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Arb.OP(Com.Div)No.38 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Arb.OP(Com.Div)No.38 of 2024

M/s.RCC Infra Ventures Limited
represented by its Managing Director,
Ravi Kumar Jain, Haryana 1222003

Petitioner

Vs

1. The Engineer in Chief, Military Engineer Services
New Delhi 110011
2. The Chief Engineer, Chennai Zone, Island Grounds
Chennai-9
3. Garrison Engineer, Military Engineer Services
Chennai-55

Respondents

Prayer:- This Arbitration Original Petition has been filed under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Independent Arbitrator, preferably a Retired Judge, Honourable Supreme Court of India, to act as an Arbitrator, to adjudicate all the disputes, arising out of the Contract, bearing CA.No.CE/ (FY)/HYD/AVD/07 of 2016-17: Construction of GA Shop and Transmission Shop with Services at HVF Avadi, dated 03.05.2016, executed between the Petitioner and the Respondents and the conditions of IAFW-2249 of Military Engineer Services General Conditions of Contracts.

For Petitioner : Mr.M.Sunil Kumar

For Respondents : Mr.A.Murugan, ACGSC

ORDER

1. This Arbitration Original Petition has been filed under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Independent



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Arbitrator, preferably a Retired Judge, Honourable Supreme Court of India, to act as an Arbitrator, to adjudicate all the disputes, arising out of the Contract, bearing CA.No.CE/(FY)/HYD/AVD/07 of 2016-17, dated 03.05.2016, executed between the Petitioner and the Respondents and the conditions of Military Engineer Services General Conditions of Contracts (IAFW-2249).

2. The facts, leading to filing of this Arbitration Original Petition are that the Petitioner is a registered Public Limited Company, engaged in the business of civil constructions. In the tender floated by the Respondents for the construction of buildings, the Petitioner became the successful bidder. The Petitioner was allotted contract, vide, order dated 03.05.2016, along with the Military Engineer Services General Conditions of Contracts (IAFW-2249). As per the general conditions of the contract, the Petitioner had completed the work. Since the Respondents failed to make the payments due, the Petitioner sent a notice, dated 26.09.2023 to the Respondents, calling upon them to settle the dues. Even after receipt of the notice, the Respondents did not come forward to settle the dues. Though it was agreed between them to appoint an Arbitrator from the list of approved panel of Arbitrators maintained by the Respondents, since it is against the provisions of the law and in order to have a fair and impartial adjudication of the disputes between the parties, this Arbitration Original Petition has been filed, seeking the relief as stated above.



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3. This Court heard the learned counsel for the Petitioner and the learned standing counsel for the Respondents.
4. The learned counsel for the Petitioner would submit that appointing an Arbitrator from the list of panel, approved and maintained by the Respondents, would cause great prejudice to the fair and impartial arbitration, as the empanelled Arbitrator, who is an Employee of the Respondents, may be influenced by the Respondents during the course of arbitration and it would give rise to justifiable doubts as to the independence or impartiality of such an arbitrator.
5. The learned counsel would further submit that as per Clause 71 of the Contract, though the disputes shall be referred to the Disputes Resolution Board Conciliator, since the value of the contract is more than Rs.10 crores, the remedy of appointing a Sole Conciliator is not applicable to the present case and that though as per Clause 70 of the Contract, it was agreed by the parties to abide by the agreement, which stipulates for appointment of an Arbitrator from the list of panel, approved and maintained by the Respondents, it is against the provisions of law, namely, Section 12(5) and Schedules 5 and 7 of the Arbitration and Conciliation Act and the decision of the Honourable Supreme Court reported in **2019 SCC OnLine SC 1517 (Perkins Eastman Architects DPC Vs. HSCC (India) Ltd)** and that therefore, the learned counsel would pray that an independent and uninfluenced Sole Arbitrator, other than the person from the list of panel, approved and maintained by the Respondents, as agreed between the parties, may be



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appointed to adjudicate the issue between the parties to have a fair and impartial adjudication.

