IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.12.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.862 of 2019

Sai Regency Power corporation Private Limited
(In Corporate Insolvency Resolution Process under
the Insolvency and Bankruptcy Code, 2016)
8-2-293/82/A/431/A, Road No.22, Jubilee Hills
Hyderabad – 500 033
Rep. By Resolution Professional
Mr.G.Ramachandran ... Petitioner

vs.

Oil and Natural Gas Corporation Limited
Cauvery Asset, Neravy Office Complex
Karaikal, Puducherry – 609 604 ... Respondent

Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint the Respondent's nominee arbitrator and presiding arbitrator to adjudicate upon the disputes arising out of the Gas Supply Agreement dated 19.04.2017 between the petitioner and the Respondent.

For Petitioner : Mr.Anirudh Krishnan

For Respondent : Ms.P.Pooja
for M/s.Giridhar & Sai

ORDER

Mr.Anirudh Krishnan, learned counsel on record for petitioner and Ms.P.Pooja of M/s.Giridhar and Sai (Law Firm) on record for the sole respondent are before this Court.

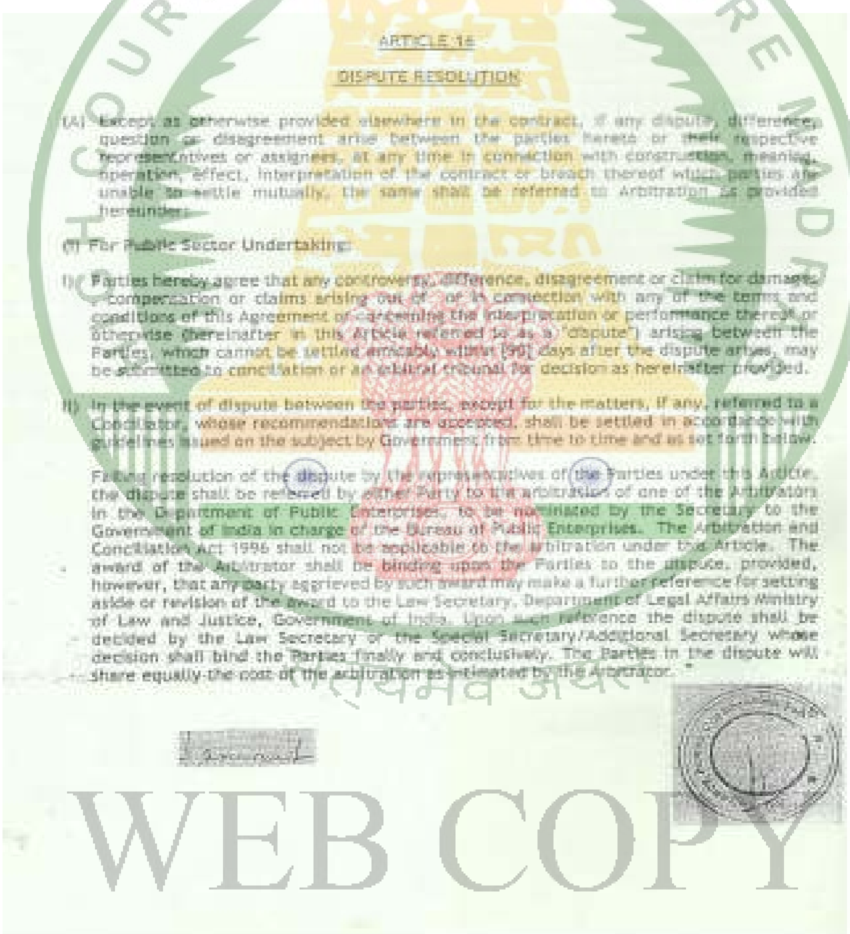
2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) has been filed under Section 11 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for the sake of brevity) with a prayer for appointment of arbitrators.

3. The task of disposing of this petition has become fairly simple owing to the stated position of the parties to this OP and the trajectory of the hearing. In other words, there is consensus regarding constitution of Arbitral Tribunal. Therefore, it is not necessary to dilate much on facts. Suffice to say that the Arbitration Agreement between the parties in the instant OP, namely the petitioner and respondent is in the form of a covenant in a contract captioned 'Gas Supply Agreement dated 09.03.2017' (hereinafter 'said Agreement' for the sake of brevity and clarity).

