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Arb.Original Petition (Com.Div.) 580 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Arb.Original Petition (Com.Div.) No.580 of 2022

Gounder Infratech Company,
Rep. by its Managing Partner,
Mr.P.Chandavel,
No.B-004, Mantri Elite Apartment,
J.P.Nagar 4th Phase,
Bannerughatta Road,
Bangalore - 560 076, Karnataka.

... Petitioner

Vs.

The Chief Engineer,
Construction of Southern Railway Administration,
Southern Railway, Construction Organization
Periyar EVR High Road, Egmore, Chennai.

... Respondent

PRAYER: The Original Petition has been filed under Section 11 (6) of Arbitration and Conciliation Act, 1996, to appoint a sole, technically competent, independent and impartial Arbitrator to adjudicate upon the disputes between the parties.

For Petitioner : Mr.P.J.Rishikesh
for M/s.T.Thangadurai

For Respondent : Mr.Prasad Vijayakumar

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ORDER

The present Original Petition has been filed under Section 11 (6) of Arbitration and Conciliation Act, 1996, for an appointment of sole Arbitrator to adjudicate all the claims and disputes arising out of the Agreement No.42/Dy. CE/GC-III/TPJ, dated 19.07.2018 between the parties.

2. According to the petitioner, as per the contract, the petitioner has executed the work and the total value of the Contract was Rs.4,52,70,376/-. It is further submitted that they have executed Rs.1.70 Crore worth of work and the balance works could not be progressed due to non-availability of proper work site. On this account, the petitioner have requested the respondent to determine the contract under Clause 61 of General Condition of Contract so many times. Finally, they sent a letter dated 30.12.2020.

3. The learned counsel for the petitioner further submitted that on the basis of the petitioner's request, the approval has been granted for foreclosure of the contract under Clause 61 of the General Condition of Contract i.e., without repercussion on either side. The learned counsel further submitted that they have accepted the final measurement and signed in the final variation. The final



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variation statement had already been vetted by finance and approved by the competent authority. But the following legitimate dues as have not been arranged so far.

<i>S. No.</i>	<i>Description of claims</i>	<i>Amount Rs.</i>
1.	Payment of final bill as per the work done and PVC	3,50,000/-
2.	To refund the security deposit amount including EMD	21,11,415/-
3.	Damages as interest from the date determination under clause 61 of GCC to the date of award @ 15% per annum	To be quantified
4.	Interest from the date of Award and up to the date of realisation (post-award)	To be quantified
5.	Cost of arbitration and legal expenses	As per actual
	Total	Rs.24,61,415/- + to be quantified

4. With these circumstances, the petitioner has issued notice under Section 21 dated 26.04.2021. However, the respondent, by its letter dated 06.05.2021, has sent a reply, but, the dispute has not been resolved. Hence, without any option, the petitioner has filed the present petition for appointment of sole Arbitrator to adjudicate all the claims and disputes.

5. The learned counsel for the petitioner further submitted that in terms of Clause 64 of the General Condition of Contract, the present dispute can



be referred to the Arbitrator. Clause 64 of the General Condition of Contract is extracted as follows:-

"64.(1) Demand For Arbitration :

64.(1) (i) *In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.*

64.(1) (ii) *The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.*

64.(1) (iii) (a) *The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.*

(b) *The claimant shall submit his claim stating the facts supporting the claims alongwith all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.*

(c) *The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.*



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(d) Place of Arbitration : The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64.(1) (iv) *No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.*

64.(1) (v) *If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.*

64.(2) Obligation During Pendency Of Arbitration : *Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

64.(3) Appointment of Arbitrator :

64.(3) (a)(i) *In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.*



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6. Per contra, the learned counsel appearing for the respondent would strongly oppose for appointment of Arbitrator. He would further submit that the subject work agreement is presently under CBI investigation (CBI CC No.5 of 2022) and the documents including the Measurement Book (M-Book) records are seized by the CBI for verification and the same is now in the custody of the CBI.

7. The learned counsel for the respondent would further submit that as per the judgment of the Hon'ble Supreme Court, the petitioner is not entitled for appointment of Arbitrator. Since there is a serious allegation of fraud played against public instrumentalities, it cannot be referred to the Arbitrator.

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

9. In the present case, the contract was awarded for a sum of Rs.4.50 Crores and a sum of Rs.1.70 Crores worth of work was also carried out and thereafter, the contract was foreclosed due to non-availability of land. In this



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circumstance, the petitioner has made a claim against the respondent. Therefore, this Court is of the considered view that the issue involved in this case can be decided by the Arbitrator, but, if there is a serious issue as alleged, it is open to the respondent to raise the said aspects before the learned Arbitrator. As on today, only by referring the CBI case, which is pending, no materials have been placed before this Court regarding seriousness of allegation and for rejecting the present petition for appointment of Arbitrator.

10. In view of the above, this Court is inclined to appoint a sole Arbitrator to decide the issue that is involved in this case and accordingly, ***Mr.Naveen Kumar Murthi, Advocate, S2, Singapore Plaza, New No.337 / Old No.164, Linghi Chetty Street, Chennai - 600 001. Mobile No.9884740424,*** is appointed as Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties. The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six (6) months from the date of receipt of the Order. The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed by him and the same shall be borne by the parties equally.



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11. This Original Petition is ordered accordingly, leaving the parties to bear their own costs. It is open to the parties to raise all the issues, which have been put forth before this Court and the learned Arbitrator is directed to decide the issue between the parties on his own, without taking any observation made in this order.

22.02.2023

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To

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Construction of Southern Railway Administration,
Southern Railway, Construction Organization
Periyar EVR High Road, Egmore, Chennai.

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