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ARB. O.P.(Com. Div) No.298 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.298 of 2023**

**and**

**Arb. Application No.184 of 2023,**

**O.A. No.293 of 2023 and A. No.2851 of 2023**

Ringfeder Power Transmission India Private Ltd.,  
Represented by its Managing Director  
Mr.Dheepan Ramalingam  
No.4, Mount Poonamallee Road,  
Kattupakkam,  
Chennai – 600 056.

...

Petitioner

vs.

Rajesh Mootha  
No.555, MKN Road,  
Alandur,  
Chennai – 600 016.

...

Respondent

**Prayer :** Arbitration Original Petition (Commercial Division) filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to adjudicate the dispute between the petitioner and the respondent in terms of the Agreement dated 29.04.2021 and to direct the respondents to pay costs.

|                |   |                                   |
|----------------|---|-----------------------------------|
| For Petitioner | : | Mr.C. Suraj                       |
| For Respondent | : | Mr.Anish Gopi                     |
|                |   | for M/s.P.B. Ramanujam Associates |



**ORDER**

Arbitration O.P. (Comm. Div.) No.298 of 2023 has been filed by the petitioner seeking for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

2. There seems to be a dispute between the petitioner and the respondent under a Built Suit Facility Agreement dated 29.04.2021. Under the aforesaid agreement, the respondent has agreed to construct a building and thereafter on completion hand over possession of the same and grant sub lease in favour of the petitioner for a specified period. Advance payments have been made by the petitioner to the respondent under the Built Suit Facility Agreement dated 29.04.2021.

3. According to the petitioner, the respondent has committed breach of contract by not adhering to the terms and conditions of the Built Suit Facility Agreement dated 29.04.2021. There is an arbitration agreement in the Built Suit Facility Agreement dated 29.04.2021 which is extracted hereunder :

***12. GOVERNING LAW AND ARBITRATION :***

***12.1 Governing Law : This Agreement is governed by and shall be construed in accordance with the laws of the Republic of India.***

***12.2 Dispute Resolution : The non-defaulting party may give written notice of the Dispute to the defaulting party on the occurrence of the Event of Default as provided under Clause 7(a), (b), (e), (f), (g), (h), (i), (j) & (k) of this Agreement which gives rise to such dispute or on the day such event comes to the notice of the applicable Party. If any dispute arising between the Parties***



*are not amicably settled within (7) seven days of commencement of attempts to settle the dispute, the Dispute shall be referred to and be finally adjudicated by Arbitration. For sake of clarity, the parties agree that the seven days period herein provided runs simultaneously along with the seven days exercise their right under Clause 8(a) & Clause 8(c) of this Agreement.*

*12.3 Arbitration : The Parties agree that the Seat of Arbitration proceedings will be Chennai in the English language in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as it then would be prevalent by a Sole arbitrator mutually appointed by the Parties. The decision of the sole arbitrator shall be final and binding on the Parties.*

4. The petitioner seeks for refund of the advance amount together with interest and damages from the respondent for the alleged breach of contract committed by the respondent under the Built Suit Facility Agreement dated 29.04.2021. The petitioner had sent a termination notice on 24.02.2023 to the respondent terminating the contract i.e., Built Suit Facility Agreement dated 29.04.2021. The petitioner has also appointed an Arbitrator and has initiated arbitration by invoking the Arbitration Clause available in the Built Suit Facility Agreement dated 29.04.2021 by sending a notice of invocation to the respondent on 29.03.2023. A reply dated 19.04.2023 has also been sent by the respondent to the petitioner denying the contentions of the petitioner. Thereafter, the petitioner had filed two applications under Section 9 of the



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Arbitration and Conciliation Act, 1996 viz., Arbitration Application No.184 of 2023 and O.A. No.293 of 2023.

