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Arb.O.P.(Com.Div.) No.459 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.459 of 2023

East Coast Constructions and Industries Limited,
Represented by its Director S.A.Mohammed Mohideen ... Petitioner

Vs.

Chennai Metropolitan Water Supply and
Sewerage Board,
Represented by its Managing Director/
Assistant Contracts Engineer ... Respondent

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying for appointment of an Arbitrator on behalf of the respondent in terms of Clause 3 of SCC dated 25.06.2010 to resolve the disputes between the petitioner and the respondent.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.Gautham S.Raman

ORDER

This Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.



WEB COPY 2. The petitioner herein was awarded a Contract/Agreement on 25.06.2010.

3. It appears that there were repeated failures on the part of the petitioner to keep with a milestone under the Contract/Agreement dated 25.06.2010. The respondent therefore proceeded to issue Show Cause Notice dated 24.07.2017 to terminate the Contract/Agreement with the petitioner on 28.08.2017.

4. After the Contract/Agreement was terminated on 28.08.2017, the petitioner sent final bill on 15.05.2018. By a communication dated 04.06.2018, the petitioner has invoked Clause 24.1 of the General Conditions of Contract.

It reads as under:-

"If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision."



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5. The petitioner therefore requested the adjudicator to give a decision on the disputes within 28 days from the date of receipt of the notification in accordance with Clause 25 of the General Conditions of Contract.

6. Since there were no further response from the adjudicator, the petitioner has proceeded to invoke arbitration clause vide communication dated 19.05.2018 by nominating Hon'ble Mr.Justice E.Padmanabhan, Former Judge of this Court to Act as an Arbitrator.

7. The respondent has replied on 03.07.2018. In the said reply, the respondent has ultimately stated as follows:-

"Regarding the payment claimed by you, it is to be informed that as per the clause 21 under contract data, **"The percentage to apply to the value of the work not completed representing the Employer's additional cost for completing the Works shall be 20 percent or as per actual whichever is higher"**. Accordingly CMWSS Board would recover the difference between the cost of balance work to be carried out by retendering after the termination of the contract and the cost of work as per your terminated contract. As the above work is under execution by the Tambaram Municipality, the actual cost of the balance work is not known at this stage. Hence only after completion of the work by Tambaram Municipality, it could be ascertained whether CMWSSB has to be make payment to M/s.East Coast Constructions & Industries Ltd or vice versa."



8. The learned counsel for the petitioner has placed reliance on the following decisions of the Hon'ble Supreme Court in support of the present Original Petition:

- i. **Geo Miller and Company Private Limited Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited**, (2020) 14 SCC 643.
- ii. **B and T AG Vs. Ministry of Defence**, 2023 SCC Online SC 657.

9. The learned counsel for the petitioner has also placed reliance on the decision of the High Court of Jammu & Kashmir and Ladakh in **Jaguar Overseas Ltd. Vs., J&K State Power Development Corporation** in Arb.P.Nos.12, 13 and 14 of 2022 dated 19.10.2023, wherein, the Jammu & Kashmir and Ladakh High Court has come to a conclusion that Section 5 of the Limitation Act, 1963 will apply to the proceedings before the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 and therefore there is no impediment for filing a petition under Section 5 of the Limitation Act, 1963 for invoking Section 11 of the Arbitration and Conciliation Act, 1996.

10. Defending the stand of the respondent, the learned counsel for the respondent submits that the decision cited by the learned counsel for the



petitioner in **Geo Miller's case** (referred to supra) is no longer relevant in the light of the subsequent decision of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited**, (2021) 5 SCC 738.

11. The learned counsel for the respondent submits that the limitation for invoking Section 11 of the Arbitration and Conciliation Act, 1996 has already expired after the contract was terminated on 28.08.2017.

12. It is submitted that the decision of the Hon'ble Supreme Court in **Geo Miller's case** (referred to supra) was considered by the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited's case** (referred to supra).

13. It is therefore submitted that initiation of the present proceedings for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 was hopelessly time barred.

14. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.



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15. The decision of the Hon'ble Supreme Court in **Geo Miller's case** (referred to supra) is the decision of bench consisting of 3 Hon'ble Judges whereas, the decision of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited's case** (referred to supra) which is subsequent, is a decision of bench consisting of two Hon'ble Judges of the Hon'ble Supreme Court.

16. The ratio laid therein cannot be applied to the peculiar facts of the present case. Admittedly, in this case, the petitioner had invoked Section 21 of the Arbitration and Conciliation Act, 1996 on 07.06.2018.

17. The said notice was received by the respondent and the respondent replied on 03.07.2018. Although the respondent has denied the claim of the petitioner, in the penultimate paragraph, it has been clearly stated that the question whether the petitioner is entitled to receive any amount or whether the respondent is entitled to recover amounts would be ascertained only at a later point of time. Thus, the claim of the petitioner has not been repudiated.

18. The respondent has also taken a stand that the notice under Section 21 of the Arbitration and Conciliation Act, 1996 was premature and the



question would only arise after the respondent ascertains the amounts to be paid or payable after the work is completed by engaging service of a third party contractor after the Contract/Agreement with the petitioner was terminated on 28.08.2017. Thus, it cannot be readily inferred that the invocation of Section 11 of the Arbitration and Conciliation Act, 1996 was time barred.

19. Although, it would have been prudent for the petitioner to approach this Court earlier by filing a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 at an earlier point of time, since limitation is a mixed question of fact and law, Court is therefore of the view the same can be decided by the Arbitrators/Arbitral Tribunal.

20. The petitioner has already nominated Hon'ble Mr. Justice E. Padmanabhan, Former Judge of this Court as an Arbitrator. The Contract/Agreement 25.06.2010 contemplates an Arbitral Tribunal consisting of three arbitrators. It reads as under:-

"3. Arbitration :

(a) In case of Dispute or difference arising between the Employer and Contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The



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third arbitrator shall be chosen by the two arbitrators so appointed by the parties, shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment, this shall be done in accordance with the Arbitration and Conciliation Act, 1996."

21. Considering the fact that the petitioner has nominated Hon'ble Mr.Justice E.Padmanabhan, Former Judge of this Court and since the respondent has failed to nominate an Arbitrator, Court is inclined to appoint Hon'ble Mr.Justice.R.S.Ramanathan, Former Judge of this Court as a second arbitrator/nominee arbitrator on behalf of the respondent.

22. Both the arbitrators may appoint a presiding arbitrator to constitute an Arbitral Tribunal to enter upon reference to adjudicate and resolve the dispute between the parties.

23. The Arbitral Tribunal, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29A of the Arbitration and



Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order touching on limitation.

24. The Arbitral Tribunal shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondent remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitral Tribunal and later recover the same from the respondent.

25. Since this Court has appointed the Arbitral Tribunal, it is open to the petitioner as well as the respondent to seek other reliefs under Section 16 and Section 17 of the Arbitration and Conciliation Act, 1996, before the Arbitral Tribunal.

26. All the issues relating to merits including limitation shall be decided by the Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996.



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27. This Original Petition is disposed of accordingly, leaving the parties to bear their own costs.

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Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

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