



WEB COPY



Arb.O.P. (Com.Div.) No.541 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.02.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.541 of 2023

M/s.KONE Elevator India Private Limited,
Plot No.A-28, Sipcot Industrial Park,
Pillaipakkam, Sriperumpudur Taluk,
Kancheepuram District,
Tamil Nadu – 602 105
Represented through its Authorized Signatory,
Mr.C.V.S. Krishnakumar.

.. Petitioner

Vs.

M/s.Kanti Prasad Mittal
Rep.through its Partners,
Vineet Mittal and Bhawana Mittal
165, Gupta Colony, Transport Nagar,
Meerut – 250 002
Uttar Pradesh.

.. Respondent

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint petitioner's nominee Mr.V.Shailendra, Advocate as the sole Arbitrator under Contract dated 21.07.2010 containing Reference No.KEI/0050/201003/955921 and Contract dated 15.06.2011 containing Reference No.KEI/0019/201106/1554032 in accordance with Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 and to direct the respondent to pay the petitioner cost of the instant application.



WEB COPY



Arb.O.P. (Com.Div.) No.541 of 2023

For Petitioner : Mr.N.P.Vijaykumar

For Respondent : Mr.Manish Gupta

ORDER

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint petitioner's nominee Mr.V.Shailendra, Advocate as the sole Arbitrator under Contract dated 21.07.2010 containing Reference No.KEI/0050/201003/955921 and Contract dated 15.06.2011 containing Reference No.KEI/0019/201106/1554032 in accordance with Section 11(6)(a) of the Arbitration and Conciliation Act, 1996.

2. The petitioner had signed two separate contract with the respondent on 21.07.2010 and 15.06.2011 for supply, installation and Commissioning of 27 Elevators together with Dumb waiters and 3 Mono Space Passenger Elevators for attendant Block at Kashiram Hospital, Greater Noida, Uttar Pradesh.

3. The respondent was engaged a civil contractor appointed by the said Hospital and therefore had placed two purchase orders for supply of



elevators under the two contracts. It appears that totally 39 elevators were to be supplied under the two contracts. The petitioner appears to have supplied, installed, tested and commissioned etc,. The installation of two elevators is not complete.

4. According to the petitioner, the installation cannot be completed as the work was completed by the respondent. By a communication dated 11.01.2017, the petitioner has sent e-mail to the respondent and stated that the petitioner has completed the inspection and thus the some of the lift materials were either missing or damaged and that the list of items along with the rate list were attached for reference and requested the respondent to look into the matter and resolve the matter at the earliest for compensation of loss and damaged material.

5. The learned counsel for the respondent submits that the respondent appears to have sent a reply through a counsel on 24.05.2017. Ultimately, on 22.09.2020, the petitioner sent a e-mail to the respondent, wherein, it was informed that the total amount due from the respondent was Rs.43,76,831/-. By a e-mail dated 19.10.2020, the respondent has responded, wherein, it has been stated as follows:-



WEB COPY



Arb.O.P. (Com.Div.) No.541 of 2023

“1. There is an order of 36 lifts as per PO NO.KEI/0050/201003/955921 dated 21.07.2010, out of which one lift of Spec.F Costing Rs.12,19,000/- has been cancelled.

There is one more order of 3 lifts a sper PO No.KEI/0019/201106/1554032 dated 15.06.2011, out of which one lift of Sr.No.2, (10 Passenger/1.0m/s/3 stops) costing Rs.14,02,000/- has been cancelled.

We have already paid advances of Rs.60,950/- and Rs.2,10,300/- against the above lifts. So kindly adjust these advances against the payment we have made for other lifts.

2. You have also discussed the tax variation in the meeting, so requesting you to provide the detail for the same.”

6. It is in this background, the petitioner has issued notice under Section 21 of the Arbitration and Conciliation Act, on 14.07.2022 which was replied by the respondent on 28.07.2022, wherein the respondent has stated that the petitioner had failed to fulfil the obligations under the two contracts and therefore has called upon the petitioner to complete of the contractual Clause so that the dispute can be resolved at the earliest.

