

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2019

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.785 of 2019

Simplex Infrastructures Limited,
Hemkunth Chamber, 4th Floor 89,
Nehru Place, New Delhi-110 019
rep. by Sh.K.L.Baid .. Petitioner

Vs.

Bharat Heavy Electricals Limited
Power Sector-Southern Region,
690, Anna Salai, Nandanam,
Chennai-600 035. .. Respondent

* * *

Prayer : Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint a Sole, independent and impartial Arbitrator to adjudicate and decide the disputes between the parties.

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For Petitioner : Mr.Thriyambak J.Kannan

For Respondent : Mr.V.V.Sivakumar

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The petitioner has filed this Original Petition seeking for appointment of a Sole, independent and impartial Arbitrator to adjudicate and decide the disputes between the parties.

2. The petitioner had been awarded the construction of civil, structural and architectural works including the erection and commissioning of various equipments and accessories of Thermal Power Project, North Chennai, by the respondent for a value of Rs.1475/- Crores vide Letter of Intent dated 30.01.2017. They entered into a contract agreement dated 08.03.2017 for the said purpose and the tenure for the work was fixed at 35 months. The petitioner was prompt in the execution of the work. During the course of execution of the contract, the petitioner sent a letter to the respondent dated 31.10.2018 informing them about the additional costs incurred, however, the respondent did not settle an outstanding amount of Rs.84.48 Crores to the petitioner. When the petitioner sought for the payment, the respondent replied to on 24.12.2018 rejecting the said claim and requested the petitioner to complete and handover civil works foundation at the earliest. Accordingly, the petitioner sent a letter dated 13.05.2019 stating that the rejection of its claim lead to difference between the parties and sought for amicable settlement of the same, for which, it asked to convene a meeting within seven days. Since there was no reply from the respondent even after expiry of three months, the petitioner, invoking arbitration clause 2.21 of the General Conditions of Contract (GCC), addressed a letter dated

26.08.2019 seeking to furnish a panel of 10 names for appointment as sole arbitrator. At that juncture, the respondent referred the disputes to a panel of Conciliators vide letter dated 06.09.2019. Since the respondent lost its right to appoint an independent Arbitrator, the petitioner is before this Court in this petition with the above said prayer.

3. The learned counsel for the petitioner contended that the petitioner sent the notice under Section 21 of the Arbitration and Conciliation Act, 1996 (in short, "the Act") on 26.08.2019, pursuant to which only, on 06.09.2019, instead of appointing an Arbitrator, the respondent initiated conciliation. Even thereafter, only on 23.09.2019 the respondent sent a letter to the learned Arbitrator, nominated by it, seeking consent. Since the nomination is immediately after the expiration of the mandatory period of 30 days from the date of issuance of the letter by the petitioner, it filed this petition on 27.09.2019. It is his submission that even after filing of this petition, till the date of hearing, the respondent did not inform the petitioner about the appointment of the learned Arbitrator, so also the consent given by the learned Arbitrator on 30.09.2019, and the said fact was disclosed only on 25.10.2019, during the course of the hearing of this petition. Hence, he claimed that since the respondent failed to act

within the mandatory period, it forfeited its right to appoint the arbitrator and as such, the power to appoint an Arbitrator is now left only with this Court.

4. Learned counsel for the respondent while denying the allegations of the petitioner contended that the respondent acted in terms of the contract agreement and also as per the mandate of the Act and hence, this petition is not maintainable. Learned counsel also relied on the judgment of the Delhi High Court in **Kadimi International Pvt. Ltd. V. Emmar MGF Land Limited, 2019 SCC OnLine Del 9857.**

5. The facts are not in dispute. The only objection of the learned counsel for the petitioner is that the appointment of the learned Arbitrator is after the expiry of the statutory period and as such, the same is invalid. The memo filed by the learned counsel for the petitioner itself makes it clear that the notice under Section 21 of the Act was sent on 26.08.2019. The memo is silent about the receipt of the notice by the respondent. Admittedly, on 23.09.2019 the respondent sent a letter to the learned Arbitrator seeking consent. The learned Arbitrator had given consent on 30.09.2019.

