

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.10.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.A.No.493 of 2020

China Datang Technologies & Engineering Co. Ltd.,
4th and 6th Floor, No.120, Zizhuyuan Road
Haidian District, Beijing- 100097
People's Republic of China
Through Mr.He Huang
Residing at A 31/7, Maruti Housing Colony
Sector 28, Gurugram, Haryana
India – 122 002 presently at New Delhi ... Applicant

vs.

1.NLC India Limited
First Floor, No.8, Mayor Sathyamurthy Road
FSD, Egmore Complex of Food Corporation of India
Chetpet, Chennai – 600 031
Tamil Nadu

2.Yes Bank Limited
Fortune Global
Arcade, Sikanderpur
Methrauli Gurgaon Road
Gurgaon-122 002, Haryana ... Respondents

Original application filed under Order XIV Rule 8 of the OS
Rules read with Section 9 of the Arbitration and Conciliation Act, 1996
to grant an order of injunction restraining the 1st respondent from

invoking and encashing PBG bearing No.002BG01193540001 dated 20.12.2019 as amended on 16.01.2020 and valid upto 30.11.2023 for an amount of Rs.55,65,00,000/- and the 2nd Respondent from making any payment to the 1st Respondent under the said PBG pending disposal of the arbitration proceedings between the petitioner and the 1st respondent.

For Applicant : Mr.M.S.Krishnan
Senior Counsel
Instructed by
Mr.Anirudh Krishnan
Mr.Adarsh Subramanian
& Mr.K.Shiva

For Respondents : Mr.N.Nithianandam for R1

ORDER

Captioned application is one under Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, clarity and convenience.

2. Before this Court proceeds further, it is made clear that second respondent is the Bank through which 'Performance Bank Guarantee' ('PBG' for the sake of brevity) was furnished by the applicant/contractor to contesting first respondent and therefore, the second respondent has no

adversarial position in this matter. In this view of the matter, the main application is taken up and disposed of vide this order as per request of learned senior counsel for applicant, counsel for contesting respondent and obviously with their consent.

3. 'Applicant' shall hereinafter be referred to as 'Contractor' and 'first respondent' shall hereinafter be referred to as 'NLC' for the sake of convenience and clarity.

4. Considering the trajectory which this matter has taken today, short facts shorn of elaboration will suffice and it is not necessary to dilate qua factual matrix. Suffice to say that the entire matter pertains to installation of what is described as 'Flue Gas Desulphurization' ('FGD' for the sake of brevity) by the contractor to NLC pursuant to a tender floated by NLC. Contractor was the successful bidder, contractor was given a Letter of Award dated 31.08.2019 followed by a contract dated 06.03.2020 and a set of commercial conditions. These three shall hereinafter collectively be referred to as 'said contract' for the sake of convenience and clarity. This Court is informed that this Letter of Award dated 31.08.2019, contract dated 06.03.2020 and commercial conditions together constitute the contractual relationship between the contractor and NLC for FGD. This Court is informed that FGD is for two thermal

power stations that are being set up by NLC in Neyveli. Vide said contract, time for completion of first FGD is 30 months i.e., for first Power Station and time of completion of the other FGD i.e, for second Power Station is 36 months. This Court is informed that the parties had agreed that the effective date qua said contract is 31.08.2019. Thereafter, arbitrable disputes erupted between the contractor and NLC, disputes centre around delay and invocation of Force Majeure clause. This shall collectively be referred to as 'arbitrable dispute' for the sake of convenience and this Court expresses no opinion on the merits of the arbitrable disputes. What is of significance is, there is no disputation or disagreement between the parties that the arbitration agreement between the parties, being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is in the form of a clause in the said contract i.e., commercial conditions clause 10.33.3.5. There is also no disputation or disagreement that contractor issued a communication dated 29.09.2020, which according to the contractor, is the trigger notice qua arbitration. To be noted, this was preceded by exchange of communications between the contractor and NLC.

5. Learned counsel for NLC submits on instructions that a reply to, what according to contractor, is the aforementioned trigger notice, has

been sent saying that it was premature in the light of the language in which arbitration clause is couched. However, it is clear that the applicant has demonstrated manifest intention to arbitrate, which is *sine qua non* for an application under Section 9 of A and C Act.

