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Arb.O.P.(Com.Div.) No.223 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.223 of 2023

and

A.No.2723 of 2023

Bharat Heavy Electricals Limited,
Registered office: BHEL House, Siri Fort,
New Delhi – 110 049,
Local Office: Power Sector: Southern Region,
690, 6th Floor, EVR Periyar Building,
Anna Salai, Nandanam,
Chennai – 600 035.

...Petitioner

vs.

Vasavi Power Services Private Limited,
Registered Office: Door No.4-13,
Ibrahim Patnam Vijayawada Krishna District,
Andhra Pradesh – 521 456,
Corporate Office: 4th Floor, Golden Edifice,
Khairatabad, Hyderabad, Represented by its Head,
Project Management, Mr.M.R.Praveen.

...Respondent

Prayer:

Arbitration Original Petition filed under Sections 34(2)(a)(iv), 34(2A)
read with Sections 18 and 28 of the Arbitration and Conciliation Act, 1996,



Arb.O.P.(Com.Div.) No.223 of 2023

to set aside the Arbitral Award dated 08.05.2023 passed by the Arbitral Tribunal in its entirety and to direct the respondent to pay the costs.

For Petitioner : Mr.AR.L.Sundaresan,
Senior Counsel,
for Mr.V.V.Sivakumar,
for M/s.Dua Associates

For Respondent : Mr.Satish Parasaran, Senior Counsel,
for Ms.Pratiksha Easwar

ORDER

Being aggrieved and dissatisfied with the interim award dated 08.05.2023 passed by the learned Sole Arbitrator, the petitioner herein has filed the present Arbitration Original Petition.

2. The brief facts of the case are as follows:

2.1 The petitioner was engaged by M/s.Sterlite Industries to set up a power generation plant comprising of 2X80 MW sets of Steam Turbine Generators in the year 2010. The petitioner's contract with M/s.Sterlite Industries was around for a sum of Rs.300 Crores. The petitioner subcontracted a portion of the works to the respondent vide a Contract dated



22.06.2011 (hereinafter called as “the Contract”), wherein it was agreed between the parties that the contract shall be deemed to have come into force from 04.02.2011.

2.2 The scope of the respondent's work was to Erect, Test and Commission the aforesaid Generators and the value of the Contract between the parties was a sum of Rs.19,38,00,000/-. On the basis of Clause 2 of the General Conditions of the Contract (hereinafter called as “GCC”), the respondent furnished a sum of Rs.98,40,000/- to the petitioner. The period of Contract was to be 14 months from the date of commencement of works at the site in terms of Clause 1.6.0 of the Letter of Intent dated 23.02.2011. The respondent commenced work on 16.03.2011.

2.3 On 09.07.2014, the respondent/claimant had submitted the final bill along with the material reconciliation statement for Unit I. On 09.01.2015, the parties held a joint meeting to review the progress of work by the respondent. During the said meeting, it appears that the petitioner had insisted the respondent to carry out the material reconciliation for the works



carried out by the respondent and submit the final bill in terms of the Contract. Accordingly, on 12.02.2015, the respondent/claimant had submitted the final bill along with the material reconciliation statement of Unit II.

2.4 Subsequent to the submission of final bill along with the material reconciliation statement by the claimant, the petitioner requested the claimant to attend the meeting for internal discussion towards closure of Contract, which was scheduled to be held on 08.02.2017. Thereafter, on 06.06.2018, the petitioner sent a communication to the respondent asking them to carry out the material reconciliation at the earliest and revert to the petitioner for further actions regarding the submission of final and pre-final bills. Pursuant to the same, the claimant/respondent had submitted the necessary material reconciliation documents in soft copies on 06.06.2018, 23.06.2018, 03.07.2018, 10.07.2018, 11.07.2018 and 12.07.2018. Thereafter, on 09.08.2018, 08.07.2019 and 05.11.2020, the claimant/respondent addressed an e-mail requesting the petitioner to close out the formalities and process the bills. However, there was no reply.



Therefore, without any other option, the respondent/claimant had invoked the Arbitration clause and issued notice dated 06.03.2021 under Section 21 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”).

