THE HIGH COURT OF JUDICATURE AT MADRAS

Date 15.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.262 of 2021 & O.A.No.120 of 2021

M/s.AI Ameen Green Energy Pvt. Ltd.,
Rep. by its Vice President
Mr.Senthil Annamalai,
No.67, Ramasamy Street, Mannady,
Chennai – 600 001. . . . Petitioner

Versus

M/s.ABB India Ltd.,
Rep. by its Authorised Representative,
Mr.Manjunath Shetty,
World Trade Centre, 21st Floor,
Brigade Gateway, No.1 26/1,
Dr.Rajkumar Road, Malleswaram West,
Bangalore – 560 055.
Also at
3rd Floor, Jayant Tech Park,
No.41, Mount Poonamalle Road,
Manapakkam, Chennai – 600 089. . . . Respondent

PRAYER : Petition filed under Section 11(5) of Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to decide the disputes that have arisen between the petitioner and the respondent under the Letter of Award [LOA] dated 29.07.2015.

For petitioner : Mr.S.Suresh

For respondent : Mr.P.J.Rishikesh

O R D E R

This application has been filed for appointment of an arbitrator to decide the dispute said to have arisen between the petitioner and the respondent in respect of Letter of Award dated 29.07.2015.

2. It is admitted by both sides that the applicant was awarded with the work of complete EPC package of 25 MW Solar project and the applicant in turn awarded electrical work alone to the respondent. The respondent appears to have completed the work and there was a claim of Rs.13.41 crores from the applicant. Therefore, the respondent herein issued demand notice dated 11.10.2017. As the applicant has not replied, the respondent approached NCLT in CP.No.1423/IB/ 2018. During the pendency of the above application, a Settlement Agreement dated 08.04.2019 came into existence between the parties, wherein the applicant has agreed to pay a sum of Rs.6 crores in four instalments. Based on the Settlement Agreement dated 08.04.2019, the

application filed before the NCLT has been withdrawn on 19.04.2019. Pursuant to the settlement agreement, the applicant is also said to have paid a sum of Rs.20 lakhs to the respondent and further payments have not been made. Again the respondent approached NCLT and filed an application in IBA No.449 of 2020. At this stage, the present application came to be filed.

3. It is the main contention of the applicant that the Settlement Agreement entered between the parties on 08.04.2019 is a result of the pressure exerted by abusing the legal process in a criminal complaint filed using the cheque issued for security. In other words, it is the contention of the applicant that the settlement agreement is void and not binding and is a result of coercion. It is his contention that under the Letter of Award dated 29.07.2015, if any dispute arose between the parties, the arbitrator has to be appointed.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

5. The contention of the applicant is that the Settlement Agreement came into existence due to exertion of pressure and the respondent filed a criminal complaint under section 138 of the Negotiable Instruments Act. At any event, it is the contention of the applicant that even assuming that the Settlement Agreement is a subsequent agreement, the same will not nullify the contract entered between the parties under the Letter of Award dated 29.07.2015. It is his further contention that the settlement agreement will no way rescind the original contract entered between the parties . Hence, an arbitrator has to be appointed. In support of his submissions, he relied on the judgment of the Apex Court in **Sanjiv Prakash Vs. Seema Kukreja and others** reported in **MANU/SC/0238/2021.**

6. On the other hand the learned counsel for the respondent has submitted that this application is nothing but an abuse of process of law and there is no dispute pending between the parties. It is his contention that the settlement agreement reached between the parties resolved the entire dispute, wherein the applicant has agreed to settle the amount in instalments in full quit and pursuant to the same a sum of Rs.20 lakhs has also

been paid. Hence, it is his contention that the Settlement Agreement has been executed by exerting pressure is an after thought. In any event, the Settlement Agreement has superseded the earlier contract and the Settlement Agreement contains a clause for super session. Hence, it is his contention that there is no dispute arise between the parties for resolution. In support of his submissions he relied on the following judgments :

Vidya Drolia and others Vs. Durga Trading Corporation reported in **2021 [2] SCC 1**

Bharat Sanchar Nigam Ltd. and another Vs. Nortel Networks India Pvt. Ltd. reported in **2021 SCC Online SC 207**

