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Arb.O.P. (Com.Div.) No.429 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.429 of 2023

Poonam Enterprise
Represented by its Proprietor,
Mr.Ravindra Poonamchand Angara,
No.17/A, Kanti Bhavan, C.P.Tank Road,
1st Parsiwada Lance,
Mumbai – 400 004.
(Present office Address is :
UG-17, Sukh Sagar Premises Co-Op Soc.Ltd.,
NS Patkar Marg, Mumbai – 400 007)

.. Petitioner

Vs.

1.Larsen & Toubro Limited,
Head Quarters office at :
Mount Poonamalee Road,
Manapakkam,
P.B.No.979, Chennai – 600 089.

2.Larsen & Toubro Limited,
Registered office at :
L & T House, N.M.Marg,
Bellard Estate,
Mumbai – 400 001.

3.Larsen & Toubro Limited,
Project office at :
Water & Effluent Treatment Project,
No.50, 1/1, Jetewana Road,
Colombo – 01400,
Sri Lanka.

.. Respondents



Prayer: Original Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, praying to appoint Arbitrator to decide the dispute between the Petitioner and the Respondents in accordance with law.

For Petitioner : Mr.K.Jayachandran

For Respondents : Mr.Anirudh Krishnan

ORDER

This petition has been filed for appointment of an Arbitrator to decide the dispute between the Petitioner and the Respondents in accordance with law.

2. The proceedings presides a notice from the petitioner on 20.08.2021 asking the respondents to consent for appointment of an Arbitrator to which the respondents have replied on 31.08.2021, wherein, it has been stated as follows:

“It is very clear that if there is any dispute between the parties, the dispute shall be resolved by amicable settlement first as per Clause 28.1, failing which arbitration can be invoked to resolve the dispute. In view of the reasons stated above, your invocation of arbitration agreement is pre-mature, and your client has failed to fulfil the prerequisite before referring the dispute to Arbitration as per Clause 28.1.2 of Terms and Conditions.



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2. We are not in position to accept request made by you in your Paragraph No.2. As first stage to Dispute Resolution is amicable settlement as per Clause 28.1 which is not yet fulfilled. We request you to advise your client to adhere to dispute resolution as per agreed Terms and Conditions.”

3. Relevant Clause for resolution of dispute through Arbitration reads as under:-

“28.Dispute Resolution

28.1 Amicable Settlement

If any dispute of any kind whatsoever shall arise between the Purchaser and the Supplier, in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity, termination or execution, during term of the Contract, and whether before or after the termination, abandonment or breach of the Contract (“Dispute”), the parties shall seek to resolve the dispute in good faith by mutual consultation. **If the parties fail to resolve the dispute by mutual consultation within [(30 thirty days)] after notice of the Dispute by one party to the other party then the provisions of Clause 28.2 (Arbitration) shall apply.**

4. The learned counsel for the respondent would submit that the invocation of Arbitration Clause itself was pre-mature and therefore it cannot be construed that there was invocation of Arbitration Clause for the purpose of Section 21 of the Arbitration and Conciliation Act, 1996.



5. That apart, the learned counsel for the respondent would draw attention to the following decisions of the Courts.

- (i) ***Sushil Kumar Bhardwaj Vs. Union of India*** [(2009) SCC Online Del 4355];
- (ii) ***Tulip Hotels Private Limited, Mumbai and another Vs. Trade Wings Limited, Mumbai and others*** [(2009) SCC Online Bom 1222];
- (iii) ***M/s.Halidram Manufacturing Company Private Limited Vs. M/s.DLF Commercial Complexes Limited*** [(2012) SCC Online Del 2139];
- (iv) ***Simpark Infrastructure Private Limited Vs. Jaipur Municipal Corporation*** (Manu/RH/1010/2012);
- (v) ***Ved Prakash Mithal and Sons Vs. DDA and another*** [(2018) SCC Online Del 9884] and
- (vi) ***M.Rajkumar Vs. The Superintending Engineer and another*** in Arb.O.P.(Com.Div)No.50 of 2023.

It is further submitted that the expression used in the agreement is “shall”. It is therefore submitted that unless and until there was an attempt to resolve the dispute through amicable settlement as is contemplated under Clause 28.1 of the Agreement, the question of invoking the Arbitration Clause under Section 28(2) cannot be countenanced.

6. The learned counsel for the respondent has also drawn attention to the views of the Author in Russell on Arbitration Twenty-Third Edition. A reference was made to the following passage from Twenty-



Third Edition of Russell on Arbitration in Paragraph No.2.036 reads as

under:-

“2.036 Multi-tier Clauses:

Many contracts containing arbitration clauses also pro-vide for the parties first to try to settle the matter by negotiation or discussion between senior executives and, if that fails, the dispute must be referred to mediation or some other ADR process. Only when these steps have failed is the matter to be referred to arbitration. This type of clause, which contemplates at least two different levels of dispute resolution procedure, is known as multi-tier or multi-level clause. Depending on the form of words used, these clauses may or may not give rise to a binding obligation to submit to the different forms of dispute resolution before starting an arbitration, but an obligation simply to negotiate is not binding. Where such preliminary steps are expressed in mandatory terms so as to constitute a condition precedent to the right to arbitrate they must be complied with. In many cases however they will not be mandatory and it is then possible for the claimant to commence arbitration even without complying with them. When drafting a multi-tier clause it is important to set out time limits within which each stage of the process is to be completed, so that the parties can be certain about when they can proceed to the next level. In some cases the decisions made during the initial steps are binding on the parties, at lease until a court or tribunal rules on the point. An application can be made for a stay of court proceedings brought in breach of an agreement to arbitrate even where the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures, which includes both binding and non-binding systems.”



7. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

8. As per Clause 28.1, the parties have to resolve the dispute in good faith by mutual consultation. The petitioner had issue a legal notice on 02.06.2021, which was replied back by the respondents on 20.07.2021, wherein, the respondents have stated that the demand notice of the petitioner issued through legal notice dated 19.12.2019 was unacceptable. Thereafter, the petitioner has issued a second notice on 20.08.2021, whereby, the petitioner has invoked the Arbitration Clause 28.2.

9. Once the dispute has arisen it was incumbent on the part of both the parties to resolve the dispute through Clause 28.1. Neither the petitioner nor the respondents have taken steps to resolve the dispute between them within a period of 30 days. After the expiry of notice period, the dispute are to be referred in terms of Clause 28.1.

10. The respondents have merely replied on 31.08.2021 stating that the question of appointment of an Arbitrator cannot be contemplated. This Arbitration Original Petition has been filed by the petitioner on 03.03.2023 and admitted on 01.09.2023. Despite lapse of more than two



years, the respondents have not taken any steps to resolve the dispute in good faith by mutual consultation in terms of Clause 28.1. Thus, the respondents have forfeited the rights under Clause 28.2.

11. Considering the above, Court is inclined to pass the following order:-

(i) **Mr.M.Aravind Subramaniam, Senior Advocate, (Cell No.9840037677) having Office at Caithness Hall, 2nd floor, Old No.157, New No.323, Linghi Chetty Street, Chennai – 600 015,** is appointed as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties.

(ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.



(iii) The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remains *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

12. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.

13. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

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C.SARAVANAN, J.

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