

In the High Court of Judicature at Madras

Dated : 06.03.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.799 of 2012

M/s.Jyothi Turbopower Services
Private Limited, No.4-124/1,
Manjeera Road, Chandanagar,
Hyderabad, Rep. by its Managing Director,
Mr.Bhaskar.

.. Petitioner

-VS-

Bharat Heavy Electricals Limited,
Power Sector – Southern Region,
E.V.Periyar Building, Anna Salai,
Chennai, Tamil Nadu.

.. Respondent

Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint a Sole independent and impartial Arbitrator to adjudicate upon the disputes between the parties.

For Petitioner : Mr.Thriyambak J.Kannan

For Respondent : Mr.Krishna Srinivasan
for M/s.Ramasubramaniam Associates.

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O R D E R

The subject matter of disputes inter se the parties, which have given rise to the present petition under section 11(6) of the

Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the said Act') is the short closing of the Contract Agreement dated 31.03.2010 by the respondent entered into for purposes of handling at site stores/storage yard, transportation to site of work, erection, testing and commissioning of 67.5 MW STG with associated auxiliaries and 1 No. Turbo Blower with its auxiliaries including supply and application of final painting for STG unit 5 (STG-5) and Turbo Blower of Unit 4 (TB-4). The agreement contains the dispute resolution clause through arbitration, being clause 2.36. which reads as under :

2.36 ARBITRATION

2.36.1 All disputes between the parties to the contract arising out of or in relation to the contract, other than those for which the decision of the engineer or of any other person is by the contract expressed to be final and conclusive shall, after written notice by either party to the contract to other party be referred to sole arbitration of General Manager or his nominee. The arbitration shall be conducted in accordance with provisions of the Arbitration and Conciliation Act, 1996.

2.36.2 The parties to the contract understand and agree that it will have no objection that the General Manager or the person nominated as arbitrator had earlier in his official capacity dealt directly or indirectly with the matters to which the contract

relates or that in the course of his official duties had expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

2.36.3 In the event of the arbitrator neglecting or refusing to act or resigning or being unable to act for any reason or his award being set aside by the court for any reasons; it shall be lawful for the General Manager or his successor, as the case may be either to act himself as the Arbitrator or to appoint another arbitrator in the place of the outgoing arbitrator in the manner aforesaid.

2.36.4 The arbitrator may from time to time with the consent of both the parties to the contract enlarge the time for making the award.

2.36.5 Work under the contract shall be continued during the arbitration proceedings. The venue of the arbitration shall be a place from which the contract is issued or such other place as the arbitrator at his discretion may determine."

The petitioner invoked the arbitration clause as per the communication dated 13.06.2012, which did not meet with any reply by the respondent.

2.The only aspect urged by learned counsel for the respondent is that there was no arbitrable dispute surviving on account of the fact that a meeting inter se the parties was held prior to the invocation of the arbitration clause from 24.04.2012 to 26.04.2012 and the Minutes of the same was drawn, where it is agreed that the contract was being short closed, the petitioner expressed their wish to perform the balance work in an extended period of time, but that request was declined by the respondent. However, in the notice issued by the petitioner though this document is not denied, a case was sought to be made out as if this document / minute was under force and coercion.

3.On hearing the learned counsel for parties, I find that it is no one's case that there has been full accord and satisfaction inter se the parties in any documents. The minutes show that there was difference of perceptions and the respondent decided to short close the contract. The petitioner still wanted to, in that situation, perform the balance contract, which was not acceptable to the respondent. As to the effect of these documents, it is for the Arbitrator to see. But, undisputedly arbitrable disputes have arisen inter se the parties, which

are liable to be referred to arbitration. Learned counsel for the respondent emphasises that the petitioner had even given the option that if the contract is short closed, it should not be at the risk and cost of the petitioner and the respondent had not sought to recover any amount from the petitioner in that behalf.

4.As to, on merits which side is to be believed, whether there being any counter claim or not, are all matters again to be adjudicated before the arbitrator. Disputes having arisen in respect of the agreement which contains the arbitration clause and the jurisdiction of the present court not being in dispute, nor the venue for such arbitration being at Chennai, an arbitrator has to be appointed.

5.Learned counsel for the respondent submits that as per the arbitration clause 2.36.2, it is the general manager or his nominee, who is to be appointed as arbitrator. However, in my view, the respondent lost the opportunity to appoint the arbitrator having not responded to the letter of the petitioner dated 13.06.2012. In this behalf, I would refer to the judgment of the hon'ble Supreme Court in **Datar Switchgears Ltd. vs. Tata Finance Ltd., 2000 (8) SCC 151**, followed subsequently in **National Insurance Co. Ltd. vs. Mastan, 2006**

(2) SCC 641, as also by a Division Bench of this Court in **The General Manager (Telecom) Madurai Secondary Switching Area, Department of Telecommunication vs. Sesa Seat Information Systems Ltd., 2005 4 MLJ 210.**

6.Thus, with consent of parties, I appoint **Mr.Justice K.Govindarajan, a retired Judge of this court**, as the Sole Arbitrator to enter upon reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally.

7.The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

(S.K.K., CJ.)
06.03.2015

sra

The Hon'ble Chief Justice

(sra)

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