

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06.09.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P.No.617 of 2017

Prodigy Hydro Power Pvt. Ltd.,
No.32, 28th Cross, Industrial Layout,
Banashankari 2nd Stage,
Bangalore 560 070,
Karnataka,
represented by its Director
Mr. Harish Yechreddy

.. Petitioner

-VS-

M/s.Khyaati Engineering,
218, New Tiny Sector,
Post Office Road,
Ambattur Industrial Estate,
Chennai 600 058.
Tamilnadu,
represented by its Partners,

1. Mr.N.S.Thiruvambalam and
2. Mr.M.A.Ravikumar

.. Respondents

Prayer: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint second arbitrator to decide the dispute that has arisen between the petitioner and the respondents pursuant to the breach of the Terms and Conditions of Contract dated 23.7.2011 marked as ANNEXURE – B.

For Petitioner : Mr.N.P.Vijay kumar

For Respondents : Mr.C.Rajan

ORDER

This petition is filed in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, 'Act') praying for the appointment of a second Arbitrator to decide upon disputes that have been arisen between the parties pursuant to alleged breach of terms and conditions of '*Contract Agreement for supply of Hydro-Mechanical equipments for 2 x 3 MW Baner – II SHP*', dated 23.7.2011. '

2. The Settlement of disputes is provided for under clause No.6 of the agreement that reads as under:

'Settlement of Disputes (GCC Clause 6)

GCC 6.1.3 – *Replace the words “an hourly” with the words “a daily” in line 1*

- *Adjudicator's daily fee*

GCC 6.1.4 - *Appointing Authority for Adjudicator:*

GCC 6.2.3 - *Any dispute, controversy or claim arising out of, or relating to this contract breach, termination or invalidity there of which has not become final and binding pursuant to G.C.C. Clause 6.12, shall be settled by arbitration by arbitral tribunal as under.*

The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Project Manager and any Recommendation(s) of the Adjudicator related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by

arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof.

The arbitral tribunal shall consist of three arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the "President of the Institution of Engineers (India)". For the purpose of this subclause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.'

3. Heard Mr. N.P. Vijay Kumar appearing for the petitioner and Mr.C.Rajan appearing for the respondent.

4. The main objection raised by the respondent is to the effect that he has already moved the Micro, Small and Medium Enterprises Development Council ('MSMEDC' in short) for resolution of disputes that have admittedly arisen between the parties. In view of the same, the petitioner could, according to him, well participate in proceedings before the MSMEDC without resorting to and insisting upon the present proceedings now initiated.

5. Per contra, learned counsel appearing for the petitioner would submit

that the MSMEDC has been constituted primarily to deal with disputes that are raised by the supplier 'to a transaction and does not envisage the raising or adjudication of counter claims by other parties to a transaction.

6. I find force in the petitioner's arguments. The respondent is a 'supplier', as per the definition of the term under section 2(n) of the Micro, Small and Medium Enterprises Development Act, 2006 (in short 'MSMED Act'). The recovery of amounts due are dealt with in terms of section 17 of the MSMED Act in the following terms:

'17. Recovery of amount due - For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.'

7. Thereafter, section 18 dealing with 'Reference to the Micro and Small Enterprises Facilitation Council' states in sub-section (1) that, notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council. Sections 17 and 18 read in conjunction appear to indicate that it is only the supplier that is entitled to approach the Council and as such, the proceedings before the Council do not include the adjudication of claims by any other party to the transaction.

8. Moreover, I note that the respondent has, in fact, registered itself as a member of the MSMEDC only on 25.3.2015, much after the date of contract

between the parties which is 23.7.2011. As such, the parties have, at the time of entering into the Contract Agreement crystallized a certain procedure for the resolution of disputes that does not include within its ambit resort to the MSMEDC. A party cannot, unilaterally, and by a subsequent act frustrate or modify the terms consciously agreed upon by the parties originally. Thus, I am of the considered view that the present petition is liable to be ordered.

9. In terms of clause 6 of the GCC, the petitioner has nominated Mr. Ajay M., Advocate, having his office at No.26, Seshadri Road, Anandarao Circle, Bengaluru 560 009 as his nominee.

