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Arb.O.P.(Com.Div).No.32 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.04.2023

PRONOUNCED ON : 19.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

Arb.O.P.(Com.Div).No.32 of 2023

Air Liquide Global E&C Solutions India Private Limited,
Represented through its Authorised Representative
Mr. Madan Mohan K R,
Having office at:
A24/10, Mohan Cooperative Industrial Estate,
Mathura Road,
New Delhi - 110001.

... Petitioner

VS

Vedanta Limited
Registered Office at
1st Floor, 'C' Wing, Unit 103,
Corporate Avenue, Atul Projects, Chakala,
Andheri (E), Mumbai, Maharashtra – 400093.

... Respondents

Prayer: This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator on behalf of the Respondent in terms of the Said Contracts, and further direct the reference of the disputes mentioned above between the parties to the Arbitral Tribunal to be constituted by the two appointed Learned Arbitrators to adjudicate upon the same.



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For Petitioner : Mr.P.V.Balasubramanian
Senior Advocate
for M/s.H.S.Chandhoke

For Respondent : Mr.Rahul Balaji

ORDER

This original petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator on behalf of the respondent and to refer the dispute between the parties to the Arbitral Tribunal to be constituted by the two appointed Arbitrators to adjudicate upon the same.

2. According to the petitioner, it was initially approached and engaged by M/s Sterlite Industries (India) Ltd., for design, erection, commissioning of 1250 TPD contained oxygen air separation unit (ASU) for 4,00,000 TPA copper smelter at Tuticorin, Tamil Nadu. The petitioner and respondent entered into four contracts namely Design Contract dated 28.12.2017, Erection Contract dated 20.07.2009, Procurement Contract dated 28.12.2017 and Umbrella Contract dated 28.12.2017. On the basis of the above said four contracts, the petitioner commenced his work in terms of contract and the performance of the petitioner was to the satisfaction of the other party to the



contract namely M/s Sterlite Industries. It is also stated by the petitioner that

the M/s Sterlite Industries was merged with Sesa Goa and subsequently,

changed to Sesa Sterlite Limited with effect from 18th September, 2013.

Thereafter, the name of Sesa Sterlite Limited was changed to Vedanta Limited

with effect from 21th April, 2015 as per the approval order passed by the

Registrar of Companies, Goa. Therefore, Vedanta Limited is shown as a

respondent in this original petition. It is claimed by the petitioner that by

virtue of judicial order the operation of the existing plant of the respondent in

Tuticorin was shut down and therefore, respondent issued a letter on

25.10.2010 to the petitioner calling upon the petitioner to suspend all the

activities. The petitioner herein placed its objection on record to the letter of

the respondent and also issued a letter dated 06.02.2014 intimating the

respondent about its claim on the date. However, the respondent failed to

make good the payments of the amount claimed by the petitioner. It was

further averred by the petitioner that on the basis of the representation and

assurance of the respondent that all statutory clearances would be obtained

for revival of the project, the petitioner agreed to the revival of the projects as

per the terms of the above said contracts and mobilised resources. Though



petitioner continued to discharge its obligation in terms of the above said contract, owing to non-compliance of environmental law by the respondent, the plant of the respondent could not be restarted. It was also claimed that the respondent failed to comply with the legal requirements and hence, invited a judicial order against it for shutting of the plant. The respondent tried to invoke the force majeure clause by referring to the judicial orders and the same was objected to by the petitioner.

3. The petitioner issued a Cure Notice dated 18.07.2022 calling upon the respondent to rectify its breaches within 30 days from the date of receipt of cure notice. In the very same notice, it was mentioned by the petitioner that the notice shall be treated as the one issued by invoking arbitration clause under Clause 20 of Design Contract, Clause 12 of Erection Contract, Clause 17.1 of Procurement Contract and Clause 6 of Umbrella Contract. The petitioner also appointed the Hon'ble Mr. Justice (Retd.) Vikramjit Sen as the learned Arbitrator of its choice. The respondent neither cured the defects pointed out in the notice nor appointed its choice of arbitrator in terms of arbitration clause contained in the above said contract. Therefore, the



petitioner was constrained to file the instant petition under Section 11(6) Arbitration and Conciliation Act, 1996.

