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Arb.O.P. (Com.Div.) No.435 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.435 of 2023

Siemens Gamesa Renewable Power Private Limited,
No.489, GNT Road, Thandalkazhani,
Vadagarai PO, Redhills, Chennai – 600 052.
Through its Authorized Representative,
Mr.Arulkumar Gunasekaran

.. Petitioner

Vs.

Veer Energy and Infrastructure Limited,
629-A, Gazdar House, 1st Floor,
Nr.Kalbadevi, Post office,
JSS Marg, Mumbai – 400 002.

.. Respondent

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator on behalf of the Respondent, for resolution of disputes under the Development Agreement dated 14.10.2011 and Construction and Delivery Agreement dated 19.11.2011 entered into by the parties and to pass an order imposing costs of these proceedings on the Respondent.

For Petitioner : M/s.Janani Shankar

For Respondent : No Appearance



ORDER

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator on behalf of the Respondent, for the resolution of disputes under the Development Agreement dated 14.10.2011 and Construction and Delivery Agreement dated 19.11.2011 entered into by the parties and to pass an order imposing costs of these proceedings on the Respondent.

2. Though the counsel had entered appearance and the name of the counsel is also printed in the cause list today, there is no representation on behalf of the respondent. No counter has been filed to this Original Petition. It appears that the respondent is not interested in contesting this Original Petition.

3. Earlier the petitioner had filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 in O.A.Nos.311 and 312 of 2023, wherein, interim order was passed by this Court on 11.04.2023. Thereafter, a final order was passed on 30.06.2023. Operative portion of the order reads as under:-



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“17. Upon hearing and perusal, it is clear that the applicant and the respondent had entered into Development Agreement and Construction and Delivery Agreement on 14.10.2011 and 19.10.2011 respectively at Chennai. Those agreements were signed at Chennai and the applicant's office is also situated at Chennai. In terms of Clause 18 of the Construction and Delivery Agreement and in terms of Clause 10 of the Development Agreement, the parties had agreed that the venue of the Arbitration shall be at Chennai. Therefore, I do not find any substance in the objection raised by the learned counsel for the respondent that this Court will not have any jurisdiction.

18. As far as the limitation is concerned, in terms of those two agreements, the respondent had agreed to provide site access to the applicant throughout the lease/sub-lease period to carry out O&M activities to its clients. The applicant had entered into the said O&M Contract with the sub-lease holders for a period of 10 years and hence, they are certainly entitled to carry out the O&M services. Since in terms of both the agreements, the respondent had obligated to provide the site access to the applicant, I do not find any substance in the submissions made by the learned counsel for the respondent with the regard to the issue of limitation.

19. As far as the stamping of the instrument is concerned, it is clear that both the agreements have been stamped with 100 Rupees Stamp Paper each.

20. Further, as far as the submission made with regard to not impleading the sub-lease holders as one of the parties is concerned, this Court is of the view that the present dispute is only between the petitioner and the respondent with regard to the aforesaid two agreements in respect of the restraining the applicant to enter into the premises of the sub-lease holders. However, the respondent had categorically agreed to provide site access for O&M activities to the clients of the applicant. Therefore, this Court is of the considered view that it is not necessary to implead the sub-lease holders as one of



the parties.

21. As far as the issue of pre-suit notice is concerned, a reading of Clause 18.3 of the Construction and Delivery agreement would show that 10 days notice would not be applicable for the filing of interim application for any interim relief. The Clause 18.3 of the Construction and Delivery agreement reads as follows:

“18.3. Right to interlocutory relief:

“Nothing in this Section 18 precludes or restricts a party's right to seek urgent interlocutory relief or remedy where it is required by that party”.

22. As far as the judgements referred by the learned counsel for the respondent is concerned, this Court is of the considered view that for the facts and circumstances of the present case, the judgements referred by the learned counsel for the respondent would not be applicable.

23. For all these reasons, this Court is of the considered view that a *prima facie* case has been made out by the applicant and the balance of convenience is also in favour of the applicant.

24. Further, this Court feels that if the interim injunction is not granted, the applicant cannot carry out the O&M service and ultimately the operation of the windmill will come into standstill, whereby the interest of the public would be affected at large and on the other hand, the interest of the respondent is not going to be affected any way.

25. Therefore, for all these reasons, this Court hold that the applicant is entitled for the interim injunction as prayed for and hence, the interim injunction already granted is hereby made absolute.

26. Accordingly, these applications are allowed and the interim injunction granted by this Court dated 11.04.2023 is hereby made absolute. This Court grants liberty to the parties concerned, to approach the Arbitral Tribunal for any modification/vacation of this order.”

4. The petitioner and the respondent have entered into two



agreements dated 14.10.2011 and 19.10.2011. The respondent has been allocated land by the Rajasthan Government where a wind energy is being defaulted by the petitioner.