2.5 On 28.07.2021, a petition has been filed under Section 11 of the Act, wherein this Court appointed a sole Arbitrator to adjudicate the disputes between the parties. Even after the first sitting of the learned Arbitrator, which was held on 21.09.2021, a meeting was conducted by the parties on 13.10.2021. In the said meeting, the petitioner indicated that the material reconciliation documents were scrutinized on 12.06.2021 and further, they requested the claimant to submit some more documents for verifying the same. Thereafter, the settlement talks were going on between the parties, however, the same was failed. Therefore, the learned Arbitrator, after hearing the parties, proceeded to pass the interim award dated 08.05.2023, whereby, the learned Arbitrator had decided that the claim is not barred by limitation and issued a direction to the parties to appoint an Expert for the purpose of material reconciliation in terms of Clause 2.23.2 of



the GCC. With these backgrounds of the case, the present original petition has been filed by the petitioner.

3. Petitioner's submissions:

3.1 Mr.AR.L.Sundaresan, learned Senior counsel, appearing for the petitioner would submit that according to the claimant, the amount falls due on 11.08.2015, whereas the Arbitration notice was issued only on 06.03.2021 and hence, the claim made by the respondent before the learned Arbitrator is barred by limitation.

3.2 Further, he would submit that the claimant has not submitted the final bill along with the material reconciliation as required under Clause 2.23.2 of GCC. Unless and otherwise the material reconciliation is done by both the parties simultaneously, no final bill along with the material reconciliation statement can be submitted by the claimant. In such case, the claim made by the respondent/claimant is premature claim. However, without considering all these aspects, the learned Arbitrator had passed the



impugned interim award stating that the claim is neither barred by limitation nor premature claim.

3.3 Further, he would submit that in the said impugned interim award, the Arbitral Tribunal has directed the parties to appoint an independent Expert, without any application from the parties concerned, to carry out the fresh material reconciliation statement in terms of the Contract, which is not in terms of Section 31(6) of the Act, but in the form of direction under Section 17 of the Act. However, since, the Tribunal has referred the said award as “interim award” and passed the same under Section 31(6) of the Act, the petitioner had constrained to challenge the said interim award before this Court.

3.4 By referring the Clause 2.23.2 of GCC, he would submit that the term “final bill” refers *inter alia* the material reconciliation, which was done prior to the submission of final bill. However, in the present case, the respondent/claimant has submitted the final bill prior to the submission of material reconciliation statement. Though the learned Arbitrator found that



the claimant has failed to carry out his obligation in terms of the Contract, instead of rejecting the claim, the learned Arbitrator has wrongly issued a direction for appointment of an Expert for the purpose of fresh material reconciliation.

3.5 Further, by referring the findings of the learned Arbitrator, wherein it has been stated that the final bills submitted by the claimants are not final bills in term of the Contract, he would submit that having come to such findings, the learned Arbitrator should have dismissed the entire claim made by the respondent, instead of passing the impugned interim award.

3.6 Further, he would submit that the impugned award is not supported by the pleadings of either parties i.e., none of the parties have ever approached the Tribunal for the purpose of appointment of an Expert for fresh material reconciliation and hence, the said interim award is liable to be set aside.



3.7 By referring the paragraph No.80K of the impugned interim award, the learned Senior counsel appearing for the petitioner would submit that the impugned award is liable to be set aside since it cannot form basis for the final award and at any cost, it cannot be a step-in-aid to pass the final award. The said portion of the award reads as follows:

“80(k) The final award will be passed after getting the report in respect of all the claims made by the claimants.”

3.8 Further, in this regard, he relied on the following paragraph of the judgment rendered by the Hon'ble Apex Court in ***McDermott International Inc vs. Burn Standard Co. Ltd. & Others*** reported in ***(2009) 11 SCC 181***, which reads as follows:

“..... An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.”

3.9 Therefore, he would submit that any interim award should attain finality and no interim award can be passed under Section 31(6) of the Act as a step-in-aid to pass the final award, whereas in the present case, the



interim award was passed under Section 31(6) of the Act only as a step-in-aid to pass the final award, which is not permissible and therefore, the same is liable to be set aside.

