

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 19TH DAY OF MARCH 2018

THE HON'BLE DR.JUSTICE ANITA SUMANTH

A. Nos.2380 & 2381 of 2018

in

O.P.No.858 of 2016

In the matter of Section 11(4) of the
Arbitration and Conciliation Act, 1996

And

In the matter of the Agreement between
M/s.Larsen & Toubro Ltd., and Indarya
Green Power (P) Ltd., dated 19.4.2013 and
Personal Guarantee dated 19.4.2013 by and
between Mr.Aboobucker & M/s.Larsen &
Toubro Ltd.,

M/s.Larsen & Toubro Ltd.,
L & T Construction,
Mount Poonamallee Road,
Manapakkam,
Chennai 600 089

..Petitioner

-Versus-

1.M/s.INDARYA Green Power (P) Ltd.,
No.132, II Floor, Thirumala Complex,
Royapettah High Road, Royapettah,
Chennai 600 014

2.Mr.Aboobucker,
No.25, Dr.Radhakrishnan Salai,
Mylapore, Chennai 600 004

..Respondents

A.No.2380 of 2018 in OP.No.858 of 2016 :

Mr.Aboobucker,

S/o R.Arif,

No.25, Dr.Radhakrishnan Salai,

Mylapore, Chennai 600 004

..Applicant/2nd Respondent

Vs.

1.M/s.Larsen & Toubro Ltd.,

L & T Construction,

Mount Poonamallee Road,

Manapakkam,

Chennai 600 089

..1st Respondent/Petitioner

2.M/s.Indarya Green Power (P) Ltd.,

No.132, II Floor,

Thirumala Complex,

Royapettah High Road,

Royapettah,

Chennai 600 014

..2nd Respondent/1st Respondent

Application praying that this Hon'ble Court be pleased to recall the order dated 6.7.2017 passed in OP.No.858 of 2016 and relieve the Applicant/2nd Respondent of the arbitration proceedings between the respondents herein.

A.No.2381 of 2018 in OP.No.858 of 2016 :

M/s.Indarya Green Power (P) Ltd.,

No.132, II Floor,

Thirumala Complex,

Royapettah High Road,

Royapettah,

Chennai 600 014

..Applicant/1st Respondent

Vs.

1.M/s.Larsen & Toubro Ltd.,

Post Box No.979,

Mount Poonamallee Road,

Manapakkam,

Chennai 600 089

..1st Respondent/Petitioner

2.Mr.Aboobucker,
 S/o R.Arif,
 No.25, Dr.Radhakrishnan Salai,
 Mylapore,
 Chennai 600 004 ..2nd Respondent/2nd Respondent

Application praying that this Hon'ble Court be pleased to recall the order dated 6.7.2017 passed in OP.No.858 of 2016 and reconstitute the arbitral tribunal as per clause 8.7 of the agreement by permitting the Applicant/1st Respondent to appoint its nominee as Arbitrator.

These applications coming on this day before this court for hearing the court made the following order:

A. Nos.2380 and 2381 of 2018 have been filed seeking to recall order dated 06.07.2017 passed by this Court in O.P.No.858 of 2016.

2. The applications are filed by R2 and R1 in the Original Petition respectively. For the sake of convenience, applicant in A.No.2380 of 2018, is referred to by name, as Mr.Aboobucker, the applicant in A.No.2381 of 2018, viz.,Indarya Green Power (P) Ltd. is referred to as 'Indarya' and the first respondent in both applications, viz.M/s.Larsen & Turbro Ltd. is referred to as 'L&T'.

3. Mr.Yashod Vardhan, learned Senior Counsel appearing for Mr.N.P.Vijayakumar, learned counsel for Mr.Aboobucker, applicant in A.No.2380 of 2018 - R2 in the Original Petition, seeks recall of order dated 06.07.2017 on the main ground that there is no arbitration agreement as between Mr.Aboobucker and L&T and as such the constitution of Arbitral Tribunal on 06.07.2017, in so far as Mr.Aboobucker is concerned, is erroneous.

4. Mr.R.Sankaranarayanan, learned Senior Counsel appears for Mr.Pradeep, learned counsel for the applicant in A.No.2381 of 2018.

5. Mr.Murari, learned Senior Counsel appears for Ms.Preeti Mohan, learned counsel for L&T and opposes the applications.

6. The main ground on which both Mr.Aboobucker and Indarya have challenged order dated 06.07.2017 is that the dispute resolution clause provides for amicable settlement and since that option had not been exhausted, the constitution of an Arbitral Tribunal was premature. It appears that Mr.Aboobucker had filed an Special Leave Petition in SLP (Civil) Diary No.36404 of 2017 challenging order dated 06.07.2017, as has Indarya. Both SLPs were dismissed by the Supreme Court as 'withdrawn' granting liberty to the parties to approach the High Court.

