

* IN THE HIGH COURT OF DELHI AT NEW DELHI
#1

+ ARB.P. 6/2009

HCIL-ARSSSPL-TRIVENI (JV) Petitioner
Through Mr.Ramesh Singh, Advocates

versus

rites ltd Respondent
Through Mr.Anil Seth with Mr.U.S.Kochar,
Advocates

CORAM:
HON'BLE THE CHIEF JUSTICE

% **ORDER**
18.09.2009

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. The case of the petitioner is as follows:

A contract for execution of package-1 for construction of railway siding Gatora to in-plant (KM 0.963 to KM 12.880) including earth working formation of railway, road, bridge work and permanent way work which supply of materials for NTPC-Sipat STPP was awarded to the petitioner, a joint venture between SCIL, ARSSSPL and Triveni, under letter of acceptance dated 8th February, 2005 by the

respondent. Accordingly, an agreement was executed between the parties (wherein the respondent was acting for and on behalf of NTPC Ltd.) on 25th February, 2005.

The agreement, inter alia, provided for General Conditions of Contract (GCC) as well as Special Conditions of Contract as part of the said agreement. Clause 56 of the GCC provides for arbitration in case of disputes between the parties in respect of the aforesaid work. In the course of execution of the contract, the petitioner raised certain claims on the respondent. Respondent failed to satisfy the aforesaid claims within the period contemplated in the GCC. As the respondent failed to satisfy the said claims, the petitioner invoked the provisions of clause 56 of the GCC and referred the said disputes for resolution of the General Manager (P) of the respondent. The General Manager (P) did not act on the said claims. In view of the inability and/or unwillingness of the General Manager (P), the petitioner once again invoked clause 56 GCC read with RITES Manual for Arbitration and Litigation Cases and requested the Executive Director (RI) of the respondent under their letter dated 1st October, 2008 to appoint a sole arbitrator to resolve/adjudicate upon the said disputes.

The aforesaid disputes having arisen between the parties and despite a request for appointment of a sole arbitrator in accordance with the prescribed procedure having been made by the petitioner, there has been a clear failure on the part of the respondent to appoint the required arbitrator to settle/adjudicate upon the said disputes between the parties. Therefore, respondent has forfeited its right to appoint the arbitrator in accordance with the agreement and thus, this is a fit case where this court shall appoint an independent arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. The application was opposed by the respondent inter alia on the following grounds:

(i) That clause 56 of the general conditions of contract provides that

Chairman and Managing Director of NTPC Limited shall nominate General Manager, NTPC as the sole arbitrator. No request was made by the petitioner to CMD, NTPC to nominate arbitrator in terms of clause 56 of GCC. As no such request has been made by the petitioner in terms of the arbitration clause there is no failure on the part of the appointing authority to

nominate the arbitrator

- (ii) That the respondent was acting for and on behalf of the NTPC Limited as its agent. Thus, the contracting party with the petitioner is NTPC Limited and not the respondent, who had merely signed the agreement as agent on behalf of the NTPC, its principal.
- (iii) That the petitioner had neither submitted its final bill within three months of the physical completion of the work i.e. on 31st March, 2007 nor the amounts claimed were part of the final bill dated 20th July, 2008 submitted by the petitioner. Thus, the claim is barred under clause 52 of the GCC.
- (iv) That clause 56 provides that no person other than the person appointed by CMD, NTPC shall act as the arbitrator and if for any reason it is not possible, the matter is not to be referred to arbitration at all. Thus, in terms of arbitration clause and agreed procedure, CMD, NTPC has power to nominate sole arbitrator.

- 3. I have heard the counsel appearing for both the sides and I proceed to deal with each of the objections raised on behalf of the respondent.

4. Insofar as objection No.(i) is concerned, it is pointed out that clause 56 of the GCC has to be read along with the errata. The said errata in the first provision is as under:

“All clauses in GCC” to be read as replace the word
“National Thermal Power Corporation Ltd” or
“Corporation by NTPC/RITES”.

There is no dispute that notice has been addressed to RITES in accordance with clause 56. Even in respect of an earlier arbitration between the same parties in the same contract, the notice was sent to RITES, as would be clear from the letter of the arbitrator dated 24th March, 2008, which has been placed on record. The petitioner had in fact invoked arbitration and referred the said disputes/claims to General Manager RITES on 14th August, 2008, the receipt of which is not disputed by the respondent. Therefore, the first objection has to be rejected.

