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Arb.OP.(Com.Div.).No.222 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.03.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.222 of 2023

M/s.NLC India Limited,
The Chief General Manage/Contracts,
Office of the Chief General Manager/Contracts
Corporate Contract Division, Corporate Office,
Neyveli – 607 801.
Tamil Nadu, India.

... Petitioner

Vs.

M/s.China Datang Technologies and Engineering Company Limited.
Incorporatd under the laws of People's Republic of China
Registered Office at 4th and 6th Floor, No.120,
Zizhuyuan Road, Haidian District Building – 100097,
People's Republic of China.

... Respondent

Prayer: Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitral Tribunal owing to failure of the respondent to agree for the same Arbitral Tribunal and/or failure to appoint an Arbitrator as required under the procedure stipulated in LOA dated 31.08.2019 and contract dated 06.03.2020.

For Petitioner	: Mr.N.Nithyanandam
For Respondent	: Mr.Ravi Varma
	Ms.Jayshree Dugar
	Ms.Varshini



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

ORDER

The petitioner has filed this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 to refer the parties to the Arbitration for the second time.

2. Already a reference was made subsequent to order dated 12.10.2010 under Section 9 of the Arbitration and Conciliation Act in OA.No.493 of 2020 by the respondent. In the said proceedings, the petitioner had filed memorandum dated 12.10.2020, pursuant to which Hon'ble Mrs.Justice R.Banumathi (retd) Former Judge of Hon'ble Supreme Court of India was appointed as the sole Arbitrator. This arrangement of an arbitral arising of one arbitrator was in dilution of the Arbitration Clause 10.33.3.5 of the General conditions of the contract.

3. The Arbitrator has also since passed an Award on 09.11.2022, in the Arbitral proceedings. The petitioner had there reserved a right to agitate the issue relating to loss arising out of awarding of the contract to a 3rd party. In paragraph 87 of the Counter filed before the Arbitral Tribunal in defense statement, the petitioner has stated as under :-



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

"87. Apart from the above undisputed facts and due to the gross negligence and non-performance of the contract, the Respondent had suffered innumerable. The claims arising out of risk and cost would be known to the Respondent after materializing new domestic tender floated for the said works. As a result, the Respondent with the leave of this Hon'ble Tribunal reserves its right to raise the said claims arises out of risk and costs as when occurs and quantified the same. The cause of action for the same is yet to arise. As such, the Respondent is entitled to reserve the right for the present."

4. After fresh tender was floated, the contract was awarded to L&T on 31.01.2022. This was at the stage when the trial had commenced before the learned Arbitrator. At this stage, it is reported that the petitioners witnesses was being examined. The dispute is between a PSU and Foreign entity. This petition is inspired from Section 11(12)(b) of the Arbitration and Conciliation Act, 1996 which stands deleted by the Arbitration and Conciliation (Amendment) Act 2019 w.e.f. 09.08.2019. The said provision read as under : -



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

“11(12)(b) Where the matters referred to in sub-sections (4), (5), (6), (7) (8) and Sub-section (10) arise in any other arbitration, the reference to “the Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.”

5. The provision as it stands today makes it clear that in respect of international arbitration, it is only the Hon'ble Supreme Court which is competent to appoint an Arbitrator or Constitute an Arbitral Tribunal where the dispute is to be resolved in an International Commercial Arbitration.

6. Section 11(6) of the Act as it stands now.

“11(6) Where, under an appointment procedure agreed upon the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that



Arb.OP.(Com.Div.).No.222 of 2023

procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

7. The learned counsel for the petitioner would submit that since in earlier round an arbitrator was appointed this Court while disposing application under Section 9 of the Arbitration and Conciliation Act vide dated 12.10.2020 in OA.No.493 of 2020, this Court is competent to appoint an arbitrator pursuant to the reference made by the petitioner vide letter dated 22.12.2022.

8. In this connection, the learned counsel for the petitioner had drawn the attention to Section 4 of the Arbitration and Conciliation Act 1996 and Section 42 of the Act. In support the learned counsel has placed reliance on the following two decisions of the Delhi High Court in



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

(1)Mr.Gajendra Mishra V. Pokhrama Foundation and another dated 10.01.2024 and (2)M/s.Oasis Projects Ltd v. Managing Director, National Highways and Infrastructure Development Corporation Ltd., dated 25.01.2023.

9. The learned counsel for the petitioner would further submit that the objection of the respondent that the parties should be relegated to conciliation is illusory and an empty formality as the parties are at logger head and that a part of dispute was partly attempted to be resolved through Arbitration, even though the parties are before this Court in OA.No.333 of 2023 and OP.No.141 of 2023 respectively against the award passed by the learned Arbitrator on 09.11.2022.

10. It is further submitted that since the matter was earlier referred to Arbitral Tribunal, consisting of sole arbitrator in deviation of Arbitration Clause 10.33.3.5 of the General conditions of the Contract, Court should exercise its discretion now by appointing the same Arbitrator, as the learned Arbitrator would be well versed with the facts of the case.



