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*O.A.No.49 of 2022
and Arb.Appln.No.48 of 2022*

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M.SUNDAR, J

This common order will dispose of the captioned two applications.

2. Mr.Rajnish Pathiyil, learned counsel (assisted by Ms.S.Geetha) on behalf of the applicant in both the applications and Mr.K.Harishankar, learned counsel (assisted by Mr.B.Gopinath and Ms.Mithreyi Kasthurirangan) on behalf of first respondent (BHEL) are before this Court.

3. Read this in conjunction with and in continuation of earlier proceedings made in the previous two listings on 07.02.2022 and 08.02.2022, which read as follows:

Proceedings dated 07.02.2022:

'Mr.Rajnish Pathiyil, learned counsel on record for the applicant, who is before this physical Court very fairly brings to notice of this Court that the first respondent i.e., Bharat Heavy Electricals Limited [BHEL] had sent a caveat notice to the applicant and he has also served on the counsel [M/s.HSB



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WEB COPY *Partners (Law Firm)]*.

2. *This Court is informed that caveat appears to have been lodged qua possible interim order in the suit and not in an application under Arbitration Act.*

3. *To be noted, second respondent is the Bank which has issued a Bank Guarantee which this Court is informed has since been invoked and is therefore a formal party. The entire matter pertains to a 'contract dated 10.08.2020 pertaining to Civil and Architectural Works of Coal Handling Plant area including Emergency Reclaiming Hopper area of Package in Udangudi Super Critical Thermal Power Project, Kallamoli, Tuticorin' [hereinafter 'said Contract' for the sake of convenience and clarity].*

4. *Learned counsel submits that there is imminent threat of said contract being awarded to a third party on risk and cost basis vide Clauses 2.7.2 and 2.7.3. of 'TCC' ['Technical Conditions of Contract'] which forms part of said Contract.*

5. *This Court checked in the virtual hearing part as to whether any counsel is waiting to accept notice on behalf of the first respondent or the counsel who has lodged aforementioned caveat qua application in a suit, but no one responded.*

6. *In the light of the narrative thus far, Registry is directed to print the name of M/s.HSB Partners qua first respondent in the cause list tomorrow. List in the Admission Board (Motion List) tomorrow i.e., on 08.02.2022.'*

Proceedings dated 08.02.2022:



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'It is submitted that an application vide Diary No.12275 dated 07.02.2022 has been filed. Time is sought to process and bring the same on Board.

2. List day after tomorrow in the ADMISSION BOARD i.e., 'MOTION LIST'. List on 10.02.2022.'

4. The above proceedings are telltale qua trajectory the matter has taken thus far.

5. The above proceedings shall be read as an integral part and parcel of this order. The short forms and short references used in the above proceedings shall continue to be used in the instant order also.

6. Short facts are that said Contract ran into rough weather; that Bank Guarantee issued by 'second respondent Bank-Union Bank of India, Besant Nagar, Chennai' [hereinafter 'said Bank' for the sake of convenience and clarity] has since been invoked by BHEL; that BHEL has resorted to clauses 2.7.2 and 2.7.3 of TCC; that this Court is informed that third party contractors have since been appointed but this Court expresses no opinion on the same owing to the order that is now being made; that



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disputation on this as this turns on facts and owing to the nature of this
order that is being made, this Court does not express any opinion on the
same; that this Court is of the view that the entire matter can be given a
quietus if a sole arbitrator is appointed and if all these issues are relegated
to Arbitral Tribunal [AT] *inter-alia* under Section 17 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 as there is no
disputation or disagreement about the existence of arbitration agreement
between the parties {arbitration agreement within the meaning of Section
2(1)(b) read with Section 7 of A and C Act} as the same is by way of
clause 2.21 of TCC.

7. Responding to the above, learned counsel on both sides after
discussions and instructions from their respective clients submitted that
Hon'ble Mr.Justice K.Mohan Ram, Retired Judge of Madras High Court
can be appointed as a sole arbitrator.



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8. Both learned counsel submit that they have taken consent of Hon'ble Judge (a) To constitute AT and (b) To have the first sitting on ensuing Saturday i.e.,12.02.2022.

9. Hon'ble Thiru.Justice K.Mohan Ram (former Judge of Madras High Court) residing at 'ISHANA', Plot No.15B, Radiant Avenue, 5th Street, VGP Golden Beach Layout, Injambakkam, ECR, Chennai-115, is appointed as sole arbitrator to enter upon reference and adjudicate all disputes that have arisen between BHEL and first respondent including the question of invocation of arbitration clause.

10. To be noted, second respondent in the captioned application being the Bank which issued Bank Guarantees which have since been invoked is only a formal party and therefore, the presence of second respondent is not necessary for disposal of the captioned applications in the aforesaid manner. However, the option of inclusion of second respondent before AT is left open.



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WEB COPY 11. It is also open to applicant to present the captioned applications before AT and make a request to treat the same as applications under Section 17 of A and C Act. If the applicant chooses to do so, AT will take a decision on the same at its discretion, as it would be the domain of Hon'ble former Judge concerned.

12. The venue shall be Arbitration and Conciliation Centre under the aegis of this Court in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and Hon'ble Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

13. Though obvious, it is made clear that all questions are left open to be adjudicated upon by AT and this Court has not expressed any view or opinion on the merits of the matter, be it arbitrable disputes or captioned applications.



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WEB COPY 14. Captioned applications are disposed of in the aforesaid manner.

There shall be no order as to costs.

15. Registry to inform and also communicate copy of this order
forthwith to Hon'ble Thiru.Justice K.Mohan Ram (Retd.)

10.02.2022

mk

Note: Issue order copy today

(Upload forthwith)



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M.SUNDAR, J
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10.02.2022