5. Insofar as objection No.(ii) is concerned, party to the agreement is RITES and not NTPC. The agreement has also been signed by RITES and not NTPC. Hence RITES is the party to the agreement and not NTPC. Under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996 ‘party’ has been defined to mean ‘a party to an arbitration

agreement’. Section 7 defines arbitration agreement and Section 11 also enjoins only the ‘party’ to make an application for appointment of arbitration. Thus, this objection is clearly misconceived.

6. Insofar as objection No.(iii) is concerned this will have to be dealt with by the arbitrator in the light of the decision of the Supreme Court in the case of *National Insurance Company v. Boghara Polyfabs Pvt. Ltd* (2009) 1 SCC 267.
7. Coming to objection No.(iv), it is not in disputes that the petitioner had demanded arbitration. It will be necessary at this stage to reproduce the relevant portion of clause 56, which reads as follows:

“Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing 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, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution 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 National Thermal Power Corporation Ltd, and if the General manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, National Thermal Power Corporation Ltd, willing to act as such arbitrator.

There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd., 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. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act Chairman and Managing Director, National Thermal Power Corporation Ltd shall appoint another person to act as arbitrator in accordance with the terms of the Contract. It is also a term of this Contract that no person other than a person appointed by CMD, NTPC Ltd., as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.”

(emphasis supplied)

8. A similar case fell for consideration of S. Ravindra Bhat, J in M/s. Ansal Buildwell Limited v. M/s.Centre for Development of Telecom (Arb.P.318/2008, decided on 1st September, 2008) wherein it was held as follows:

“4. Learned counsel for the petitioner relied upon the text of Section 11 and a decision of the Bombay High Court in Satya Kailashchandra Sahu vs. M/s.Vidarbha Distillers, Nagpur, AIR 1998 BOMBAY 210. It was argued that when an arbitration agreement provides for appointment of a named person or persons as Arbitrator and when they refuse to act, the procedure require to be followed is as provided in Section 11. It was argued analogically, where the process containing the Agreement, envisions appointment by one of the

parties and also provides for contingency, a similar inference has to be drawn, that upon the happening of that contingency, the power to appoint an Arbitrator stands exhausted.

5. The Court is un-persuaded by the submission of the petitioner. The Arbitration Agreement, i.e. clause 67.1 is no doubt unusually worded. That does not detract from its real effect. The contracting parties categorically agreed that no person other than one appointed by the Executive Director, C-DOT, could act as Arbitrator and that if for any reason that was not possible, there could not be any reference for arbitration at all. In essence what the condition says is that the foundation of the Arbitration Agreement itself is appointment by the Executive Director, in the manner contemplated. If this condition which is fundamental to the Arbitration Agreement itself, were to be seen with the preceding terms, it would be apparent that the C-DOT, (subject to other provisions of law such as Section 11, i.e. fixing time limits etc., as interpreted by the Supreme Court in *Datar Switch Gear vs. Tata Finance Ltd.*, 2002 (8) SCC 151), retained the right to appoint Arbitrator at all times. This condition is unlike the one which the Bombay High Court had occasioned to deal with in *Satya Kailashchadras* case (*supra*).

6. It is interesting to also note that the Bombay High Court had relied upon a previous decision of the Supreme Court in *State of West Bengal vs. M/s.National Builders*, AIR 1994 SC 200. The Supreme Court was generally speaking about the right

of the Court to appoint Arbitrators, under Section 8 of the 1940 Act. The Court held as follows:-

“It is for the Court to intervene and appoint another arbitrator under S.8(1)(b), if arbitration agreement does not show that it was intended that the vacancy shall not be supplied.”

7. From the above discussion, it is apparent that the right of the C-DOT to appoint an Arbitrator in the manner contemplated in clause 67.1.4 did not get exhausted upon the named Arbitrator refusing to act further. Mr.J.C.Seth, learned counsel appearing for C-DOT, submits that by an office order dated 26.8.2008, Mr.P.S.Saran(Retd.), Secretary, Department of Telecom Services, and Member (Services) Telecom Commission, has been since appointed as Arbitrator.”

9. In the light of the above decision, the Chairman and Managing Director, NTPC Ltd/RITES is directed to appoint an arbitrator in terms of clause 56 to adjudicate upon the disputes between the parties within four weeks from today.
10. The petition stands disposed of.

CHIEF JUSTICE

SEPTEMBER 18, 2009

“V”