



Arb. O.P. (Com. Div.) No.107 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2025

CORAM

THE HON'BLE Mr. JUSTICE ABDUL QUDDHOSE

Arb.O.P (Com.Div.) No.107 of 2025

and

Arb. Appln. Nos.797 and 798 of 2024

M/s. R. Vinudhanu Commerce,
A partnership firm,
Through its Managing Partner,
R. Ramesh,

... Petitioner

Vs

1. NLC India Limited
Represented by its
Deputy General Manager,
Mech & Planning,
TPS-1, NLCIL,
Neyveli – 607 807.

2. Metal Scrap Trade Corporation Limited (MSTC)
Ministry of Steel, Government of India,
Rep. by its Chief Manager,
Mr. N. Shanmugam,
ISPAT Bhavan,
3rd Floor,
No.5, Kodambakkam High Road,
Chennai – 600 034.

... Respondents



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Prayer : Arbitration Original Petition (Commercial Division) filed under Section 11(6)(a) & (c) of the Arbitration and Conciliation Act, 1996 read with Rule 2 of the Appointment of Arbitrators of Madras High Court Scheme, 1996 for the following reliefs :-

A. Appoint an arbitrator, on behalf of the Respondent, for adjudicating the disputes and differences that have arisen between the parties that had arisen out of the auction in No. MSTC/SRO/NLC INDIA LIMITED/2/TPS/23-24/28492[401937] and Sale Confirmation dated 30-10-2023;

B. Direct the Respondents to pay costs.

For Petitioner : Mr. Avinash Wadhwani

For Respondents : Mr.N. Nithianandam for R1

Mr.C. Vijayakumar

and Mr.V.G. Agash for R2

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. The petitioner had participated in a tender conducted by the 1st respondent. The petitioner was declared as the successful bidder in the



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said auction. The petitioner had paid an Earnest Money Deposit(EMD) of Rs.8,00,00,000/- for participating in the tender. However, the respondents have forfeited the EMD amount given by the petitioner since according to them, the petitioner did not adhere to the tender conditions by paying the Security Deposit amount of Rs.27,00,00,000/- on time. However, the same is disputed by the petitioner, who claims that the respondents have illegally forfeited the EMD amount. The 1st respondent is the Company, which floated the tender, and the 2nd respondent acted as a Facilitator for completing the tender process.

3. There seems to be a dispute between the petitioner and the respondents arising out of the tender conditions dated 30.10.2023. Based on the arbitration clause contained in the tender conditions, the petitioner invoked arbitration by issuing notice to the respondents on 08.01.2025 in compliance with Section 21 of the Arbitration and Conciliation Act, 1996. A reply has been received from both the respondents. The 1st respondent would state that the dispute raised by the petitioner is not an arbitrable dispute, since a contract has not been entered into between the petitioner and the respondents. The 2nd respondent has also sent a reply



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to the arbitration invocation notice by stating that they acted only as a Facilitator and therefore, they cannot be made liable for the arbitral claim. In their reply, they have also admitted the arbitration clause which is contained in the tender conditions which has been relied upon by the petitioner for the purpose of filing this petition under Section 11 of the Arbitration and Conciliation Act, 1996. 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, 1996 seeking for appointment of an arbitrator by this Court.

4. Heard Mr.Avinash Wadhwani, learned counsel for the petitioner; Mr. N. Nithianandam, learned counsel for the 1st respondent and Mr.C.Vijayakumar, learned counsel for the 2nd respondent.

5. The learned counsel for the petitioner drew the attention of this Court to the arbitration clause contained in the tender conditions and also drew the attention of this Court to the letter by way of e-mail, dated 30.10.2023 sent by the 2nd respondent on behalf of the 1st respondent and



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would submit that further Security Deposit of Rs.27,00,00,000/- has to be paid by the petitioner as per Clause 27 of the Special Terms and Conditions of e-Auction. He would submit that since the Special Terms and Conditions of e-Auction contains the arbitration clause, the claim of the petitioner is an arbitrable dispute. He also drew the attention of this Court to Clause 28 of the terms and conditions of the tender and would submit that on receipt of the acceptance letter viz., treating the petitioner as the successful bidder, the terms and conditions stipulated in the tender conditions are made applicable to both the parties to the dispute. Therefore, according to him, since the petitioner was declared as the successful bidder and the letter of acceptance was issued by the 1st respondent, the arbitration clause contained in the terms and conditions stipulated in the tender are binding on the respondents. Therefore, he would submit that the petition filed under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an arbitrator is maintainable, since there is an arbitrable dispute between the parties arising out of the terms and conditions of the tender.

