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

+ ARB.P. 257/2009

M/S IVRCL INFRASTRUCTURES
& PROJECTS LTD

..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Adv. with
 Mr.M.Y. Deshmukh, Adv.

versus

NTPC-TAMIL NADU ENERGY
COMPANY LTD

..... Respondent

Through: Mr. S.K. Taneja, Sr. Adv. with
 Mr.Puneet Taneja, Adv.

Date of Decision : FEBRUARY 16, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') for appointment of an independent sole Arbitrator.

2. The agreement executed between the parties contains an arbitration clause being clause No.56 which reads as under :-

*“Arbitration and Laws
Arbitration :*

56. Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings 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 contract, designs, drawings, 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 work or after the completion or abandonment thereof shall be referred to the sole Arbitration of the General Manager of NTPC Ltd. (Formerly 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, NTPC Limited (Formerly 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 NTPC Limited (Formerly 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 or any reason as aforesaid at the time of such transfer, vacation of office or inability to act, Chairman and Managing Director, NTPC Limited (Formerly 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)

3. The said arbitration clause was amended at the time of award of the contract itself. The amendment reads as under :-

Sl.No.	Page No.	Clause No.	Line Reference	Fill/Add/Delete/Replace (As mentioned below)
xxx	xxx	xxx	Xxx	xxx
35	49	56	9, 10 & 11	Replace the words “shall be referred to is unable”, by the following : “ <u>shall be referred to the sole arbitration of the Project Incharge of the Project concerned of NTECL Limited and if the Project Incharge is unable</u> ”

(emphasis supplied)

4. The petitioner invoked the arbitration clause vide letter dated 19th March, 2009 addressed to the respondent through its Superintendent Engineer. The said letter was replied to by the respondent vide their letter dated 04th April, 2009 wherein it was stated as under:-

“Please see that as per Cl. No.56 of the General Conditions of the Contract the General Manager/NTPC, who is the Chief Executive Officer of NTECL is the sole arbitrator and you can put forth your case to him if you so desire.”

(emphasis supplied)

5. Mr. Rajiv Nayar, learned senior counsel for the petitioner submitted that in view of the invocation of the arbitration clause and the failure of the respondent to nominate an arbitrator before filing of the present petition, the

respondent had lost its right to appoint an arbitrator. In this connection, he relied upon a judgment of the Supreme Court in ***Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.*** reported in (2007) 7 SCC 684, wherein it has been held as under :-

“12. A three-Judge Bench of this Court in Punj Lloyd Ltd. vs. Petronet MHB Ltd. (2006) 2 SCC 638, considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in Datar Switchgears Ltd. Vs. Tata Finance Ltd. (2000) 8 SCC 151, wherein at SCC p.158, para 19, this Court held as under:-

“19 So far as cases falling under Section 11(6) are concerned--such as the one before us--no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

(emphasis in original)

As already noticed, the respondent filed Section 11(6) petition on 30-3-2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15-5-2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

6. On the other hand, Mr. S.K. Taneja, learned senior counsel for the respondent stated that the petitioner had directly approached this Court for appointment of an arbitrator without first approaching the Project Incharge as stipulated in the arbitration clause. According to him, even if the Project Incharge had refused to adjudicate upon the disputes, even then the petitioner could not have approached this Court as the petitioner was then bound to ask the Chairman and Managing Director NTPC to appoint an arbitrator.

7. Mr. S.K. Taneja also drew my attention to the supplementary affidavit filed on behalf of the respondent wherein it has been stated that Mr. N. Suriyanarayanan was the Project Incharge as well as the General Manager and the Chief Executive Officer of NTECL. Relevant portion of the said affidavit reads as under :-

“2 That the respondent has already filed opposition to the petitioner’s application under Section 11(6) of Arbitration & Conciliation Act, 1996, vide index dated 8.12.2009, however, as per order dated 10.12.2009 of

this Hon'ble Court, the respondent is filing present supplementary affidavit to the effect that Sh. N.Suriyanarayanan, is the Project Incharge/In-charge of NTECL. He was appointed as Project Incharge vide office order dated 03.04.2008. Copy of the letter dated 03.04.2008 is annexed herewith as ANNEXURE-R-1. Later, on his elevation as "General Manager" on promotion/appointment, he was appointed as "Chief Executive Officer" of NTECL vide letter dated 10.07.2008. Copy of the letter dated 10.07.2008 is annexed herewith as ANNEXURE-R-2. Such appointment was done prior to the alleged letter of invocation dated 19.03.2009 of the petitioner. Therefore, it does not lie in the mouth of petitioner that he had no knowledge about such appointment or that nobody was designated or nominated as Project in Charge of NTECL. It is pertinent to mention that CEO who is in the grade of General Manager is the Project Manager of NTECL. Though there was no invocation of arbitration clause vide letter dated 19.03.2009 as the same was written by the petitioner to Superintendent Engineer, NTECL, however, the respondent vide letter dated 04.04.2009, negating the claims of the petitioner as not arbitrable and against the conditions of contract and without merit, also informed the petitioner that he can do so by making claims before the General Manager, who is the Chief Executive Officer of NTECL and who is also the Project Incharge of NTECL."

