

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 27.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE R. SURESH KUMAR

O.P. No.132 of 2019

M/s. Tecton Engineering & Construction L.L.C
Rep. by its Authorised Representative
Samuel Raj Gnanaiah,
Having its Registered Office at
P.O.Box 6039, AJman,
U.A.E.,

And also at

No.808, GR Complex,
Second Floor,
Anna Salai, Nandhanam,
Chennai - 600 010.

.. Petitioner

-VS-

M/s. NLC Tamil Nadu Power Limited
Having its Registered Office at :
"Neyveli House"
135, Periyar EVR High Road,
Kilpauk,
Chennai - 600 010.

.. Respondent

Prayer: Petition filed to appoint an Independent Arbitrator and impartial Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996, to resolve the disputes between the petitioner and the respondent arising out of the Agreement dated 06.04.2011.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.Harishankar

ORDER

This Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking for a prayer of appointment of an independent and impartial Arbitrator, to resolve the disputes between the petitioner and the respondent arising out of the agreement dated 06.04.2011.

2. Heard Mr.P.J.Rishikesh, learned counsel appearing for the petitioner and Mr.Harishankar, learned counsel appearing for the respondent.

3. It is the case of the petitioner that, the petitioner namely M/s.Tecton Engineering & Construction L.L.C is an International Engineering, Procurement and Construction Company, having its base in UAE and in India.

4. The respondent is NLC Tamil Nadu Power Limited, a Company incorporated under the Companies Act, 1956.

5. As the respondent intended to set up a Thermal Power Station comprising two units, each with the capacity of 500 MW at Tuticorin, Tamil Nadu, India, they invited tenders for various components of the said project. The petitioner being the successful bidder, the contract was awarded under the Letter of Award (LoA), dated 23.07.2010, by which awarded the work of Desalination Plant & Water Treatment Plant, Package (TA5) specified in Schedule 2 of the contract.

6. Pursuant to the said LoA, a contract agreement, dated 06.04.2011 came to be executed between the parties, i.e., the petitioner and the respondent. The said contract work, i.e., TA5 package had been divided into three separate contracts (1) for supplies, (2) for civil works and (3) for services.

7. The schedule date of completion for trial operation was 23.02.2012 and Performance Guarantee Test was 23.05.2012. There is a clause in the contract, under which, Liquidated Damages (L.D) of 0.5% per week of delay or part there of, of the non utilizable portion of the works / supplies value, subject to a maximum of L.D. of 7.5% of the total contract price, would be recovered.

8. 90% of the Liquidated Damage amount withheld or leviable may be released against the submission of Liquidated Damages Bank Guarantee (LDBG). Under Clause 10.33.2.1, any dispute arises between the parties that would be first referred to the purchaser, who would try to resolve the dispute amicably, which is otherwise called as "Informal Dispute Resolution", within a period of 30 days.

9. If the issue could not be resolved under Informal Dispute Resolution, within the said period, the issue can be referred to Arbitration under Clause 10.33.3.2. The Arbitral Tribunal will be consisting of 2 Arbitrators, one each to

be nominated by both the parties and the two Arbitrators so appointed would choose the Presiding Arbitrator. Hence the Arbitral Tribunal would consist of one Presiding Arbitrator and two Arbitrators.

10. In this background, the contract work awarded under LoA, dated 23.07.2010 had been undertaken by the petitioner company. However there had been some dispute with regard to non usability of the plant, therefore invoking the relevant clause under the Agreement, dated 06.04.2011, the respondent claimed Liquidated Damages and in order to meet the same, the petitioner furnished Bank Guarantee, otherwise called as LDBG. The details of LDBG as well as the amount withheld towards Liquidated Damage by the respondent, as claimed by the petitioner, is provided herein.