7. The petitioner therefore sent another notice to the respondent on 17.04.2023, wherein, the petitioner has nominated an Advocate from the Madras High Court as the sole arbitrator to resolve the dispute. The



respondent has thereafter responded on 05.05.2023 stating that question of invoking arbitration Clause under two contracts dated 21.07.2010 and 15.06.2011 at the stage was belated and time barred.

8. Opposing the prayer, the learned counsel for the respondent would draw attention to a recent decision of the Hon'ble supreme Court in **B and T AG Vs. Ministry of Defence** reported in [(2023) SCC Online SC 657] rendered on 18.05.2023.

9. The learned counsel for the respondent would submit that the cause of action in this case arose as early as 11.01.2017 when there were exchange of communications therefore the limitation has to be reckoned from 11.01.2017 and therefore the invocation of arbitration Clause vide notice dated 17.04.2023 has to be held to be time barred and therefore would be no saving of limitation. It is submitted that limitation would have expired on 11.01.2020.

10. Specifically, the learned counsel for the respondent would drawn attention to paragraph 51 from the decision of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited Vs. Nortel Networks**



India Private Limited reported in [(2021) 5 SCC 738], which has followed the order of the Hon'ble Supreme Court in **B and T AG Vs. Ministry of Defence** reported in [(2023) SCC Online SC 657]. A further reference was made to the submission of law by the Hon'ble Supreme Court in the above mentioned case in paragraph 77, wherein, the Hon'ble Supreme Court held that mere negotiations will not postpone the “cause of action” for the purpose of limitation. The Legislation has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.

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

12. There is no doubt that the contract under which the arbitration Clause was invoked by the petitioner only on 17.04.2023 in respect of the contracts signed on 21.07.2010 and 15.06.2011. The admitted position is that out of 39 elevators that were to be supplied, installed and commissioned etc., only 37 have been installed in the Kashiram Hospital, Greater Noida, Uttar Pradesh.



WEB COPY

13. The parties were negotiating for payment right from 2017. In fact after the petitioner called upon the respondent to pay the amount as per e-mail dated 11.01.2017, the respondent by a e-mail dated 19.10.2020 has stated that advances paid for a sum of Rs.60,950/- and Rs.2,10,300/- may be adjusted. The respondent therefore, called upon the petitioner to adjust these advances against the dues. Exchange of correspondence between the counsel for the petitioner and the counsel for the respondent also indicates that the respondent by its letter dated 28.07.2022 bearing reference Letter No.KPM/2022-2023/KONE/Notice/Reply has called upon the petitioner to complete its contractual Clause so that the matter can be resolved at the earliest.

14. Thus, it can be said cause of action did not arise earlier on 11.01.2017.

15. Therefore, the reliance placed on the decision of the Hon'ble Supreme Court in **B and T AG Vs. Ministry of Defence** reported in **[(2023) SCC Online SC 657]** will not come to the rescue of the respondent. The view of the Hon'ble Supreme Court in ***Bharat Sanchar***



Nigam Limited Vs. Nortel Networks India Private Limited reported in

[(2021) 5 SCC 738] referred to supra cannot be applied to the facts of the present case.

16. It has to be construed that the respondent has forfeited the rights to participate in the constitution of the Arbitral Tribunal under the Agreement.

17. Considering the above, **Mr.T.K.Bhaskar, Advocate, having office at No.37, Law Chambers, High Court Buildings, Chennai – 600 104, (Ph.No.9840077673)**, is appointed as an Arbitrator to enter upon reference and adjudicate / resolve the *inter se* dispute between the parties.

18. The learned Arbitrator appointed herein, 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 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

19. The learned Arbitrator appointed herein 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 Arbitrator and later recover the same from the respondent.

20. The parties are at liberty to workout the venue for Arbitration at Chennai.

21. The Original Petition is allowed with the above observations, leaving the parties to bear their own costs.

22. Since the Court has appointed an Arbitrator, it is open to the petitioner as well as the respondent to seek other reliefs under Section 17



Arb.O.P. (Com.Div.) No.541 of 2023

of the Arbitration and Conciliation Act, 1996, before the learned
Arbitrator.

01.02.2024

jas

Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No



WEB COPY



Arb.O.P. (Com.Div.) No.541 of 2023

C.SARAVANAN, J.

jas

Arb.O.P.(Com.Div.)No.541 of 2023

01.02.2024