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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.07.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.250 of 2024

Annai Engineering Industries
Rep by its Propreitor,
Sukumaran,
Having Office at,
No.16, 2nd Floor, 1st Cross,
Anna Nagar, Puducherry

... Petitioner

Vs.

The Executive Engineer,
Building and Roads (South) Division,
PWD, Pondicherry.

... Respondent

Prayer:

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint an independent sole arbitrator to adjudicate the disputes arising between the petitioner and the respondent pursuant to the Agreement No.82/PW/BRS/A2/2021-2022 dated 15.12.2021 for construction of bus stand at Bahour in Bahour Cluster,

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Puducherry and Clause 25 of the GCC for appointment of Sole Arbitrator and directing the respondent to pay the cost of this petition.

For Petitioner : Ms.R.Jayasree

For Respondent : Mr.Ramasamy Meyappan
Government Advocate

ORDER

This Arbitration Original Petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act") to appoint an Arbitrator to adjudicate the dispute between the petitioner and the respondent.

2. The learned counsel for the petitioner would submit that the petitioner and the respondent had entered into an Agreement dated 15.12.2021 for the construction of bus stand at Bahour in Bahour Cluster, Puducherry. The value of the project is a sum of Rs.1,68,92,522/- and as per the said Agreement, the project has to be completed within a period of 9 months. Subsequently, the petitioner had also furnished a bank guarantee for a sum of Rs.8,44,626/- in favour of the respondent. Thereafter, there was a

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delay in clearing the bills by the respondent, due to which, the petitioner was unable to carry on the construction work. Under these circumstances, the respondent had terminated the Agreement vide a non-speaking order and also they are trying to invoke the bank guarantee executed by the petitioner.

3. Further, he would submit that the said termination is illegal as per the Clause 3 of the said Agreement and the dispute is arbitrable in terms of Clause 25 of the said Agreement and thus, this petition has been filed for appointment of Arbitrator.

4. In reply, the learned counsel for the respondent had also accepted the submission made by the learned counsel for the petitioner and requests this Court to appoint a sole Arbitrator.

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

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6. In the present case, it appears that the dispute between the parties is arising out of the Agreement dated 15.12.2021. Upon perusal of the said Agreement, it is clear that the dispute among the parties shall be resolved by virtue of Arbitration as per the Clause 25 of the said Agreement, which reads as follows:

> *"**CLAUSE 25***
>
> *Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work er as to any other question, claim, nght, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter*
>
> *(1) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the*

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Engineer- in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer Chief Engineer, the toner the Dispute Redressal Committee (Band disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committes (DRC) shall give his decision within a period of 90 days from the

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receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule F. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitralor appointed by the Chief Engineer, PWD, in charge of the work or if there be no Chief Engineer, the Administralive Head of the said PWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office. due to any reason whatsoever, another sole arbitrator shall be appointed

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in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer PWD or the Administrative Head of the PWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment

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thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/, the arbitrator shall give reasons for the award

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whorn and in what manner, such costs or any part thereof shall be paid and fix or

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settle the amount of costs to be so paid"

7. Considering the submissions made by the learned counsel for the petitioner and the respondent and also in view of the fact that the dispute between the petitioner and the respondent arose out of the Agreement dated 15.12.2021 and the same can be resolved by virtue of Clause 25 of the said Agreement, this Court is inclined to appoint a sole Arbitrator.

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

i) **Hon'ble Mr.Justice N.Kirubakaran (Rtd.,), residing at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai 600 089, Contact No.9445025454** 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

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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.

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.

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Speaking/Non-speaking order
Index : Yes / No
Neutral Citation: Yes / No
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Note: Issue order copy on 02.08.2024

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