

JIN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17.12.2019

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THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.997 of 2019

McNally Bharat Engineering Company Ltd
Ecospace Campus 2B 11F/12
(Old Plot No.AA-II/BLK-3)
New Town Rajarhat
North 24 Parganas, Kolkata 700 160. .. Petitioner

Vs.

NLC India Ltd
(Formerly Neyveli Lignite Corporation Ltd.)
First Floor, No.8, Mayor Sathyamurthy Road
FSD, Egmore Complex of Food Corporation of India
Chetpet, Chennai - 600 031. .. Respondent

This Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to

- (a) appoint an arbitrator in terms of Clause 57.2.3 and Clause 23.2 of Contracts I & II respectively, dated 14.06.2011, on behalf of the respondent;
- (b) direct the respondent to pay costs of this petition to the petitioner and
- (iii) pass such further or other orders as this Hon'ble Court may deem fit in the facts and the circumstances of the case and thus render justice.

For Petitioner : Mr.Menon

For Respondent : Mr.N.Nithianandam

ORDER

Mr.Menon, learned counsel on record for petitioner and Mr.N.Nithianadam, learned counsel on record for sole respondent are before this Court.

2. Arbitration agreements between the petitioner and respondent being arbitration agreements within the meaning of Section 7 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) are in the form of clauses in contracts, both dated 14.06.2011, one bearing reference 'No.NLC.Contract No.053438/Cont.I/Co.Conts/0022P/M-I/BWE/2010 (hereinafter 'contract-I' for brevity)' and 'NLC Contract No.053438/Cont.II/Co. Conts/0022P/M-I/BWE/2010' (hereinafter 'Contract-II' for brevity). Relevant clause in contract-I is 57.2 and relevant clause in contract-II is 23.2 and the same are captioned 'Arbitration of Disputes'. To be noted, this Court is informed by learned counsel on both sides that clause 57.02 in contract-I and clause 23.2 in contract-II are ad verbatim the same. Clause 57.02 in Contract-I reads as follows:

'57.2. Arbitration of Disputes

57.2.1. If either party is dissatisfied with the decision rendered by

the NLC, or if the purchaser. NLC omits or declines to render a decision within the said period of 30 days, 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 of omission to so refer the dispute for arbitration within the said further period of 30 days, shall constitute waiver by the dissatisfied party of the right to invoke the arbitration provisions herein for dispute resolution.

57.2.2. 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 Neyveli or 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. Interest, if awarded by the arbitrators, shall be at a rate not exceeding the Cash Credit rate prevailing on the date of the award. All interest payments so awarded are subject to deduction of TDS at sources as applicable at prevailing rates of Income Tax.

57.2.3. 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 57.2.1, 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.

57.2.4 The agreement and the rights and obligations of the parties, shall remain in full force and effect pending the award in any arbitration proceedings. Supplies and/or services under the Contract shall, if

reasonably possible, continue during arbitration proceedings.

57.2.5. For the purposes of this clause, the term 'dispute' shall include a demand or difference of any kind whatsoever, arising out of the contract and respecting the performance of the contract, whether during the contract period including extensions if any, or after completion, and whether before or after termination, abandonment or breach of the contract (except as to any matter, the decision of which is specifically provided for in any of these conditions).

57.2.6. The party, in whose favour the award is passed shall be entitled to recover the entire costs of arbitration from the other party. The arbitrators shall indicate the above in their award clearly.'

3. Notice invoking arbitration clause has been issued by the petitioner and the same is dated 04.12.2018. Respondent replied vide a communication dated 10.01.2019, wherein respondent has *inter alia* taken a stand that the arbitrable disputes raised by the petitioner are stale or in other words barred by limitation.

4. Thereafter, there has been further communication from the petitioner being letter dated 02.04.2019, but in the light of consensus that has been arrived at in the hearing today, it may not be necessary to dilate further on those factual aspects of the matter.

5. Consensus arrived at can be adumbrated as follows:

(a) there is no dispute about the existence of Arbitration Agreements between the parties i.e., petitioner and respondent, which are in the form a clause i.e, clause 57.2 in contract-I and clause 23.2 in contract-II.

(b) Though the arbitration agreements provide for arbitration by a three member Arbitral Tribunal, both sides by consent agree to downsize the Tribunal and agree for arbitration by an Arbitral Tribunal constituted by a sole Arbitrator.

(c) both sides request that a Hon'ble former member of the Bench of this Court may please be appointed as sole Arbitrator.

(d) All questions including the limitation question raised by the respondent are left open to be decided by the Arbitral Tribunal, in the light of the authoritative pronouncement of Hon'ble Supreme Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Norther Coal Field Limited*** case reported in ***2019 SCC OnLine SC 1518***. Arbitration shall be conducted in 'The Madras High Court Arbitration Centre' (MHCAC' for brevity) under the aegis of this Court.

6. Before proceeding with the appointment of the sole Arbitrator, this Court makes it clear that it has reminded itself of principle laid down by Hon'ble Supreme Court in **Mayavati Trading Private Limited Vs. Pradyut Deb Burman** case reported in **(2019) 8 SCC 714** wherein, in the light of sub Section 6-A of Section 11, all that this Court would look into (in a petition of this nature) is the existence of the arbitration agreement (which in the case on hand is in the form of arbitration clauses in contracts-I & II in the instant case).

7. Hon'ble Mr.Justice G. Rajasuria, (Retired) former judge of this Court, residing at No.31, III Cross, Brindavanam, Puducherry, is appointed as sole Arbitrator vide this order. Hon'ble Arbitrator is requested to enter upon reference and conduct Arbitration at MHCAC in accordance with A and C Act, more particularly in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules, 2017.

OP is disposed of on above terms. There shall be no order as to costs.

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Note: Registry is directed to communicate this order to Hon'ble Mr.Justice

G. Rajasuria, (Retired) former judge of this Court, residing at No.31, III Cross, Brindavanam, Puducherry, forthwith.

M.SUNDAR, J.

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