IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

Dated:21.11.2017

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P.No.387 of 2017

M/s.Star Engineering Contractors,
No.6/486, Cuddalore Main Road,
Neyveli 607 802,
represented by its Managing Partner,
N.Kolappan .. Petitioner

Versus

M/s.N.L.C.India Limited,
First Floor,No.8,Mayor Sathiyamurthy Road,
FSD Egmore Complex of
Food Corporation of India,
Chetpet, Chennai 600 031 .. Respondent

Prayer: Petition filed under section 11 of the Arbitration and Conciliation Act, 1996, praying for appointment of an Arbitrator on behalf of the respondent to proceed further, to constitute an Arbitral Tribunal in terms of Clause 21 of the General Conditions of the Contract or in the alternative to designate the Arbitrator nominated by the petitioner, to act as the sole arbitrator and pass an award with respect to the disputes and differences between the petitioner and the respondent, that have arisen out of the Contract Agreement between the petitioner and the respondent.

For Petitioner .. Mr.S. Kadarkarai
For respondent .. Mr.N. Nithyanandam

ORDER

This petition is filed praying for the appointment of an Arbitrator on behalf of the respondent so as to constitute an Arbitral Tribunal in terms of Clause 21 of the General Conditions of the Contract or in the alternative, to designate the arbitrator nominated by the petitioner as sole arbitrator, to adjudicate upon the disputes between the parties.

2. Detailed submissions of Mr. S.Kadarkarai appearing for the petitioner and Mr.Nithyanandam appearing for the respondent have been heard and the pleadings, written submissions and case-law perused carefully.

3. The petitioner is a contractor who claims to be regularly engaged by the respondent for execution of various project/construction works for over three decades. Pursuant to a competitive open tender floated by the respondent, the petitioner was awarded a contract for the construction of a new disposal yard including internal electrification works in B and C area including internal, civil, structural and electrification works. A letter of award dated 17.4.2010 was issued pursuant to which, an agreement dated 20.09.2010 entered into by both parties. The contract provided for the scope of work to be completed within 12 months from the date of handing over of the site. On account of various reasons that I shall come to presently, the contract was completed only in January 2013.

4. One of the main disputes that arose as between the parties was the question of who the delay was attributable to. While the respondent would hold the petitioner responsible

pleading that the delay was attributable to the acts of omission and commission on its the part, Mr.Kadarkarai would point out that on account of the specific request made by the petitioner on the levy/leviability of liquidated damages for the delay in completion of the contract, a Special Committee was constituted by the respondent to examine the issue and offer recommendations. The Committee, vide report issued in June 2013 had recommended exonerating the petitioner from such liability holding that the delay caused was on account of other hindrances and not attributable to the petitioner. The time for completion of contract was consequently extended from 3.4.2011 to 31.1.2013 without the levy of liquidated damages.

5. The petitioner, vide letter dated 26.06.2014 thus came to claim the difference of actual costs incurred as against what had been contracted for, reiterated by subsequent letters. The demand was rejected vide letter

from the respondent dated 15.09.2015 confirming that the rates quoted were firm rates not subject to price variation. The petitioner thereafter issued a legal notice dated 27.08.2016 calling for settlement of an amount of Rs.97,38,592/- on account of escalation of price of materials, labour and bank commission and charges and calling upon the respondent in terms of clause 20 of the general conditions of contract to settle the claim amicably confirming such decision within 60 days.

6. Alternatively, the petitioner conveyed its intention to invoke clause 21 of the agreement relating to resolution of disputes by arbitration. An interim response dated 14.11.2016 was received from the respondent stating that a detailed reply would be sent and calling upon the petitioner not to precipitate matters in the meanwhile. No response was forthcoming. Thus, a communication dated 12.1.2017 was issued by the petitioner, received by the respondent on

16.1.2016 informing the respondent of the appointment of Mr.V.Radhakrishnan, Senior Advocate of the Madras High Court as its nominee arbitrator in terms of Article 21.2 of the Agreement. The respondent was called upon to nominate its arbitrator and convey the same. While there was no response to this letter, the petitioner received a letter also dated 12.1.2017 from the respondent in response to its legal notice dated 27.8.2016 rejecting all claims of the petitioner. The letter dated 12.1.2017 has been served on the petitioner on 27.1.2017. Though the petitioner would allege that the letter had been despatched only on 21.1.2017, nothing is filed to establish the same. The respondent, in its letter, makes no reference to the petitioners' letter dated 12.1.2017 and merely repudiated its liability to settle the claims by the petitioner, skirting the issue of reference to arbitration raised by the petitioner, altogether. The time lag between the date of letter, 12.1.2017 and receipt of the same by the petitioner on 27.1.2017 is curious.

