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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 15.05.2019**

+ **ARB.P. 888/2018**

BHARAT HEAVY ELECTRICALS LIMITED Petitioner
Through Mr. Kartik Nayar, Mr. Mohit Mahla
and Mr. Sarthak Malhotra, Advs.

versus

LALITPUR POWER GENERATION COMPANY LIMITED
..... Respondent
Through Mr. Alok Krishna, Mr. Mayank
Bughani, Mr. Upendra Prasad, Mr.
Sanjeev Kr. Singh and Mr. Shighra
Kumar, Advs.

AND

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CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

Backdrop:

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act') for appointment of a

nominee-arbitrator on behalf of the respondent.

2. Briefly, the backdrop in which the captioned petitions have been filed are as follows:

2.1 On 22.4.2010, a Memorandum of Understanding (MOU) appears to have been executed between the Government of Uttar Pradesh and the respondent i.e. Lalitpur Power Generation Company Limited (herein referred to as 'LPGCL').

2.2 To be noted, in its earlier avatar LPGCL was known as Bajaj Hindustan Limited.

2.3 This MOU concerned setting up of a 3x660 MW Super Critical Thermal Power Plant (in short 'power plant'). The MOU envisaged setting up of the power plant via a Special Purpose Vehicle (SPV).

2.4 Accordingly, LPGCL floated a tender for the supply and installation of a Boiler Turbine Generator (BTG) Package. This tender was floated on 9.11.2010.

2.5 Against this tender, amongst others, the petitioner i.e. Bharat Heavy Electricals Limited (hereafter referred to as 'BHEL') submitted its techno-commercial bid and price bid. The bids which were in two parts were submitted on 19.2.2011 and 10.3.2011 respectively.

2.6 BHEL was declared successful in the bidding process and, consequently, two Letters of Award (for short 'LOA') of even date 21.3.2011 were issued in its favour. The LOAs, broadly, required BHEL to design and supply the equipment and also install the BTG Package. By virtue of the 1st LOA, BHEL was required to design and supply the equipment for BTG package while the 2nd LOA required

rendering services which, *inter alia*, involved erection of the BTG package.

2.7 Thus, as required, BHEL furnished a bank guarantee for the said purpose to LPGCL in the sum of INR 236,73,22,000.00. This bank guarantee was furnished by BHEL on 25.3.2011. Besides this, as required, BHEL also furnished advance bank guarantees and corporate guarantee to LPGCL. The details of the guarantees need not be given by me as it is common ground that all of these stand released to BHEL.

2.8 Continuing with the narrative, the parties herein also executed a Wrap-up Contract Agreement on 10.8.2011, preceded by a separate Supply and Services Contract Agreement of even date (hereafter collectively referred to as 'definitive agreements'). It is not in dispute that BHEL has executed its obligations under the LOAs and/or the definitive agreements.

3. It is the petitioner's case that it has discharged its obligations under the definitive agreements.

4. The respondent on the other hand says that there are defects in the execution of the subject works which are required to be cured. It is LPGCL's stand that the subject works were not fully completed and even the part which BHEL claims to have completed was riddled with defects.

5. The record filed before me shows that correspondence has been exchanged between the parties with regard to payment of outstanding dues. What I have on record is one such letter which dates back to 20.6.2013. Via this letter, BHEL laid a claim on LPGCL for a sum of

Rs.290 crores. This letter was followed by a letter dated 20.6.2014 whereby BHEL claimed a sum of Rs.542 crores from LPGCL. After this, letters were issued by BHEL only in May 2018 in which claims in the range of Rs.650 and Rs. 655 crores were raised by BHEL. This aspect is recorded in letters dated 8.5.2018 and 25.5.2018. There is, at least on record, a huge gap of four years.

5.1 Pertinently, in the letter dated 25.5.2018 there is also a reference to the meetings held between the CMD, BHEL and the Chairman, LPGCL. The meetings between these two persons appear to have been held on 13.2.2017 and 24.8.2017.

6. Since there was no resolution of the dispute, BHEL vide its communication dated 29.10.2018 finally triggered the arbitration agreements which according to it obtains between itself and LPGCL. In this letter, reference was made to Clause 30 relatable to the 1st LOA issued *vis-a-vis* the Supply Contract dated 10.8.2011 and likewise to Clause 29 of the 2nd LOA relatable to the Services Contract also dated 10.8.2011, which have been collectively described hereinbefore as definitive agreements.

6.1 Furthermore, in this communication, BHEL named its nominee-arbitrator and called upon LPGCL to appoint its own nominee-arbitrator.