5. Arbitration Application No.184 of 2023 was filed seeking for a direction to the respondent to furnish security by way of a Bank Guarantee to the extent of the advance amounts paid by the applicant and O.A. No.293 of 2023 was filed for an injunction to restrain the respondent from not putting up any further construction and from handing over possession of the property to a third party. The respondent had entered appearance in the said applications and they have filed an application in Application No.2851 of 2023 seeking for dismissal of Arbitration Application No.184 of 2023 filed by the applicant on the ground that the Arbitration Agreement, which the applicant relies upon is contained in an insufficiently stamped document. All the three applications are still pending consideration and is listed before this Court today. Subsequent to the filing of the aforesaid applications, Arbitration O.P. (Comm. Div.) No.298 of 2023 has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 by the applicant based on the Arbitration Agreement seeking for appointment of an Arbitrator by this Court.



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6. The learned counsel for the respondent in Arbitration O.P. (Comm. Div.) No.298 of 2023 would submit that the contentions of the respondent, which have been stated in Application No.2851 of 2023, wherein the respondent had filed an application to dismiss the application namely Arbitration Application No.184 of 2023 filed by the applicant under Section 9 of the Arbitration and Conciliation Act, 1996 can be treated as counter to the application filed by the applicant under Section 11 of the Arbitration and Conciliation Act, 1996 seeks for appointment of an Arbitrator by this Court.

7. The sum and substance of the dispute between the parties in this Section 11 application viz., Arbitration O.P. (Comm. Div.) No.298 of 2023 is whether the Built Suit Facility Agreement dated 29.04.2021 is an agreement which comes under the purview of Article 5(i) of Indian Stamp Act, 1899, which deals with an agreement relating to construction, or will it fall under the purview of Article 5(j) which deals with an agreement not specifically provided for under Article 5. The contention of the petitioner in this Section 11 application is that the agreement which the petitioner has entered into with the respondent is in the nature of an agreement to enter into a lease and therefore, Article 5(j) gets attracted and the stamp duty payable for the said Agreement is only Rs.20/-. According to the applicant, the Built Suit Facility Agreement



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dated 29.04.2021, has been sufficiently stamped in accordance with Article 5(j)

of the Indian Stamp Act, 1899 by affixing a stamp duty of Rs.20/-. However, according to the respondent, the Built Suit Facility Agreement dated 29.04.2021 is insufficiently stamped. According to the learned counsel for the respondent being an agreement relating to construction of a building, the stamp duty payable by the petitioner for the said agreement will fall within the purview of Article 5(i) of the Indian Stamp Act, 1899, which relates to construction of building. According to him, as per the said Article, the Stamp duty payable is Rupee one for every Rs.100/- or part thereof of the cost of the proposed construction or the value of the construction or the consideration specified in the agreement, whichever is higher.

8. The learned counsel for the petitioner relied upon relevant Clauses in the Built Suit Facility Agreement dated 29.04.2021, wherein an arbitration agreement is found. After relying upon the said Clauses, he would submit that the Built Suit Facility Agreement dated 29.04.2021 is only an agreement to enter into a future lease as the petitioner has not been put in possession of the property. The learned counsel for the petitioner also relied upon Section 17(2)(v) of the Registration Act, 1908 and would submit that since the Built Suit Facility Agreement dated 29.04.2021 merely creates a right for the



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petitioner to obtain another document in the nature of a sublease agreement

from the respondent, the question of payment of Stamp duty as per Article (5)(i) will not arise. He would also submit that as on date, the petitioner does not have any vested right over the super structure constructed by the respondent and therefore, the stamp duty payable by the petitioner under the Built Suit Facility Agreement dated 29.04.2021 is only under Article 5(j) of the Indian Stamp Act i.e., Rupees twenty only.