4. The respondent herein filed a counter affidavit and resisted the petition. In its counter affidavit, the respondent averred that the present petition is not maintainable and the same is liable to be dismissed as premature in so far as the petitioner issued the cure notice dated 18.07.2022, even before taking steps to amicably settle the dispute with the respondent. It was averred by the respondent that as per arbitration clause incorporated in the aforesaid contract between the parties, in case of any difference or dispute arising under the contract, the same shall be settled by an amicable efforts on the part of both the parties. As attempt to arrive at a settlement shall be deemed to have failed as soon as one of the party to the contract so notifies to other party in writing. If the attempt of settlement is met with a failure, the dispute shall be resolved by taking recourse to provisions of Arbitration and Conciliation Act, 1996. However, the petitioner herein without making any sincere efforts to settle the dispute amicably and without notifying the respondent in writing about the failure of the settlement efforts, filed the



present application after nominating its choice of arbitrator. Therefore, the present application filed by the petitioner without resorting to settlement procedure contemplated under Article 20 of Design Contract, Article 17.1 of Procurement Contract, Article 12(1) of Erection Contract and Article 6 of Umbrella Contract is not maintainable. It is also averred that the petitioner did not take any steps to mutually discuss or provide any opportunity for discussion and mutual settlement inspite of multiple reminders by the respondent. On these pleadings, the respondent sought for dismissal of the petition.

5. The learned counsel for the petitioner by taking this Court to Article 20 of Design Contract, Article 12 of Erection Contract, Article 17.1 of Procurement Contract and Article 6 of Umbrella Contract entered into between the parties, submitted that the efforts of the parties to settle the dispute amicably had been met with a failure and the same was intimated to respondent in writing as required under the relevant arbitration clause in the above said contract by notice of the petitioner dated 18.07.2022. The learned counsel also referred to the earlier communication of the petitioner to the



respondent to substantiate its contention every attempt for amicable settlement was made by the parties. The learned counsel submitted in its cure notice dated 18th July, 2022 the petitioner nominated its arbitrator and the same was done only after informing the respondent about failure of attempt to settle the matter amicably. The learned counsel further submitted in spite of the fact that petitioner nominated its arbitrator and intimated the same to the respondent. It failed to nominate its choice of arbitrator within the time stipulated by the Arbitration and Conciliation Act, 1996 and consequently, the petitioner has no other option but to invoke Section 11(6) of Arbitration and Conciliation Act, 1996.

6. Per contra, the learned counsel appearing for the respondent submitted that Section 11 (6) of the Arbitration and Conciliation Act, 1996, can be invoked only in cases where the respondent failed to act in accordance with agreed procedure. In the case on hand, parties failed to exhaust the agreed procedure for settlement of the issues and consequently, the petitioner is not entitled to rush to this Court by invoking provisions of Arbitration and Conciliation Act, 1996, seeking nomination of respondent's arbitrator. The



learned counsel by taking this Court to the reply issued by the respondent dated 10.08.2022 in response to the cure notice issued by the petitioner dated 18.07.2022 submitted that respondent suggested meeting between the parties for exploring the possibility of amicable settlement. In such circumstances, it cannot be said the attempt to resolve the dispute by settlement got failed. In support of his contention that the present application filed by petitioner is pre-matured, the learned counsel relied on the following judgments:-

- (i) ***National Highways Authority of India and another vs. Bumihiway DDB Ltd., (JV) and others*** reported in ***(2006) 10 SCC 763***.
- (ii) ***Union of India and another vs. Premco-DKSPS (JV) and others*** reported in ***(2016) 14 SCC 651***.

7. The petitioner herein has come up with this application seeking nomination of arbitrator for respondent mainly on the ground that inspite of it's written notice nominating its arbitrator, the respondent failed to exercise its choice and nominate its arbitrator within the time stipulated under the Arbitration and Conciliation Act, 1996. The petition is opposed by the respondent mainly on the ground that the petitioner rushed to this Court



without exhausting the mechanism provided under first limb of the Article which deals with the disputes and arbitration in the contract between the parties. Article 20 of Design Contract, Article 17(1) of Procurement Contract, Article 12(1) of Erection Contract and Article 6 of Umrella Contract deal with disputes and arbitration. The relevant article reads as follows:-

“20.1 Any differences or disputes arising from the contract or from agreements regarding its performance shall be settled by an amicable effort on the part of both Parties to the contract An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the Parties to the contract so notifies the other Party in writing.

If an attempt at settlement has failed, the disputes shall be finally settled under the provisions of the Arbitration & Conciliation Act, 1996 upon such reference made by either of the Parties by an arbitral tribunal consisting of three arbitrators. Either Party shall be entitled to appoint one arbitrator each and the third to be appointed by the two arbitrators so appointed. The place of arbitration shall be Tuticorin, Tamil Nadu, India. The arbitral award shall be substantiated in writing.”

