the plaintiff has immediately taken steps to set aside the dismissal order.

14. Therefore, considering the fact that there is an arbitral agreement between the parties to resolve their disputes and taking into account the two earlier rounds where the plaintiff has



15. Therefore, the application is allowed, parties are directed to resolve their disputes through arbitration. Both the counsels on instruction have consented to the appointment of **Mr. Justice V. Parthiban (Retd), as an Arbitrator. Address:- 5069, Z Block, 12th Street, Anna Nagar West, Chennai – 600040. Ph.No:- 9444094401 and 9841067721.**

16. The counsel for the applicant had expressed an apprehension that the subject matter is too technical and it may be a little difficult for a learned Judge to follow the technical jargon. Therefore, this Court leaves it open to the learned Arbitrator to seek technical advice if required. If the learned Arbitrator requires the assistance, he can take the assistance of a retired Engineer of the



Highway Department.

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