6. On the other hand, the learned counsel for the 1st respondent

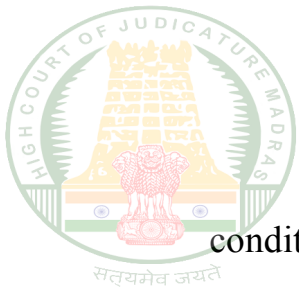


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drew the attention of this Court to Sub-clauses contained in Clause 27 of the terms and conditions of the tender, more particularly, Sub clauses (d) and (i) and would submit that since the petitioner failed to deposit the required Security Deposit amount, the respondents have the right to forfeit the EMD amount paid by the petitioner and therefore, the arbitration clause which is found in the tender conditions cannot be made applicable to the petitioner since the said arbitration clause will be binding on the respondents only after a sale order is issued on receipt of the full security deposit amount from the petitioner.

7. The learned counsel for the 1st respondent also drew the attention of this Court to Clause 34 of the tender conditions, which stipulates jurisdiction, and would submit that as per the said clause even if the sale order is issued, it shall be only in accordance with the Indian laws in force and is subject to the exclusive jurisdiction of Neyveli Courts only.

8. The learned counsel for the petitioner by way of reply drew the attention of this Court to Clause 10.33.3.5 in Annexure II to the tender



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conditions and would submit that the term dispute shall include a demand or difference of any kind whatsoever, arising out of the Contract and therefore, the claim made by the petitioner is an arbitrable dispute.

9. However, on the other hand, the learned counsel for the 1st respondent would submit that only after a contract has been executed between the parties, the arbitration clause contained in the terms and conditions of the tender can bind both the parties. Since a contract has not been entered into, he would submit that the claim made by the petitioner is not an arbitral dispute.

10. The learned counsel for the 2nd respondent would submit that they are only a formal party as they acted only as a Facilitator on behalf of the 1st respondent, who floated the tender, and therefore, they are not bound by the arbitration clause contained in the tender conditions.

Discussion :

11. Admittedly, the EMD amount paid by the petitioner to the respondents for participating in the tender has been forfeited by the



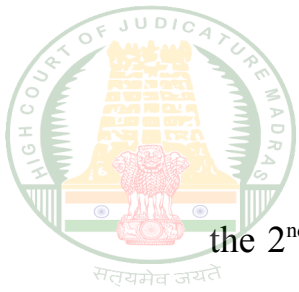
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respondents. Admittedly, the petitioner was also declared as the successful bidder in the auction conducted by the respondents. However, on account of the alleged non-payment of the Security Deposit amount by the petitioner to the respondents on time, the respondents have forfeited the EMD amount paid by the petitioner. While directing the respondents to pay the Security Deposit amount of Rs.27,00,00,000/-, through their letter, dated 30.10.2023, the respondents have themselves relied upon Clause 27 of the terms and conditions of the tender, which stipulates the payment of the Security Deposit amount. Since the said amount was not paid, the respondents have forfeited the EMD amount of Rs.8,00,00,000/- paid by the petitioner for participating in the bid. However, the petitioner has categorically contended before this Court that they have adhered to the terms and conditions of the tender and they have not committed breach of the tender conditions. According to the petitioner, the forfeiture of the EMD amount to the tune of Rs.8,00,00,000/- made by the respondents is illegal. It is for the Arbitral Tribunal to decide once an Arbitral Tribunal is constituted with regard to the contentious issues raised by both the parties before this Court.



