

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.50 OF 2018

ORDER:

This is an Application for a measure under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996; for short, "the Act".

2. The applicant is a Partnership Firm and the respondent is a Company, which is a Public Sector Undertaking.

3. The existence of disputes as between the parties is established on the basis of the pleadings and materials on record. Arbitration agreement to which the applicant and respondent is being noted hereinafter.

4. Clause 28.0 of the General Conditions of Contract for Construction Work of VSP-NTK-03 Revised in the Agreement provides mode of settlement of disputes. This is the admitted situation even going by the counter affidavit of the respondent.

5. The provision for settlement of disputes is as follows.

"28.0 Settlement of Disputes.

28.1 Disputes to be finally determined by the Engineer:

The decisions, opinions, directions, orders, certificates or valuation of the Engineer with respect to all or any part of the matters under Clauses 9.5 to 9.9, 9.11, 9.27, 15.2(h), 17.1, 17.3.1, 17.5, 17.5.1, 17.6 to 17.9, 18.4, 18.5.1, 18.7, 18.9, 19.0, 20.0, 21.0, 22.2, 22.4, 25.5, 26.1, 26.3 to 26.5 and Special Conditions of Contract for the decision of which specific provisions have been made thereof (which matters herein referred to as "Excepted Matters") shall be final and conclusive and binding on the parties hereto and shall be without appeal.

28.2 Settlement of Disputes by Arbitration: Except the matters covered under above Clause No.28.1, all disputes and differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by Arbitration. Each party shall appoint its arbitrator; the two arbitrators so appointed shall appoint the third arbitrator who shall be the presiding arbitrator. The arbitration shall be governed by the provisions of Arbitration and Conciliation Act 1996 and the statutory modifications to the said Act. The award made in pursuance thereof shall be binding on the parties, provided that withholding of any of the certificate, decision, order, opinion, direction, valuation etc., by the Engineer for a period of more than six months shall be referable to Arbitration and shall not be barred as excepted matter.

In case the Contractor is Government of India Undertaking any dispute between the Contractor and the Employer in respect of this Contract shall be settled in accordance with the procedure laid down from time to time by Bureau of Public Enterprises (BPE)/Government of India.

28.3 The further progress of any work under the contract shall unless otherwise directed by the Engineer continue during the arbitration proceedings and no payment due or payable by the Employer shall be withheld on account of such proceedings. It shall not be open to Arbitrators to consider and decide whether or not such work shall continue during the Arbitration proceedings.

Provided further that no reference to Arbitration whether the final bill for the work has been passed or not shall be made later than 6 months from the date of satisfactory completion of the work under the contract.

28.4 No interest shall be awarded by the Arbitrator in any arbitration proceedings.

28.5 The arbitration bench shall make a reasonable award.

28.6 The venue of arbitration shall be at Visakhapatnam, Andhra Pradesh, India.”

6. The plea of the respondent is that it and the applicant have agreed to settle through arbitration, only those disputes other than those falling under the clauses, which would go into the basic of disputes which are to be determined by the Engineer in terms of Clause 28.1.

7. Disputes between the parties may include the question of arbitrability of disputes sought to be raised, as well as whether those disputes are arbitrable or having been lost as having become barred by limitation. Those disputes and issues, in this case, are arbitrable in terms of the provisions of the Act. This is so applying the law laid down by the Hon'ble Supreme Court of India in **Arasmeta Captive Power Company Private Limited vs. Lafarge India Private Limited**¹.

8. The arbitration agreement provides that each party shall appoint its Arbitrator; and that the two Arbitrators so appointed shall appoint the third Arbitrator, who shall be the Presiding Arbitrator. As per Annexure P.11 document, dated 17.02.2017, the applicant appointed Mr V.Srinivasa Rao, M.Tech., Consulting Engineer, as its arbitrator. The respondent was thereby called upon to appoint its arbitrator. No appointment has been made by the respondent. This led to institution of this Arbitration Application. Pending this application, Mr V.Srinivasa Rao expressed his inability to continue as arbitrator owing to personal reasons. Accordingly, the applicant has nominated Mr S.V.S.Prasad Rao (ICA Panel Arbitrator) and that fact has been brought on record through I.A.No.1 of 2018. The requisite

¹ AIR 2014 SC 525

measure, which is to be taken in the said situation, is to require the respondent to appoint its arbitrator.

9. In the result, this Arbitration Application succeeds and is allowed in the following terms:-

(a) The respondent is directed to appoint its arbitrator and intimate the applicant of such appointment within a period of one month from the date of receipt of copy of this order;

(b) On such appointment by the respondent, it will be open to the said arbitrator and Mr S.V.S.Prasad Rao, the arbitrator appointed by the applicant, to appoint a third arbitrator, who shall be the Presiding Arbitrator;

(c) If the respondent fails to appoint its arbitrator within the time fixed hereinabove, the arbitrator appointed by the applicant Mr S.V.S.Prasad Rao will be the sole Arbitrator; and

(d) The Arbitrator/s shall arbitrate on the disputes between the applicant and the respondent, including the claims and counter claims of both sides. The said Arbitrator/s shall enter on reference and proceed with, as enjoined by the Act. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

20.09.2018
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