4. Both the learned counsel before this Court submit without any disputation or contestation that Article 16 of said Agreement captioned

'DISPUTE RESOLUTION' and more particularly Article 16.1 to 16.14 is the arbitration agreement between the parties, being arbitration agreement within the meaning of Section 7 of A & C Act.

5. For the purpose of clarity and specificity, this Court deems it appropriate to extract entire Article 16, which reads as follows:



ARTICLE 16

DISPUTE RESOLUTION

(A) Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement arise between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

(B) For Public Sector Undertaking:

I) Parties hereby agree that any controversy, difference, disagreement or claim for damages, compensation or claims arising out of or in connection with any of the terms and conditions of this Agreement or concerning the interpretation or performance thereof or otherwise (hereinafter in this Article referred to as a "dispute") arising between the Parties, which cannot be settled amicably within [90] days after the dispute arises, may be submitted to conciliation or an arbitral tribunal for decision as hereinafter provided.

II) In the event of dispute between the parties, except for the matters, if any, referred to a Conciliator, whose recommendations are accepted, shall be settled in accordance with guidelines issued on the subject by Government from time to time and as set forth below.

Failing resolution of the dispute by the representatives of the Parties under this Article, the dispute shall be referred by either Party to the arbitration of one of the Arbitrators in the Department of Public Enterprises, to be nominated by the Secretary to the Government of India in charge of the Bureau of Public Enterprises. The Arbitration and Conciliation Act 1996 shall not be applicable to the arbitration under this Article. The award of the Arbitrator shall be binding upon the Parties to the dispute, provided, however, that any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary whose decision shall bind the Parties finally and conclusively. The Parties in the dispute will share equally the cost of the arbitration as intimated by the Arbitrator. "

(ii) Notwithstanding anything contained above, before any matter is referred for arbitration such matter shall be referred by either Party:

(a) to the Chairman/appointed representatives of the Chairman of the Parties for resolution. Such senior representatives shall undertake to resolve such dispute in good faith within [30] days from the date of such reference.

(B) For others: As stipulated under:

I. Resolution of disputes through conciliation by Outside Expert Committee (OEC):

If any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof which parties are unable to settle mutually, the same may first be referred to conciliation through Outside Expert Committee ("OEC") to be constituted by CMD, ONGC as provided hereunder:

1. The party desirous of resorting to conciliation shall send a notice of 30 (thirty) days to the other party of its intention of referring the dispute for resolution through OEC. The notice invoking conciliation shall specify all the points of disputes with details of the amount claimed to be referred to OEC and the party concerned shall not raise any new issue thereafter.
2. CMD, ONGC shall nominate three outside experts, one each from Financial/commercial, Technical and Legal fields from the Panel of Outside Experts maintained by ONGC who shall together be referred to as OEC (Outside Experts Committee).
3. Parties shall not claim any interest on claims/counterclaims from the date of notice invoking conciliation till execution of settlement agreement, if so arrived at. In case, parties are unable to reach a settlement, no interest shall be claimed by either party for the period from the date of notice invoking conciliation till the date of OEC recommendations in any further proceeding.
4. The Proceedings of the OEC shall be broadly governed by Part III of the Arbitration and Conciliation Act, 1996 including any modifications thereof.
5. OEC shall hear both the parties and recommend possible terms of settlement between the parties. The recommendations of OEC shall be non-binding and the parties may decide to accept or not to accept the same. Parties shall be at liberty to accept the OEC recommendation with any modification they may deem fit.
6. Where recommendations are acceptable to both the parties, a settlement agreement will be drawn up in terms of the OEC recommendations or with such modifications as may be agreed upon by the parties. The settlement agreement shall be signed by both the parties and authenticated by all the OEC members either in person or through circulation. This settlement agreement shall have the same legal status and effect as that of an arbitration award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996.
7. The parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
8. The parties shall not rely upon or introduce as evidence in any further arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the OEC proceedings;

(c) proposals made by the OEC;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the OEC.

9. The parties shall present their case before OEC only through their in-house executives. Neither party shall be represented by a lawyer unless OEC specifically desires that some issue of legal nature is in dispute that needs to be clarified/interpreted by a lawyer.

