

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2015

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
11.09.2015	18.09.2015

Coram

THE HON'BLE Mr.JUSTICE T.S.SIVAGNANAM

O.P.No.667 of 2013

K.C.Babu

... Petitioner

Vs

- 1 The Nuclear Power Corporation of India Limited
A Government of India Enterprises
(The Madras Atomic Power Station)
rep. by its Chairman and Managing Director
Kalpakkam 603 102.
- 2 The Manager (HR)
The Madras Atomic Power Station
Nuclear Power Corporation of India Limited
(A Government of India Enterprises)
Kalpakkam 603 102. Respondents

Prayer :-Petition filed under Section 11(6) (a) & (c) of the Arbitration and Conciliation Act, 1996 read with Rule 2 of the Appointment of Arbitrators of the Madras High Court Scheme, 1996 to appoint an arbitrator to resolve all disputes arising out of the Tender Notice No. MAPS/HR/ER/02/2008.

For petitioner .. Mr.V.Raghavachari

For Respondents .. Mr.V.Vijayashankar

O R D E R

This Petition has been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), for appointment of an Arbitrator to resolve all disputes arising out of the tender awarded in favour of the petitioner by the respondent Organisation.

2(a) The respondent, the Nuclear Power Corporation of India Limited vide notice dated 17.10.2008, invited offers from reputed parties having similar experience of work for running of Catering Services, Room Services, Front Lobbying and House Keeping Maintenance in NPCIL Guest house and NTC Hostel at DAE Township, Kalpakkam. The probable date of commencement of work was notified as 01.12.2008 and the period of contract was for two years.

(b) The petitioner submitted its tender documents and was awarded the work vide Work Order dated 08.05.2009, for total value of Rs.64.80 lakhs i.e. at the rate of Rs.2,70,000/- per month for two years. The terms and conditions of contract were reduced into writing as stipulated under the Work Order.

(c) The petitioner would state that they had completed the work and were issued a completion certificate

02.07.2012 was issued to the petitioner calling upon them to explain as to why certain sums of money should not be recovered. The petitioner is said to have submitted their representation dated 09.07.2012 requesting for details. However, by further communication dated 27.08.2012, the petitioner was called upon to pay a sum of Rs.26,30,663/-. The petitioner by letter dated 24.04.2013 (sent by Registered post with acknowledgment), requested for appointment of an Arbitrator in terms of the conditions of contract. Thereafter, the petitioner is said to have sent reminders on 06.06.2013, stating that his request for appointment of an Arbitrator by letter dated 13.05.2013 has not evoked any response as they are facing financial constraint because of the pending bills and once again made a request for appointment of an Arbitrator at the earliest to resolve the long pending issue. It appears that even for the reminder there was no response from the respondents and hence the petitioner filed this Original Petition before this Court on 31.07.2013.

3(a) In the counter affidavit filed on behalf of the respondents, it is stated that during the course of execution of contract awarded to the petitioner, complaints were received, based on which investigation was carried out and a decision was taken to recover a sum of Rs.26,30,682.90/- and the petitioner was intimated about

recover the same from the pending bills and the balance to be adjusted from the security deposit. It is further submitted that already a sum of Rs.13,47,842/- has been recovered and the balance to be recovered is Rs.12,82,840/.

(b) It is further submitted that pursuant to the petitioner's Application No.KCB/ME/CMD/01-13 dated 24.04.2013, the respondent Organisation has appointed Thiru K.V.Kuppuswamy, as sole Arbitrator vide its order dated 31.07.2013 and the learned Arbitrator fixed the first preliminary hearing on 02.09.2013. On receipt of such intimation, the petitioner by their letter dated 14.08.2013, informed the respondents that they have already moved this Court for appointment of an Arbitrator. The said communication was brought to the notice of the learned Arbitrator, who in turn has kept the proceedings in abeyance. It is stated that apart from the Arbitration proceedings commenced by the Arbitrator appointed by the respondent Organisation, the present Petition filed under section 11 of the Act and an Application under section 9 of the Act was also filed. It is further submitted that the present Petition is not maintainable, since already an Arbitrator has been appointed by the respondent Organisation and therefore, the Petition is liable to be dismissed. In this regard, the learned counsel for the respondents referred to the documents filed in the typed set of papers filed along with the counter affidavit.