7. Interestingly, LPGCL responded to BHEL's letter dated 29.10.2018 whereby the arbitration agreement was sought to be triggered. This response was sent by LPGCL vide communication dated 30.11.2018. It would be relevant to quote an extract from the letter only to highlight the fact that the stand taken by LPGCL before

me, in Court today, is inconsistent with what is stated in its communication dated 30.11.2018.

“...Under such circumstances, we would sincerely APPEAL to you that

a) If we could approach the entire issue through a negotiated settlement between us instead of going to Arbitration - Arbitration being a lose-lose situation for both of us - so much for BHEL also, who, we claim to be our partner holding our hands and NOT a supplier - on a transactional basis.

b) We would request that let us 'meet as frequently as possible at operating level under your guidance and try to agree before March 2019 to arrive at payment time frame agreed between us - as mentioned to you in the meeting.

c) In any case, again, as mentioned in the meeting, we will need 3 years - to pay you whatever is the settled amount between us. Please consider our situation - we are keen to pay you but have dearth of means, which is why requesting you to accommodate us to pay you - as early as possible.

d) We would also request you to recognize our bonafide intention – our intention is not to pay you one Rupee LESS than what is due to you and agreed by us.

e) Finally, under such circumstances, request you to kindly consider our approach to resolve the issue - and withdraw the Arbitration Procedure and settle between us. Arbitration, you will appreciate, is not going to expedite the payment to you if there is no money with us.

f) Last but not the least, we wanted to assure you that

though we are asking for three years' time frame to be on safe side (so that we do not fail in our commitment) - we understand our responsibility of paying you the settled amount - and if, God Willing, money comes earlier than anticipated- please rest, assured that you will be our first partner to receive your money..."

8. As would be evident upon perusal of the aforesaid extract, it was not the stand of LPGCL that there was no arbitration agreement between the parties. LPGCL also did not take the stand that BHEL had not followed the procedure prescribed for triggering the arbitration agreement.

Submissions of Counsel

9. Given this background, arguments on behalf of the BHEL have been addressed by Mr. Kartik Nayar, while the submissions on behalf of LPGCL have been advanced by Mr. Bughani.

10. It is, broadly, Mr. Nayar's submission that a perusal of Clauses 29 and 30 of the two LOA's which are *pari materia* in their language and content and Article 5 of the definitive agreements would show that there is an arbitration agreement obtaining between the parties. It is, thus, the stand of the learned counsel that since disputes have erupted between the parties with regard to payments, they need to be referred to an arbitral tribunal.

11. Mr. Nayar also says that since in terms of the arbitration agreement obtaining between the parties BHEL has appointed its nominee-arbitrator, the prayer made in the petition is for appointment of a nominee-arbitrator on behalf of LPGCL, in view of its failure to appoint one, despite a notice in that behalf having been served upon

it.

12. Mr. Bughani, on the other hand, makes two submissions. First, that there is no arbitration agreement obtaining between the parties. Second, that in case this Court were to hold that there is an arbitration agreement obtaining between the parties, then, since BHEL has not followed the procedure prescribed for that purpose, this Court cannot, at this juncture, appoint a nominee-Arbitrator for LPGCL.

13. It is further submitted by Mr. Bughani that the LOAs issued by LPGCL, in a sense, got subsumed by the definitive agreements executed between the parties. In other words, it is the submission of the learned counsel that once the definitive agreements were executed between the parties, the LOAs lost their relevance and that, in particular, the arbitration clause which stood incorporated in the LOAs does not form part of the definitive agreements.

13.1 In this behalf, Mr. Bughani has submitted that the parties had a choice after the LOAs were executed to enter into either a format agreement which, consciously, they chose to move away from or a negotiated agreement. According to the learned counsel, the parties chose the latter path and hence upon negotiations being held between them executed the definitive agreements.

14. Mr. Bughani, thus, relies upon the definitive agreements to contend that since these agreements do not contain an arbitration clause there is, in fact, no agreement to arbitrate between the parties in respect of the disputes which have erupted between them.

15. Insofar as the other submission is concerned, which pertains to BHEL not following the prescribed procedure, Mr. Bughani has

referred me to the General Conditions of Contract (in short 'GCC'). In particular, reliance has been placed by Mr. Bughani on Clause 22.0, 22.1 and, lastly, Clause 22.3 and their various sub-clauses of the GCC.