Secunderabad Cantonment Board Vs. B.Ramachandraiah & Sons reported in **2021 SCC Online SC 219**

7. The above facts are not disputed. This application has been filed on the basis of the Letter of Award dated 29.07.2015. Admittedly, the applicant sub contracted one portion of the work to the respondent. Though there was huge claim made by the respondent, now it is his contention that there was a settlement agreement entered between the parties on 08.04.2019. The factum of settlement agreement has not been disputed. The only contention of the applicant is that it came into existence due to

pressure exerted by the respondent. It is also not disputed that a proceeding has been initiated before the NCLT in C.P.No.1423/IB/2018. Similarly it is also not in dispute that after the settlement agreement entered between the parties, the application filed before NCLT has been withdrawn by the respondent. Pursuant to the settlement agreement reached between the parties, a sum of Rs.20 lakhs has also been paid towards the amount agreed in the settlement agreement.

8. The settlement agreement, filed in typed set of papers, when carefully seen, it is seen that the parties in fact have resolved the dispute and despite huge claim made by the respondent, the parties have resolved the dispute and agreed to pay a sum of Rs.6 crores in four instalments. Pursuant to the above agreement, a sum of Rs.20 lakhs is also said to have been paid. It is also admitted in the affidavit filed by the applicant. Now it cannot be said that the settlement agreement came into existence by exertion of pressure. The same has also been acted upon by paying part payment on Rs.20 lakhs. Now in the year 2021, after a lapse of two years, the latter agreement was put into challenge in this application by contending that the parties are only governed only by the Letter of Award dated 29.07.2015.

9. It is to be noted that the parties have originally referred the dispute in Letter of Award dated 29.07.2015. Subsequently, on 08.04.2019, they have entered into a settlement agreement to resolve the dispute wherein, in fact, they have calculated the amount payable to the respondent and a part payment is also made. In such view of the matter, the settlement agreement supersedes the Letter of Award. The very terms in the settlement agreement itself shows that the other previous contracts terms agreed to be rescinded by the parties. In such view of the matter, they cannot invoke the original contract to refer the dispute to the arbitration. Admittedly, the dispute itself has been resolved by them. The applicant has defaulted to pay the agreed amount. The application filed before the NCLT has been withdrawn, which is also admitted by the parties. In such view of the matter, this Court is of the view that there is no dispute arose between the parties for reference and Letter of Award cannot be invoked for reference as the parties themselves agreed to resolve their dispute. The apex Court in Sanjiv Prakash Vs. Seema Kukreja and others reported in MANU/SC/0238/2021 has held that despite the hire purchase agreement after the Memorandum of Understanding, still the matter can be referred to the arbitrator. In the above case, both the agreements

contain arbitration clause and the dispute is between the members of the family. Considering the above aspects, the Apex Court has referred the parties to the decision of the arbitrator to decide the validity of the matter.

10. In Bharat Sanchar Nigam Ltd. and another Vs. Nortel Networks India Pvt. Ltd. reported in 2021 SCC Online SC 207 in para 38 it has been held as follows :

> "In a recent judgment delivered by a three-judge bench in Vidya Drolia V. Durga Trading Corporation, on the scope of power under sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-exisent and invalid arbitration agreements, or non-arbitrable disputes." The prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists or that the subject matter is not arbitrable, that reference may be refused."

11. In the above judgment, the dispute has already been resolved between the parties and rescinded by the earlier contract or otherwise superseded by the subsequent agreement. The above judgment squarely applies to the facts of the present case. In the present case also, subsequent to the Letter of Award, subsequently, parties have entered into a Settlement Agreement and they had resolved the dispute and the applicant had also paid a sum of Rs.20 lakhs and hence, now they cannot invoke the original contract and seek for appointment of an arbitrator.

12. Accordingly, the Original Petition is dismissed. In view of the Order passed in the Original Petition, the application filed for interim Orders under section 9 of the Arbitration and Conciliation Act will not survive for any consideration, since the applicant himself, as per the settlement agreement had paid a part amount and now the matter is also pending before NCLT for the default committed by the applicant, the Original application is also dismissed.

15.04.2021

Index : Yes / No
Internet: Yes
Speaking/non speaking order
vrc

N. SATHISH KUMAR, J.

vrc

order in:

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