**IN THE HIGH COURT FOR THE STATE OF TELANGANA**
**AT HYDERABAD**

WEDNESDAY ,THE THIRD DAY OF JANUARY
TWO THOUSAND AND TWENTY FOUR

**PRESENT**
**THE HON'BLE SRI JUSTICE C.V. BHASKAR REDDY**

**ARBITRATION APPLICATION NO: 174 OF 2022**

**Between:**

M/s. Triveni Constructions, having its registered office at # 2150, 1st floor, Section-61 (Phase-VII) SAS Nagar, Mohail Punjab-160062, Rep. by its Partner, Sri Amit Anand, S/o. Late Sh. Sant Swarup Anand, Aged about 44 years, R/o. # 2150, 1st floor, Section-61 (Phase-VII), SAS Nagar, Mohail Punjub-160062

**...APPLICANT**

**AND**

1. Military Engineer Services, Asst Garrison Engineer (Indep) Fy Ordnance Factory Post Eddumilaram - 502 205 Dist .Sangareddy (Telangana)
2. Chief Engineer (FY), Hyderabad Opp: Parade Ground, Sardar Patel Road, Secunderabad - 500 003.
3. AGE (I) Fy, Ordnance Factory Estate, Yeddumallaram- 502 205.

**...RESPONDENTS**

Arbitration Application Under Section 11 (6) of the Arbitration and Conciliation Act 1996 ( Act 26 of 1996 ) praying that this Hon'ble Court may be pleased to

i) To appoint a Sole Arbitrator to adjudicate the claims and disputes between the Applicant and Respondents.
ii) To award the costs of application.

**IA NO: 1 OF 2023**

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to take on record the present affidavit along with material papers for proper adjudication of the above Sec-11 application for appointment of arbitrator

**Counsel for the Applicant : Smt. M. VANAJAKSHI**

**Counsel for the Respondent: Smt. L. PRANATHI REDDY**
**( SC FOR CENTRAL GOVT)**

**The Court made the following ORDER**

**THE HONOURABLE SRI JUSTICE C.V. BHASKAR REDDY**

**ARBITRATION APPLICATION No.174 OF 2022**

**ORDER:**

This application, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") read with Scheme for Appointment of Arbitrators, 1996, is filed by the applicant seeking appointment of a sole Arbitrator to adjudicate the claims and disputes between the applicant and the respondents.

**2.** The case of the applicant, in brief is that, it is a Partnership firm registered under Micro, Small and Medium Enterprises Development Act, 2006 and it is engaged in the business of construction and also undertakes Government work contracts. It is further case of the applicant that Respondent No.1 invited tenders for replacement of existing AC sheets with Galvalume sheets in LMS Shop Building No.06 inside factory area at O.F.Medak, vide tender published on 08.12.2017. The respondent No.1 accepted the applicant's bid for the subject tender work for a sum of Rs.3,62,13,440/- and declared the applicant as successful bidder vide proceedings dated 16.04.2018. It is further case of applicant that bid amounts quoted were only for completion of work by the applicant and the said bid amount was excluding the GST @ 12% and labour welfare cess @ 1% and it was expressly agreed between the applicant and the Respondents that the GST and labour welfare

cess are to be charged over and above the bid amounts. However, during internal financial audit it came to light that the Respondent Nos.1 and 2 have been deducting the GST @ 12% and labour welfare cess @ 1% from the principal bid amount instead of paying additional amounts to the tune of 13% which includes GST and labour welfare cess over and above the bid consideration. The applicant submitted a letter dated 23.01.2022 to the Respondent No.3 and informed the disparity in the internal financial audit and requested the Respondents to immediately release the amounts of the taxes and repay tax amounts deducted along with interest @ 24% per annum including penalties, if any, till the date of payment. The Accounts Officer addressed a letter dated 14.02.2022, to the Respondent No.3 and the applicant, stating that as per their office records the applicable GST and labour welfare cess have been credited from time to time with public fund account as per Government of India norms. To the said letter, the applicant gave a reply vide letter dated 18.06.2022 and stated that the bid amounts did not include statutory taxes i.e., GST @ 12% and labour welfare cess @ 1% and that the Respondents deducted the said statutory taxes from his quoted rates and therefore, the applicant requested the respondents to release the said statutory taxes i.e. GST @ 12% and labour welfare cess @ 1% to the applicant over and above the tendered amount quoted within 15 days from the date of receipt of

