

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 06TH DAY OF AUGUST 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P. No.395 of 2018

In the matter of Arbitration
and Conciliation Act, 1996

and

In the matter of the disputes
arising out of the Memorandum
of Agreement dated 23.01.2013

M/s.United Telecoms Limited,
rep. by its Sr.Manager (Marketing)
M.Vishnu Prakash,
No.18A/19, Doddanekundi Industrial Areas,
Mahadevapura Post, Bengaluru-560 048. ... Petitioner

-Versus-

M/s.Electronics Corporation of Tamil Nadu,
rep. by its Managing Director,
MHU Complex, IInd Floor, 692,
Anna Salai, Nandanam, Chennai-600 035. ... Respondent

Original Petition praying that this Hon'ble Court be
pleased to appoint either Mr.Justice S.Rajeswaran, or
Mr.Justice K.Venkatraman or Mr.Justice K.Govindaraj, retired
Judges of this Hon'ble High Court, as Sole Arbitrator to
adjudicate upon the disputes that have arisen between the
petitioner and the respondent.

This Original Petition coming on this day before this
Court for hearing the court made the following order:-

The Original Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator to adjudicate the dispute between the petitioner and the respondent.

2.The petitioner invoked Arbitration Clause in Clause 23 of the Contract of Agreement dated 23.01.2013 signed with the respondent by a notice dated 22.11.2017. The said clause reads as under :-

23. Any dispute or difference whatsoever arising between the parties to the Agreement out of or relating to the construction, meaning, scope, operation or effect of the Agreement or validity of the breach thereof, which cannot be resolved through negotiation process, shall be referred to a sole Arbitrator to be appointed by the Managing Director of ELCOT. The Arbitration shall be held in Chennai, India and the language shall be English only.

3.The notice called upon the respondent to consent for appointment of one among the three named retired Judges of this High Court as the sole arbitrator.

4.For the sake of clarity, it is to be noted that there are two agreements in this petition both dated 23.01.2013. The

1st agreement is between the petitioner and the consortium partners viz., M/s.Shenzhen Emc Technology Co., Ltd., China and M/s.Arunachala Impex (P) Ltd., Chennai called to Consortium Agreement and the 2nd agreement which is the contract between the petitioner and the respondent titled "Contract" which has the aforesaid arbitration clause. These have been executed in terms of the requirements of the Tender floated by the respondent. In the consortium agreement, the petitioner has been named as "Prime bidder".

5.In the notice the petitioner referred to the decision of the Hon'ble Supreme Court **TRF vs. ENERGO Engineering Projects Ltd.**, (2017)18 SCC 377 to say that M.D. of the respondent did not have power to appoint an arbitrator.

6.The respondent by a reply dated 19.12.2017 merely stated that Managing Director was competent to nominate an arbitrator and did not consent for appointment of any of the three named persons as arbitrator. However, the respondent did not nominate an arbitrator under Clause 23 of the Contract/Agreement. Under these circumstances, the petitioner has approached this Court for appointing of a retired Judge of this High court as an Arbitrator.

7. Heard learned Senior Counsel Mr.M.S.Krishnan for the appellant and Mr.Vijayan for M/s.King and Partridge the learned counsel for the respondent. Learned Senior presented his argument in two parts.

8. The learned senior counsel for the respondent reiterated the content of the notice invoking the arbitration clause and submitted that the MD of the respondent was incompetent to nominate a person as an arbitrator in view of the decision of the Hon'ble Supreme Court in **TRF vs. ENERGO Engineering Projects Ltd.**

9. By way of alternative submission, he submitted that in view of the failure to appoint an arbitrator though requested, the respondent forfeited their right after the respondent has approached this Court.

10. In this connection, relied upon the following decisions of the Hon'ble Supreme Court:-

- i. **Datar SwithGear Ltd. Vs Tata Finance Ltd.**
(2008) 8 SCC 151
- ii. **Punj Lloyd Ltd., vs. PetronetMhb Ltd.,**
(2006) 2 SCC 638;

iii. **Union of India vs. Bharat Battery Manufacturing Co., (P) Ltd.,** (2007) 7 SCC 684;

iv. **Bharat Sanchar Nigam Ltd., and another vs. Motorola India Private Ltd.,** (2009) 2 SCC 33.

11. Per contra, the learned counsel submitted that the decision of the Court in **TRF vs. ENERGO Engineering Projects Ltd** was not applicable to the facts of the case as in that case since the MD could not act as an arbitrator and therefore could not nominate any person to act as an arbitrator.

12. The learned counsel for the respondent submitted that none of the other decisions are relevant as the respondent's M.D was competent to appoint an arbitrator and that in absence of the other partners to the Consortium Agreement dated 23.01.2013, the invocation of arbitration clause 23 in the Contract dated 23.01.2013 and machinery under Section 11 of the Act was pre-mature.

13. The learned counsel for the respondent drew attention to the clauses in the Consortium Agreements and Contract both dated 23.01.2013 executed in terms of the tender documents in support of the submission that the petitioner has to act along with consortium partners in the agreement for invoking the arbitration clause.

14.It was further argued that as per the Consortium Agreement, the parties to the agreement are jointly and severally liable for any loss, damage or injury to third party resulting from its obligations. Specifically attention was drawn to Clause 4 of the Consortium Agreement, wherein, it is specified that each member of the consortium shall be equally responsible and jointly and severally liable for the execution of the contract in accordance with the terms of the contract signed with the respondent.

