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Arb.O.P.(Comm.Div.)No.182 of 2023



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.06.2023

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The Honourable Mr.Justice KRISHNAN RAMASAMY

Arb.O.P.(Comm.Div.) No.182 of 2023

M/s.Cornerstone Constructions Limited,
M22, 10th Street, M Block,
Anna Nagar East, Chennai – 600 102,
Represented by its Managing Director, Mr.Anto George

...Petitioner

Versus

Central Institute of Plastics Engineering & Technology,
CIPET, Industrial Estate,
Guindy, Chennai – 600 032.
Represented by its Director General

...Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the following reliefs:

(i) To appoint an Arbitrator to adjudicate the disputes between the petitioner and the respondent in terms of the Arbitral Agreement contained in General Conditions of Contract forming part of Articles of Agreement dated 21.03.2014 and

(ii) To direct the respondent to pay the costs.

For Petitioner : Mr.Navod Prasannan

For Respondent : Mr.C.Kulanthaivel,
Senior Panel Counsel



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ORDER

The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') praying to appoint an Arbitrator to adjudicate the dispute arisen between the petitioner and the respondent in terms of the Arbitral Agreement contained in General Conditions of Contract forming part of Articles of Agreement dated 21.03.2014

2. The learned counsel for the petitioner submitted that pursuant to tenders invited by the respondent for the purpose of construction of Boys Hostel (G+8 Floors) intended for the Institute of Petrochemicals Technology at a total estimated cost of Rs.22 Crores, the petitioner firm submitted its sealed tender. Since the petitioner was the first lowest bidder, the Deputy Director of the respondent issued a Work Order dated 07.02.2014 for a sum of Rs.20,74,14,174/- to the petitioner. Thereafter, the petitioner and the respondent entered into an Agreement dated 21.03.2014 for the construction of Boys Hostel. The petitioner had also received an



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Additional Work Order for Rs.1,24,30,496/- with the existing terms and conditions as per the previous work order taking the total value of the project to Rs.21,90,69,987/-. The agreed time period for completing the project work is till August 2015. Due to the delay caused by the respondent, the petitioner was not able to complete the project work by August 2015. The petitioner sent representations dated 18.01.2016 & 15.05.2017 respectively to the respondent, claiming escalation costs for the remaining works. Thereafter, the respondent had issued a Work Order dated 13.06.2017 to the petitioner, for construction of Fire Protection, UG Sump etc., for a sum of Rs.1,24,30,496/-, for which, the petitioner vide Reply dated 07.07.2017, clarified that since the Work Order dated 13.06.2017 was issued after a period of three years, the work can be done only as per current escalated rates and not at the rates given in 2014. Then, the petitioner sent a representation dated 27.01.2020 to the respondent, clarifying the reasons for delay in completing the project work. The petitioner completed the project work on 06.07.2020 and submitted the final RA bill to the respondent. Then, the petitioner made a total escalation claim of Rs.10,46,60,171/-, but, the respondent has not made any payments towards the claim made by the petitioner.



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2.1. All the RA bills submitted by the petitioner were verified, measured and certified by M/s.Pithavadian and Partners who are the Architects authorized under the articles of aforesaid Agreement. Though the petitioner as well as the said M/s.Pithavadian and Partners made several representations to the respondent explaining all the clarifications raised regarding the escalation claims, retention money and the completion date, the respondent did not come forward to make any payments.

2.2. The petitioner made several representations to the respondent to settle the entire claim, however, the respondent has denied the requests of petitioner by citing reasons such as lack of funds and awaiting decision of the CIPET Head Office's Competent Authority. As on date, the total outstanding amount payable by the respondent is Rs.12,56,22,000/- inclusive of interest i.e., Rs.3,03,882.58/-.

2.3. The learned counsel further submitted that as per Clause 71 of General Conditions of Contract, if any dispute arises between the parties in relation to the Agreement dated 21.03.2014, the same shall be resolved by a Sole Arbitrator as per the provisions of the Act. For better appreciation,



Clause 71 of General Conditions of Contract is extracted hereunder:

“71.1. SETTLEMENT OF DISPUTES ARBITRATION

All disputes or difference of any kind whatsoever arising out of or in connection with the Contract, whether during the progress of work/service or after its completion and whether before or after the determination of the Contract, shall be referred by the Contractor to the EMPLOYER and the EMPLOYER shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions directions, classifications, measurements, drawings and certificates with respect to any matter, decision of which is specially provided for by these conditions given and made by the EMPLOYER, are matters which are referred to hereinafter as 'Excepted Matters, and shall be final and binding on the Contractor, and shall not be set aside or attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without appeal.