6. Learned counsel for NLC, on instructions, has now filed a memo dated 12.10.2020, which reads as follows:

MEMO FILED ON BEHALF OF THE 1ST RESPONDENT

It is respectfully submitted as follows: -

- 1. On instructions, it is submitted though the Arbitration Clause in the Contract contemplates Three Member Tribunal, we are agreeable to appointment of Single Member Tribunal for adjudication of the disputes between the parties.*
- 2. The Sole Arbitrator may be appointed by this Hon'ble Court without reference to the Arbitrator appointed by the Petitioner.*

Dated at Madras on this the 12th day of October, 2020.

-Sd-

N.Nithianandam

Counsel for the 1st Respondent'

7. From the above memo, it becomes clear that NLC consents for appointment of a sole Arbitrator though the arbitration clause provides for an Arbitral Tribunal to be constituted by three Arbitrators. Learned

counsel for contractor also agrees to this course and this submission is recorded. To be noted, learned counsel for NLC submits that this departure notwithstanding its reply and the mechanism in arbitration clause shall not be quoted as a precedent. Both parties also, on instructions, submit that this Court can proceed to appoint a sole Arbitrator at its discretion as there is no dispute about the existence of an arbitration agreement between the parties.

8. In the light of the trajectory which this matter has taken and in the light of the curves which this matter has taken in reaching this Court vide captioned application, this Court, noticing that there is no dispute about the existence of arbitration agreement and parties agree for appointment of a sole Arbitrator, though arbitration agreement provides for appointment of three member Arbitral Tribunal and more importantly, the parties have left the choice of sole Arbitrator to this Court, now proceeds to dispose of captioned application inter alia by appointing a sole Arbitrator. It is made clear that this Course is adopted owing to the peculiar facts of this case and peculiar trajectory this matter has taken and therefore, this order will not serve as a precedent in times to come.

9. Before this Court does so and before this Court appoints an Arbitrator, it is necessary to deal with the interim prayer that has been

sought for *inter alia* under Section 9 of the A and C Act. As already alluded to supra, as the applicant has demonstrated manifest intention to arbitrate, this application is entertained, this Court notices that the applicant had the benefit of an interim order from 09.09.2020 to date and therefore, this Court deems it appropriate to continue the interim order. In doing so, this Court has noticed that the interim prayer pertains to invocation and encashment of PBG. *Prima facie* case has been made out as manifest intention to arbitrate has been demonstrated. Balance of convenience also is in favour of acceding to this request as invocation/encashment of PBG pending arbitration will tantamount to putting the cart before the horse. Irreparable legal injury determinant also buttresses the grant / continuation of interim order as this Court notices that PBG is for 10% of the value of the said contract, performance of which now forms part of arbitrable dispute.

10. Another factor, which has weighed in the minds of this Court, is that there is no dispute that PBG is valid till 2023. Counsel for contractor/applicant submits that PBG will be kept alive not only till 2023, but for a period of 30 days post receipt of final award by both parties in the arbitral proceedings. This submission is recorded. To be noted, under normal circumstances, this Court would have relegated the

parties to move Hon'ble Arbitrator under section 17 of A and C Act for the interim prayer to be decided on merits by Hon'ble Arbitrator, but in this case, owing to the undertaking on the part of the contractor to keep the PBG alive not only till 2023, but for a further period of 30 days post receipt of final award to be made by Hon'ble Arbitrator, in response to which learned counsel for NLC consenting that the interim order as prayed for in captioned application can operate till the end of arbitral proceedings, this Court is disposing of captioned application on the terms to be set out infra. However, considering the facts and circumstances, this Court deems it appropriate to leave it open to the parties to move the AT under Section 17 of the A and C Act even with regard to this order and undertaking, if the need arises. If such a situation arises, such an application under Section 17 of A and C Act, though obvious, will be dealt with by Hon'ble Arbitral Tribunal on its own merits and in accordance with law.

11. Learned counsel for NLC submits that original PBG bearing No.002BG01193540001 dated 20.12.2019 as amended on 16.01.2020 and valid upto 30.11.2023 for an amount of Rs.55,65,00,000/- issued by the second respondent has been submitted to the second respondent Bank. In the light of this order, the second respondent Yes Bank is

directed to return the original PBG to first respondent NLC within a fortnight from the date of receipt of a copy of this order by the second respondent.

12. As this application is disposed of at the first listing stage, learned counsel on record on both sides shall communicate this order to the second respondent for due compliance in all aspects of the matter.