"a. LDBG Details

<i>S.No.</i>	<i>Bank Guarantee No.</i>	<i>Bank Detail</i>	<i>Amount of BG</i>
1.	90041MSBL0001012	BOB	Rs.13,52,70,609/-
2.	90041MSBL0000912	BOB	USD 150,879

b. Amount withheld towards L.D : On submission of the LDBG, after withholding a sum of Rs.1,35,71,259/-, the balance was released.

Therefore an amount of Rs.13,52,70,609/- & USD 150,879 is kept in the form of LDBG and Rs.1,35,71,259/- is withheld towards L.D., by the Respondent herein."

11. Thereafter the project was completed and it was taken over completely by the respondent on 23.11.2018 and as per the annexure filed herein, the respondent issued a certificate for the successful completion and taking over of the project. However the said amount towards Liquidated Damages was not released to the petitioner, hence there has been a dispute between the parties.

12. In that circumstances, the petitioner vide communication, dated 02.04.2018, 28.05.2018 and 14.06.2018 addressed the respondent herein to resolve the dispute as per the Dispute Resolution clause under Clause 10.33.2.1.

13. However without referring the matter for amicable settlement through Dispute Resolution Clause, the respondent has sent a communication on 30.11.2018 and called upon the petitioner to remit the Liquidated Damages on or before 07.12.2018, otherwise the Bank Guarantee could be invoked.

14. Sensing the threat, from the respondent for invoking the Bank Guarantee, the petitioner under Section 9 of the Arbitration and Conciliation Act approached the Principal District Court, Tuticorin, which is the Jurisdictional Court under the contract Agreement, dated 06.04.2011 and filed Arbitration O.P.No.88 of 2018 and obtained an interim order of injunction restraining the respondent from invoking the Bank Guarantee.

15. Since the Bank Guarantee expired sometime in December 2018, by letter, dated 21.12.2018, the petitioner had extended the Bank Guarantee up to 30.06.2019.

16. In the meanwhile, since the respondent, as claimed by the petitioner, did not come forward to resolve the issue amicably under Dispute Resolution Clause within the time stipulated, the petitioner by letter, dated 07.12.2018, called upon the respondent to refer the matter for Arbitration and in this regard, the petitioner in fact proposed the nominee Arbitrator on the side of the petitioner.

17. Despite these developments, since the respondent has not come forward to nominate the Arbitrator on its side, so as to enable both the Arbitrators to select the Presiding Arbitrator, the petitioner has filed this Original Petition with the aforesaid prayer.

18. The respondent entered appearance through counsel and in fact they filed a counter, where they refuted the allegations made by the petitioner in the Original Petition. In the counter, the respondent also stated that, vide letter, dated 07.02.2019, the respondent already nominated a Former ED / IDBI as their Arbitrator, however the same was not on record before this Court.

19. With these contentions in the background, the learned respective counsel appearing for the parties have made a submission today that, though each of the party, i.e., both the petitioner and the respondent named their respective nominee Arbitrator, since both of them have not agreed upon such nominations, the learned counsel submitted that, instead of an Arbitral Tribunal consisting of Presiding Arbitrator and two other Arbitrators, this Court can appoint a sole Arbitrator, who can constitute an Arbitral Tribunal consisting only of sole Arbitrator, and in that case, both the petitioner and the respondent would be satisfied.

20. I have considered the said submissions made by the learned counsel appearing for both sides.

21. There is no dispute over the fact that, there is a contract agreement, dated 06.04.2011, where Clause 10.33 reads thus :

"10.33 Jurisdiction, Resolution of Disputes & Arbitration

10.33.1 Jurisdictional The Laws applicable to this Contract shall be the Laws in force in India. The Civil Courts having Ordinary Original Jurisdiction over Tuticorin shall alone have exclusive Jurisdiction over all matters concerning this Contract including the Arbitration Proceedings if any arising under the Contract.

10.33.2 Resolution of Disputes

10.33.2.1 Informal Dispute Resolution

The parties agree to use reasonable efforts to resolve all disputes equitably and in good faith. If any dispute between the Contractor and the Purchaser arises it shall in the first instance be referred in writing to the Purchaser, who shall endeavor to resolve the dispute amicably and render a decision within 30 days. The period of 30 days shall be reckoned from the date of intimation of the dispute is received by the Purchaser.