WEB COPY 12. The petitioner has also complied with the requirements of Section 21 of the Arbitration and Conciliation Act by invoking arbitration in accordance with the arbitration clause contained in the tender conditions by issuing notice to the respondents on 08.01.2025. A reply has also been received from both the respondents, to the same. The 1st respondent has stated that the claim of the petitioner is not an arbitrable dispute, since a Sale Order has not been issued in favour of the petitioner as per the terms and conditions of the tender. According to them, only after the issuance of Sale Order, the arbitration clause contained in the terms and conditions of the tender shall bind both the parties to the contract. However, the same is disputed by the petitioner before this Court. The 2nd respondent has also sent their reply to the arbitration invocation notice by stating that they have only acted as a Facilitator for the 1st respondent and therefore, they cannot be made liable for any claim being made by the petitioner and they have also stated that the arbitration clause contained in the terms and conditions of the tender is not binding on them.

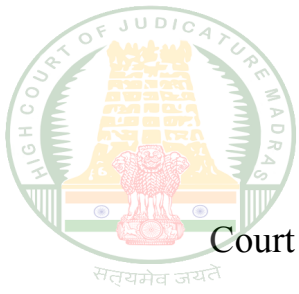
13. The learned counsel for the 2nd respondent has submitted that



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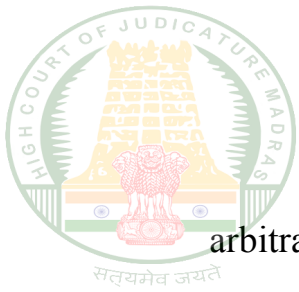
the 2nd respondent is not a necessary party as they are not bound by the arbitration clause contained in the tender conditions. However, the 2nd respondent who acted as a Facilitator on behalf of the 1st respondent has issued a Communication to the petitioner, dated 30.10.2023, directing the petitioner to pay the Security Deposit amount of Rs.27,00,00,000/-. In fact, they have referred to Clause 27 of the terms and conditions of the tender. In view of the same, on a prima facie consideration, this Court finds that they are bound by the arbitration clause contained in the tender conditions. However, if at all they are aggrieved they always have the right to file an application under Section 16 of the Arbitration and Conciliation Act before the Arbitral Tribunal questioning the arbitral claim made against them by the petitioner. Therefore, the contention of the 2nd respondent is rejected, as this Court while deciding an application under Section 11 of the Act has limited scrutiny.

14. The law is now settled by various decisions rendered by the Hon'ble Supreme Court including the decision relied upon by the learned counsel for the respondents in the case of *Vidya Drolia and others Vs. Durga Trading Corporation reported in 2021 2 SCC 1* that the referral



Court under Section 11 of the Arbitration and Conciliation Act, 1996 will only have to look into the prima facie existence of an arbitration clause.

Though the learned counsel for the respondent would rely upon certain paragraphs of *Vidya Drolia's* case, (cited supra), in support of his contention that the claim of the petitioner is not an arbitrable dispute, those contentions cannot be adjudicated by this Court under Section 11 of the Arbitration and Conciliation Act, 1996 and it can be adjudicated only by the Arbitrator, either through an application filed by the respondents under Section 16 of the Arbitration and Conciliation Act 1996 or through the statement of defence filed by the respondents before the Arbitral Tribunal, once the same is constituted, as the doctrine of kompetenz-kompetenz comes into play. Admittedly, the respondents have forfeited a sum of Rs.8,00,00,000/- paid by the petitioner towards EMD. The respondents have also relied upon Clause 27 of the terms and conditions of the tender while directing the petitioner to pay the Security Deposit amount of Rs.27,00,00,000/-. The very same terms and conditions of the tender also contains an arbitration clause. The same is also not disputed by the respondents. The only dispute they have raised is that only after entering into a contract / issuance of Sale Order, the

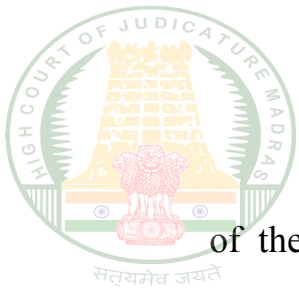


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arbitration clause contained in the terms and conditions of the tender will become binding upon the parties. However, the same has to be rejected by this Court at this referral stage, in view of the following reasons :

a) The respondents themselves have relied upon Clause 27 of the terms and conditions of the tender for directing the petitioner to pay the Security Deposit amount of Rs.27,00,00,000/-;

b) The petitioner claims that they have not paid the Security Deposit amount of Rs.27,00,00,000/-, as according to them, despite making requests for extensions, the respondents have failed to consider those extensions. The same is disputed by the respondents as seen from their counter as well as from the submissions made by the learned counsel appearing for the respondents. The said contentions cannot be decided by this Court while deciding an application under Section 11 of the Arbitration and Conciliation Act, 1996, as held by various decisions of the Hon'ble Supreme Court as well as this Court including the decision rendered in *Vidya Drolia's* case referred to supra. As a referral Court, only a limited scrutiny can be exercised by this Court. When admittedly there exists an arbitration clause in the terms and conditions