3.10 Further, he would submit that no interim award can be passed on the basis of equity, unless expressly agreed by both the parties. When such being the case, since the parties have not agreed to pass any award based on equity, the interim award passed by the Tribunal is liable to be set aside.

3.11 Hence, for all these reasons, he requests this Court to set aside the impugned interim award passed by the learned Arbitrator dated 08.05.2023.

4. Respondent's submissions:

4.1 Per contra, Mr.Satish Parasaran, learned Senior counsel, appearing for the respondent would submit that in the present case, as far as the issue of limitation as well as the aspect of the issuing direction for appointment of an Expert for the purpose of material reconciliation are



concerned, the determination of the said issues will affect the rights of the parties and thus, in the present case, the final rights of the parties have been decided by the learned Arbitrator. Therefore, he would submit that the present interim award has been rightly passed by the learned Arbitrator in terms of the provisions of Section 31(6) of the Act.

4.2 As far as limitation aspect is concerned, he would submit that until the payment of final bill, the running account for the works would continue. In the present case, though the respondent/claimant had submitted the final bill along with the material reconciliation statement, only the petitioner has failed to perform their part of material reconciliation. Therefore, they cannot take advantage of their deliberate omission to do the material reconciliation in terms of Clause 2.23.2 of GCC. If the material reconciliation was completed on the either side and the final bill was submitted, the same would be the date for the starting point for limitation for the filing of claim i.e., the limitation will not start until any payment made against the final bill. In the event of failure to make payment by the petitioner, until the completion of material reconciliation by the petitioner, it



is only the running account for works. In the present case, admittedly, no payment was made on the final bill in terms of Clause 2.23.2 of GCC. When such being the case, the claim made by the respondent/claimant was well within the period of limitation.

4.3 Further, he would submit that by determining the question of limitation, the parties' rights have been finally decided by the learned Arbitrator. Thus, on the aspects of limitation, the decision of the learned Arbitrator attained finality and it will not have any link or step-in-aid in passing the final award. Therefore, for all practical purposes, the decision arrived at by the learned Arbitrator on the aspect of limitation is concerned, it is an interim award passed in terms of Section 36(1) of the Act.

4.4 He would further submit that after initiation of Arbitration proceedings, the first sitting of the learned Arbitrator was held on 21.09.2021. Thereafter, for the purpose of material reconciliation between the petitioner and the respondent, on 13.10.2021, a meeting was conducted between the parties and the minutes of meeting was also drawn up. A



perusal of the said minutes makes it very clear that even as on 13.10.2021, the material reconciliation was not carried out. When such being the case, the running account for the works would continue even as on 13.01.2021. Therefore, he would submit that the Tribunal, while passing the interim award, has not acted contrary to or in ignorance of the provisions of the Contract and hence, the said interim award warrants no interference.

4.5 As far as the plea raised by the petitioner with regard to the premature claim is concerned, he would submit that in the present case, there is no dispute on the aspect of completion of work on the part of the claimant/respondent, however, only the quantification was pending. In the present case, the claimant has completed their part of material reconciliation and submitted the final bill and requested the petitioner to complete their part of material reconciliation, however, they had failed to do the same. Therefore, without any other option, based on the final bill submitted along with the material reconciliation statement, the respondent filed a claim before the Tribunal to quantify the claim.



4.6 Normally, in the course of quantification of claim, the Tribunal either would have accepted or refused the claim as it is. However, in the present case, by exercising its power, the Tribunal had thought it would be necessary to appoint an Expert by the parties concerned for the purpose of reconciliation so as to arrive at the quantum of liabilities. The parties have agreed for the material reconciliation in the contract. Therefore, since the parties failed to do the material reconciliation as agreed in the terms of the Contract and being unsatisfied with the material reconciliation done by the claimant, the Tribunal thought it would be necessary to determine the quantum of claim, for which a simultaneous material reconciliation by both the parties is required. Thus, the Tribunal had issued a direction to the parties to appoint an Expert for the purpose of material reconciliation and submit the report.