9. The learned counsel for the petitioner would also submit that the decision of the Hon'ble Supreme Court in the case of ***N.N.Global Mercantile Private Ltd., vs. Indo Unique Flame Ltd. And others reported in 2023 SCC Online SC 495*** has no applicability to the facts of the instant case. He would submit that in the aforesaid decision of the Hon'ble Supreme Court, it has been made clear that the said decision was pronounced by the Hon'ble Supreme Court not with reference to an application under Section 9 of the Arbitration and Conciliation Act, 1996. He would also submit that the facts of the case in the decision of the Hon'ble Supreme Court referred to supra are totally different from the facts of the instant case. According to the learned counsel for the petitioner, since the petitioner was not put in possession and does not have any vested right as on date over the constructed portion of the building nor over the



land, the decision of the Hon'ble Supreme Court referred to supra has no applicability to the facts of the instant case. In support of his stand that only in cases where it is evident that possession, right or title is passed on to the applicant under the agreement, the question of payment of Stamp duty under Article 5(i) may arise. He relied upon a judgment of the Hon'ble Supreme Court in the case of *Food Corporation of India and others vs. Babulal Agrawal reported in 2004 2 SCC 712*. He would submit that in the said judgment, it has been made clear that only in cases, where under an agreement a person has been put in possession and a right or title has been created in his favour at the time of the agreement, the document requires to be stamped as per Article 5(i) of the Stamp Act and is admissible in evidence.

10. Learned counsel for the petitioner would submit that in the case on hand, under the Built Suit Facility Agreement dated 29.04.2021, it has been made clear that it is in the nature of an agreement to enter into a lease as the sublease agreement will be entered into between the parties only after the due performance of the Built Suit Facility Agreement dated 29.04.2021 by the respondent. He would submit that being in the nature of an agreement to enter into a lease, it is only an executory agreement and not an agreement creating rights in the immovable property in favour of the petitioner and therefore, the requirement to pay Stamp Duty as per Article 5(i) will not arise.



11. Per contra, learned counsel appearing for the respondent would reiterate the contents of the application filed by the respondent seeking for dismissal of Section 9 applications filed by the applicant by stating that the Built Suit Facility Agreement dated 29.04.2021 is in the nature of an agreement for construction and therefore, the stamp duty payable will fall under the purview of Article 5(i) of the Indian Stamp Act, 1899 and not under Article 5(j). He also drew the attention of this Court to the decision of the Hon'ble Supreme Court in the case of case of *N.N.Global Mercantile Private Ltd., vs. Indo Unique Flame Ltd. And others reported in 2023 SCC Online SC 495* referred to supra. In particular, he referred to paragraphs 117, 118, 120 of the said judgment. He would submit that as seen from the aforesaid decision of the Hon'ble Supreme Court, an instrument, which is exigible to stamp duty, which contains an Arbitration Clause and which is insufficiently stamped, cannot be said to be a contract within the meaning of Section 2(h) of the Contract Act and enforceable as per Section 2(g) of the Contract Act. He would further submit that as seen from the aforesaid decision of the Hon'ble Supreme Court an arbitration agreement in an unstamped instrument, when it is mandatorily required to be stamped is not an enforceable arbitration agreement.

12. Relying upon the aforesaid decision of the Hon'ble Supreme Court, the learned counsel for the respondent would submit that the Built Suit



### Discussion :

13. As seen from the terms and conditions of the Built Suit Facility Agreement dated 29.04.2021 entered into between the petitioner and the respondent it is in the nature of an agreement to enter into a lease. The petitioner has agreed to enter upon the property which has been allotted to the respondent by SIPCOT on completion of the construction by the respondent as per the Built Suit Facility Agreement dated 29.04.2021. The same is also not disputed by the respondent as seen from his application filed to dismiss the Section 9 application filed by the petitioner. The relevant Clauses in the Built Suit Facility Agreement dated 29.04.2021 also confirms that the petitioner will be put in possession of the property only after the completion of the construction by the respondent as per the Built Suit Facility Agreement dated 29.04.2021. Admittedly, the Built Suit Facility Agreement dated 29.04.2021 contains an Arbitration agreement which is stated supra.