4.The learned counsel for the petitioner submitted that in terms of section 11(6) of the Act, if one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within a period of thirty days of the demand, the right to appoint arbitrator of their choice will be forfeited after the expiry of thirty days.

5.It is submitted that appointment of the Arbitrator though said to have been made on 30.07.2013, the communication clearly shows that the concerned Officer had signed the said communication only on 01.08.2013, which is also beyond the period of thirty days time limit. In support of such contention, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of *DEEP TRADING COMPANY v. INDIAN OIL CORPORATION AND OTHERS* [(2013) 4 SCC 35].

6.The learned Standing Counsel appearing for the respondents submitted that the right to appoint an Arbitrator by the respondent Organisation does not get forfeited automatically and till the Application is entertained by this Court, the respondent Organisation has the right to appoint an Arbitrator and this Court entertained the Petition only on 25.10.2013 and by then, the respondent Organisation had already nominated an Arbitrator and the Arbitrator also commenced the proceedings by fixing the first date of hearing.

7. Heard the learned Counsels appearing for the parties and perused the materials placed on record.

8. The question which falls for consideration is as to whether the respondents have forfeited their right to appoint their Arbitrator in terms of the conditions contained in the contract.

9. It is not in dispute that the contract contains an arbitration clause and such arbitration agreement is valid. Further, the dispute raised by the petitioner falls within the scope of reference to Arbitration under the said clause. The only issue which is required to be considered is as to whether this Court should appoint an Arbitrator to decide the dispute in spite of the fact that the respondent organisation is said to have nominated a Departmental Arbitrator by their proceedings dated 30.07.2013.

10. The legal issue has been considered by the Hon'ble Supreme Court in the case of *DATAR SWITCHGEARS LTD., v. TATA FINANCE LTD. AND ANOTHER* [(2000) 8 SCC 151], and the Hon'ble Supreme Court held that in cases falling under section 11 (6) of the Act are concerned, no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under section 11(4) and Section 11(5) of the Act and therefore, so far as section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to

appointment does not get automatically forfeited after expiry of 30 days and if the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under section 11*, that would be sufficient. It is further pointed out that in cases arising under Section 11(6) of the Act, if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under section 11 of the Act seeking appointment of an arbitrator and only then the right of the opposite party ceases.

11. In the instant case, the respondent would state that they have appointed an arbitrator by proceedings dated 30.07.2013. However, the said proceedings has been signed by the Chairman and Managing Director only on 01.08.2013. As noticed above, the petitioner has filed the Application before this Court on 31.07.2013. Thus, by applying the law laid down by the Hon'ble Supreme Court in the case of *DATAR SWITCHGEARS LTD* (supra), the relevant consideration should be the date of filing of the Application and not the date on which the Application was taken on file. Hence, the petitioner is justified in seeking for a direction from this Court to appoint an Arbitrator.

12. In the light of the above I appoint,

Mr. P. Ganesan, M.A., B.L.,

District Judge (Retd)

No. 778, Judge Colony,

4th Street, Kahithapuram,

S. Kolathur (Near 200 ft Road), Chennai 600 017.

Phone No. 044-29725237, Mobile No. 9600045571.

as the Sole Arbitrator to enter upon the 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. In the event of respondents not entering appearance, the same may be borne by the petitioner at the initial stage to form part of the main cause.

The Original Petition is accordingly allowed, leaving the parties to bear their own costs.

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sd/.T.S.N.J
18.09.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/21.12.2015

COURT OFFICER