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of the tender, which is the subject matter of the dispute between the parties, and since the petitioner has invoked arbitration in accordance with the arbitration clause contained therein and there is no consensus between the parties for arbitration, necessarily, this Court will have to appoint an Arbitrator as prayed for in this petition. Further, the claim of the petitioner cannot also be treated to be a dead claim or hopelessly barred by law of limitation.

15. This Court, as observed earlier, only will have to see the prima facie existence of an arbitration clause. Admittedly, there exists an arbitration clause in the tender conditions and the same is extracted hereunder :-

Annexure II – 10.33.3.5 : For the purpose of this clause, the term 'dispute' shall include a demand or difference of any kind whatsoever, arising out of the Contract and respecting the performance of the Contract, whether during the Contract period including extensions if any, or after completion, and whether before or after termination, abandonment or breach of the Contract. (except as to any matter, the decision of which is specifically otherwise provided for in any of these conditions).



WEB COPY 16. As seen from the arbitration clause, the Arbitral Tribunal shall comprise of 3 Arbitrators. The petitioner has already nominated their Arbitrator, by name viz., Mr.Karthick Sundaram, Advocate, practising before this Court. The petitioner had also requested the respondents to appoint their Arbitrator. However, they have disputed the existence of an arbitration agreement between the petitioner and the respondents. Since the respondents have not accepted the request of the petitioner for nominating their Arbitrator, this Court will have to necessarily appoint an Arbitrator on behalf of the respondents under Section 11 of the Arbitration and Conciliation Act, 1996.

17. For the foregoing reasons, the following directions are issued :-:-

a) This Court appoints Hon'ble Mr. Justice Rajiv Shakdher, former Chief Justice of Himachal Pradesh High Court, having office at C-2, Nizamuddin East (2nd Floor), New Delhi, (Mobile 9717495004) (Email :rajivshakdher62@gmail.com) as the Arbitrator on behalf of the respondents to adjudicate the dispute between the parties arising out of the tender, dated 30.10.2023.



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(b) The Arbitrator appointed by this Court shall be paid his remuneration / fees in accordance with the 4th schedule of the Arbitration and Conciliation Act, 1996.

(c) Both the parties shall equally share the Arbitrator's fees.

(d) The Arbitral Tribunal shall conduct the arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and shall complete the arbitration within the specified time as prescribed under the said Act.

(e) The Arbitrator nominated by the petitioner as well as appointed by this Court on behalf of the respondents, by consensus, shall appoint the Presiding Arbitrator as per the arbitration clause. The Arbitral Tribunal shall pass an Arbitral Award, within the time frame fixed under the Arbitration and Conciliation Act, 1996.

18. With regard to Arb. Appln No.797 of 2024, the learned counsel for the applicant seeks permission of this Court to withdraw the said application. However, he seeks liberty for the applicant to seek similar interim reliefs as prayed for in Arb. Appln No.797 of 2024 before the Arbitral Tribunal under Section 17 of the



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Arbitration and Conciliation Act, 1996. He also seeks for refund of

the Court Fees paid in Arb. Appln No.797 of 2024 to the applicant.

19. In the result, i) Arb. O.P. (Com. Div.) No.107 of 2025 is allowed as prayed for, ii) Arb. Appln No.797 of 2024 is dismissed as withdrawn, but, however, liberty is granted to the applicant to file similar interim reliefs before the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1996. The respondents are also granted liberty to file an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal, once the same is constituted to raise all objections, including the objections raised before this Court in this Section 11 petition. In view of the above, Arb. Appln. No.798 of 2024 is closed.

Registry is directed to refund the applicable Court fees to the applicant in Arb. Appln No.797 of 2024.

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Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
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and
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