6. Per contra, the learned standing counsel for the Respondents, by filing a counter affidavit, would, in support of his contention that this Petition is not maintainable as all the dues had already been settled between the parties and that the sole Arbitrator shall be appointed by the Engineer in Chief as per the Clause 70 of the General Conditions of Contract (IAFW-2249), mainly rely on the Clauses 70 and 71 of the General Conditions of the Contract, which read as under:-

“70. Arbitration

All disputes, between the parties to the contract (other than those for which the decision of the CWE 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 sole arbitration of a Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub division II of Institution of Surveyor (India) recognised by the Government of India 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 of alleged completion of the Works or termination of determination of the contract under Condition No.s55, 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 finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceedings, hereunder or otherwise shall not in any



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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 parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *ex parte* if either party, in spite 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 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 Arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims.

The venue 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.

71. Conciliator:- If dispute (other than those for which the decision of the CWE or any person is by the contract expressed to be final and binding) of any kind whatsoever arises between the parties to the contract during the execution of the works, or after completion or after determination/ cancellation/ termination of the contract, including any disagreement by either party with any action, inaction, opinion, instruction, certificate or valuation by the Accepting Officer or his nominee, the matter in dispute shall, in the first place be referred to the Disputes Resolution Board (DRB) in case of contracts valuing Rs.10 crore or more and to conciliation by a sole conciliator, in case of contracts valuing less



than Rs.10 crores. In case of disagreement with the decision of such DRB or Conciliator, any party may invoke arbitration clause.

Procedure for the constitution/ appointment of DRB/Conciliator shall be as laid down in the Contract Agreement.”

7. The learned standing counsel for the Respondents would further submit that in the present case, since a panel of Arbitrators had been named in the agreement and the general conditions of the contract and the Petitioner also consented for accommodating those Arbitrators named in the approved panel, now the Petitioner is not entitled to approach this Court and contend that it is against the provisions of law and the ratio laid down by the Honourable Supreme Court and therefore, the Arbitrator named in the panel of Arbitrators as agreed by the parties may be permitted to be nominated.
8. The learned standing counsel would further submit that since adjudication of the present dispute requires expertise in the construction field, seeking appointment of a retired Judge as an independent Arbitrator in this case would not serve the purpose, as such an Arbitrator may not have expertise in the construction field and that considering those aspects and also the law laid down by the Honourable Supreme Court and the relevant provisions of the Act, this Court may pass any order in this case, in which case, the Respondents will duly comply with the same.
9. This Court considered the submissions of the learned counsel on either side and also perused the materials placed on record, including the relevant provisions of the Act and the decisions of the Honourable Supreme Court.



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10. It appears that in the present case, in terms of the conditions of the Contract Agreement and the General Conditions of the Contract, particularly, Clause 70, the parties herein have agreed for appointment of an Arbitrator from the list of panel of arbitrators, approved and maintained by the Respondents, thereby meaning that the Arbitrator to be appointed would be an Employee of the Respondent Company only. As per Clause 71 of the Contract, a Sole Conciliator can be appointed as an Arbitrator.

11. The fact that appointment of a Sole Conciliator as per Clause 71 cannot be made since the value of the contract is more than Rs.10 crores is not in dispute. However, the Petitioner has assailed the Clause 70 of the General Conditions of the Contract on the ground that it is against the provisions of law and the decisions of the Honourable Supreme Court reported in **2019 SCC OnLine SC 1517 (Perkins Eastman Architects DPC Vs. HSCC (India) Ltd)** and sought for appointment of an independent Arbitrator other than the person from the list of panel of approved Arbitrators maintained by the Respondents. Hence, the issue, that arises for consideration and requires to be adjudicated in this case, is that when the parties to the disputes have agreed to the person to be appointed as an Arbitrator from the list of empanelled Arbitrators maintained by the Respondents as per the Clause 70 of the Contract Agreement, can an independent Arbitrator be appointed other than the Arbitrator as agreed by the parties in the contract agreement?