letter and it is further stated that the said communication should be treated as notice under Condition No.70 of IAFW-2249 forming part of the contract agreement. The Respondent no.3 vide its letter dated 23.06.2022 stated that the GST amounts were being uploaded against the GST number provided by the applicant to the department and that the lumpsum amounts of a particular month was deposited with Reserve Bank of India and the labour welfare cess was also being deposited with the Telangana State Building and other Construction Workers Welfare Board, Hyderabad through a crossed cheque wherever any amount recovered on account of LEC. It is further case of applicant that due to non-payment of statutory taxes to the tune of Rs.53,29,536/- to the applicant as per the tender condition, he was constrained to issue a letter dated 11.07.2022 invoking Arbitration clause as per condition No.70 of IAFW-2249. However, the respondent No.2 vide letter dated 19.07.2022 stated that as per condition No.70 of IAFW-2249 general conditions of contract, if any, dispute arises between the parties, the same shall be referred to sole arbitrator, who would be a serving officer duly appointed by the Engineer-in-Chief, New Delhi. The Respondent No.2 further stated that the Applicant accepted the final bill process on 08.07.2022 without protest and therefore taking recourse to arbitration in view of condition No.70 of IAFW - 2249 would be at the own risk of the Applicant, and refused to settle the

dispute amicably. Therefore, the applicant is constrained to file the present Arbitration Application for appointment of a Sole Arbitrator as per the provisions of Section 11 and other relevant provisions of the Arbitration and Conciliation Act, 1996.

**3.** A counter affidavit has been filed by the respondent No.1, wherein *inter alia* it is stated that the applicant-firm was awarded a contract bearing No.CE (Fy)/HYD/MDK/02 of 2018-19 for Replacement of existing AC sheets with Galvalume sheets in LMS shop Building No.6 inside Factory area at Ordnance Factory Medak for an amount of Rs. 3,62,13,440/-. As per the work order the work was commenced on 03.05.2018 and the work was physically completed by the contractor on 22.12.2019 subject to completion of rectification of defects as pointed out while issuing completion certificate by AGE (Indep) Fy Eddumilaram vide letter No.8199/CE/ 95/E8 dated 26.12.2019 and requested to rectify the defects by 30.01.2020. It is further submitted that the complete details of recovered amount on account of GST/LEC against CA No.CE (Fy)/HYD/MDK/02 of 2018-19 also intimated to the applicant contractor vide letter dated 23.06.2022. Inspite of receiving all the details of payments, applicant is making allegations against the Department that the statutory taxes were neither paid to the applicant nor deposited with the Central Government against the credit of applicant-firm. The amount so deducted against GST from

all works executed by the applicant contractor during the period was already deposited with the authorities concerned. In this connection, Form GSTR 7A TDS certificate duly downloaded from GST Portal is filed before this Court. With regard to Labour welfare cess, the same is being deposited with Telangana State Building and other Construction Workers Welfare Board Hyderabad through a crossed cheque whenever any amount recovered on account of LEC. It is further stated in the counter affidavit that after lapse of almost 2 years, the applicant with an intention to receive further payments raised this claim of tax returns and when the same was not accepted by the respondents, the applicant has filed the present Arbitration Application. It is further stated that as per Condition No.65 of IAFW-2249, no further claims shall be made by the contractor after submission of Final Bill and they shall be deemed to have been waived and extinguished. Further, since the applicant contractor has signed the final bill without any reservation and as the final bill was processed and paid to the contractor vide D.V.No.07 of March, 2021, no claims whatsoever shall be entertained. It is finally stated that since the prayer of the applicant is not in terms of provisions of contract, sole arbitrator shall not be appointed under Section 11 of the Act.

**4.** Heard the arguments of the respective counsel and perused the record.

**5.** Smt. M. Vanajakshi, learned counsel for the applicant has submitted that bid amounts quoted were only for completion of work by the applicant and the said bid amount was excluding the GST @ 12% and labour welfare cess @ 1% and it was expressly agreed between the applicant and the respondents that the GST and labour welfare cess are to be charged over and above the bid amounts. It is further stated that during internal financial audit it came to light that the Respondent Nos.1 & 2 have been deducting the GST @ 12% and labour welfare cess @ 1% from the principal bid amount instead of paying additional amounts to the tune of 13% and soon after noticing the same, the applicant submitted a letter dated 23.01.2022 to the respondent No.3 and informed the disparity in the internal financial audit and requested the Respondents to immediately release the amounts of the taxes and repay tax amounts deducted along with interest @ 24% per annum including penalties, if any, till the date of payment. It is submitted that there are serious disputes with regard to deduction of the amounts contrary to the terms of the agreement and those are required to be determined by the Arbitrator. Since the respondents have not turned up to settle the disputes before the Arbitrator as per the notice dated 18.06.2022, the applicant was constrained to approach this Court invoking the jurisdiction under Section 11(6) of the Act.

