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Arb.O.P.(Com. Div.) No.46 of 2025



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **01.04.2025**

CORAM

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Arb.O.P.(Com. Div.) No.46 of 2025

M/s.K.S. and Company,
Rep. by its Managing Partner,
Mr.K. Sundaresan,
4/150, Lake Area Main Road,
Uthangudi Post,
Madurai - 625 107.

... Petitioner

Vs.

Union of India,
Ministry of Road Transport and Highways,
Rep. by Superintending Engineer,
National Highways, Madurai Circle,
No.5, Besant Road,
Chinna Chokkikulam,
Madurai - 625 002.

... Respondent

PRAYER: Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint a sole arbitrator to adjudicate the dispute between the petitioner and the respondent in terms of clause 26 (ii) (b) of the agreement dated 09.08.2019 and to direct the respondent to pay the cost.

For Petitioner : Mr.Mithreyi Kasthurirangan



For Respondent : Dr. D. Simon

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ORDER

This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking for appointment of an Arbitrator by this Court.

2. There seems to be a dispute between the petitioner and the respondent arising out of the agreement dated 09.08.2019. The said agreement contains an arbitration clause. The petitioner has invoked the arbitration clause by issuing notice to the respondent on 21.06.2024 in compliance with Section 21 of the Arbitration and Conciliation Act. No reply has been received from the respondent to the said arbitration invocation notice. Since there was no consensus between the parties with regard to the name of the arbitrator, the petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act.

3. A counter affidavit has been filed by the respondent before this Court contending that the dispute resolution mechanism stipulated in the terms and conditions of the agreement dated 09.08.2019 has not been



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adhered to by the petitioner. According to the respondent, before initiating arbitration, the petitioner will have to comply with the conciliation mechanism provided under Article 26.2 of the agreement dated 09.08.2019.

4. However, the learned counsel for the petitioner would submit that only due to the fact that the respondent did not respond to the various notices sent by the petitioner seeking for conciliation as per the conciliation mechanism provided under Article 26.2 of the agreement dated 09.08.2019, the petitioner was constrained to file this petition under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an arbitrator by this Court. According to the petitioner, they have complied with all the requirements of conciliation as per Article 26.2 of the agreement dated 09.08.2019.

5. The learned counsel for the petitioner also drew the attention of this Court to the letters dated 16.11.2023, 07.02.2024 and 29.02.2024 sent by the petitioner to the respondent requesting the respondent to come for conciliation. According to the petitioner, despite sending those letters requesting the respondent to come for conciliation as per Article 26.2 of the



agreement dated 09.08.2019, the respondent has failed to respond to those letters.

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6. The learned counsel for the respondent would reiterate the contents of the counter filed before this Court and would submit that since conciliation mechanism has not been adhered to as per the agreement dated 09.08.2019, the present petition is not maintainable.

7. However, as seen from the communication dated 09.07.2024 sent by the Divisional Engineer, National Highways, Madurai, to the Superintending Engineer, National Highways Circle, Madurai, the aforesaid letters sent by the petitioner have been referred to in the said communication dated 09.07.2024 which will prove that despite requests made by the petitioner for conciliation, the said requests were ignored by the respondent.

8. On the last hearing date, i.e., on 26.03.2025, the learned standing counsel for the respondent sought further time to get instructions with regard to the aforementioned letters sent by the petitioner, which have been relied upon by the learned counsel for the petitioner for the purpose of



satisfying the requirements of conciliation mechanism as provided under Article 26.2 of the agreement dated 09.08.2019.

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9. Today, the learned standing counsel appearing for the respondent would refer to the subsequent letter dated 13.12.2024 sent by the petitioner to the respondent agreeing to go for conciliation. However, the learned counsel for the petitioner would submit that the letter referred by the learned standing counsel for the respondent dated 13.12.2024 is the reply sent by the petitioner and it was not a consent given by the petitioner for agreeing to go for fresh conciliation. She would also submit that eventhough the petitioner's representative had logged-in through video conferencing on the scheduled date and time, the respondent did not come for conciliation. The same is disputed by the learned standing counsel for the respondent.

10. The scope of inquiry under Section 11 of the Arbitration and Conciliation Act is limited to ascertaining the *prima facie* existence of an arbitration agreement. Admittedly, in the instant case, the petitioner had earlier requested the respondent for conciliation as per the conciliation mechanism provided in the dispute resolution mechanism through their



letters dated 16.11.2023, 07.02.2024, 29.02.2024 and 30.03.2024.