10. OEC members shall be entitled for the following fees and facilities:

Sl. No	Fees/ Facility	Entitlement	To be paid by
1.	Fees	₹ 20,000 per meeting subject to maximum of ₹ 2,00,000 for the whole case. In addition, one OEC member chosen by OEC shall be paid an additional amount of ₹ 10,000 towards secretarial expenses in writing minutes / OEC recommendations.	Buyer
2.	Additional Fee for attending meeting to authenticate the settlement agreement	₹ 10,000/-.	Buyer
3.	Transportation in the city of the meeting	Luxury car of ₹ 2,000 per day.	Buyer
4.	Venue for meeting	ONGC conference rooms/Hotels	ONGC
Facilities to be provided to the out-stationed member			
5.	Travel from the city of residence to the city of meeting	Business class air tickets/ First class train tickets/ Luxury car/ reimbursement of actual fare. However, entitlement of air travel by Business class shall be subject to austerity measures, if any, ordered by Govt. of India.	Buyer
6.	Transport to and fro airport / railway station in the city of residence	Luxury car of ₹ 3,000/-	Buyer
7.	Stay for out stationed members	5 Star Hotel.	ONGC
8.	Transport in the city of meeting	Luxury car of ₹ 2,000 per day.	

11. All the expenditure incurred in the OEC proceedings shall be shared by the parties in equal proportion. The parties shall maintain account of expenditure and present to the other for the purpose of sharing on conclusion of the OEC proceedings.

12. If the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the contract.

II. <u>Resolution of disputes through ARBITRATION:</u>

Except as otherwise provided elsewhere in the AGREEMENT, if any dispute, difference, question or disagreement arises between the Parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation of the AGREEMENT or breach thereof which Parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

16.01 A Party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 (sixty) days' notice to the other Party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.

16.02 The number of the arbitrators and the appointing authority will be as under:

Claim amount (excluding claim for interest and counter claim, if any)	Number of arbitrator	Appointing authority
Upto ₹ 50 lakhs	Sole Arbitrator to be appointed from a panel of retired officers from ONGC/other PSU/Non-PSU organizations.	Asset Manager of concerned Asset of ONGC. [Note: ONGC will forward a list containing names of five retired officers from ONGC/other PSU/Non-PSU organizations for selecting one from the list who will be appointed as sole arbitrator by ONGC]
Above ₹ 50 lakhs to ₹ 5 crores	Sole Arbitrator to be appointed from a panel of retired jurists	Asset Manager of concerned Asset of ONGC. [Note: ONGC will forward a list containing names of five jurists to the other party for selecting one from the list who will be appointed as sole arbitrator by ONGC]
Above ₹ 5 crores	3 Arbitrators	One arbitrator by each party and the 3rd arbitrator, who shall be the presiding arbitrator, by the two arbitrators. ONGC will appoint its arbitrator from the panel of jurists.

16.01 The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause, including the fees schedule provided herein. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.

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16.04 Parties agree that there will be no objection if the Arbitrator appointed holds equity shares of ONGC and/or is a retired officer of ONGC/any other PSU. However, neither party shall appoint its serving employee as arbitrator.

16.05 If any of the Arbitrators so appointed dies, resigns, becomes incapacitated or withdraws for any reason from the proceedings, it shall be lawful for the concerned Party/arbitrators to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both Parties consent for the same; otherwise, he shall proceed de novo.

16.06 Parties agree that neither Party shall be entitled for any pre-reference or pendente-lite interest on its claims. Parties agree that any claim for such interest made by any Party shall be void.

16.07 The arbitral tribunal shall make and publish the award within time stipulated as under:

Amount of Claims and Counter Claims (excluding interest)	Period for making and publishing of the award (counted from the date of first meeting of the arbitrators)
Upto ₹ 5 Crore	Within 8 months
Above ₹ 5 Crore	Within 12 months

The above time limit can be extended by the arbitrator, for reasons to be recorded in writing with the consent of the Parties.

16.08 Arbitrators shall be paid fees at the following rates:

Amount of Claims and Counter Claims (excluding interest)	Lump sum fees (including fees for study of pleadings, case material, writing of the award secretarial charges etc.) payable to each arbitrator (to be shared equally by the parties)
Upto ₹ 50 lakhs	₹ 10,000 per meeting subject to a ceiling of 1,00,000/-.
Above ₹ 50 lakhs to ₹ 1 crore	₹ 1,35,000/- plus ₹ 1,800/- per lakh or a part thereof subject to a ceiling of ₹ 2,25,000/-
Above ₹ 1 crore and upto ₹ 5 Crores	₹ 2,25,000/- plus ₹ 33,750 per crore or a part thereof subject to a ceiling of ₹ 3,60,000/-
Above ₹ 5 crores and upto ₹ 10 crores.	₹ 3,60,000/- plus ₹ 22,500/- per crore or a part thereof subject to a ceiling of ₹ 4,72,500/-.
Above ₹ 10 crores	₹ 4,72,500 plus ₹ 15,000/- per crore or part thereof subject to a ceiling of ₹ 15,00,000/-.