16. It is Mr. Bughani's submission that since the procedure prescribed therein was not followed by BHEL, the stage for BHEL to approach the Court for appointment of LPGCL's nominee-arbitrator has not reached. In other words, according to Mr. Bughani, these petitions, in a sense, at this juncture, are premature.

Reasons

17. I have heard the learned counsel for the parties and perused the record. What emerges from the record is as follows:

(i) That there are disputes with regard to the alleged non-payment of dues of BHEL.

(ii) There is correspondence on record commencing from 20.6.2013 until October, 2018 which brings forth the fact that BHEL has been demanding payment of its dues from LPGCL.

(iii) LPGCL, in fact, in its communication dated 30.11.2018, to which I have made a reference hereinabove, seems to have taken a stand that the matter could be amicably settled and that parties need not proceed to arbitration.

(iv) The fact that parties entered into two LOAs of even date followed by definitive agreements dated 10.8.2011 is not in dispute.

18. Therefore, what this Court is required to examine is simply this as to whether or not there is an arbitration agreement obtaining between the parties, as contended by BHEL, since the triggering of

the arbitration agreement by BHEL vide its order dated 29.10.2018 is not in dispute?

19. Since the arbitration clauses which appear in the two LOAs of even date are identical, I intend to extract one of the two clauses. Thus, Clause 29 of LOA dated 21.3.2011 is extracted hereafter:

“29.0 Settlement of Disputes by Arbitration:

If any dispute arises between the Parties hereto during the subsistence of this LOA, in connection with the validity, interpretation, implementation or performance or non performance or alleged breach of any provision of this LOA, the dispute shall be resolved by binding arbitration. The arbitration proceeding shall be governed by the Arbitration and Conciliation Act, 1996. Each Party shall appoint one arbitrator who shall select the third arbitrator within thirty (30) days of the selection of the second arbitrator. The arbitration proceedings shall be in the English language and the venue of the arbitration proceedings shall be New Delhi.

The detailed provisions relating to the settlement of the disputes through the arbitration mechanism shall be described in the Definitive Agreements.”

20. This clause has to be read with Article 5¹ of the definitive agreements referred to hereinabove. Once again I may note that Article 5 which is incorporated in the definitive agreements is identical save and except as to the reference made therein to the relatable LOA and the Contract.

20.1. A conjoint reading of the arbitration clause i.e. Clause 29 and

¹ **Terms and Conditions of the letter of Award**

All other terms and conditions as set out in the letter of Award no. LPGCL/ BTG/LOA/03 dated March 21, 2011 (attached as Annexure-1) unless otherwise provided hereinabove shall remain unchanged and shall form part of this contract.

30 of the LOAs in issue and Article 5 would show that all terms and conditions which are set out in the two LOAs form part of the definitive agreements unless otherwise provided in the definitive agreements.

21. A perusal of the definitive agreements would show that there is no suggestion whatsoever that the arbitration clause which finds mention in the LOAs does not form part of the definitive agreements. In fact, the LOAs are appended as Annexure-1 to the definitive agreements.

22. Therefore, Mr. Bughani's submission that there is no arbitration agreement obtaining between the parties, to my mind, is a submission that I am unable to accept. I may in this behalf also refer to Articles 2.1 and 2.2 of the definitive agreements which are also identical. A bare perusal of Article 2.1² would show that apart from anything else, it is indicative of the fact that the LOAs form an integral part of the definitive agreement and that the LOAs along with other documents which includes the tender documents, the clarifications issued by LPGCL's engineers, minutes of the post-bid/pre-award discussion/meetings etc. constitute together the Contract Documents. Article 2.2³, in order to lend greater clarity, accords priority to

² The Tender Documents, pre-bid clarifications issued by the Owner's Engineers, Minutes of the post-bid/pre-award discussions/meetings, the Offer and the Letter of Award shall be treated as forming integral part of this Contract and shall together constitute the "Contract Documents".

³ In case of any ambiguity, inconsistency or conflict between any of the Contract Documents, the documents shall prevail in the following order:

- (a) Overall Wrap-Up Contract Agreement dated 10th August, 2011
- (b) This contract
- (c) Supply Contract Agreement dated 10th August, 2011
- (d) Letter of Award(s) together with amendments;
- (e) Minutes of the post-bid/ pre-award discussions/ meetings

documents which collectively are referred to as Contract Documents in the eventuality of an *inter se* ambiguity, conflict or inconsistency among them.

23. In my opinion, Articles 2.1 and 2.2 provide further intrinsic evidence of the fact that the LOAs form an integral part of the definitive agreements.

