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Arb.O.P.(Comm.Div.)No.198 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.06.2023

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

Arb.O.P.(Comm.Div.) No.198 of 2023

Larsen & Toubro Construction Limited,
Heavy Civil Infrastructure,
Rep. by its Power of Attorney Holder,
Mr.R.Lakshmanan
Having its Construction Division Headquarters Office at:
Mount Poonamallee Road,
Manapakkam, P.B.No.979,
Chennai – 600 089.
Having its Registered Office at:
L & T House,
Narottam Morarji Marg,
Ballard Estate,
Mumbai – 400 001.

...Petitioner

Versus

- 1.Fast Reactor Fuel Cycle Facility,
Rep. by its Project Director, Mr.K.S.Rahaman,
Indira Gandhi Centre for Atomic Research,
Department of Atomic Energy,
Kalpakkam, Kancheepuram – 603 102.
- 2.Mr.K.Srinivas,
Director, Engineering Services Group,
Sole Arbitrator, TSD Building,
Bhabha Atomic Research Centre,
Mumbai – 400 085.

...Respondents



Original Petition filed under Section 14(1) r/w. Section 15 of the Arbitration and Conciliation Act, 1996 praying to terminate the mandate of the Sole Arbitrator, Mr.K.Srinivas, Director, ESG, BARC, the 2nd respondent herein who has been unilaterally and unlawfully appointed by the 1st respondent as the Sole Arbitrator to adjudicate the dispute between the petitioner and 1st respondent and to appoint a neutral, independent person to act as the Sole Arbitrator to adjudicate the dispute between the petitioner and 1st respondent vide Agreement No.IGCAR/FRFCF/CV-1A/A-012/2014 dated 17.04.2014.

For Petitioner : Mr.Anirudh Krishnan
For Respondents : Mr.S.Janarthanan,
Senior Central Govt. Standing Counsel

ORDER

The present petition has been filed under Section 14(1) r/w. Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') seeking to terminate the mandate of the Sole Arbitrator, Mr.K.Srinivas, Director, ESG, BARC (second respondent herein) who has been unilaterally appointed by the first respondent as Sole Arbitrator for adjudicating the dispute between the parties and to appoint a neutral, independent person to act as Sole Arbitrator to adjudicate the dispute arisen between the parties under the Agreement No.IGCAR/FRFCF/CV-1A/A-012/2014 dated 17.04.2014.



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2. The learned counsel for the petitioner submitted that the petitioner was awarded the package for excavation, dewatering, sub-soil investigation, geological mapping, consolidation grouting and backfilling works for various plant buildings of the first respondent at Kalpakkam vide Agreement No.IGCAR/FRFCF/CV-1A/A-012/2014 dated 17.04.2014 r/w. Work Order No.IGCAR/FRFCF/CV-1A/Tr/002/2013-WO dated 24.03.2014. The contractually envisaged sequence of work was that the petitioner was to complete excavation works, the excavated land was to be given to the interfacing contractors for execution of foundation works and then re-handed to the petitioner for taking up backfilling works. The said works were scheduled to be completed by 06.04.2017. The construction schedule under the contract envisaged that 18 months would be spent on excavation and another 18 months would be spent on backfilling activities. Due to delay caused by the first respondent, the petitioner was not able to complete the work within the contractually envisaged timeline. Seven times, the petitioner was granted extension of time for completing the works. Finally, the petitioner has completed the said work only by 31.12.2021. After completing the entire works, the petitioner requested the first respondent to issue the work completion certificate. Despite the



repeated requests of petitioner, the first respondent has not yet issued the work completion certificate to the petitioner. Further, the first respondent has not yet made payment to the final bills raised by the petitioner. Though the petitioner has raised claims in relation to price escalation; compensation for additional costs incurred due to COVID-19 pandemic; reimbursement of GST; payment of final bill; reimbursement of excise duty and Value Added Tax on high-speed Diesel, etc., the first respondent has rejected the same without any reason. The attempts made by the petitioner to resolve its claims amicably with the first respondent were also failed.

2.1. The learned counsel further submitted that as per Clause 25 of General Conditions of Contract (GCC), any dispute or difference arises between the parties in relation to the contract shall be settled by a Sole Arbitrator as per the provisions of the Act. For better appreciation, Clause 25 of GCC is extracted hereunder:

“CLAUSE 25: SETTLEMENT OF DISPUTES & ARBITRATION

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to



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any other question, claim, rights, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination or abandonment thereof be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period of if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of the Superintending Engineer's decision, appeal to the Project Director who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Project Director shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with his decision, give notice to the Project Director for appointment of



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arbitrator failing which the said decision shall be binding and conclusive and not referable to adjudication by the arbitrator.