14. The only issue that arises for consideration in this Section 11 application is whether the agreement viz., the Built Suit Facility Agreement dated 29.04.2021 has been properly stamped or not. According to the petitioner it is properly stamped, whereas the respondent contends that it is insufficiently stamped. According to the respondent, the agreement viz., Built Suit Facility Agreement dated 29.04.2021 is in the nature of an agreement for construction and therefore Article 5(i) of the Indian Stamp Act, 1899 applies, whereas the petitioner contends that the Built Suit Facility Agreement, dated 29.04.2021 will fall under Article 5(j) of the Stamp Act and hence the stamp duty paid at Rs.20/- is correct.

15. Article 5(i) and 5(j) of the Indian Stamp Act, 1899 reads as follows :-

|                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                       |                                                                                                                                                                                                              |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>5(i)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b><i>If relating to construction of building</i></b> | <b><i>One rupee for every hundred rupees or part thereof of the cost of the proposed construction or the value of construction or the consideration specified in the agreement, whichever is higher.</i></b> |
| <b><i>Explanation – For the purpose of this clause, “building” includes any unit, residential, commercial, institutional, industrial or otherwise proposed to be constructed on an undivided share of land</i></b>                                                                                                                                                                                                                                          |                                                       |                                                                                                                                                                                                              |
| <b>5(j)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b><i>If not otherwise provided</i></b>               | <b><i>[Twenty rupees]</i></b>                                                                                                                                                                                |
| <b><i>Exemptions :-</i></b><br><b><i>Agreement or memorandum of agreement : (a) for or relating to the purchase or sale of goods or merchandise exclusively not being an agreement or memorandum of agreement chargeable under clause (d), clause (e), clause (f), clause (g), or clause (h) of this article or a note or memorandum chargeable under No.43; (b) made in the form of tenders to the Central Government for, or relating to any loan</i></b> |                                                       |                                                                                                                                                                                                              |



16. When it is not in dispute that the petitioner has not been put in possession of the property and no rights over the property has been created in its favour under the Built Suit Facility Agreement dated 29.04.2021, the question of payment of Stamp Duty as per Article 5(i) of the Indian Stamp Act, 1989 will not arise for the following reasons :-

a) The Built Suit Facility Agreement dated 29.04.2021 does not confer any vested right over the property in favour of the petitioner.

b) The petitioner has paid only the advance amounts to the respondent under the Built Suit Facility Agreement dated 29.04.2021 and according to the petitioner, the respondent has committed breach of contract. It is also seen from the Clauses contained in the agreement that only after completion of the construction by the respondent and on payment of the consideration by the petitioner, the respondent will put the petitioner in possession of the property, whereas that stage has not arisen as of now.

c) The Built Suit Facility Agreement dated 29.04.2021 also stipulates that in future, the parties will have to enter into a sub lease agreement on completion of the construction by the respondent under which, the petitioner will be put in possession of the property.



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d) Article 5(j) of the Indian Stamp Act, 1899 which deals with agreements which are not otherwise provided will get attracted in view of the fact that the nature of the Built Suit Facility Agreement dated 29.04.2021 is only in the nature of an agreement to enter into a lease and is not the final agreement which the parties have agreed to enter into in the near future on completion of the construction by the respondent.

17. It is clear from the Hon'ble Supreme Court's decision relied upon by the learned counsel for the petitioner in the case of ***Food Corporation of India and others vs. Babulal Agrawal reported in 2004 2 SCC 712***, that when no possession, right or title has passed on to the petitioner in praesenti at the time of the execution of the agreement, such an agreement is only an executory agreement and not an agreement creating rights in the immovable property. The Built Suit Facility Agreement dated 29.04.2021 which contains an Arbitration Clause is one such agreement which has not created any rights as on date of the agreement for the petitioner over the property in question. Hence, the petitioner has properly valued the said agreement by paying the proper stamp duty of Rs.20/- as per Article 5(j) of the Indian Stamp Act, 1899.