If the Contractor be dissatisfied with the decision of the EMPLOYER on any matter or question, dispute or difference on any account or as to the withholding by the Employer of any certificate to which the Contractor may claim to be entitled, or if the Employer fails to make a decision within a reasonable time then and in any such case, but except in any of the excepted matters referred to above, the Contractor may within a reasonable time but not exceeding 30 days of the receipt of communication of such decision take steps to refer the matter in question, dispute or difference to arbitration as herein under provided.



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71.2. *The demand for arbitration by the Contractor shall specify the matters which are in question, dispute or difference, only such dispute or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.*

71.3. *If the Contractor does not make his final claims in writing within a period of sixty (60) days of receiving the intimation from employer that the final bill is ready for payment, he will be deemed to have waived his claim(s) and the Employer shall be discharged and released for all liabilities under the Contract in respect of these claims.*

71.4.1. *Matters in question, dispute or difference between the parties (whatever relating to the Contractor's claim against the Employer or vice versa) to be arbitrated upon shall be referred for decision to:*

In respect of sub-clauses with private Contractors:

71.4.2. *The sole arbitrator is the Director General of CIPET and if the Director General is unable or unwilling to act as such, then the matter shall be referred to sole arbitrator of such other person appointed by the Director General of CIPET willing to act as such Arbitrator. There will be no objection, if the Arbitrator, so appointed is unable to act for any reasons, Director General of CIPET in the event of such inability shall appoint another person to act as Arbitrator in accordance with the terms of the Sub-Contract. Such person shall be entitled to proceed with the reference from the state at which it as left by his predecessor. It is also a term of this Contract that no person other than a person appointed by Director*



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General, CIPET as aforesaid should act as Arbitrator.

Subject as aforesaid the provision of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this cause.

***CONTRACTORS WITH PUBLIC SECTOR UNDERTAKING
AND GOVT. DEPARTMENT***

71.5.1. The arbitration or one of the Arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in charge of the Bureau of Public Enterprises. The Indian Arbitration and Conciliation Act, 1996, shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however any party aggrieved by such award not have a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary / Additional Secretary when so authorized by the law secretary, whose decision shall bind the parties finally and exclusively. The parties to him dispute will share equally the cost of arbitration as intimated by the Arbitrator.

71.5.2. It is a term of the Sub-Contract that the party seeking arbitration shall specify the dispute to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute(s). The Arbitrator may from time to



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time with the consent of the parties enlarge the time for making and publishing the award. The work under the Sub-Contract shall nevertheless continue during the arbitration proceedings. The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The Arbitrator shall give a separate reasoned award in respect of each reference referred to.

71.6.1 The award of the Arbitrator shall be final, conclusive and binding on all parties to this Contract.

71.6.2. The venue for Arbitration will be at Chennai.

71.7. PROGRESS OF WORK NOT TO BE INTERRUPTED

The Contractor must at all time fulfill his obligations under the Contract and shall not slow down or stop the progress of works during the period any dispute is under settlement either through reference to the EMPLOYER or through Arbitration, pursuant to the last proceeding sub clause, even if the works to be carried out during such period involves matters under dispute. Failure of the Contractor in this respect shall constitute a Default on his part and render him liable to action under the provisions of the Clause 67 thereof.”

Hence, the petitioner sent a Notice dated 07.03.2023 to the respondent, proposing the names of five Retired Judges of this Court viz.,

(i) Hon'ble (Retired) Mr.Justice Thottathil B.Radhakrishnan

(ii) Hon'ble (Retired) Mr.Justice Vineet Kothari



(iii) Hon'ble (Retired) Mr.Justice V.Parthiban

(iv) Hon'ble (Retired) Mr.Justice K.Venkataraman

(v) Hon'ble (Retired) Mr.Justice Kannan Krishnamoorthy

for the purpose of mutually appointing any one of them as Sole Arbitrator to adjudicate the disputes between the parties. However, even after the receipt of said notice, there was no response from the respondent. Therefore, left with no other alternative, the petitioner has filed the present petition before this Court.