10. Mr. C. Rajan appearing for the respondent suggests the nomination of Mr. Justice Gnanaprakasam, Former Judge of this Court as the nominee of the respondent.

11. The two arbitrators nominated aforesaid by the petitioner and respondent respectively shall nominate a third Arbitrator to preside over the Arbitral Tribunal within a period of 30 days from the date of receipt of this order in accordance with clause 6 of the Contract Agreement dated 23.7.2011.

12. Accordingly, and upon the suggestion of the respondent, I appoint Mr. Justice K. Gnanaprakasam, Former Judge, having his office at AH-196, 3rd Street, 8th Main Road, Shanthi Colony, Anna Nagar, Chennai-40 (Mobile-9444554567) as an Arbitrator, who shall, along with Mr. Ajay M., Advocate appoint

a presiding Arbitrator in accordance with clause 6 of the Contract Agreement between the parties.

13. Though clause 6 provides for the conduct of arbitration proceedings at Mumbai, learned counsel for the respondent would request that the proceedings be conducted at Chennai. The suggestion is not acceded to by the applicant and no agreement could be arrived at in this regard. I thus leave it to the learned Arbitral Tribunal to decide upon the venue of Arbitration taking into account the convenience of the Tribunal as well as the parties.

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

06.09.2017

msr/sl

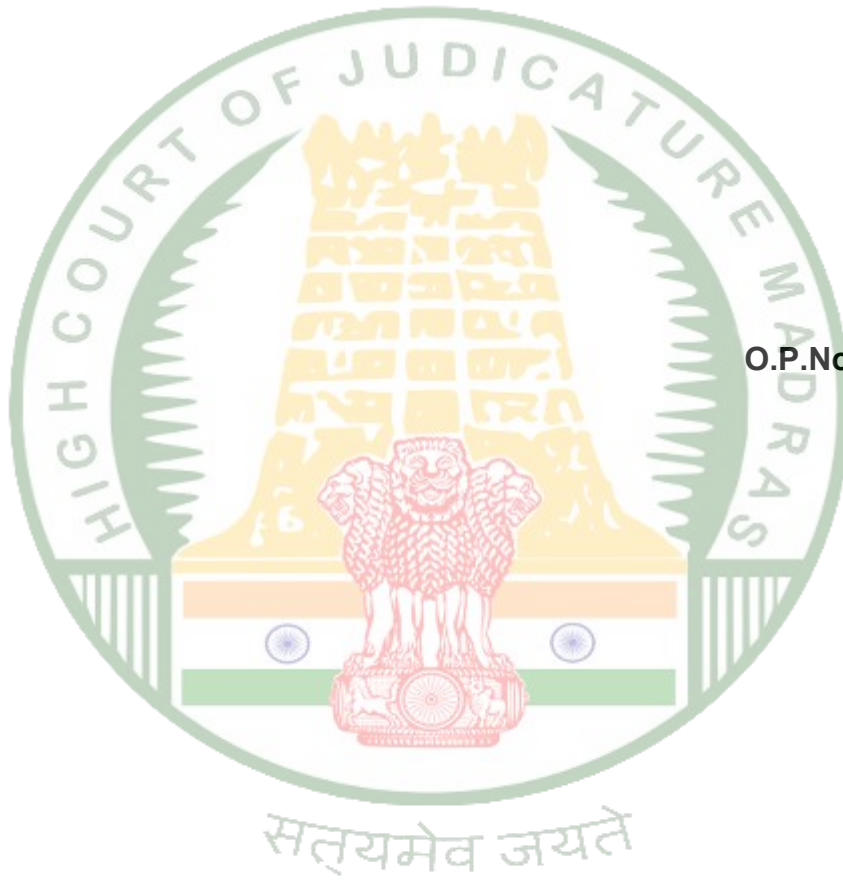
Index:Yes/No

Note: Issue order copy on 13.09.2017.

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DR. ANITA SUMANTH, J.

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O.P.No.617 of 2017

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06.09.2017