15.It is submitted that though the petitioner as a "prime bidder" was responsible for overall management of the project for ensuring the members of the consortium comply with the terms and conditions set out in the tender documents, could nevertheless arrogate upon itself the power to represent the consortium in an arbitration proceedings by itself.

16.Considered arguments advanced for either of the parties and have given my thoughts.

17.The view that the MD of the respondent did not have the power to appoint an arbitrator in the light of the

decision of the Hon'ble Supreme Court in **TRF vs. ENERGO Engineering Projects Ltd.** referred to *supra*, appears to be incorrect.

18.The agreement in the said case stipulated that the MD of the company could either act as an arbitrator or nominate a person to act as an arbitrator.

19.It was in that context, the Hon'ble Supreme Court held that the Managing Director of the Company was incompetent to act both as an arbitrator and to nominate any person to act as an Arbitrator in view of amendment to section 12(5) of the Arbitration and Conciliation Act, 1996. Operative portion of the judgment in para 54 reads as under:

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the

infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.

20.The decision does not take away the power of a party to the agreement to nominate an arbitrator *simpliciter* where only such power has been vested under the agreement. The M.D of the respondent was merely an appointing authority. Therefore, the power vested withi him does not get eclipsed on account of Section 12(5) of the Act.

21.Adequate statutory safeguards have been incorporated under Section 11 and Section 12 r/w Schedules V and VII of the Act to rule out bias in arbitration proceedings.Section 12(1) (b) r/w Schedule V and Section 12(5) r/w Schedule VII makes it amply clear. Therefore, the reasons stated in the notice is not correct.

22.At the same time, the respondents failed to appoint an arbitrator, the petitioner moved the above application for appointment of an arbitration under Section 11(5)(6) of the

Arbitration and Conciliation Act 1996 on 19.04.2018 i.e., after a lapse of almost five months time after the date of notice invoking the arbitration clause in the contract/agreement.

23.In all the cases cited the Hon'ble Supreme Court has held that if one party demands the opposite party to appoint an arbitrator and the opposite party fails to appoint an arbitrator within the stipulated period of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. 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.

24.In **Bharat Battery Manufacturing Co., (P) Ltd.** case cited *supra*, it was held that as already noticed, the respondent filed Section 11(6) petition on 30.03.2006 seeking appointment of an arbitrator.

25.In the said case, the appellant thereafter is said to have appointed one Dr.Gita Rawat on 15.05.2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement

therein. Court held once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. Thus, the right to appoint an arbitrator stands ceded/forfeited in favour of the Court after expiry of the time specified or thereafter, after a petition under Section 11(5) has been filed for appointment of an arbitrator. In the present case admittedly the respondent also did appoint an arbitrator. While the petitioner has approached this Court.

26. In the present case, it is noticed that the petitioner is the "prime bidder" and is the single point of contact between the petitioner and the respondent.

27. The Contract dated 23.01.2013 has been signed only between the petitioner (who is stated to be in consortium with ShenzenEmc Technology limited, china and Ms.Arunchala Impex Private Limited) and the respondent. It has a stand alone clause for resolution of dispute between the petitioner and the respondent only.

28. The consortium partners are not party to the agreement/contract dated 23.01.2013 signed between the petitioner and the respondent.

29. There is no privity of contract between the respondent and the consortium partners and it is the petitioner which is the single point of contact.

30. The petitioner has not only received the amounts on behalf of the consortium under the arrangement but is also the interface with the respondent under the Contract dated 23.01.2013.

31. The respondent has raised a specious argument that the petitioner was incompetent to invoke arbitration clause without the consortium. Therefore, the said agreement advanced on behalf of the respondent is rejected. Likewise, the argument of the petitioner that the respondents' M.D. lost his power to appoint an arbitrator in view of the decision of the Hon'ble Supreme Court in **TRF** case is liable to be rejected.

32. The respondent has also not brought any decision to support their plea that as a "prime bidder" under the agreement/contract the petitioner was incompetent to invoke the arbitration clause without the consortium partners even if the consortium partners are not party to the

agreement/contract dated 23.01.2013.

33.Since the respondent has failed to appoint an arbitrator, the right to appoint an arbitrator stood forfeited in view of the decision of the Hon'ble Supreme Court referred to *supra* in para 9. It is therefore concluded that the petitioner was competent to invoke the Arbitration Clause in the contract/Agreement dated 23.01.2013.

34.The above view was expressed during the course of the hearing and the counsels were asked to arrive at a consensus to give a name of a retired Judge of this Court who could act as an Arbitrator to resolve the dispute without further delay. Therefore the case was briefly passed over and taken up after recess.

35.After the recess, the counsel for the respondent submitted four other alternative names which includes the name of Hon'ble Mr.Justice.P.Jothimani (Retired) from this Court.

36.The applicant's counsel has consented with the name of Hon'ble Mr.Justice.P.Jothimani (Retired) to be appointed as the sole Arbitrator.

37.Hon'ble Mr.Justice.P.Jothimani (Retired) is therefore appointed to act as a sole Arbitrator to resolve the dispute between the Petitioner and the respondent. Parties hereto shall therefore approach Hon'ble Mr.Justice.P.Jothimani (Retired) to proceed further.

38.The procedure under Section 11(8) of the Act is dispensed with, in view of the consent.

39.The application is accordingly closed. No costs.

Sd/-C.S.N.J
06/08/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 04.10.2018

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COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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