Admittedly, those letters were not responded to by the respondent. Only, after the conciliation requests made by the petitioner was unanswered, the petitioner was constrained to file this petition under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of the arbitrator by this Court.

11. The arbitration clause contained in the agreement dated 09.08.2019, which is the subject matter of the dispute between the parties is extracted hereunder:

"26.3 Arbitration

(i) Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by arbitration in accordance with the rules of arbitration of the Society For Affordable Redressal Of Disputes (SAROD).

(ii) The parties expressly agree as under in case of arbitration of disputes:



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(a) There shall be no arbitration for a dispute involving a claim value upto INR 50 Lakh (INR fifty lakh). The Authority's Engineer shall give a reasoned decision in case of such dispute and the same shall be, binding on both the parties.

(b) In case of a dispute involving claim value of above INR 50 Lakh (INR fifty lakh), but upto INR 50 Crore (INR fifty crore), the same shall be referred to a Sole Arbitrator. Authority shall within 30 (thirty) days propose names of 5 (five) Arbitrators from the list of Arbitrators maintained by SAROD (Society for Affordable Redressal of Disputes) and the Contractor shall within 30 (thirty) days select one name from the list of five and the name so selected by the Contractor shall be the Sole Arbitrator for the matter in dispute. In case Authority delays in providing the list of 5 (five) names, President, SAROD will provide 5 names within 30 (thirty) days of receipt of reference from aggrieved party in this regard. In case the Contractor fails in selecting one from the list of five, President, SAROD shall select one from the list of five provided by Authority within 30 (thirty) days of receipt of reference from aggrieved party in this regard.



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(c) In case of a dispute involving a claim value of more than INR 50 Crore (INR fifty crore), the same shall be referred to an Arbitral Tribunal comprising 3 (three) Arbitrators. The Dispute shall be settled in accordance with the rules of Arbitration of the Society for Affordable Redressal of Disputes (SAROD).

(d) The venue of arbitration shall be Madurai, and the language of arbitration proceedings shall be English.

(e) The fees of the Arbitrators shall be as per the rates fixed by the Authority from time to time. The cost of arbitration shall be shared equally by the parties

(f) Neither Party shall be entitled for any pre-reference or pendent lite interest. Le, interest from date of cause of action till date of Award by Arbitral Tribunal. The parties specifically agree that claim for any such interest shall not be considered and shall be void. The Arbitrator or Arbitral Tribunal shall have no power/jurisdiction to award pre-reference or pendent lite interest in case of disputes.



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(iii) *The Arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.*

iv) *The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.*

(v) *This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.*

(vi) *In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five*



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per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120% (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."

12. The petitioner has also invoked arbitration in accordance with the arbitration clause by issuing notice to the respondent on 21.06.2024 in compliance with Section 21 of the Arbitration and Conciliation Act. No reply has been received for the same by the petitioner. The said fact is also not disputed by the learned standing counsel appearing for the respondent.

13. Since there exists an arbitration clause in the agreement dated 09.08.2019, which is the subject matter of dispute between the parties, and the petitioner having adhered to the conciliation mechanism provided therein, and since there was no response to the same, and since the



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petitioner has satisfied the requirements of Section 21 of the Arbitration and Conciliation Act, by issuing notice to the respondent on 21.06.2024, this Court will necessarily have to appoint an arbitrator as prayed for in this petition.

14. Accordingly, this Arbitration Original Petition is allowed as prayed for by issuing the following directions:

(a) Hon'ble Mr.Justice Sanjay V. Gangapurwala, Former Chief Justice, Madras High Court, who is having office at Durga Mata Mandira Samor, House No.2-2-278, Govardhanagiri, Kharakuwa, Aurangabad - 431 001 (Mobile No.95451 11995) is appointed as the sole Arbitrator to decide the dispute between the petitioner and the respondent arising out of the agreement dated 09.08.2019;

(b) The Arbitrator shall be paid his remuneration / fees in accordance with the 4th schedule of the Arbitration and Conciliation Act, 1996 or as per the mutual consent of both the parties;

(c) Both the parties shall equally share the arbitrator's fees;

(d) The Arbitrator shall conduct the arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and shall complete



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the arbitration within the specified time as prescribed under the said Act.

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Index : Yes/No
Speaking Order : Yes / No
Neutral Citation Case: Yes / No
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ABDUL QUDDHOSE. J.,

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