10.33.2.2. Save as hereinafter provided in respect of a dispute so referred, the decision of the Purchaser shall be final and binding upon the parties until the completion of the Contract and shall forthwith be given effect to by the Contractor who shall proceed with the Contract with all due diligence, whether or not either party has sought Arbitration of the dispute as hereinafter provided.

10.33.3 Arbitration

10.33.3.1 Deleted

10.33.3.2 For other Contractors

(a) If the Contractor is dissatisfied with the decision rendered by the Purchaser or if the purchaser omits or declines to render a decision within the period of 30 days stipulated in Clause 10.33.2.1, then within a further period of 30 days, the dissatisfied party may require by a notification that the dispute be referred to Arbitration in the manner hereinafter

provided. Such a notification shall be in writing and it shall be duly served on the other party. Failure to invoke the Arbitration within the Time schedule shall debar the party from seeking reference to Arbitration.

(b) Except as otherwise provided in this Clause, any dispute arising out of or relating to this agreement, or the breach, termination or validity thereof, shall be finally settled by Arbitration in accordance with the Arbitration and Conciliation Act, 1996 ("the Act"). The Arbitration shall be held at Chennai, Tamil Nadu. The Arbitration proceedings shall be conducted and the award shall be rendered in English. The award shall state the reasons upon which it is based.

(c) There shall be three Arbitrators of whom each party shall appoint one. The party requesting that the dispute be referred to Arbitration shall, within 30 days of the notification in terms of Clause 10.33.3.2 (a), appoint an Arbitrator as also call upon the other party to appoint an Arbitrator within 30 days. The two Arbitrators so appointed shall, within 30 days of the date on which the second of them is appointed, agree on the third Arbitrator who shall act as the presiding Arbitrator of the Tribunal."

22. According to the said provision, attempt has been made by one of the party to resolve the issue amicably under Informal Dispute Resolution

method, however the same was failed as no resolvment attained within the time stipulated therein. Therefore both the parties had no other option, except to refer the matter for the Arbitration under the provisions of the Arbitration and Conciliation Act, 1996, thereby, though both the parties claimed that, both of them have nominated their nominee Arbitrator, the fact remains that, both of them have not agreed upon such nomination made by each other.

23. The learned counsel appearing for the parties further submitted that, instead of an Arbitral Tribunal consisting of three members, headed by a Presiding Arbitrator, a sole Arbitrator to be appointed by this Court can constitute the Tribunal consisting of only the sole Arbitrator.

24. By making the said submission, both the parties have waived the right of having an Arbitral Tribunal consisting of three Arbitrators including the Presiding Arbitrator under sub-clause (c) of Clause 10.33.3.2 as extracted above.

25. This Court have considered all these aspects and the submissions made by the learned counsel appearing for the parties have been taken note of.

26. Since there is an agreement consisting of an Arbitration clause, which is in writing and the same has been signed by both the parties and though the Arbitral Tribunal may have three Arbitrators including the Presiding Arbitrator, in view of the stand now taken by the parties through the respective counsel to have the sole Arbitrator to resolve the issue to be referred for Arbitration, this Court is inclined to pass the following order :

(1) That the issue arises between the petitioner and the respondent herein arising out of the agreement, dated 06.04.2011, is referred to an Arbitral Tribunal consisting of sole Arbitrator.

(2) In this regard, Hon'ble Mr. Justice N. Paul Vasanthakumar, Former Judge of the Madras High Court and Former Chief Justice of Jammu & Kashmir High Court, is appointed as Sole Arbitrator.

(3) The learned Arbitrator shall enter into the reference and to proceed in accordance with law.

(4) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses, which shall be borne by both the parties equally.

With these order of appointment of Arbitrator, this Original Petition is ordered.

27.03.2019

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R. SURESH KUMAR, J.

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