4.7 Further, he would submit that the aforesaid direction is the only way to adjudicate the claim and the Tribunal has not exercised anything beyond its jurisdiction since the relevant parties have agreed to go for material reconciliation in the contract and unless and otherwise, the material



reconciliation is done, the learned Arbitrator cannot decide the quantification of the claim. Thus, he requests this Court to dismiss the present petition.

5. I have given due consideration to the submission made by Mr.AR.L.Sundaresan, learned Senior counsel, appearing for the petitioner and Mr.Satish Parasaran, learned Senior counsel appearing for the respondent and also perused the materials available on record.

6. Upon hearing, the following issues were raised for consideration, which are required to be decided in the present case:

i) Whether the claim made by the respondent/claimant before the learned Arbitrator is either barred by limitation or premature claim?

ii) Whether the interim award passed by the learned Arbitrator is an award in terms of Section 31(6) of the Act?

iii) Whether the direction issued by the Arbitral Tribunal to the parties for the appointment of Expert, without any request from them for the purpose of material reconciliation is within its jurisdiction?



7. Issue No.1 - Whether the claim made by the respondent/claimant before the learned Arbitrator is either barred by limitation or premature claim?

7.1 The petitioner raised an issue before the learned Arbitrator with regard to the limitation of the claim, for which, the Arbitral Tribunal has passed the interim award stating that it is well within the period of limitation. According to the petitioner, the bill raised by the claimant fall due and payable on 11.08.2015. However, the claimant invoked the Arbitration clause and issued notice only on 06.03.2021. Therefore, he would submit that the entire claim is barred by limitation.

7.2 Even though the petitioner took the above stand, they have also taken a stand that the present claim is a premature claim. According to them, the claimant can submit the final bill only with the material reconciliation in terms of Clause 2.23.2 of GCC along with the documents mentioned therein and therefore, it was contended by the petitioner that since the material reconciliation has not been done by both the parties jointly, the claim of the respondent/claimant is premature.



7.3 The findings of the Tribunal was that no final bill was submitted by the claimant and also no final payment has been made. Therefore, until the submission of final bill along with material reconciliation statement, the account maintained for the work is only in a running account. At this juncture, it would be worthwhile to extract Clause 2.23.2 and 2.25 of GCC, which deals with Final Bill and closing of Contract, which read as follows:

“2.23.2 Final Bill

Final Bill is used for final payment on closing of running account for works or for single payment after completion of works. “Final Bill” shall be submitted as per prescribed format after completion of works as per scope and upon material reconciliation, along with the following.

iii) “No claim Certificate” by Contractor

iv) Clearance certificates where ever applicable viz Clearance Certificates from Customer, various Statutory Authorities like Labour department, PF Authorities, Commercial Tax Department, etc.,

v) Indemnity bond as per prescribed format

BHEL shall settle the final bills after deducting all liabilities of Contractor to BHEL.



2.25 Closing of Contracts

The Contract shall be considered completed and closed upon completion of all contractual obligations and settlement of Final Bill or completion of Guarantee period whichever is later. Upon closing of Contract, BHEL shall issue a completion certificate as per standard format, based on specific request of Contractor.”

7.4 A reading of clause 2.23.2 of GCC makes it very clear that the account maintained by the petitioner is running account for the works. The said account will get closed only upon the final payment made against the final bill. Thus, the limitation will start from the time when the final payment for final bill is made. In the present case, no final payment has been made so far. Therefore, until the payment of final bill/closure of running account for works, the limitation will not start.

7.5 Further, the claimant had completed their part of obligation by submitting the final bill along with the material reconciliation statement. However, the petitioner has not completed their part of obligation in spite of several remainders from the claimant/respondent. Merely the non-



performance of the material reconciliation by the petitioner/respondent will no way deprive the right of the claimant to quantify its claim based on its material reconciliation and file the same before the learned Arbitrator for adjudication.

7.6 Even after the first sitting of the Arbitral Tribunal, both the claimant/respondent and the petitioner had conducted a meeting on 13.10.2021 and a perusal of the minutes of the said meeting would show that the parties are still on the issue of material reconciliation. Thus, even after the commencement of Arbitral proceedings, the material reconciliation has not been completed and thus, there is no doubt that the account maintained by the petitioner for the works is running account and the same is not yet closed. Therefore, the commencement of limitation would not arise in the present case.



