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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 16.12.2024

Pronounced on: 21.12.2024

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THE HONOURABLE MR.JUSTICE P.B.BALAJI

A.No.5235 of 2024

in

Arb.Appln. No.440 of 2024

Constronics Infra Limited,
Represented by its Authorised Signatory,
Mr.K.Suresh Kumaar.

... Petitioner

vs.

NTPC Tamil Nadu Energy Company Limited,
Vallur Thermal Power Project
Post-Vellivoyal Chavadi, Ponneri Taluk,
Thiruvallur District, Chennai – 600 013.

... Respondent

PRAYER: This Application is filed under Order XIV Rule 8 of O.S. Rules read with Order IX Rule 7 of Code of Civil Procedure, 1908 to set aside the exparte order dated 20.08.2024 in Arb.Appl.No.440 of 2024.

For Applicant : Mr.M.Vijayan
for M/s.King & Patridge

For Respondents : Mr.C.P. Hemkumar,
for M/s.Ganesh & Ganesh



ORDER

Arb.Appln No.440 of 2024, has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'Act') seeking for a direction to the respondent to give precedents and allot a feasible designated point to lift the wet pond ash to the Applicant being the highest H1 bidder for the contract through the letter of acceptance dated 03.05.2024 arising from tender in reference No.NTECL/ Pond Ash - supply/DOM/CS - 5660 dated 12.04.2024.

2. This Court by an order dated 20.08.2024, after hearing the learned counsel for the Applicant and being satisfied that notice was served on the respondent, passed an order directing the respondent to allot a feasible designated place to the applicant to lift the wet pond ash, as per the acceptance to the condition of the applicant Company within a period of of two weeks. Thereafter, the Application No.5235 of 2024 has been filed by the respondent to set aside the said order dated 20.08.2024. This Court on 18.11.2024 directed the respondent to comply with the order dated 20.08.2024 in letter and spirit.

3. I have heard Mr.C.P.Hemkumar, learned counsel for M/s.Ganesh and Ganesh, learned counsel for the Applicant in Arb.Appln.No.440 of 2024 and for respondent in A.No.5235 of 2024 and Mr.M.Vijayan for



M/s.King and Partridge, learned counsel for the respondent in Arb.Appln.No.440 of 2024 and for the Applicant in A.No.5235 of 2024.

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4. Before me, the learned counsel on either side, took adjournments for exploring the possibility of allotting a feasible and designated place to enable the Applicant in Arb.Appln.No.440 of 2024 to lift wet pond ash. However, despite exchange of plans, the parties have not been able to agree upon any designated place and hence the matter was heard at length. Both the learned counsel for the Applicant and the respondent in both Applications have made elaborate submissions.

5. According to the Applicant, he was a successful bidder and the respondent issued a letter of acceptance on 03.05.2024 for the rate quoted by the Applicant at Rs.126 (per tonne) plus GST. The applicant carried out a preliminary visit and came to know that there was no ash to be lifted and it would be possible to commence operation only after three months. The Applicant also paid the Contract Performance Guarantee of Rs.1.008 crores and the first month off- take advance payment of Rs.42.03 lakhs to the respondent on 18.05.2024. According to the Applicant, the Applicant is entitled to lift 35,000 tonnes of pond ash, but the Applicant has not been able to commence the work of lifting the ash because of non availability of wet ash in the pond and also non availability of a



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designated delivery point for the Applicant. The grievance of the Applicant is that despite paying huge amounts to the respondent, the applicant is made to sit idle without being able to lift any wet ash and under such circumstances, he has approached this Court under Section 9 seeking a direction to the respondent to allot a feasible designated point to lift wet pond ash.

6. Per contra, it is the case of the respondent that the respondent has already identified two places where wet ash is available and can be lifted, however for reasons best known to the Applicant, the Applicant is not willing to lift ash from either of the two designated places and insists on earmarking particular spots, which according to the respondent are not feasible, since they have already been allotted to different bidders under other contracts.

7. The learned counsel on either side would also take me through the photographs with the locations marked therein, that is the locations which are being offered by the respondent as well as locations which are being requested by the Applicant.