(iii) Except where the decision has become final, binding and conclusive in terms of Sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Director, IGCAR/Secretary, DAE. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of the contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Project Director of the appeal.

It is also a term of this contract that no person other than a person appointed by such Director, IGCAR/Secretary, DAE, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from Engineer-in-Charge that the final bill is ready for payment of the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in



respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996, (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and, in all cases, where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in discretion of the arbitrator who may direct to any by whom and in what manner, such costs, or any part thereof shall be paid and fix or settle the amount of costs to be so paid."



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2.2. Since no Superintending Engineer has been appointed by the first respondent for the present contract package, the petitioner placed its claims directly before the Project Director of first respondent by way of Letter dated 27.01.2023 bearing no.L&T/HCI/CACM-B/FRFCF/001 (hereinafter referred to as 'Notice of Dispute'). In the said Notice of Dispute, the petitioner had set out the factual background of the dispute and listed all its claims in a consolidated manner. Further, in the said Notice of Dispute, it has been stated that if the first respondent fails to response to this notice within a period of 30 days, the petitioner would treat the silence as a rejection of its claims and initiate arbitration proceedings against the first respondent and it has also been stated that if the petitioner is dissatisfied with the decision rendered by the Project Director of first respondent, the petitioner would initiate arbitration proceedings against the first respondent. Even after 30 days from the receipt of said Notice of Dispute, the Project Director of first respondent did not respond to it. Hence, the petitioner sent a Arbitration Notice dated 16.03.2013 to the Project Director of first respondent, wherein, it has been stated that the petitioner has nominated Mr.S.Soundararajan (Former Chief Engineer, Chennai Port Trust) as Sole



Arbitrator to resolve the dispute between the parties and the first respondent is called upon to accept the nomination of said Sole Arbitrator, within a period of 30 days from the date of receipt of the said notice. After the receipt of said notice, the first respondent issued his response to the claims raised by the petitioner in Notice of Dispute. However, the petitioner has not accepted the response made by the first respondent to Notice of Dispute since the time limit for making response to the said Notice of Dispute has expired on 03.03.2023 itself. Hence, the petitioner requested the first respondent to respond to the Arbitration Notice dated 16.03.2023.

2.3. Thereafter, the Project Director of first respondent sent a Letter dated 05.04.2023 to the petitioner, stating that the petitioner's nomination of Sole Arbitrator was not acceptable and hence, Mr.K.Srinivas (second respondent) has been unilaterally appointed as Sole Arbitrator to adjudicate the dispute between the parties.

2.4. The learned counsel for the petitioner contended that in the present case, without the consent of the petitioner, the first respondent has unilaterally appointed an Arbitrator to adjudicate the disputes between the



parties, which is in violation of provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996. It is pertinent to extract Section 12(5) of the Act hereunder:

“12. Ground for challenge.-

(1).....

(2).....

(3).....

(4).....

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

A mere perusal of the above provision makes it clear that the persons mentioned in Schedule VII of the Act would be ineligible to be appointed as Arbitrator. Further, proviso to Section 12(5) envisages that the persons mentioned in Schedule VII are also ineligible to nominate any person as arbitrator and the parties may subsequent to disputes having arisen between



them, waive the applicability of this sub-section by an express agreement in writing. However, no such consent was obtained by the respondent. Hence, the unilateral appointment of the arbitrator made by the first respondent is in violation of provisions of Section 12(5) of the Act. In support of his contentions, he placed reliance on the judgment, ***TRF and Bharat Broadband Network Limited Vs. United Telecoms Limited*** reported in ***(2019) 5 SCC 755***, wherein, the Hon'ble Apex Court referred to Section 12(5) of the Act in the context of appointment of an arbitrator by a Managing Director of a corporation, who became ineligible to act as arbitrator under the Seventh Schedule. The relevant portion of the said judgment reads as follows:

“50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the 13 language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the



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Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction.....

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54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he



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cannot nominate another as an arbitrator. The 14 arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

2.5. The definition of 'express and implied authority' is explicitly defined under Section 187 of the Contract Act, which reads as under:

“187. Definitions of express and implied authority. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.”

