



O.A.No.404 of 2022

O.A.No.404 of 2022

M.SUNDAR, J.,

This order will now dispose of the captioned application.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 20.07.2022 and a separate order made in Arb.O.P.(Com.Div.)No.329 of 2022 (Section 11 petition) today which read as follows:

Proceedings dated 20.07.2022 made in O.A.No.404 of 2022:

'Mr.S.Ravi learned counsel of M/s.Gupta and Ravi (Law Firm) on behalf of sole applicant Company and Mr.K.Harishankar, learned counsel who is on caveat qua lone respondent (BHEL) are before this Court.

2. When the matter was taken up in the Admission Board, Mr.S.Ravi, learned counsel for the applicant submitted that the applicant company is presenting a petition under Section 11 of The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996) today. Learned counsel requests for a short accommodation to bring on Board the Section 11 petition also. Request acceded to.

3. List the captioned application along with Section 11 petition (to be filed today) in the Admission Board i.e., Motion List day-after-tomorrow. List on 22.07.2022.'



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WEB COPY Proceedings dated 22.07.2022 made in

Arb.O.P.(Com.Div.)No.329 of 2022:

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 20.07.2022 under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of convenience, clarity and brevity] with a prayer to appoint an Arbitrator.

2. Captioned Arb OP is in the Admission Board i.e., motion list.

3. Mr.S.Ravi, learned counsel of M/s.Gupta and Ravi (Law Firm) is before this Court on behalf of sole petitioner and Mr.K.Harishankar, learned counsel with address for service at No.554/555, 'Capitale', 9th Floor, Anna Salai, Teynampet, Chennai-600 108, Mobile No.9841076561, Email ID : hari@hsbpartners.com, who is present in Court accepts notice on behalf of lone respondent i.e., 'Bharat Heavy Electricals Limited' which shall hereinafter be referred to as 'BHEL' for the sake of convenience and clarity.

4. Aforementioned two counsel on either side consented for main Arb OP being taken up and disposed of. Therefore, main Arb OP on hand is being disposed of in and by this order with the consent of both sides.

5. Both learned counsel submit that a contract dated 06.07.2021 captioned 'CONTRACT AGREEMENT' which



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shall hereinafter be referred to as 'primary contract' for the sake of convenience and clarity is the nucleus of contractual relationship between the petitioner and BHEL. Both learned counsel submit that the primary contract is inter alia for 'Civil and Architectural works to be carried out in the main plant work area, various buildings, watch tower patrol road and drains etc., at Udangudi Super Critical Thermal Power Project at Tuticorin in Tamil Nadu' [hereinafter 'said work' for the sake of convenience and clarity].

6. Both the learned counsel further submit that inter alia there is a set of conditions captioned 'TECHNICAL CONDITIONS OF CONTRACT' [hereinafter 'TCC' for the sake of convenience and clarity] which forms part of primary contract and clause 2.21.1 captioned 'ARBITRATION' of TCC serves as Arbitration Agreement between the parties. To be noted, this clause 2.21.1 of TCC reads as follows:

'2.21.1 ARBITRATION

2.21.1.1 Except as provided elsewhere in this Contract, in case parties are unable to reach amicable settlement (whether by Conciliation to be conducted as provided in Clause 2.21.2 herein below or otherwise) in respect of any dispute or difference; arising out of the formation, breach, termination, validity or execution of the Contract; or the respective rights and liabilities of the Parties; or, in relation to interpretation of any provision of the Contract; or , in any manner touching upon the Contract (hereinafter referred to as the 'Dispute'), then, either Party may, commence arbitration in respect of such Dispute by issuance of a notice in terms of



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Section 21 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Notice'). The Notice shall contain the particulars of all claims to be referred to arbitration in sufficient detail and shall also indicate the monetary amount of such claim. The arbitration shall be conducted by a sole arbitrator to be appointed by the Head of the BHEL Power Sector Region issuing the Contract within 60 days of receipt of the complete Notice. The language of arbitration shall be English.

The Arbitrator shall pass a reasoned award.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act 1996 (India) or statutory modifications or re-enactments thereof and the rules made thereunder as in force from time to time shall apply to the arbitration proceedings under this clause. The seat of arbitration shall be Chennai (the place from where the contract is issued). The contract shall be governed by and be construed as per provisions of the laws of India. Subject to this provision 2.21.1.1 regarding ARBITRATION, the principal civil Court exercising ordinary civil jurisdiction over the area where the seat of arbitration is located shall have exclusive jurisdiction over any DISPUTE to the exclusion of any other Court. '

7. It is also to be noted that there is an arbitration clause i.e., clause 2.21 captioned 'ARBITRATION' qua General Conditions of Contract [GCC] which also forms part of primary contract and this clause 2.21.1 of GCC stands replaced by the aforementioned clause 2.21.1.1 of TCC. It is not necessary to dilate more on this as both learned counsel