12. It is well settled that when a law or Statue requires a particular act or thing to be done in a particular manner, it has to be done in the same manner and



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the said act has to be considered in accordance with the provisions of the said Act only. If anything is agreed upon by the parties against and contrary to the provisions of the Act and the law laid down by the Honourable Supreme Court, it need not be entertained.

13. Schedules 5 and 7 of the Act contemplates the grounds, giving rise to justifiable doubts as to the independence or impartiality of Arbitrators and about the categories of relationship of the Arbitrators with the parties or counsel, raising such doubts. One such ground is Clause (1) of the Schedule 5 of the Act, which says that appointment of an employee as an Arbitrator, who has past or present business relationship with the party, to adjudicate the dispute between the parties, would give rise to justifiable doubts as to the independence or impartiality of such an Arbitrator. In this case, if an employee of the Respondent or a person, who has past or present business relationship with the Respondents is appointed as an Arbitrator, it cannot be said that there will be any fair and impartial adjudication of the disputes, as such an employee, influenced by the Respondent, would work only in favour of the Respondents.

14. As per Section 12(5) of the Act, any person, whose relationship with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Schedule 7, shall be ineligible to be appointed as an Arbitrator. In terms of Schedule 7 of the Act, the Arbitrator to be ineligible to be appointed as an Arbitrator, is categorised as an employee, consultant, advisor or has any other past or present business relationship with the party.



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In the present case, it is apparent that it was agreed between the parties to appoint an Arbitrator, who is an employee of the Respondents. In view of Schedule 7 and Section 12(5) of the Act, an employee, consultant, advisor or any other person having past or present business relationship with Respondents is not eligible to be appointed as an Arbitrator. Hence, the business relationship means the past employees' involvement into the business affairs of the Respondents. Therefore, such a condition as given in the Clause 70 of the contract agreement runs contrary to the provisions of the Act and the decision of the Honourable Supreme Court cited supra and hence, the contract agreement in respect of arbitration in this case need not be taken into consideration. Considering the above aspects, this Court is inclined to appoint a Sole Arbitrator to adjudicate the present dispute between the parties herein.

15. In so far as the contention of the learned standing counsel for the Respondents that in the present case, to adjudicate the dispute, an Arbitrator should have expertise in the construction field is concerned, this Court in similar cases, which are relating to the construction field, appointed independent persons to act as Sole Arbitrators to adjudicate the dispute between the parties. In the event if an expertise is required, it is for the Arbitrator to appoint a technical expert to assist the Arbitrator. Therefore, lack of technical expertise for an independent person to act as a Sole Arbitrator is not a ground for refusing to appoint a Sole Arbitrator other than the person from the panel of past employees of the Respondents.



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Therefore, this Court is inclined to appoint an independent person to act as a Sole Arbitrator to resolve the dispute between the parties, as prayed for.

16. Accordingly, this Arbitration Original Petition is disposed of, with the following directions:-

- (a) Dr.B.Ramasamy, Advocate, Madras High Court, having Office at B3/43, Jeevan Bhima Nagar, Anna Nagar West, Chennai 600101 (Cell No.9999605344) is appointed as a Sole Arbitrator to enter upon reference and adjudicate the disputes between the parties, arising out of the above said purchase orders.
- (b) The Sole Arbitrator shall initiate arbitration proceedings and after issuing notice to the parties concerned and upon hearing them, pass an award, on merits and in accordance with law and uninfluenced by any of the observations made in this order, within a period of six months from the date of receipt of a copy of this order.
- (c) The Sole Arbitrator shall be paid fees and other incidental charges, as per the Schedule IV of the Act and the same shall be borne by both 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 is at liberty to recover the same directly from the Respondent.

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Web:Yes/No
Speaking/Non Speaking
Neutral Citation:Yes/No
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