8. It is seen from the tender document dated 12.04.2024 that insofar as lifting sequence and allocations after the auction process, the parties have clearly agreed and understood that the same would be finalised by



the respondent depending on site specific conditions by the Engineer In charge (EIC) of the respondent. In fact, the parties have also agreed that the bidders would comply with all reasonable controls imposed by the NTECL station and to cooperate with the station as well as other operating bidders / contractors and abide by the decision of the Engineer In charge (EIC). It is also further agreed upon between the parties that in case of any dispute, the decision of the Engineer In Charge (EIC) shall be final and binding.

9. Admittedly, it is not the case that the respondents are not willing to allot a designated place to the Applicant to lift wet pond ash. It is a case where the respondents have identified and earmarked two places where wet pond ash is available to be lifted. However, the Applicant is not willing to lift the ash from the said designated places citing circuitous route to reach the said designated places, and on the contrary, there are two other places, according to the Applicant, where wet ash is readily available and with ulterior motives the respondents are not designating the said places.

10. At the hearing, the learned counsel for the respondent would submit that there are other bidders, in respect of other contracts who are already lifting wet ash from the places which are now pointed out by the



applicant and therefore, the said places cannot be designated for the Applicant to lift the wet ash. However, he would submit that wet ash is available in two other designated places from where the applicant can easily lift the wet ash without any difficulty. He would also submit that merely because the Applicant would have to travel a longer distance to reach these two designated places, the same cannot be a ground to reject the earmarked places designated by the respondents.

11. Considering the agreement and the terms and conditions agreed between the parties, designating a particular place for lifting wet ash is certainly the prerogative of the respondent and the Applicant cannot dictate terms. Further, even when the Applicant has any objection and raises a dispute, the decision of the Engineer In charge (EIC) / respondent alone would be final and binding. Here, the respondents have been very clear before this Court that they are willing for the Applicant lifting the wet pond ash from places A & B which are morefully shown in the photographs filed along with typedset of papers. However, it is the Applicant who is refusing to accept either of the two places A or B designated by the respondent and insiting in C or D cited by the Applicant. The Applicant having contracted to abide by the terms and conditions of the respondent and also the decision of the Engineer In Charge (EIC), cannot seek for specific locations to be designated to



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enable the Applicant to lift the wet pond ash. They are bound by the tender conditions and when the respondent has admittedly identified two places for the Applicant to lift wet pond ash, the Applicant is bound to accept one of the two locations and cannot insist upon a different location, at his whims and fancies. The Applicant can only be entitled to a designated point to lift the wet pond ash and choice of such designated point is entirely at the discretion of the respondent. Therefore, in the light of the respondent having identified two designated places, where wet pond ash is available. It is for the Applicant to choose one of these two locations and cannot insist on a particular location to be designated for the Applicant to lift wet pond ash. Even in the interim order dated 20.08.2024, this Court only directed the respondent to allot a feasible designation place to the applicant to lift wet pond ash as per the acceptance of the condition of the Applicant Company. Therefore, there is no infirmity in the action taken by the respondent and consequent designation of two places for the Applicant to lift the wet pond Ash. It is for the Applicant to choose one of the two locations designated by the respondent and under the garb of the the interim order, the Applicant cannot seek for designation of specific locations for lifting wet ash to suit his convenience.



places and designating the same to enable the Applicant to lift the wet pond ash, no further directions are necessary in the application. It is for the Applicant to choose one of the two designated places and proceed with the lifting of wet pond ash.

13. With the above observations, this Application is closed.

21.12.2024

Neutral citation: Yes/no

Index : Yes/No

Speaking/Non Speaking

To:

NTPC Tamil Nadu Energy Company Limited,

Vallur Thermal Power Project

Post-Vellivoyal Chavadi, Ponneri Taluk,

Thiruvallur District, Chennai – 600 013.

P.B.BALAJI, J.,

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Pre-delivery Order in
A.No.5235 of 2024
in
Arb.Appln. No.440 of 2024

21.12.2024