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Arb.O.P (Com.Div.) No.171 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.171 of 2024

Hariom Projects Private Limited,
Rep by its Authorised Signatory,
Anil Haresh Sangtani,
A Company incorporated under the Companies Act, 1956,
Having its registered Office at
B-301, Shree Balaji Residency,
Behind Sangath Silver Apartment,
Sabarmati-Gandhinagar Highway,
Motera, Ahmedabad 380 005.

... Petitioner

Vs.

1.Military Engineer Services,
Through, Chief Engineer,
Chennai Zone, Island Grounds,
Chennai 600 009.

2.Union of India,
Through Ministry of Defence,
At: South Block, Ministry of Defense,
New Delhi 110 011.

... Respondents

Prayer:

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Arb.O.P (Com.Div.) No.171 of 2024

Arbitration Original Petition filed under Section 11(5)&(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to adjudicate the disputes between the petitioner and the respondents.

For Petitioner : Mr.Rishitha Kishan,
for M/s.Vivrit Law

For Respondent : No appearance

ORDER

This Arbitration Original Petition has been filed under Section 11(5)&(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) to appoint a Sole Arbitrator to adjudicate the dispute between the petitioner and the respondents.

2. In the present case, notice was served and the names of the respondents were also printed in the cause list. However, there is no representation on behalf of the respondents, which shows that they have no interest in contesting this matter. Therefore, this Court is inclined to hear the petitioner and proceed to pass the present order.



3. The learned counsel for the petitioner would submit that the petitioner and the respondents had entered into the Work Order dated 29.07.2013 along with the General Conditions of Contract (GCC). Thereafter, though the work was completed by the petitioner, the respondents had not paid the petitioner as agreed in terms of the said Work Order and the total liability of the respondents is a sum of Rs.1,41,87,000/-.

4. Further, she would submit that since the present dispute is arising out of the said Work Order and the same is arbitrable in terms of GCC, the petitioner has also sent a letter dated 21.08.2020 to the respondents for commencement of Arbitration. However, the respondents had not nominated any Arbitrator. Therefore, this petition has been filed for appointment of Arbitrator.

5. Heard the learned counsel for the petitioner and also perused the materials available on record.

6. In the present case, it appears that the dispute between the parties is



arising out of the Work Order dated 29.07.2013, which was entered between the parties along with GCC. Upon perusal of the said Work Order and GCC, it is clear that the dispute among the parties shall be resolved by virtue of Arbitration as per the Clause 70 of GCC, which reads as follows:

"70. Arbitration:

All disputes, between the parties to the Contract(other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the solc arbitration of an Engineer officer to be appointed by the authority mentioned in the tender documents

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Work or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or



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Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one



year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and binding on both parties to the Contract."

7. From the reading of the above Clause, it appears that it was agreed by both the parties that the dispute, arising out of the Work Order, shall be referred to the Arbitration of an Engineer Officer to be appointed by the Authority mentioned in the Tender Documents.

8. There is no dispute on the aspect that when the parties have agreed



something, the same should not be beyond the scope of the provisions of the Act and the law laid down by the Hon'ble Apex Court. However, in the present case, the agreement of the parties are contrary to the provisions of the Schedule V(1) of the Act, wherein it has been stated as follows:

“The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”

9. A reading of the above provision would make it clear that appointment of any person referred in the Schedule V(1) of the Act, would be construed as ground for raising the justifiable doubt with regard to the independence and impartiality of the Arbitrator.

10. In the present case, the persons named for the panel of Arbitrators in the above Clause are their Engineer officers, who are fully into the business relationship with the respondent while performing their duty. The term “business relationship” refers to working and supporting for the



business of the respective company, in which case, the persons nominated at the above clause would be considered to have a business relationship with the parties and appointing the said persons as Arbitrator would be a ground to raise the justifiable doubts as to the independence and impartiality of the Arbitrator. In such case, those persons cannot be appointed since they are interested persons in terms of provisions of the Act and hence they are ineligible to be appointed as Arbitrator. Accordingly, the terms of the agreement entered between by the parties is contrary to the provisions of Schedule V(i) of the Act.

11. Further, such appointment is also against the law laid down by the Hon'ble Apex Court in ***Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.***” reported in ***2019 SCC OnLine SC 1517***. When such being the case, considering the submissions made by the learned counsel for the petitioner and in view of the fact that the dispute between the petitioner and the respondents can be resolved by virtue of Arbitration in terms of Clause 70 of the GCC, this Court is inclined to appoint an Arbitrator.



12. Accordingly, this Court feels it appropriate to pass the following order:

i) **The Hon'ble Mr.Justice K.Kalyanasundaram, Former Judge, Madras High Court, Plot No.406, 5th South Cross Street, Kapaleaswarar Nagar, Neelankarai Chennai 600 115, Mobile No.93810 11077,** is appointed as sole arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

ii) 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 months from the date of receipt of the Order. The learned Arbitrator is also directed to decide the matter without influenced by the observations made by this Court in the present order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, as per Schedule IV of the Act and the same shall be borne by the parties equally. In the event of non-appearance of the respondent, the petitioner shall bear the entire remuneration and other expenses and thereafter, the petitioner can recover the same directly from the respondent and vice versa.



Arb.O.P (Com.Div.) No.171 of 2024

WEB COPY

9. This Arbitration Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an 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.

11.07.2024

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation: Yes / No

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Arb.O.P (Com.Div.) No.171 of 2024

KRISHNAN RAMASAMY.J.,
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Arb.O.P (Com.Div.)No.171 of 2024

11.07.2024