24. This brings me to the other submission made by Mr. Bughani, which is, that if this Court were come to the conclusion that there is an arbitration agreement in existence, then, BHEL has on its own showing, failed to follow the procedure prescribed in Clauses 22.0, 22.2 and 22.3 of the GCC.

25. In my view, this submission of Mr. Bughani is, in fact, destructive of his earlier submission that there is no arbitration agreement in existence.

25.1 Be that as it may, I propose to examine this submission as well.

30. Insofar as Clause 22.0 is concerned, a bare perusal of the same would show that it prescribes procedure for settlement of claims relating to “additional payment”. Mr. Nayar, to my mind, is right in contending that BHEL’s claim does not relate to any additional payment and that it relates to payments qua works executed under the LOAs and/or the definitive agreements. It is, therefore, obvious that Clause 22.0 and the connected sub-clauses would have no application to the matter at hand.

26. Insofar as Clause 22.2 and its various sub-clauses as also

(f) Pre-bid clarifications issued by the Owner's Engineer/LPGCL

(g) Tender Documents including Technical specifications, General & special conditions of contract;

Clause 22.3 and its various sub-clauses are concerned, I am of the opinion that BHEL has substantially complied with the same. The correspondence referred hereinabove by me would show that BHEL has been writing to LPGCL that its claims needed to be settled.

27. The first time around BHEL appears to have raised the issue of non-payment of its due was on 20.6.2013, at that point in time the petitioner's claims hovered around Rs.290 crores. Over a period of time, the claims have ballooned to nearly Rs.650 crores, if not more, when BHEL triggered the arbitration agreement obtaining between the parties vide its notice dated 29.10.2018. The only response that it received (and which is, concededly, the only letter on the issue available on record) was via LPGC's letter dated 30.11.2018.

28. As alluded to above, LPCGL in its letter of 30.11.2018 did not take the stand that there was no arbitration agreement in existence or the stand that the disputants had to follow the procedure as prescribed in Clauses 22.2.and 22.3 of the GCC. This stand LPGCL has taken for the first time, as is evident from the record, only before this Court.

28.1. As indicated above, even if I were to assume that LPGCL in its correspondence, some of which Mr. Bughani claims is not on record, had taken umbrage to the fact that BHEL had not followed the procedure prescribed under Clauses 22.2 and 22.3 of the GCC—there has been, to my mind, substantial compliance by BHEL of these clauses. In fact, the Chairman and Managing Director, BHEL, had met up with the Chairman, LPCGL to resolve the *inter se* disputes. However, despite their intercession, the issue of non-payment of bills

(h) Offer

remained unresolved which forced BHEL to trigger the arbitration agreement.

28.2 Thus, for the foregoing reasons I find no merit in this submission advanced by Mr. Bughani.

29. Having regard to the fact that LPCGL has failed to appoint its nominee-arbitrator despite being served with a notice triggering the arbitration agreement, I am inclined to allow the captioned petitions and appoint a nominee-arbitrator on behalf of LPGCL.

30. On this aspect of the matter, I have put to Mr. Bughani that given the fact that there is an interrelation between the definitive agreements coupled with the circumstances that BHEL has already appointed its nominee-arbitrator, it would sub-serve the interest of both parties if a common nominee-arbitrator is appointed in respect of the definitive agreements. Strangely, Mr. Bughani says that he cannot agree to this suggestion of the Court. However, having regard to what is in the best interest of the parties (given the fact that LPGCL's failure to appoint its nominee-arbitrator in time emasculated its right in that behalf), particularly, keeping in mind that adjudication of the matter needs to be hastened as also to avoid a possible conflict in the findings that may arise if two separate arbitral tribunals are constituted, I am inclined to appoint a common nominee-arbitrator on behalf of LPGCL in the captioned matters.

31. Accordingly, Mr. Justice Madan B. Lokur, former judge, Supreme Court (Cell No: 9868219007), is appointed as the nominee-arbitrator on behalf of LPGCL in the captioned matters.

31.1 In terms of the arbitration clause obtaining between the parties,

the nominee-arbitrators shall convene a meeting for appointing a presiding arbitrator.

31.2 The arbitral tribunal shall be paid its fee in accordance with the Fourth Schedule appended to the 1996 Act.

31.3 Needless to say, before entering upon reference, the members of the arbitral tribunal will file a declaration under Section 12 read with attendant provisions of the 1996 Act.

32. The petition is disposed of in the aforesaid terms.

33. Parties will, however, bear their own costs.

RAJIV SHAKDHER, J

MAY 15, 2019

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