7.7 Taking all these aspects into consideration, the Tribunal has categorically come to the conclusion that the claim made by the claimant/respondent is not barred by limitation and the same requires no interference of this Court.

7.8 On the aspect of premature claim, the Tribunal has arrived at a conclusion that the claim made by the respondent is only pre-mature in the quantum of liabilities and not the very liabilities itself. The above referred Clauses 2.23.2 and 2.5 of GCC would reveal as to how the final bill to be submitted and payment to be made. In the present case, the claimant has submitted the final bill along with the material reconciliation statement. However, the petitioner has failed to perform their obligation, in which case, the claimant need not wait forever.

7.9 Initially, the claimant has submitted two bills on 09.07.2014 and 12.02.2015. Thereafter, the claimant had made several requests to the petitioner for material reconciliation. All these communications have been marked before the Arbitral Tribunal. However, in spite of their repeated



requests, the petitioner has failed to perform their part of material reconciliation. Therefore, though according to the petitioner, the claim made by the respondent is premature, this Court is of the view that the claimant need not wait endlessly for the reconciliation of petitioner but after providing reasonable time, the claimant can very well invoke the Arbitration Clause, to adjudicate his claim before the Arbitrator and that is what happened in the present case. Thus, at any cost, the claim made by the claimant is not premature one.

7.10 Therefore, this Court is of the considered view that the present claim is neither barred by limitation nor a premature claim as contended by the petitioner. All these aspects have been rightly considered by the Tribunal. Thus, this Court is not inclined to interfere with the findings of the Arbitral Tribunal on the aspects of limitation as well as premature claim.



8. Issue No.2 - Whether the interim award passed by the learned Arbitrator is an award in terms of Section 31(6) of the Act?

8.1 The present interim award was passed under Section 31(6) of the Act. Any award passed under Section 31(6) of the Act would decide the ultimate rights of the parties and the same would be final. The said interim award will not be a step-in-aid to the final award. Therefore, the interim award passed under Section 31(6) of the Act is not one in respect of which final award can be made, but it is a final award on the matters covered therein, which was made at interim stage.

8.2 In the present case, the Tribunal has dealt with two aspects, in which, one was with regard to the limitation. No doubt that any decision passed by the Tribunal on the aspect of limitation, would decide the final rights of the parties and the said decision would be final. Hence, the interim award passed by the Tribunal on the aspect of limitation is well within the scope of Section 31(6) of the Act.



8.3 As far as the direction issued for the appointment of the Expert for material reconciliation is concerned, no parties' final rights was decided and thus, by implication it was a direction issued by the Tribunal under Section 26 of the Act, where the Arbitral Tribunal have power to appoint the Expert on its own. However, the Tribunal erroneously held that the said power can only be exercised upon the request of the parties concerned.

8.4 The learned Senior counsel appearing for the petitioner made a fair submission that since the award was named as interim award, by virtue of abundant caution, the petitioner has filed the present original petition to challenge the direction issued for the appointment of Expert by the Tribunal and to set it right, otherwise, they will lose their right to challenge the said direction along with the final award.

8.5 Therefore, if at all if there is any discrepancies or other illegalities, etc., on the aspect of appointment of the Expert, the same can be challenged along with the final award since the said direction was issued as step-in-aid to pass the final award.



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8.6 Accordingly, this Court is of the considered view that the award under challenge was passed by the Tribunal in terms of Section 31(6) of the Act since the issue of limitation was decided finally.

9. Issue No.3 - Whether the direction issued by the Arbitral Tribunal to the parties for the appointment of an Expert, without any request from them, for the purpose of material reconciliation is within its jurisdiction?

9.1 As far as the direction issued by the Tribunal for the appointment of an Expert by the parties is concerned, the Tribunal has recorded that the said appointment was not made in terms of Section 26 of the Act, since no request was made from any of the parties.