8. The first limb of arbitration clause make it obligatory on the part of the parties, to make an attempt to resolve the dispute between them by amicable settlement. As attempt to arrive at amicable settlement deem to be



failed as soon as one of the party to the contract notifies to the other party in writing regarding the failure. Therefore, once one of the party to the contract notifies to the other party that efforts made to resolve the dispute is failed, the second limb of the article namely recourse to arbitral proceedings comes into play. The learned counsel by relying on the judgment in ***National Highways Authority of India and another vs. Bumihiway DDB Ltd., (JV) and others*** reported in ***(2006) 10 SCC 763*** and ***Union of India and another vs. Premco-DKSPS (JV) and others*** reported in ***(2016) 14 SCC 651***, submitted that in the case on hand, petitioner nominated its choice of arbitrator even without exhausting the first limb of the above said article.

9. The petitioner herein issued cure notice dated 18.07.2022 to respondent asking him to cure the defects within 30 days from the date of receipt of notice. In Paragraph No.26 of the said notice, the petitioner clearly mentioned that numerous attempts to resolve the disputes amicably met with a failure. The relevant averment in Paragraph No.26 of the notice reads as follows:-

“26. Further, it is stated that in the event, VL fails to rectify



the breaches indicated in the instant communication, the instant communication shall also be considered to be a notice invoking arbitration under Article 20 of the Design Contract, Article 12 of the Erection Contract, Article 17.1 of the Procurement Contract and Article 6 of the Umbrella Contract. It is a matter of record that numerous attempts have been made by AL to discuss and resolve the disputes amicably with VL. However, from the facts at hand, VL's obstinate silence and refusal has made it clear that VL is not amenable to an amicable resolution. Accordingly, and in the event of non-rectification of breaches, AL nominates and appoints Hon'ble Mr. Justice (Retd.) Vikramjit Sen as the Learned Arbitrator of its choice. VL is requested to take note of the same and act accordingly."

10. Therefore, as required by first limb of the arbitration clause in the contract between the parties, the petitioner intimated to the respondent that all efforts to settle the dispute amicably met with a failure. In the very same notice, it also exercised its option of nominating its arbitrator. The petitioner in its letter dated 25.05.2018 addressed to respondent requested the respondent to arrange for an urgent meeting to resolve the dispute. The desire for meeting was reiterated by the petitioner in its another letter dated 01.06.2018. The e-mail communication between the petitioner and respondent dated 14.06.2018 and the letter of the petitioner to the head of the



project at Tuticorin dated 27.07.2018 also refers about the discussion and meeting. Therefore, the communication between the parties prior to cure notice issued by the petitioner dated 18.07.2022 would make it clear that there were efforts by the parties to settle the disputes amicably. In its cure notice dated 18.07.2022, the petitioner clearly mentioned that all attempts to resolve the dispute by amicable settlement met with a failure and proceeded to nominate its choice of arbitrator. Therefore, the petitioner decided to invoke the arbitration clause and nominate its arbitrator only after informing the respondent regarding failure of efforts to resolve the dispute. Therefore, the first limb of article relating to arbitration extracted above, is duly complied in the opinion of this Court.

11. It is also pertinent to mention that the respondent in its counter filed in AR.O.P.No.157 of 2022 on the file of the Principal District Court, Tuticorin dated 28.11.2022 mentioned about failure of settlement talks between the parties. This petition for appointment of arbitrator was filed by the petitioner by invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 only on 04.01.2023. As mentioned above, inspite of petitioner's



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notice dated 18.07.2022 nominating its choice of arbitrator, the respondent failed to exercise its option and nominate its choice of arbitrator within the time stipulated by statute (Section 11(4) of Arbitration and Conciliation Act, 1996). Therefore, the objection raised by the respondent that the present petition is pre-matured is liable to be rejected.

12. Accordingly, the present petition seeking appointment of arbitrator is deserved to be allowed. Accordingly, Hon'ble Mr.Justice V.Bharathidasan, Judge (Retired), High Court, Madras is appointed as Arbitrator for the respondent. The Arbitrator named by the petitioner and the Arbitrator appointed by this Court for the respondent shall appoint a Presiding Arbitrator. The arbitral Tribunal shall enter upon the reference and adjudicate the disputes *inter se* between the parties in accordance with law. The learned Arbitrator is at liberty to fix remuneration and other incidental expenses in accordance Arbitration and Conciliation Act read with Madras High Court Arbitration Rules.

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S.SOUNTHAR, J.

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