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Arb.O.P.(Com.Div.) Nos.29 and 30 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) Nos.29 and 30 of 2024

Karam Chand Thapar & Bros (Coal Sales) Limited,
Represented by its Authorised Signatory

Mrs.Meghna Maji,
Having Office at Thapar House,
163 SP Mukherjee Road,
Kolkata, West Bengal – 700 026.

... Petitioner in both O.Ps

Vs.

NLC Tamil Nadu Power Limited,
No-135, EVR Periyar High Road,
Kilpauk, Chennai – 600 010.

... Respondent in both O.Ps

Prayer in Arb.O.P.(Com.Div.) No.29 of 2024: 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 on account of the failure of the respondent to appoint a nominee arbitrator in accordance with the procedure as envisaged under Clause 36.3(b)(8) under the Tender.

Prayer in Arb.O.P.(Com.Div.) No.30 of 2024: 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 on account of the failure of the respondent to appoint a nominee arbitrator in accordance with the procedure as envisaged under Clause 36.3.2.3 under the Tender.



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Arb.O.P(Com.Div.) Nos.29 and 30 of 2024

For Petitioner : Ms.RS.Pornima
(In both O.Ps)
For Respondent : Mr.N.Nithianandam
(In both O.Ps) Standing Counsel

COMMON ORDER

By this common order, these Original Petitions are being disposed of.

2. In Arb.O.P.(Com.Div.) No.29 of 2024, subject matter of dispute is under an Agreement dated 04.02.2021. In Arb.O.P.(Com.Div.) No.30 of 2024, subject matter of dispute is under an Agreement dated 29.04.2020.

3. The Arbitration Clause under the respective Agreement read identically as follows:-

"b) Arbitration:

If the dispute is not resolved amicably through conciliation, then the same shall be referred to arbitration.

1. Arbitration shall be as per Arbitration and Conciliation Act, 1996, which shall be applicable only for the dispute(s) involving claims from Rs.25,00,000/- to Rs.20,00,00,000/-.

2. Dispute(s) involving claims below Rs.25,00,000/- are subject to the jurisdiction of the respective Civil Court having jurisdiction over Tuticorin.

Dispute(s) involving claims above Rs.20,00,00,000/- are subject to the exclusive jurisdiction of the Court situated at Chennai.

3. Setting aside the dispute to be resolved, the work shall be proceeded with.

4. For the sum of Provisional Claim & Provisional Counter Claim



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- Upto Rs.3,00,00,000/- : One Arbitrator
- More than Rs.3,00,00,000/- : Three Arbitrators

5. The Provisional Claim/Counter claim amount shall be indicated by the respective parties while initiating/concurring for Arbitration.

6. However, number of Arbitrators will not be modified, even if the Sum of Actual Claim and Actual Counter Claim amount vary from the sum of Provisional Claim and Counter Claim amounts.

7. The Sole Arbitrator to be appointed for the dispute with sum of Provisional Claim & Provisional Counter Claim up to Rs.3,00,00,000/- will be appointed by NTPL/NLCIL.

8. For the disputes with sum of Provisional Claim & Provisional Counter Claim more than Rs.3,00,00,000/-: The Arbitration shall be conducted by 3 (Three) Arbitrators, one each nominated by each party and the third arbitrator appointed by both the arbitrators.

9. The Arbitration shall be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996 and its Amendments, if any, issued from time to time.

10. The Venue of the Arbitration shall be Chennai or Neyveli or Tuticorin.

11. The Arbitrators shall publish a speaking award which shall be binding on both the parties. The party in whose favour the award is passed, shall be entitled to recover the entire costs of arbitration from the other party. The arbitrators shall indicate the above clearly, in their award.

12. In case of Conciliation/Arbitration invoked with respect to certain disputes, payment to the contractor can be released for the items which are not under the referred Conciliation/Arbitration."

Wherever, the quantum of amount is above Rs.3,00,00,000/-, the dispute has to be resolved through an Arbitral Tribunal, consisting of three members, each party to nominate one Arbitrator and the two Arbitrators in turn to nominate the third Arbitrator/or the Presiding Arbitrator.



4. The petitioner has invoked an Arbitration Clause by issuing Section 21

Notice to the respondent in both the petitions on 21.08.2023.

5. In the Section 21 Notice dated 21.08.2023 governed by Agreement dated 04.02.2021 in Arb.O.P.(Com.Div.) No.29 of 2024, the petitioner has quantified the amount due and payable by the respondent as Rs.15,76,83,953/-.

6. In the Section 21 Notice dated 21.08.2023 governed by Agreement dated 29.04.2020, the petitioner has quantified the amount due and payable by the respondent as Rs.19,53,13,613/-.

7. The learned Standing Counsel for the respondent would submit that although the Arbitration Clause contemplates the Arbitral Tribunal consisting of three members, a single Arbitrator can be appointed.

8. The learned counsel for the petitioner would submit that the constitution of the Arbitral Tribunal under the Arbitration Clause cannot be diluted. Hence, the Arbitral Tribunal has to be consisting of three Arbitrators.



Arb.O.P(Com.Div.) Nos.29 and 30 of 2024

9. As far as Arb.O.P.(Com.Div.) No.30 of 2024 is concerned, the learned Standing Counsel for the respondent would submit that the claim amount is Rs.19,53,13,613/- and the disputes will not be governed by the above arbitration clause.

10. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Standing Counsel for the respondent.

11. The petitioner has nominated Hon'ble Mr.Justice.J.D.Kapoor (Retd.,) Former Judge of the Delhi High Court as the Sole Arbitrator. The nomination of Hon'ble Mr.Justice.J.D.Kapoor (Retd.,) Former Judge of the Delhi High Court stands recorded.

12. The respondent has not nominated its Nominee Arbitrator in accordance with the arbitration clause.

13. Since the respondent has failed to nominate its Nominee Arbitrator, Court is inclined to appoint Hon'ble Dr.Justice.P.Jyothimani (Retd.,), Former Judge of this Court as a Nominee Arbitrator on the respondent.



14. The respective Arbitrators shall nominate/appoint a Presiding Arbitrator and constitute an Arbitral Tribunal to enter upon reference to adjudicate and resolve the *inter se* dispute between the parties strictly in accordance with the terms of the Agreements dated 04.02.2021 and 29.04.2020.

15. The Arbitral Tribunal 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 29A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order touching on limitation.

16. The Arbitral Tribunal 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 respondent remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitral Tribunal and later recover the same from the respondent.



Arb.O.P(Com.Div.) Nos.29 and 30 of 2024

17. Since this Court has appointed the Arbitral Tribunal, it is open to the petitioner as well as the respondent to seek other reliefs under Section 16 and Section 17 of the Arbitration and Conciliation Act, 1996, before the Arbitral Tribunal.

18. All the issues relating to merits including limitation shall be decided by the Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996.

19. These Original Petitions stand allowed, leaving the parties to bear their own costs.

20. The rights of the respondent in Arb.O.P.(Com.Div.) No.30 of 2024 under the Agreement dated 29.04.2020 is preserved under Section 16 of the Arbitration and Conciliation Act, 1996.

29.01.2024

Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

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Arb.O.P(Com.Div.) Nos.29 and 30 of 2024

C.SARAVANAN, J.

arb

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29.01.2024