A perusal of the above makes it clear that an authority is to be implied when it is inferred from the circumstances of the case and is said to be expressed when it is given by words spoken or written. In the present case, from the circumstances even if it is inferred that the authority is implied by the act of the petitioner having not raised any objection towards the appointment of



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the Arbitrator made by the respondent unilaterally, the same cannot be taken as implied authority inasmuch as the proviso to Section 12(5) of the Act insists that the express agreement between the parties for providing consent for unilateral appointment, must be in writing. Therefore, if the consent is not in writing, no other inference can be drawn contrary to what is provided under the proviso to Section 12(5) of the Act.

2.6. Moreover, as per the dictum laid down by the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.***, reported in ***(2020) 20 SCC 760***, any unilateral appointment of Arbitrator without the consent of the other party would be non-est in law. Therefore, the learned counsel prayed this Court to terminate the mandate of the Sole Arbitrator who has been unilaterally appointed by the first respondent and to appoint a neutral person as Sole Arbitrator for adjudicating the dispute between the parties.

3. *Per Contra*, the learned Senior Central Government Standing Counsel appearing for the respondents submitted that as per Clause 25 of GCC, if any dispute or difference arises between the parties, the same shall



be referred for adjudication through arbitration by a Sole Arbitrator appointed by the Director, IGCAR/Secretary, DAE. Accordingly, Mr.K.Srinivas (second respondent) was appointed as Sole Arbitrator and the same was also communicated to the petitioner by the first respondent. A formal appointment order of Sole Arbitrator was communicated to both the petitioner and the first respondent on 19.04.2023. Therefore, the learned counsel prayed this Court to pass appropriate orders in this matter.

4. Heard the learned counsel on either side and perused materials placed before this Court.

5. In the present case, without the consent of the petitioner, the first respondent initiated the arbitral proceedings and appointed the Sole Arbitrator unilaterally, for adjudicating the dispute between the parties. The first respondent simply sent an intimation to the petitioner stating that a Sole Arbitrator has been appointed for adjudicating the dispute between the parties. The first respondent has not even given 30 days time to the petitioner to provide its consent for unilateral appointment of Arbitrator. Hence, the petitioner is before this Court.



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6. As rightly pointed out by the learned counsel for the petitioner, as per Section 12(5) of the Act, the first respondent ought to have obtained the consent of the petitioner in writing. Unless the petitioner provides its consent for unilateral appointment of Arbitrator, the first respondent ought not to have proceeded with the appointment of Arbitrator.

7. Not only in this case but also in many number of cases where the respondent has unilaterally appointed an Arbitrator without the consent of the petitioner, this Court has observed that such unilateral appointment of Arbitrator is an absolute violation of the provision of Section 12(5) of the Act. In the case of ***Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.***, reported in ***(2020) 20 SCC 760***, the Hon'ble Apex Court has also held that the unilateral appointment of Arbitrator is non-est in law.

8. According to the respondents, the Sole Arbitrator has been appointed as per Clause 25 of GCC. However, this Court is of the opinion that Clause 25 of GCC is not in accordance with the provision of Section 12(5) of the Act and the Agreement dated 17.04.2014 is illegal since the same is also not in accordance with Section 12(5) of the Act.



9. Considering the above facts and circumstances of the case and also, in the light of the dictum laid down by the Hon'ble Supreme Court in the case of *TRF and Bharat Broadband Network Limited Vs. United Telecoms Limited* reported in (2019) 5 SCC 755, this Court is inclined to terminate the mandate of the Sole Arbitrator, Mr.K.Srinivas, Director, ESG, BARC (second respondent herein) who has been unilaterally appointed by the first respondent and appoint a new person as Sole Arbitrator to adjudicate the disputes arisen between the parties. Accordingly, this Court pass the following order:

(i) **The Hon'ble Mrs.Justice R.Banumathi, Former Judge of Hon'ble Supreme Court, C-20, C-Block, Ground Floor, Defency Colony, New Delhi – 110 024, Mobile No.7042955477** is appointed as new Arbitrator to enter upon reference and adjudicate the dispute *inter se* the parties.

(ii) The learned new Arbitrator shall pass award within a period of six months from the date of receipt of a copy of this order, only after issuing notice to the parties and hearing them.

(iii) The parties shall pay fees and other incidental charges to the learned Arbitrator fixed by her, equally.



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(iv) In the event of non-appearance of the respondents before the learned Arbitrator, petitioner shall pay the entire remuneration and other expenses at first instance and thereafter, petitioner can recover the same directly from the respondents.

10. Accordingly, this petition is ordered. The parties shall bear their own costs. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996, before the Arbitrator.

26.06.2023

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Index : Yes/No

Speaking Order (or) Non-Speaking Order

Note to Registry: Issue order copy on 17.07.2023



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