9.2 Further, the learned Senior counsel for the petitioner would submit that if no direction was issued under Section 26 of the Act, the Tribunal has no power to issue any such directions under any other provisions of the Act without any pleading/request from the parties concerned. According to the



petitioner only if any direction was requested by the parties concerned under

Section 17 of the Act, the Tribunal have power to issue such direction.

9.3 At this juncture, it would be apposite to extract paragraph No.67 of the award, which reads as follows:

“67. It is made clear that this Tribunal is fully conscious of the position of law under Section 26 of the A&C Act, 1996. It is true that under the said provision of law, the experts can be appointed by the Arbitral Tribunal only when the parties agree for such appointment for reporting before the Tribunal on specific issues for its determination. In this case, the Tribunal as such is not exercising the power under Section 26 of the said Act by appointing any expert on its own and on the other hand directs the parties to appoint an independent expert of their choice from each sides for exercising the duties and obligations as observed supra. Thus, this direction issued by this Tribunal as part of the interim award by exercising its power under Section 31(6) of the said Act. The parties should bear it in mind that the experts so appointed by them on their respective side shall not have any personal interest, either directly or indirectly



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Arb.O.P.(Com.Div.) No.223 of 2023

on either of the parties. They also should not be ex-officials or retired officials of the respective parties.”

9.4 A perusal of the above paragraph would show that since no application was filed by any of the parties, the Arbitral Tribunal was handicapped in passing the orders under Section 26 of the Act without any specific request from the parties concerned.

9.5 Thus, the Tribunal has itself presumed that it does not have any power to appoint the Expert in terms of Section 26 of the Act. If that so, how does the Tribunal, without any request/pleadings from any of the parties, had issued direction to the parties for the appointment of an Expert to carry out the material reconciliation.

9.6 This Court is not in a position to accept the aforesaid view that the Tribunal does not have any power to appoint the Expert on its own even if it thinks that it is necessary to appoint the Expert to assist the Tribunal. Mere reading of Section 26 of the Act makes it clear that if the Tribunal thinks that it is necessary to appoint the Expert for its assistance, either with or



without applications from the parties concerned, it can very well issue a direction for the same to enable the Tribunal to arrive at the quantum of claim. That apart, it is only for the Tribunal to decide as to whether the Expert opinion is required or not. The Tribunal can decide the requirement of Expert opinion either upon application made by the parties or on its own if the Tribunal thinks that it is necessary to obtain any assistance from the Expert. Therefore, the findings of the Tribunal, that it is helpless to appoint the Expert under Section 26 of the Act in the absence of filing of the application for appointment of Expert by the parties concerned, is not acceptable since the provisions of Section 26 of the Act no way prohibits the learned Arbitrator to appoint the Expert on its own.

9.7 At this juncture, it would be apposite to extract the provisions of Section 26 of the Act, which reads as follows:

“26. Expert appointed by arbitral tribunal.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and



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Arb.O.P.(Com.Div.) No.223 of 2023

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.”

9.8 A reading of the above makes it clear that there is no prohibition with regard to the appointment of the Expert by the learned Arbitrator on its own, even if the parties had not agreed. In case, if the parties had agreed for the said appointment by virtue of agreement, the Tribunal shall go by the same. However, in the present case, in the agreement, nothing has been mentioned with regard to the appointment of the Expert. Therefore, the Tribunal, either with the application made by the parties concerned or on its



own, can appoint the Expert, since nowhere it has been prohibited to appoint the Expert on its own and also nowhere it has been mentioned that the Expert can be appointed only upon application made by either of the parties.

9.9 It is the prerogative of the Tribunal to take assistance from the Expert, if it thinks it is necessary. Section 26 of the Act empowers the Arbitral Tribunal to appoint the Expert either on its own or by application of the parties concerned. Therefore, provision of Section 26 of the Act is also meant for the learned Arbitrator to take assistance from the Expert on its own in the process of adjudication of claims, if it feels that it is just necessary. In fact, it would help for the speedy disposal of the claims.

9.10 The Arbitrators are not and cannot be Experts in all fields and the opinion of Experts cannot be supplanted by the Arbitral Tribunal. If that is so, the appointment of Expert cannot be dispensed with, when it is required for the Arbitral Tribunal, by citing the reasons that no request was made by the parties concerned when Section 26 of the Act does not mention anything about the said request from the parties concerned.



