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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2021

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

CMA No.2447 of 2021
and CMP No.13954 of 2021

M/s Bharat Heavy Electricals Ltd.,
Power Sector Southern Region,
Tek-Towers, No.11,
Old Mahabalipuram Road,
Okkiyam Thoraipakkam,
Chennai - 600 097

... Appellant

vs

M/s ANCL & CO India Pvt Ltd.,
252-C, 2nd Floor, Sant Nagar,
East of Kailash,.
New Delhi - 110 065

... Respondent

Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 against the Procedural Order dated 26.07.2021 in Arbitration No.of 2021 passed by the Arbitral Tribunal.

For Appellant : Mr.John Zachriah

JUDGMENT

(Heard through Video Conference)

This Civil Miscellaneous Appeal has been filed as against the procedural order passed by the Arbitral Tribunal on 26.07.2021, wherein, the appellant, who is the respondent in the Arbitration was directed to pay costs of Rs.50,000/- (Rupees fifty thousand only) to the claimant on or before 18.08.2021 and failure to pay the cost before the said date, the Tribunal held that the statement of defence in Khandwa arbitration matter shall not be received.

2. Section 37 of the Arbitration and Conciliation Act, 1996 deals with appealable orders and it reads as follows:

" 37.Appealable Orders:-(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees



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of the Court passing the order, namely:-

- (a) refusing to refer the parties to arbitration under Section 8;
- (b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to the appeal to the Supreme Court.

3. Learned counsel for the appellant admits that the subject-appeal will not fall under Section 37 of the Arbitration and Conciliation Act, 1996. However, he would submit that the appellant should not be left without remedy as it is their substantive right to file appeal, aggrieved by any order passed by the Arbitral Tribunal.

4. The Arbitration and Conciliation Act, 1996 is a special enactment and it prescribes minimum intervention by Courts over arbitral proceedings. Section 5 of the Act also makes it clear that no judicial authority shall intervene unless and until specific statutory provision for such interference is available under the Act. Section 5 of the Arbitration and Conciliation Act, 1996 reads as follows:-

" Extent of judicial intervention:-

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

5. For the foregoing reasons, this Court does not find any merit in this appeal. However, the appellant should not be left remediless. Under Section 17 of the Arbitration and Conciliation Act, 1996, any party to the dispute can seek protection by filing an application before the Arbitral Tribunal. Section 17 of the Act reads as follows:



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"Interim measures ordered by arbitral tribunal:-

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court."



6. Section 17(e) of the Act gives wide powers for granting interim measure of protection as may appeal to the arbitral tribunal to be just and convenient.

7. In the instant case, instead of filing an application under Section 17 of the Arbitration and Conciliation Act, 1996, seeking relief that is sought for in this appeal, the appellant has chosen a wrong forum by filing an appeal as against the impugned procedural order before this Court. This Court does not find any merit in this appeal, as it is not maintainable under the provisions of the Arbitration and Conciliation Act, 1996.

8. However, the appellant should not be left without any remedy, if aggrieved by the impugned procedural order. Therefore, liberty is granted to the appellant to approach the Arbitral Tribunal, by filing an application under Section 17 of the Arbitration and Conciliation Act, 1996, seeking waiver of the payment of costs of Rs.50,000/- (Rupees fifty thousand only) under the impugned procedural order and for reception of the statement of Defence without the payment of the said costs. The learned Arbitrator shall pass orders on merits and in accordance with law as and when such an application is filed by the appellant.

9. With the above direction, the civil miscellaneous appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar (CS V)

True Copy

Sub-Assistant Registrar

sr

To

The Hon'ble Justice Ms. R. BANUMATHI,

(Sole Arbitrator) of the Arbitral Tribunal,

Former Judge Supreme Court of India,

C.20, Ground Floor, Defence Colony, New Delhi 110 024.

email. banumathir1955@gmail.com

Mobile No. 70429 55477

73973 29476

1 cc to M/s. For Mandal Associates, Advocate Sr.43255

CMA No.2447 of 2021

RGN (CO)

EU 27.08.2021