6. It is to be stated that Section 11(5) of the Act clearly says that the party to the agreement has to agree on the arbitrator within thirty days **from the date of receipt of the request from the other party**. Section 11(6)(a) also mandates that when an appointment procedure is in place, if a party fails to act as required under that procedure, the other party may request the Court to take necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. It cannot be stated that the acts of the respondent do not fall within any of the conditions stipulated above warranting interference of this Court in the appointment of the learned Arbitrator.

7. Having regard to the submissions, this Court appoints Hon'ble Mr.Justice P.K.Balasubramanyan, a Former Judge of the Supreme Court, residing at "Aparna", Achutham Layout, Parinamam Road, Kaloor, Kochi-682 017, as nominated by the respondent, as the Sole Arbitrator to enter upon reference and adjudicate the disputes between the parties. The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses. The appointment of the

PUSHPA SATHYANARAYANA, J.

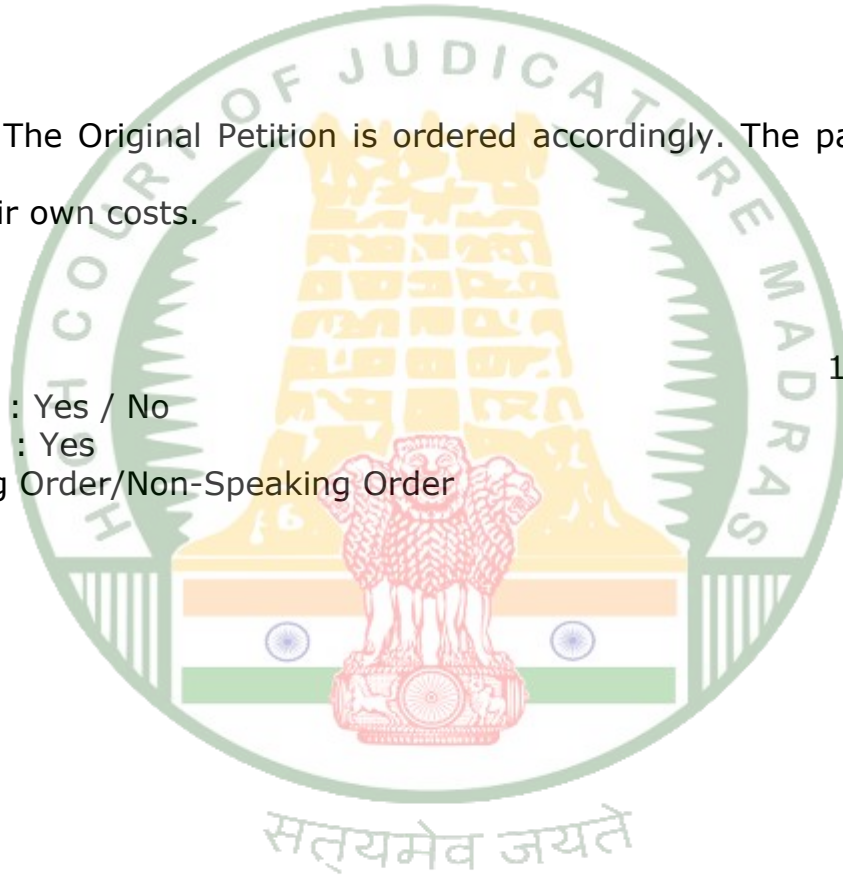
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Arbitrator will be subject to the disclosure and declaration made, as per the Sixth Schedule to the Arbitration and Conciliation Act, 1996 coupled with the amendments made therein.

8. The Original Petition is ordered accordingly. The parties shall bear their own costs.

18.11.2019

Index : Yes / No
Internet : Yes
Speaking Order/Non-Speaking Order
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