16.09 If after commencement of the Arbitration proceedings, the Parties agree to settle the disputes mutually or refer the dispute to conciliation, the arbitrators shall put the proceedings in abeyance until such period as requested by the Parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the Parties, the fee payable to the arbitrators shall be determined as under:

16.09.01 20% of the fees if the claimant has not submitted statement of claim.

16.09.02 40% of the fees if the pleadings are complete.

16.09.03 60% of the fees if the hearing has commenced.

16.09.04 80% of the fees if the hearing is concluded but the award is yet to be passed.

16.10 Each Party shall pay its share of arbitrator's fees in stages as under:

16.10.01 20% of the fees on filing of reply to the statement of claim.

16.10.02 40 % of the fees on completion of pleadings.

16.10.03 20% of the fees on conclusion of the final hearing.

16.10.04 20% at the time when award is given to the parties.

16.11 Each Party shall be responsible to make arrangements for the travel and stay etc. of the arbitrator appointed by it. Claimant shall also be responsible for making arrangements for travel/stay arrangements for the Presiding Arbitrator and the expenses incurred shall be shared equally by the Parties.

In case of sole arbitrator, ONGC shall make all necessary arrangements for his travel/stay and the expenses incurred shall be shared equally by the Parties.

16.12 The Arbitration shall be held at the place from where the gas is supplied; i.e., concerned work center of Seller. However, parties to the contract can agree for a different place for the convenience of all concerned.

16.13 The Arbitrator(s) shall give reasoned and speaking award and it shall be final and binding on the Parties.

16.14 Subject to the aforesaid conditions, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause.

6. Adverting to trigger notice or in other words, notice invoking arbitration being notice dated 27.06.2019, it is pointed out that petitioner has nominated as arbitrator Hon'ble Mrs.Justice K.B.K.Vasuki (Retd.), Plot No.394, 11th Avenue (Next to Panaiyur Bharat Petrol Bunk), See Shore Town, Panaiyur, ECR, Chennai – 119.

7. Referring to written instructions, learned counsel for respondent submits that the respondent has nominated as arbitrator Hon'ble Mr.Justice Suresh Kantilal Shah (Retd), No. 301, Siddhart Co-operative Housing Society, Madhusudhan Kelkar Marg, Koanagar, Bandra, East Mumbai – 400 051.

8. This Court reminds itself of ***Mayavati Trading Pvt. Ltd., Vs. Pradyuat Deb Burman*** reported in ***(2019) 8 SCC 714)***. Relevant paragraph is Paragraph 10, which reads as follows:

> *"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.'*
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> ***(underlining made by this Court to supply emphasis and highlight)***

9. This takes us to Duro Felguera SA principle being Judgment of Hon'ble Supreme Court in ***Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in ***(2017) 9 SCC 729***. Relevant paragraphs are Paragraphs 47 and 59 and the same read as follows:

> *'47. What is the effects of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the 2015 Amendment') with particular reference to Section 11(6) and the newly added Sectin 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'*
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> *'59. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till*

the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected. '

10. Therefore, Hon'ble Mrs.Justice K.B.K.Vasuki (Retd.) and Hon'ble Mr.Justice Suresh Kantilal Shah (Retd) are appointed as arbitrators, who in turn shall appoint a Presiding Arbitrator, which will result in constitution of three member Arbitral Tribunal. Thereafter, three Arbitral Tribunal shall enter upon reference.

Instant OP ordered on above terms. No costs.

18.12.2019

Speaking order: Yes/No
Index: Yes/No
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Note: Registry is directed to communicate this order to Hon'ble Mrs.Justice K.B.K.Vasuki (Retd.), at Plot No.394, 11th Avenue (Next to Panaiyur Bharat Petrol Bunk), See Shore Town, Panaiyur, ECR, Chennai – 119 and Hon'ble Mr.Justice Suresh Kantilal Shah (Retd) at No. 301, Siddhart Co-operative Housing Society, Madhusudhan Kelkar Marg, Koanagar, Bandra, East Mumbai – 400 051.

M.SUNDAR.J.,

gpa

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