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

11. In this connection, the learned counsel for the petitioner has placed reliance on the decision of the Delhi High Court in **2020 SCC online Del 659 in Gammon India Ltd and another v. National Highways Authority of India**. A specific reference was made to Paragraph 45.3, wherein it was observed as under :-

“45.(iii.) In petitions seeking appointment of an Arbitrator/Constitution of an Arbitral Tribunal, parties ought to disclose if any Tribunal already stands constituted for adjudication of the claims of either party arising out of the same contract or the same series of contracts. If such a Tribunal has already been constituted, an endeavor can be made by the arbitral institution or the High Court under Section 11, to refer the matter to the same Tribunal or a single Tribunal in order to avoid conflicting and irreconcilable findings.”

12. Defending the stand of the respondent, the learned counsel for the respondent submits that the submission of the learned counsel for the respondent is fallacious. It is submitted that admittedly the parties are from India and China and therefore the dispute between them through Arbitration can be resolved only an International Commercial Arbitration



Arb.OP.(Com.Div.).No.222 of 2023

as defined under section 2(f) of the Arbitration and Conciliation Act, 1996.

WEB COPY

13. The learned counsel for the respondent would specifically draw attention to Section 11(6) of the Arbitration and Conciliation Act as it stands today.

14. It is submitted that a reference to Section 11(12)(b) of the Arbitration and Conciliation Act is no longer relevant in the light of the amendment to the Arbitration and Conciliation Act vide Arbitration and Conciliation (amendment) Act, 2019 w.e.f. 09.02.2019.

15. That apart, the learned counsel for the respondent would draw the attention to the following two decisions of the Hon'ble Supreme Court **Rodemadan India Ltd v. International Trade Expo Centre Ltd** in (2006) 11 SCC 651 and **State of West Bengal and others v. Associated Contractors** in (2015) 1 SCC 32. A specific reference was made to Paragraph 23 to the decision of the in **Rodemadan India Ltd v. International Trade Expo Centre Ltd** in (2006) 11 SCC 651, wherein it was observed as under :-



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

“23. Even under Section 42 itself, a Designated Judge has held in HBM Print Ltd. v. Scantrans India (P) Ltd. [(2009) 17 SCC 338 : (2011) 2 SCC (Civ) 394] , that where the Chief Justice has no jurisdiction under Section 11, Section 42 will not apply. This is quite apart from the fact that Section 42, as has been held above, **will not apply to Section 11 applications at all.**”

16. A further reference was made to paragraph 16 of the decision of the Hon'ble Supreme Court in **Amway India Enterprises Private Limited v. Ravindranath Rao Sindhia and another** (2021) 8 SCC 465 wherein the Hon'ble Supreme Court held as follows :-

“16. In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case.”



Arb.OP.(Com.Div.).No.222 of 2023

WEB COPY

17. Finally the learned counsel for the respondent also drawn the attention to the latest decision of the Hon'ble Supreme Court in **IBI Consultancy India Private Limited v. DSC limited** in (2018) 17 SCC 95, wherein it was held that only the Hon'ble Supreme Court had jurisdiction to appoint an arbitrator in a dispute in an international commercial arbitration.

18. The learned counsel also emphasised the requirements of mandatory conciliation. It is submitted that same cannot be deviated. A reference was made to decision of the Delhi High Court in **M/s.Shoba Limited v. M/s.Nava Vishwa Shashi Vijaya Krishna Properties Pvt Ltd and others** dated 10.06.2022.

19. The learned counsel for the respondent also submitted that there cannot be a peacemeal adjudication of dispute and submits that when the Contract was awarded to L&T on 31.01.2022, whereas the Award was yet to be passed by the Arbitral Tribunal. It is submitted that the Award was passed by the Arbitral Tribunal later on 09.11.2022. It is therefore submitted that it is not open for the petitioner to initiate a fresh arbitration



Arb.OP.(Com.Div.).No.222 of 2023

proceedings.

WEB COPY

20. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

21. The languages under section 11 of the Arbitration and Conciliation Act 1996 is clear in respect of the international commercial arbitration. It is only the Hon'ble Supreme Court which has jurisdiction to appoint an Arbitrator. This has been made clear by the Hon'ble Supreme Court in **Amway India Enterprises Private Limited v. Ravindranath Rao Sindhia and another** (2021) 8 SCC 465.

22. The appointment of the learned Arbitrator earlier vide order dated 12.10.2020 in OA.No.493 of 2020 was in a proceedings initiated by the respondent under Section 9. There, a consent was given by the petitioner vide Memo dated 12.10.2020, before the Court. Therefore, the Court appointed the learned Arbitrator.

23. Thus it cannot mean, this Court is bound to make an appointment under Section 11 of the Act. The concession given by the petitioner at the stage of Section 9 application filed by the respondent



Arb.OP.(Com.Div.).No.222 of 2023

would not confer jurisdiction of this Court in the second round, especially when the respondent is contesting the petition under Section 11 of the Arbitration and Conciliation Act, 1996.

24. Therefore, I am of the refraining from making any observation on merits of the petition. Suffice to state, that it is open for the petitioner to move the Hon'ble Supreme Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the same Arbitrator to be the Arbitrator. Although procedural, it cannot be helped in view of the law under Section 11 of the Arbitration and Conciliation Act, 1996.

25. With the above liberty, the petition stand dismissed. No costs.

19.03.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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C.SARAVANAN, J.
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WEB COPY



Arb.OP.(Com.Div.).No.222 of 2023

Arb.OP.(Com.Div.).No.222 of 2023

19.03.2024.