18. The petitioner has also terminated the contract by its termination notice dated 24.02.2023 on account of the alleged breach of contract committed



by the respondent. The petitioner is also not seeking any rights over the property in question and therefore, the Stamp Duty of Rs.20/- affixed in the Built Suit Facility Agreement dated 29.04.2021 which contains an Arbitration Clause is correct and only in accordance with the residuary Clause viz., Article 5(j) of the Indian Stamp Act, 1899, the stamp duty has been paid at Rs.20/-.

19. The Constitution Bench judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the respondent in the case of ***N.N.Global Mercantile Private Ltd., vs. Indo Unique Flame Ltd. And others reported in 2023 SCC Online SC 495*** has no applicability. Since the petitioner has satisfied that the document, viz., Built Suit Facility Agreement dated 29.04.2021 has been properly stamped in accordance with law, the Constitution Bench judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the respondent in the case of ***N.N.Global Mercantile Private Ltd., vs. Indo Unique Flame Ltd. And others reported in 2023 SCC Online SC 495*** has no bearing for the instant case as that was a decision, where the subject document was insufficiently stamped and the Hon'ble Supreme Court has held that an Arbitration agreement contained in the insufficiently stamped document cannot be acted upon. Whereas in the instant case since the agreement viz., Built Suit Facility Agreement dated 29.04.2021



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which contains an Arbitration Clause has been sufficiently stamped in accordance with Article 5(j) of the Indian Stamp Act 1899, the arbitration agreement contained therein is a valid arbitration agreement and is an enforceable one.

20. For the foregoing reasons, the petition filed by the petitioner in Arbitration O.P. (Comm. Div.) No.298 of 2023 under Section 11 of the Arbitration and Conciliation Act, 1996 seeking for appointment of an Arbitrator by this Court is maintainable as the arbitration agreement in the Built Suit Facility Agreement dated 29.04.2021 is a valid arbitration agreement. The petitioner has invoked the arbitration prior to the filing of this petition by sending a notice to the respondent on 29.03.2023, which has been duly acknowledged by the respondent, who has also sent a reply on 19.04.2023. Since there was no consensus between the parties with regard to the name of the Arbitrator, the petitioner was constrained to file this application under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator.

21. For the foregoing reasons, necessarily, this Court will have to appoint an Arbitrator since there is a valid arbitration agreement and there has been no consensus between the parties for appointment of an Arbitrator. Accordingly, this petition is allowed as prayed for in Arbitration O.P. (Comm. Div.) No.298



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of 2023 by appointing Mr.P.V. Balasubramaniam, learned Senior Advocate as Arbitrator to decide the disputes / differences between the parties arising out of the Built Suit Facility Agreement dated 29.04.2021 on merits and in accordance with law and pass an Arbitral Award accordingly by issuing the following directions :

(a) This Court appoints Mr.P.V. Balasubramaniam, learned Senior Advocate, who is having office at No.47/2, Rams Surabhi Apartments, 1<sup>st</sup> Main Road, R.A.Puram, Chennai - 600 028, (Mobile No.9841041888) as a sole Arbitrator to decide the disputes between the petitioner and the respondent arising out of the Built Suit Facility Agreement, dated 29.04.2021.

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



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22. The Section 9 applications viz., Arbitration Application No.184 of 2023 and O.A. No.293 of 2023 are disposed of by directing the applicant to approach the Arbitrator for seeking the said reliefs by filing applications under Section 17 of the Arbitration and Conciliation Act, 1996. It is for the Arbitrator to decide the merits of those interim applications as and when they are filed and decide the same in accordance with law. Consequently application Nos.2851 of 2023 filed by the respondent is closed. No costs.

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**ABDUL QUDDHOSE, J.**

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