7. As far as this specific point is concerned, which is what has been raised in the Special Leave Petitions as confirmed by the learned senior counsel appearing for the applicants. I have in order dated 06.07.2017 specifically recorded at paragraph 8, the following:

'8. It is further made clear that this order will not operate as a bar for the parties to arrive at an amicable solution in terms of clause 8.4 of the Agreement dated 21.03.2013 till such time the learned Arbitrators upon reference in the matter.'

8. This issue has thus been covered in my order dated 06.07.2017 and the parties can thus have no grievance in this regard.

9. Now, the argument advanced in A.No.2380 of 2018 on behalf of Mr.Aboobucker is that the deed of personal guarantee as between him

and L&T does not contain an arbitration clause and as such the constitution of an Arbitral Tribunal including the applicant/individual in those proceedings is incorrect. The application is itself misconceived for the reason that the argument raised therein has not been raised at any point in time either before this Court or before the Supreme Court.

10. It is for the first time in the present application that such an argument has been raised before this Court despite Mr.Aboobucker being duly represented by learned counsel, whose presence has been noted even in the original instance.

11. Moreover, the appointment of the Arbitrator has been by consent of both learned counsel. No argument was taken at that juncture relating to the absence of an arbitration agreement as between Mr.Aboobucker and L&T.

12. The deed of guarantee dated 19.04.2013 itself reveals that the transaction between Mr.Aboobucker, L&T and Indarya is a comprehensive one. The response of both Mr.Aboobucker and Indarya to the notice issued by L&T seeking winding up of Indarya, is revealing. While Mr.Aboobucker assures Indarya that sincere and earnest efforts were being taken to move ahead with the project in question, Mr.Aboobucker states that his obligation to pay the amount guaranteed would stand triggered only if the company, viz., Indarya is unable to pay the amount to L&T. Thus it is apparent that the stand taken by Mr.Aboobucker is that the transaction is a consolidated one and all parties are intrinsically connected.

13. The conduct of Mr.Aboobucker has been one of consensus from the word go. He has participated in full in the proceedings in the

Original Petition. An attempt is made by Mr.Yashod Vardhan, at this juncture, to state that the learned counsel, who had appeared on behalf of Mr.Aboobucker in the Original Petition was not duly authorised to do so. I am loathe to consider this submission and believe that it is an after thought for the reason that this ground has not been taken or pursued before the Supreme Court and the only ground taken is that there is no arbitration agreement as between the parties. In fact the submission is made only orally and not raised in the application. The same is rejected outright.

14. The Supreme Court in the case of *Chloro Controls India Private Limited V. Severn Trent Water Purification Inc. and others* ((2013) 1 SCC 641 has stated in no uncertain terms that it is the intention of the parties that is to be taken into account while deciding the inclusion or otherwise of non-signatories to an arbitration agreement in the proceedings. Paragraph 72 of the judgement to this effect is extracted below:

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

15. At paragraph 76, the Court cautions that the plea to implead a non-signatory to arbitration proceedings would have to be decided

based on the contract and the intention of the parties.

16. The intention of the party in the present case from the time of reply to winding-up notice to the stage of SLP before the Supreme Court makes it clear that the transaction as between the parties is a single, comprehensive one and the intention of all parties is to address the same in a cohesive manner.

17. The Supreme Court in the case of *Sukanya Holdings (P) Ltd. v. Jayesh H.Pandya* ((2003) 5 SCC 531) also settles the view that in a case where multiple remedies might legally be available, it stands to reason, and would be in the best interest of parties that a common proceeding is initiated and pursued.

18. In this view of the matter, in the light of the facts and circumstances as noted above and seen in the context of the judgments cited, I am of the view that there is no merit in A.No.2380 of 2018 and the same is dismissed.

19. Coming to A.No.2381 of 2018 filed by Indarya, Mr.Sankaranarayanan points out a typographical error in paragraph 6 wherein the names of the nominees of the petitioner and the respondents in the Original Petition have been interchanged. The typographical error is corrected hereunder and paragraph 6 of order dated 06.07.2017 will read now as follows:

'6. During the course of hearing, petitioner had nominated upon instructions, Justice E.Padmanabhan, Former Judge of the Madras High Court as their nominee in the Panel of Arbitrators. Learned counsel for the respondents has nominated Justice K.Govindarajan, Former Judge of the Madras High Court as its nominee.'

20. Though a faint attempt is made to state that the procedure for appointment of the arbitration has not been followed it is seen that clause 8.10 of the agreement dated 19.04.2013 provides for each party to nominate its arbitrator and both arbitrators so appointed to nominate a Presiding Arbitrator. This is precisely what has transpired in the present case.

21. Application No.2381 of 2018 stands dismissed.

Sd/- A.S.M.J

19.03.2018

//Certified to be true copy//

Dated at Madras this the day of 2018.

TR : 04.04.2018

COURT OFFICER(O.S.)

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