**6.** Per contra, Smt.L.Pranathi Reddy, learned Standing Counsel for Government appearing for the respondents has vehemently contended that as per Condition No.65 of IAFW-2249, no further claims shall be made by the contractor after submission of final bill and the claims shall be deemed to have been waived and extinguished and therefore, even though the agreement provides arbitration clause, the subject dispute cannot be referred to arbitral tribunal. It is further contended by the learned Standing counsel that since the applicant accepted the Final Bill without any reservation and as the Final Bill was processed and paid to the contractor, no claims whatsoever is maintainable and the application filed under Section 11(6) of the Act, is liable to be dismissed as barred by limitation.

**7.** In reply, learned counsel for the applicant relying upon the decision in ***Inder Singh Rekhi vs Delhi Development Authority***[1] has submitted that once there is a valid claim for reference under Section 20 of the Arbitration and Conciliation Act, 1996, the cause of action survives even after passing of the Final Bill. Whether the claim made by the applicant is barred by limitation or not is required to be decided by the arbitrator after entering into reference and at the time of making an award. It is also further stated that at

[1] (1988) 2 SCC 338

the stage of deciding the application filed under Section 11(6) of the Act, the issue relating to the limitation cannot be gone into.

**8.** It is well settled principle of law that considering the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court has to see whether there is an arbitral dispute between the parties and whether the agreement entered between the parties has an arbitration clause to refer the matter to an arbitrator or not. Further, it is also well-settled law that while deciding the question of appointment of arbitrator, the Court should not touch the merits of the case as it may cause prejudice to the case of the parties.

**9.** Condition No.65 of General Conditions of "IAFW-2249" reads as under:

> ***"65. Final Bill (Applicable only to Measurement and Lump Sum Contracts):*** *The Final Bills shall be submitted by the Contractor on IAFW-2262 in duplicate within three months of physical completion of the works to the satisfaction of the Engineer-in-Charge. It shall be accompanied by all abstracts, vouchers, etc., supporting it and shall be prepared in the manner prescribed by the G.E. No further claims shall be made by the Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished. The Contractor shall be entitled to be paid the final sum less the value of payments already made on account, subject to the certification of the final bill by the G.E. No charges shall be allowed to the Contractor on account of the preparation of the final Bill.*

**10.** Condition No.70 of General Conditions of "IAFW-2249" which relates to Arbitration Clause, reads as under:

> ***"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 sole 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 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.."*

**11.** In ***IBI Consultancy (India) (P) Ltd. v. DSC Ltd.***[2], the Hon'ble Supreme Court while dealing with the Arbitration Application filed under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator to adjudicate the disputes that have arisen between the parties therein in connection with the contracts in question, has held, at Para 8, as under:

***8.*** *The first and the foremost thing is the existence of an arbitration agreement between the parties to the petition under Section 11 of the Act and the existence of dispute(s) to be referred to arbitrator is condition precedent for appointing an arbitrator under Section 11 of the Act. It is also a well-settled law that while deciding the question of appointment of arbitrator, the court has not to touch the merits of the case as it may cause prejudice to the case of the parties. The scope under Section 11(6) read with Section 11(9) is very limited to the extent of appointment of arbitrator. This Court has to see whether there exists an arbitration agreement between the parties and if the answer is in the affirmative then whether the applicant has made out a case for the appointment of arbitrator.*

**12.** In ***Duro Felguera, S.A. v. Gangavaram Port Ltd.,***[3] the Hon'ble Supreme Court, at para 59, has held as under:

---

[2] (2018) 17 SCC 95
[3] (2017) 9 SCC 729

*"The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co.Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."*