13. Though obvious it is made clear that all questions are left open to be decided by Hon'ble Arbitral Tribunal.

14. The following order is passed:

a) An interim order as prayed for in the captioned application is granted and the same shall operate till the award is passed by Hon'ble Sole Arbitrator.

b) It is open to the parties to move the Hon'ble Arbitrator under section 17 of The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), if the need arises for any relief including anything touching upon or pertaining to order granted in captioned application. If this scenario unfurls, Hon'ble Arbitrator will decide the application under section 17 of A and C Act on its own merits without being impeded in any manner by this order.

c) Hon'ble Mrs.Justice R.Banumathi (Retd.), former Judge of Hon'ble Supreme Court of India at No.C20, Ground Floor, Defence Colony, New Delhi-110 024, (Mob:

7042955477, e-mail:banumathir1955@gmail.com) is appointed as sole Arbitrator to enter upon reference, adjudicate and pass an award in the arbitrable disputes between applicant China Datang Technologies & Engineering Co. Ltd., (applicant) and first respondent NLC India Limited vide said contract, constituted by Letter of Award dated 31.08.2019, contract dated 06.03.2020 and commercial contract;

d) Hon'ble Arbitrator is free to fix fees at the discretion of Hon'ble Arbitrator;

e) The arbitral sitting/s being physical hearing or virtual hearings shall also be at the sole discretion of the Hon'ble Arbitrator.

This application is disposed of accordingly. There shall be no order as to costs.

12.10.2020

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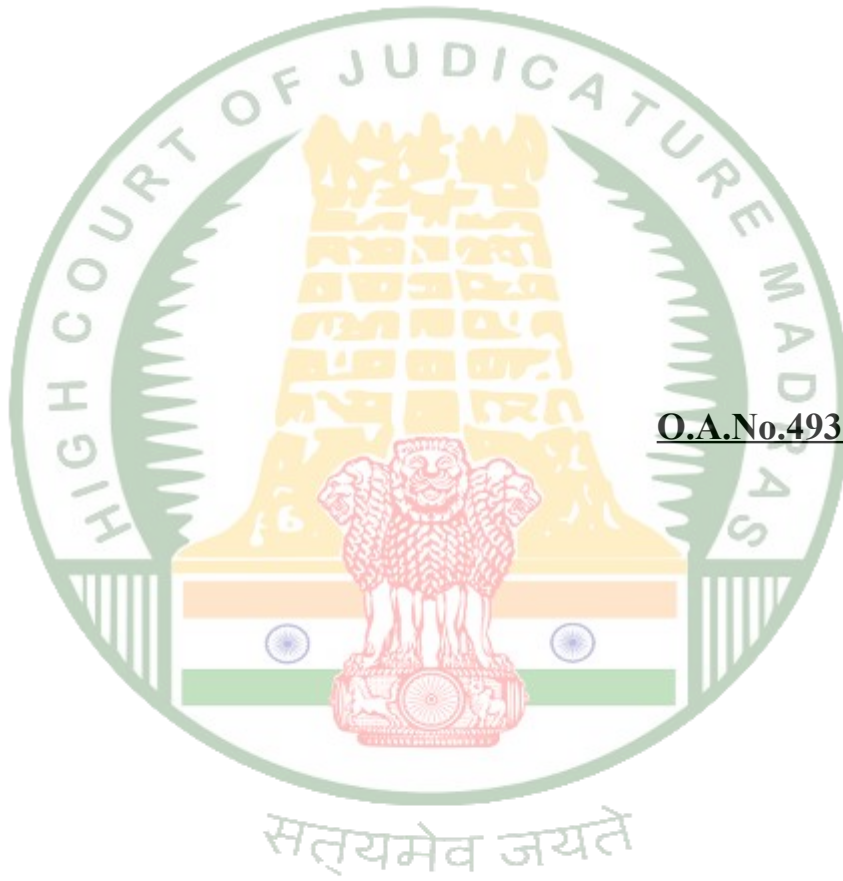
Note to office: **Issue order copy on 14.10.2020.**

Registry is directed to communicate a copy of this order to Hon'ble Arbitrator (Hon'ble Mrs.Justice R.Banumathi (Retd.), former Judge of Hon'ble Supreme Court of India) at No.C20, Ground Floor, Defence Colony, New Delhi-110 024, (Mob: 7042955477) forthwith through electronic mail at e-mail:banumathir1955@gmail.com, besides conventional modes of communication.

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M.SUNDAR.J.,

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