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Arb.O.P.(Comm.Div.)No.667 of 20__



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.03.2023

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

Arb.O.P.(Comm.Div.)No.667 of 2022

M/s.S.K.Engineering and Construction Company,
Rep. by its Authorised Signatory
T.Sivakumar
I Floor, Unit B-4, TNHB Flats,
Fairlands, Salem – 636 016.

...Petitioner

Versus

M/s.Bharat Heavy Electricals Ltd.,
Rep. by its Executive Director,
Boiler Auxiliaries Plant,
Indra Gandhi Complex,
Ranipet – 632 606.

...Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint an Arbitrator for adjudicating the disputes that have arisen between the petitioner and the respondent under the Agreement No.CF-20/2017 dated 27.01.2018.

For Petitioner : Mr.T.Sai Krishnan

For Respondent : Mr.S.Salai Geethan



ORDER

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The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') praying to appoint an Arbitrator for adjudicating the disputes that have arisen between the petitioner and the respondent under the Agreement No.CF-20/2017 dated 27.01.2018.

2. The learned counsel for the petitioner submitted that the petitioner firm is a registered contractor with the respondent and it has done several works for the respondent from the year 2008-2009 onwards. While so, the respondent floated a Tender dated 30.03.2016, for providing ultra-filtration plant of 56.7 MLD capacity for 3 x 500 MW Thermal Power Plant, Chennai for its client namely M/s.NTPC Tamilnadu Energy Company Limited, Vallur. The Tender Notice was issued on 25.06.2017 and the petitioner submitted its offer dated 29.07.2017 and the contract was awarded to the petitioner on 17.01.2018. The Total value of the work excluding GST was Rs.3,64,69,931/- and the work was to be completed within five months.



2.1. As per the tender conditions, the petitioner deposited a sum of Rs.9,11,750/- towards security deposit. The work was commenced on 24.05.2018 as the site could not be taken by the respondent till March 2018 for want of required insurance. Though the Letter of Award was dated 17.01.2018 and the Contract Agreement was entered into between the parties on 27.01.2018, enormous and phenomenal delay was caused by the respondent in securing and handing over the site to the petitioner which itself caused heavy loss to the petitioner. The petitioner has submitted the bills to the tune of Rs.54,80,669/- for work that was already completed by it, however, the respondent did not make any payment towards the said bills. The petitioner is entitled for the payment of interest on the delayed payment of bill amount. That apart, the petitioner has got the claim as against the respondent, for having been thrown away from the site even without providing the drawings for proceeding with the balance work. Though the petitioner vide letters dated 02.03.2021, 28.03.2021, 06.05.2021, 24.05.2021, 10.06.2021, 28.06.2021, 02.07.2021, 03.08.2021, 14.09.2021 and 11.10.2021, repeatedly requested the respondent to make payment for the works already completed, but, there was no response for the said letters. The respondent did not come forward to settle the dues which



is absolutely illegal and contrary to the terms of the contract entered into between the parties.

2.2. As per Clause 60 of the Contract Agreement dated 27.01.2018, the dispute arose between the parties is arbitrable. For better appreciation, Clause 60 of the Contract Agreement is extracted hereunder:

“60. Arbitration

Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or there conditions or otherwise concerning the work or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of BHEL and if General Manager is unable or unwilling to act, to the sole arbitration of some other persons appointed by the General Manager, willing to act as such arbitrator.

The cases referred to arbitration shall be other than those for which the decision of the Accepting Officer, or Engineer-in-charge as the case may be, is expressed in the contract to be final and conclusive. There will be no objection if the arbitration, so appointed is an employee of BHEL and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference.



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The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such General Manager as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification 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 a term of the contract that the party involving arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amount claimed in respect of each dispute.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the Contractor shall if reasonably possible continue during the arbitration proceedings and no payment due or payable to the Contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notices to both the parties fixing the date of first hearing.

The Arbitration shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitration shall be final, conclusive and binding on all parties to this contract.

In the event of disputes or differences arising between one public sector



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enterprise and a Govt. Department or between two public sector enterprises the above stipulations shall not apply, the provisions of BPF Office Memorandum No.BPF/CL001/76MAN/2(1.10)75-BPE (GM-1) dated 1st January 1976 or its amendments for arbitration shall be applicable.”

Hence, the petitioner vide legal notice dated 20.05.2022, invoked Clause 60 of the Contract Agreement dated 27.01.2018 and called upon the respondent to nominate and appoint any neutral and independent arbitrator with legal background and preferably a retired judicial officer, for adjudicating the dispute between the parties, within 30 days from the receipt of that notice. Even after the receipt of said notice, the respondent has not sent any reply to the petitioner. Hence, left with no other alternative, the petitioner has filed the present petition for the aforesaid relief.

2.3. Further, the learned counsel submitted that the petitioner herein has already a filed a petition in Arb.O.P.(Com.Div.)No.664 of 2022, seeking to appoint a Sole Arbitrator to resolve the dispute between the parties therein and this Court vide its order dated 16.03.2023 has allowed the said petition and appointed an Arbitrator. Therefore, the learned counsel prayed this Court to allow this petition as well.



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3. The learned counsel appearing for the respondent has also agreed that the dispute involved herein is arbitrable. Therefore, he has no objection for appointment of an arbitrator.

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

5. Upon perusing the materials and hearing the submissions made by the learned counsel on either side, it is crystal clear that the dispute involved herein is arbitrable as per Clause 60 of the Contract Agreement dated 27.01.2018 entered into between the parties. Hence, this Court is inclined to pass the following order:

(i) **Mr.Naveen Kumar Murthi, Advocate, having office at T6, 3rd Floor, Singapore Plaza, No.164, Linghi Chetty Street, Chennai – 600 001, Mobile No.9884740424** is appointed as the Arbitrator to enter upon reference and adjudicate the dispute *inter se* the parties.

(ii) The learned 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.



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

(iv) In the event of non-appearance of the respondent 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 respondent.

6. 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.

23.03.2023

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Index : Yes/No

Speaking Order (or) Non Speaking Order



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KRISHNAN RAMASAMY, J.

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