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9.11 The purpose behind inserting Section 26 of the Act highlight the significance of Expert advice in Arbitral proceedings. The Arbitration could involve several complex theories, specific terms and principles unknown to the Arbitrators. The case could involve technical aspects from different fields like arts, science, accounting and business. Thus, it becomes highly important to use external help from Experts to make decisions in these situations.

9.12 Under the provisions of the Arbitration and Conciliation Act, 1996, the Expert can be appointed both by the parties and by the Tribunal. While the Tribunal may appoint Experts for their expert opinion and knowledge, the parties may appoint them as witnesses. Thus, the Experts can either be party appointed or Tribunal appointed on its own.

9.13 Section 26, Section 20(3) and Section 27 of the Act, also specify that the parties can individually appoint Expert to help in establishing their case or resolve discrepancies. Thus, while Section 26 of the Act only deals



with Tribunal appointed Expert (either on its own or upon the request made by the parties), the Arbitration Act permits the parties to bring Experts.

9.14 Appointment of Experts by the Tribunal not only ensures the independence and impartiality of the Expert but also ensures the competency of the Experts. These Experts indirectly help in delivering justice by assisting the Tribunal. For example, technical experts, clerks, accountant, damage expert and counting experts all assist the Tribunal in their own capacity.

9.15 Thus, if the Arbitration Act not included Section 26 of the Act, it would have been a taunting task for the Arbitrators to find out everything on their own. That is what happened in the present case that the Arbitrator was not able to quantify the claim due to the failure of one of the parties in material reconciliation, for which the parties were directed to appoint Experts. Such direction can be issued by the Tribunal under Section 26 of the Act on its own.



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9.16 Though the Tribunal observed that the direction for appointment of Expert was not issued in terms of the provisions of Section 26 of the Act, the order passed for such direction by the Tribunal shall fit under the scope of Section 26 of the Act.

9.17 Therefore, this Court is of the firm view that as far as the direction issued by the Tribunal for appointment of Expert for material reconciliation is concerned, it should be construed as a direction issued under Section 26 of the Act, wherein, the Tribunal have power to pass such orders on its own, with or without any application filed by the parties concerned.

9.18 Since this Court has arrived at the above conclusion, all the further disputes with regard to the appointment of the Expert can be challenged once the final award is passed, if any of the parties intend to do so.



9.19 Accordingly, this Court is of the considered view that the direction issued to the parties for the appointment of Expert for material reconciliation is well within the jurisdiction of the Arbitral Tribunal.

10. Result:

10.1 In view of the above, this Court does not find any merits in the present arbitration original petition, except to the extent of clarification and observation made by this Court on various aspects as narrated above.

10.2 Therefore the present petition is disposed of with the following directions:

A) In fine, this Court upholds the interim award dated 08.05.2023 with regard to the aspect of limitation.

B) As far as the appointment of the Expert is concerned, this Court holds that the direction issued by the Arbitral



Tribunal, with regard to the appointment of the Expert, is well within the provision of Section 26 of the Act.

C) Further, since time frame fixed by the Tribunal has already expired, this Court is inclined to extend the same in the following manner:

i. As far as the time frame fixed by the learned Arbitrator at paragraph No.80(a) of the interim award is concerned, the said 10 days period would start from the date of receipt of this order copy.

ii. As far as the time frame fixed at paragraph No.80(l), i.e., on or before 31.07.2023 is concerned, the same stands modified as 30.09.2024.

10.3 With regard to the all other aspects, the Interim Award passed by the Tribunal stands confirmed and the same shall be followed.



Arb.O.P.(Com.Div.) No.223 of 2023

10.4 With the above directions, observation and clarification, this

Arbitration Original Petition is disposed of. No cost. Consequently, the connected miscellaneous application is also closed.

01.07.2024

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation: Yes / No

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WEB COPY



Arb.O.P.(Com.Div.) No.223 of 2023

KRISHNAN RAMASAMY.J.,
nsa

Arb.O.P (Com.Div.) No.223 of 2023
& A.No.2723 of 2023

01.07.2024