5. The first agreement signed was Development Agreement on 14.10.2011 followed by the Construction and Delivery Agreement dated 19.10.2011. Both the agreements contemplate resolution of *inter se* dispute between them through Arbitration. Clause under 18.2 the second mentioned Construction and Delivery Agreement dated 19.10.2011, parties have agreed to continue to perform their obligations under Agreement, which are not the subject of the dispute. Relevant Clause in the Construction and Delivery Agreement dated 19.10.2011 reads as under:-

“18.2. Continuing Obligations:

During the term of this Agreement, in the event of a dispute between the parties, or any arbitration or Court proceedings relating to this Agreement, the parties will continue to perform their obligations under this Agreement, which are not the subject of the dispute.”

6. Clause 18.1 of the Construction and Delivery Agreement dated



19.10.2011 signed between the petitioner and the respondent

contemplates resolution of dispute through Arbitration. It reads as

under:-

“18.Dispute Resolution

18.1. Procedure

(a) The parties must use all their reasonable endeavours to resolve any dispute.

(b) If the parties fail to resolve a dispute within 10 (ten) Business Days of one Party giving notice to the other of the dispute, either party, by giving notice to the other, may refer the dispute to the parties' senior officers who, each party must ensure, must co-operate in good faith to resolve the dispute as amicably as possible within 10 Business days of the dispute being referred to them.

(c) If the senior officers fail to resolve the dispute within 10 (ten) business days after the dispute being referred to them, the parties must, upon either party delivering a notice requesting resolution of the dispute by arbitration by a tribunal in Chennai, in accordance with the Arbitration and Conciliation Act, 1996. The arbitration tribunal shall consist of three arbitrators, one arbitrator being appointed by each party and the third arbitrator being appointed by the two appointed arbitrators. The venue of the arbitration will be Chennai.

(d) The arbitration proceedings shall be conducted in the English language.

(e) The parties agree that any arbitration award issued by the arbitrator will be final and binding upon the parties and the parties waive their right to seek adjudication or determination of any dispute under this agreement before any Court.”



7. This petition precedes a notice of the petitioner dated 06.06.2023 issued under Section 21 of the Arbitration and Conciliation Act, 1996 to the respondent. The respondent has replied to the above notice dated 06.06.2023 vide reply dated 14.06.2023. However, the respondent has neither consented nor nominated an arbitrator on its behalf. Instead, has stated that the dispute is not arbitrable as it is time barred. The agreement *prima facie* seems to indicate that there are continuing obligations under the Agreement. Since the issue relating to the limitation can be decided by the Arbitral Tribunal, it is best left to be decided by the Arbitral Tribunal. It is deemed that the respondent has forfeited the rights to appoint an Arbitrator.

8. The petitioner has nominated Hon'ble **Ms.Justice K.B.K.Vasuki, Retired Judge of this Court**, as nominee arbitrator on behalf of the petitioner.

9. Considering the above, Court is inclined to allow this Original Petition by recognising nomination of **Hon'ble Ms.Justice K.B.K.Vasuki, Retired Judge of this Court**, as the Arbitrator nominated on behalf the petitioner. **Hon'ble Ms.Justice R.Mala,**



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Retired Judge of this Court, is appointed as the nominee Arbitrator on behalf of the respondent. Both the Arbitrators shall nominate a presiding arbitrator to resolve the dispute between the parties.

10. The parties are at liberty to workout the venue for Arbitration at Chennai.

11. The Court is inclined to pass the following order:-

(i) **Hon'ble Ms.Justice K.B.K.Vasuki, Retired Judge of this Court, (Mobile No.:9842261610) residing at No.108/64, 2nd Floor, Catholic Centre, Armenian Street, Parrys, Chennai – 600 001**, is appointed as an nominee Arbitrator to enter upon reference and adjudicate / resolve the *inter se* dispute between the parties.

(ii) **Hon'ble Ms.Justice R.Mala, Retired Judge of this Court, (Mobile No.:9498022266) residing at No.26, Balaji Garden, Aanaikuppam, Anna Nagar, Cuddalore – 607 001**, is appointed as an nominee Arbitrator to enter upon reference and adjudicate / resolve the *inter se* dispute between the parties.



(iii) Both the Arbitrators shall nominate a presiding arbitrator to resolve the dispute between the parties.

(iv) The learned Arbitrators appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order. The two Arbitrators may appoint the deciding Arbitrator and thereafter proceed to pass an Award after hearing both parties.

(v) The learned Arbitrators appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioner shall pay the entire fee and



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other incidental charges to the Arbitrator and later recover the same from the respondent.

12. This Original Petition is allowed with the above observations, leaving the parties to bear their own costs.

13. Since the Court has appointed an Arbitrators, it is open to the petitioner as well as the respondent to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrators.

29.11.2023

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Index : Yes / No
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C.SARAVANAN, J.

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