3. The learned Senior Panel Counsel appearing for the respondent contended that the petitioner is not entitled to escalation charges since there is a specific clause under the Articles of Agreement dated 21.03.2014 that “The price shall remain firm and fixed till the completion of the work and no escalation whatsoever will be permissible on any account” as mentioned under Sub-Clause No.51.0 (Firm Price) of Point No.11 (Special Conditions of Contract) in the Tender Document is a part of the Clause No.4 (All the terms and conditions of the Tender) under Schedule – III of Articles of Agreement dated 21.03.2014. He further contended that the respondent sent an e-mail dated 30.01.2018 to the petitioner, stating that there is no cost



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escalation clauses and rates are fixed for the contract period and works are to be completed as per BOQ and agreement, without delay. Then, the respondent vide Letter dated 08.12.2022, rejected the escalation claim of petitioner.

3.1. The learned Senior Panel Counsel brought to the notice of this Court that in reply to the Section 21 Notice dated 07.03.2023 issued by the petitioner, the respondent sent its Reply vide e-mail dated 06.04.2023 to the petitioner, wherein, it has been stated that the list of 5 nominees proposed by the petitioner is not acceptable and hence, the respondent proposes the names of following three empaneled arbitrators viz.,

- (i) Dr.Natarajan, CPWD empaneled arbitrator
- (ii) Mr.R.Subramanian, CPWD empaneled arbitrator
- (iii) Mr.A.Manickavasagam, IITA empaneled arbitrator

and one of whom, shall be mutually nominated to be appointed as an Arbitrator since the said three empaneled arbitrators are Techno-Commercial persons and they are well versed in Civil Constructions/Escalation matters.



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3.2. Further, it is to be noted that Section 21 Notice dated 07.03.2023 issued by the petitioner was received by the respondent on 08.03.2023 and immediately thereafter, on 24.03.2023, the petitioner has filed this petition before this Court, which clearly shows that the petitioner has rushed to this Court without even giving sufficient time of atleast 30 days to the respondent. Hence, the present petition is liable to be dismissed.

4. Heard the learned counsel on either side and perused materials placed before this Court.

5. So far as this case is concerned, the petitioner and the respondent have entered into an Agreement dated 21.03.2014, for construction of Boys Hostel. As per the said Agreement, the project work was to be completed within a period of 18 months i.e., by August 2015, but, due to the delay caused by the respondent, the petitioner was unable to complete the work within the stipulated time. Hence, the petitioner claimed escalation costs for all the works for the extended time period until the completion of work. The petitioner completed the project work on 06.07.2020 and submitted the RA bills to the respondent for receiving the payment. However, the



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respondent has not release any payments to the petitioner. Though the petitioner repeatedly requested the respondent to settle its escalation claim, the respondent did not come forward to settle the same. Hence, the petitioner has issued Section 21 Notice to the respondent, proposing the names of 5 Retired Judges of this Court for the purpose of appointing any one of them as Sole Arbitrator to adjudicate the dispute between the parties, for which, the respondent vide its Reply dated 06.04.2023 suggested the names of three empaneled arbitrators for the purpose of mutually nominating any one of them to be appointed as Arbitrator. Hence, the petitioner is before this Court.

6. Upon perusing the materials and hearing the submissions made by the learned counsel on either side, it is crystal clear that the dispute between the petitioner and the respondent has arisen out of the Agreement dated 21.03.2014 and the same is arbitrable as per Clause 71 of General Conditions of Contract agreed between the parties. Hence, this Court feels that it would be appropriate to appoint a legal expert to adjudicate the dispute between the parties. Accordingly, this Court is inclined to pass the following order:



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(i) **The Hon'ble Dr.Justice Vineet Kothari, Former Acting Chief Justice, Madras High Court and Gujarat High Court, No.947, 11th D Road, Sardarpura, Jodhpur, Rajasthan – 342 003, Mobile No.9480822552** is appointed as the Arbitrator to enter upon reference and adjudicate the dispute *inter se* the parties.

(ii) The venue of arbitration shall be at Chennai, India.

(iii) The mode of arbitration shall be video conferencing or physical hearing as may be fixed by the learned arbitrator in his sole discretion.

(iv) The learned Arbitrator shall pass award within a period of six months from the date of receipt of a copy of this order, only after issuing notice to the parties and hearing them.

(v) The parties shall pay fees and other incidental charges to the learned Arbitrator fixed by him, equally.

(vi) In the event of non-appearance of the respondent before the learned Arbitrator, petitioner shall pay the entire remuneration and other expenses at first instance and thereafter, petitioner can recover the same directly from the respondent.



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7. Accordingly, this petition is ordered. The parties shall bear their own costs. Since this Court has appointed the 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.

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Index : Yes/No

Speaking Order (or) Non-Speaking Order

Note to Registry: Issue order copy on 17.07.2023



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KRISHNAN RAMASAMY, J.

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