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agree and are on the same pages in saying that the aforementioned clause 2.21.1.1 of TCC is the arbitration agreement between the parties i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

8. This takes this Court to the arbitrable disputes. When the primary contract was operated, said work had to be completed within the time frame of 22 months i.e., by 01.05.2023 but there was alleged delay resulting in withdrawal notice and it is also alleged that the petitioner company has suffered a loss to the tune of Rs.253.58 Crores. BHEL disputes this position and says they have a counter claim and they are entitled to Liquidated Damages which is well over Rs.50 Crores. To be noted, this is only a thumbnail sketch of arbitrable disputes that have erupted between the petitioner and BHEL when the primary contract was operated qua said work. To put it differently, it is not an exhaustive adumbration of arbitrable disputes that have arisen between the petitioner-Company and BHEL.

9. According to the learned counsel for petitioner, owing to eruption of aforementioned arbitrable disputes, a notice invoking arbitration agreement i.e., trigger notice dated 29.12.2021 was issued and the BHEL replied to the same in and by communication dated 20.01.2022. Though learned counsel for BHEL contends that this may not qualify strictly as trigger notice, on instructions, learned counsel for BHEL consented for appointment of sole Arbitrator as the aforementioned arbitrable disputes have to be adjudicated



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upon. To be noted, for the purpose of specificity, it is deemed appropriate to clarify that consent is only with regard to existence of arbitration agreement between the parties, for appointment of a sole Arbitrator by this Court's choice and it does not pertain to any concession qua lis. To put it differently, all the questions and disputes arising out of primary contract are left open to be decided by Hon'ble sole Arbitrator to be appointed by this Court (infra elsewhere in this order).

10. In the light of the aforementioned consensus, this Court deems it appropriate to not to dilate further owing to the scope of a Section 11 legal drill and this Court deems it appropriate to call the drill to a halt here. However, it is necessary to record that along with captioned Arb OP, an application under Section 9 of A and C Act namely, O.A.No.404 of 2022 has been moved by the petitioner-Company and the same is on Board. Prayer in this Section 9 application is inter alia for interim injunction restraining BHEL from unilaterally ordering forfeiture of the petitioner's security deposit (prayer says unilaterally forfeiting the applicant's security deposit, obviously BHEL cannot forfeit, it can only order forfeiture as it deposit is in the hands of BHEL and therefore it will suffice to say that this is not happily worded and have it at that). To be noted this is one limb of the prayer and it is not imperative to advert to further parts of the interim prayer as the Section 9 prayer will now go before Hon'ble Sole Arbitrator (as would be set out infra).

11. In the light of the consent and consensus qua



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appointment of sole Arbitrator of this Court's choice, this Court deems it appropriate to accede to the request of learned counsel for petitioner to present a copy of Section 9 application before 'Arbitral Tribunal' [hereinafter 'AT' for the sake of convenience and clarity] with a prayer to treat the same as one under Section 17 of A and C Act. To be noted, a separate order is being made today by this Court in O.A.No.404 of 2022.

12. In the light of the narrative thus far, Hon'ble Mrs.Justice R.Banumathi (Retd.), Former Judge, Hon'ble Supreme Court of India, residing at C-20, C-Block, Ground Floor, Defency Colony, New Delhi - 110 024, Mobile Nos.7042955477, 7397329476, E-mail ID : banumathir1955@gmail.com is appointed as sole Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference, qua primary contract i.e., contract dated 06.07.2021, adjudicate upon arbitrable disputes that have arisen between the parties and render an Arbitral Award by holding sittings in the 'Madras High Court Arbitration Centre under the aegis of this Court' (MHCAC) as per Madras High Court Arbitration Proceedings Rules 2017 and fee of Hon'ble sole Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.

13. Captioned Arb OP is disposed of in the aforesaid manner. There shall be no order as to costs.'



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3. Learned counsel for applicant makes a request to permit the applicant to present a copy of the captioned application before Hon'ble 'Arbitral Tribunal' [hereinafter 'AT' for the sake of convenience and clarity] and seek an interim injunction by treating the same as an application under Section 17 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity]. Request acceded to.

4. If the applicant-Company chooses to take aforementioned legal route, though obvious, it is made clear that it is open to Hon'ble AT to deal with the application on its own merits and in accordance with law notwithstanding this judicial order. It is also open to the applicant to make any other interim prayer with further ancillary prayer/s that is/are deemed appropriate if so desired and if so advised.

5. Captioned application is disposed of as closed making it clear that no view or opinion has been expressed either on the merits of the main *lis* or on the interim prayer. There shall be no order as to costs.

22.07.2022
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