7. Mr.Nithyanandam for his part would point out that the original contract value was of a sum of Rs.4,99,97,018/-, enhanced and finalized at Rs.5,28,09,418/-. He would refer to a no-claim letter dated 20.4.2015 issued by the petitioner stating that with reference to the subject agreement, the petitioner had completed the entire works and had no claim except the final agreed value of Rs.5,28,09,417.68. In the light of the aforesaid letter, he would state that the petition filed was unsustainable in law. In this context, he would rely on the judgment of the Supreme Court in *New India Assurance Company Limited Vs. Genus Power Infrastructure Limited* (2015) 2SCC 424.

8. Mr.Nithyanandam would also argue that there no price variation clause in the contract as between the parties and thus the dispute raised was not an arbitrable dispute. Thus, according to him, the contract had been fully

performed and discharged and there remained no dispute, much less an arbitrable dispute to be decided.

9. Mr. Kadarkarai would distinguish the aforesaid judgment pointing out that the Bench in the case of Genus Power (surpa) was concerned with a statutory letter of subrogation under the Insurance Act and not a commercial contract as in the present case. He would refer to a decision of this Court in the case of *Bharath Salt Refineries Limited Vs. New India Assurance Company 2016 (4) CTC 515* wherein this Court refers to the observations of the Supreme Court in the case of *Boghara Polyfab Pvt. Ltd. (2009) 1SCC 267* deprecating the practice by which Government Departments, Statutory Corporations and Government Companies received undated receipts in advance from the contractors to be used for issuing no claim certificates for full and final settlement vouchers. In the present case however, while, by way of a passing reference, the petitioner would

state in the written submissions that the no-claim certificate was issued under compulsion, there is no allegation to this effect in the petition under section 11(6) and it was left to the respondent to bring to the notice of the Court petitioner's letter dated 20.4.2015.

10. It is in the conspectus of the above facts and the provisions of section 11(6A) of the Act that I have to decide upon the question of appointment of arbitrator.

11. The sine qua non of a petition under section 11 is an arbitration agreement and the provisions of section 11(6A) enjoin me to examine the existence thereof as a pre-condition to deciding the prayer for appointment. The parties in this case, do not dispute the existence of an arbitration clause in the agreement. Mr.Nithyanandam would only argue that the dispute inter se parties relates to price variation and in the absence of any provision for the same in the agreement between the parties, there is no arbitrable

dispute. This is a question that falls within the domain of the arbitral tribunal for resolution and I reserve the rights of the parties to raise the same in terms of section 16 of the Act.

12. Furthermore and in terms of article 20.3, the dispute raised by the petitioner vide its letter dated 27.8.2016 invoking article 20 of the agreement has not been resolved or adverted to by the respondent within 60 days and as such the reference to arbitration made by the petitioner on 12.1.2017 is in order. The prayer in the petition is accepted for this reason as well.

13. The petitioner has appointed Mr.V.Radhakrishnan, Senior Advocate, Madras as its nominee. On behalf of the respondent, and at its suggestion, I appoint Mr.Justice Mohan Ram, Former Judge of this Court, residing at No.3, Sivakamipuram, II Cross Street, Thiruvanmiyur, Chennai -41 as its nominee. The two arbitrators shall appoint a presiding arbitrator by concurrence to constitute the arbitral tribunal.

The tribunal is requested to dispose of any jurisdictional objections raised on priority, and the matter in entirety as expeditiously as possible, preferably within a period of six months from the date of first sitting. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

14. The observations made in this order are solely for the disposal of this petition and no more. Petition allowed with no costs.

21.11.2017

Speaking order/non speaking order
Index:Yes/No
msr

DR.ANITA SUMANTH, J.

msr

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