**13.** It is settled law that in a commercial dispute, mere failure to pay may not give rise to a cause of action. Once the applicant has asserted his claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and thus it is the cause of action for reference to arbitration. In the case on hand, it is the case of applicant that having found in internal financial audit that the Respondent Nos.1 & 2 have been deducting the GST @ 12% and labour welfare cess @ 1% from the principal bid amount instead of paying additional amounts to the tune of 13%, has addressed a letter dated 23.01.2022 to the respondent No.3 requesting to release the amounts. It is further case of the applicant that on 14.02.2022, the respondent has issued a reply through Accounts Officer stating that as per the office records, the applicable GST and labour welfare cess have been credited from time to time with public fund account as per Government of India norms. The applicant has issued a reply dated 18.06.2022 stating that the bid amounts did not include

statutory taxes i.e., GST @ 12% and labour welfare cess @ 1% and that the Respondents deducted the said statutory taxes from his quoted rates and therefore, the applicant requested the respondents to release the said statutory taxes i.e., GST @ 12% and labour welfare cess @ 1% to the applicant over and above the tendered amount quoted within 15 days from the date of receipt of letter, otherwise requested the respondents to treat the said letter as notice under Condition No.70 of IAFW-2249 forming part of the contract agreement. This shows that the applicant soon after settlement of Final Bill has raised a dispute that the amounts have been deducted over and above as mentioned in the statutory contract and requested the respondents to pay the amounts, otherwise treat the said communication as notice invoking the arbitration clause.

**14.** Sofaras limitation aspect is concerned, it is settled law that mere negotiations will not postpone the cause of action for the purpose of limitation. The limitation period of three years for filing such application would commence from the date when the cause of action arose. Since there is no provision in the Arbitration and Conciliation Act, 1996 specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963. Section 43 of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act shall apply

to arbitrators, as it applies to proceedings in Court. Since none of the Articles in Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of arbitrator under Section 11, it would be covered by the residual provision under Article 137 of the Limitation Act which provides that the period of limitation is three years for any other application for which no period of limitation is provided elsewhere in the division. The time limit starts from the period when the right to apply accrues. Admittedly, in the instant case, the Final Bill of the applicant has been settled on 07.03.2021 and even before the expiry of the three years limitation period prescribed under Article 137 of the Limitation Act, 1963, the applicant has raised a dispute and sought reference to the Arbitrator. Therefore, viewing the case from any angle, the dispute sought for reference to the arbitrator is not barred by limitation. Adding further, whether the claim is barred by lapse of time is a matter which requires to be decided by the Arbitrator at the time of making an order under Section 20 of the Arbitration and Conciliation Act, 1996.

**15.** For the aforementioned reasons, Sri Tariq Khan, Advocate (resident of 21st Floor, Vijay Krishna Towers, Nanakramguda, Gachibowli, Hyderabad-32, Mobile No.9999663628) is appointed as Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator is requested to enter upon reference and take

further steps in terms of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his remuneration, costs and expenses of the secretarial assistance for the arbitration proceedings upon deliberation and consultation with the parties. The learned Arbitrator is requested to complete the arbitration proceedings, and pass an award at the earliest, preferably within a period of six months from the date of commencement of the arbitral proceedings. Needless to state that the respondents are at liberty to raise all such objections as are permissible to be raised under Section 16 of the Act.

**16.** The parties shall appear before the learned Arbitrator on 27.01.2024 at 11:00 am for further proceedings.

**17.** Registry to inform and communicate a copy of this order to the learned Arbitrator.

**18.** Accordingly, this Arbitration Application is allowed.

Miscellaneous Applications, if any, pending in the Arbitration Application shall stand closed.

**SD/-M.VIJAYA BHASKAR**
**JOINT REGISTRAR**

**//TRUE COPY//**

**SECTION OFFICER**

One Fair Copy to the Hon'ble Sri Justice C.V. Bhaskar Reddy
(For His Lordships Kind Perusal)

To

1. Sri Tariq Khan, Advocate R/o. 21st Floor, Vijay Krishna Towers, Nanakramguda, Gachibowli, Hyderabad – 32 , Mobile No. 9999663628 ( By Special Messenger) ( Along with a copy of affidavit and material papers)
2. 11 LR Copies

--Contd--

3. The Under Secretary, Union of India Ministry of law, Justice and Company Affairs, New Delhi
4. The Secretary Telangana Advocates Association, Library, High Court Buildings Hyderabad
5. One CC to M/s. M. VANAJAKSHI, Advocate [OPUC]
6. One CC to Smt. L PRANATHI REDDY (Sr SC FOR CENTRAL GOVT) [OPUC]
7. Two CD Copies

kul

**HIGH COURT**

**DATED:03/01/2024**

L.R. COPY TO BE MARKED




**ORDER**

**ARBITRATION APPLICATION No.174 of 2022**

**ALLOWING THE ARBITRATION APPLICATION**

(20) Copies
18/1/24