8 Mr. S. K. Taneja further stated that the petitioner was also aware that the posts of General Manger, Chief Executive Officer and Project Incharge were held by only one person. In this context, he drew my attention to the various averments in the petition filed by the petitioner under Section 11 of the Act, 1996.

9 In rejoinder Mr. Rajiv Nayar reiterated the fact that the posts of General Manager, Chief Executive Officer and Project Incharge were not held by the same person. He further specifically denied that the petitioner was aware that the said posts were held by one person.

10 In the present case, upon a perusal of the Arbitration Clause as well as its amendment and the supplementary affidavit placed before me, I am of the view that the present petition for appointment of an arbitrator is premature as the petitioner has directly approached this Court for appointment of an arbitrator without first approaching the authority designated in the arbitration clause to act as an arbitrator. In fact from the perusal of the supplementary affidavit, it is apparent that Mr. N. Suriyanarayanan was the General Manager, NTPC as well as the Chief Executive Officer of the Joint Venture Company NTECL and the Project Incharge of the project in dispute. Even then, the petitioner had not approached the said authority for adjudication of its disputes. This is despite the fact that vide letter dated 4th April, 2009, the respondent had requested the petitioner to put forth its claims before him.

11. From a reading of the grounds in the present petition, it seems very unlikely that the petitioner was unaware that the offices of General Manager, Chief Executive Officer and Project Incharge were held by only one person namely Mr. N. Suriyanarayanan. Some of the averments in the present petition are reproduced herein below :-

“As such, the General Manager/CEO/Project Incharge of the Respondent will not review the earlier decisions taken by them or their subordinates..……

Because in view of Clause 56, General Manager of NTPCL will be the Sole Arbitrator and in view of the fact that the General Manager has taken several decision in the process, which is required to be referred to Sole Arbitrator between the parties. As such, the General Manager/the Chief Executive Officer/AGM of the Respondent have taken number of decisions without

considering the facts and the subsequent events and the decisions are taken arbitrarily without any just and proper reason with a view to deny the genuine claim of the Petitioner and in view of the amended General Conditions of Contract, the General Manager of NTPCL is the Chief Executive Officer of NTECL. As such, the arbitration proceedings will not be conducted in a fair manner and the Petitioners apprehends that the Sole Arbitrator will confirm his own earlier decisions.”

12. In fact the Supreme Court in ***Northern Railway Administration, Ministry of Railways Vs. Patel Engineering Company Ltd.*** reported in 2008 (3) Arb. LR 349 (SC), noticed the divergent view taken in ***Bharat Battery Manufacturing Co.(P) Ltd.*** (Supra) and has clarified the scope of Section 11(6) as under:-

“2. Noticing two different views in two decisions of this Court in *Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304 = 2007 (2) Arb. LR 49 (SC) and *Union of India Vs. Bharat Battery Mfg. Co.(P) Ltd.*, (2007) 7 SCC 684=2007(3) Arb. LR 282 (SC) the matter has been referred to a larger bench and that is how these cases are before us.

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xxx

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11. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true, as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

12. The expression ‘due regard’ means that proper attention to several circumstances has been focussed. The expression ‘necessary’ as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the

accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

13. In all these cases at hand the High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.”

(emphasis supplied)

13. In view of the aforesaid subsequent judgment of three Judges Bench wherein the scope of Section 11 of Act, 1996 has been clarified, the judgment in ***Bharat Battery Manufacturing Co.(P) Ltd.*** (Supra) offers no assistance to the petitioner.

14. Consequently, in my opinion, as the petitioner has not approached the authority designated as the Arbitrator in the arbitration clause read with the amendment reproduced hereinabove, the present petition is premature and this Court does not have the power to appoint an Arbitrator under Section 11 of Act, 1996.

15. Accordingly, the present petition is dismissed with costs of Rs.10,000/- to be paid to the respondent.

FEBRUARY 16, 2010
J

MANMOHAN,J