

+ **ARB.P. 322/2010**

..... Petitioner

..... Respondents

Chand Thapar & Bros (Coal Sales) Ltd. (hereinafter referred to as “KCT”).

BRIEF BACKGROUND

2. The essential facts leading to the dispute between the parties are within a narrow compass. The Respondent, Tehri Hydro Development Corporation India Limited (hereinafter referred to as “THDC”) is a joint venture corporation of Government of India and Government of U.P. THDC invited tenders for three packages for the work of construction of Tehri Hydro Power Plant. KCT submitted its tenders for the three packages vide their letter dated 14.12.1993. THDC accepted the offer of KCT and issued Letter of Intent dated 8th November, 1995 and Contract Agreements to this effect were signed on 03.01.1996 separately for the three packages between the parties. KCT contends that the present petition relates to Package-III specifically, which is denied by THDC. It is the submission of THDC that KCT has raised disputes pertaining to other packages as well. It is, however, not in dispute that Clause 60 of the “General Conditions of the Contract” provided for a four tier system for settlement of disputes. For the facility of reference, Clause 60 is reproduced hereunder:-

“Claues 60.0 SETTLEMENT OF DISPUTES

- (i) *If the Contractor considers any work demanded of him to be outside the requirements of the contract or considers any decision of the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing for written*

instructions or decision. Thereupon the Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision, the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-Charge fails to give his instructions or decision in writing within a period of thirty days after being requested for or if the contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the contractor may within thirty days after receiving the instructions or decision, file a written appeal with the CMD, THDC stating clearly and in detail, the basis for the objection. The CMD will consider the written appeal and make his decision on the basis of relevant contract provisions, together with the facts and circumstance involved in the dispute. The decision will be furnished in writing to the contractor within thirty days after the receipt of the contractor's written appeal.

If the contractor is still dis-satisfied with the decision, the contractor, within a period of fifteen days from the receipt of the decision, shall indicate to the CMD, THDC his intention to refer the matter to the Disputes Review Board (DRB) and within period of another fifteen days shall formally appeal to the Disputes Review Board.

*The constitution of the Dispute Review Board and the procedure to be adopted by it for resolving the disputes is elaborated in the TABLE-A, provided, however, **all such disputes which may arise prior to the constitution of the Board, shall be taken up for consideration at its first meeting convened not later than thirty days upon its constitution.** As specified under para 1 of Annex-A, the*

decisions/recommendations of Dispute Review Board in respect of the disputes involving the individual claims upto Rs.200.00 lacs shall be binding on the THDC and the contractor. In the case of the dispute involving individual claim beyond Rs.200.00 lac, if inspite of the recommendations/decision of the Disputes Review Board, the dispute remains unresolved, either party, within 15 days of the receipt of the aforesaid recommendations/decision of the board, may appeal the decision back to the Board for review. However, if even after this review of its recommendations/decision by the Disputes Review Board, the two parties still fail to resolve the dispute, either party may resort to arbitration. In that case ,within a period of 30 days of the receipt of the Disputes Review Board's final recommendations/decision, the party desiring to resort to arbitration shall indicate its intention to refer the dispute to Arbitration, failing which, the said final recommendations/decision of the Disputes Review Board shall be conclusive and binding.

- (ii) The disputes arising between the contractor and the THDC shall be resolved by arbitration in accordance with the provisions of Indian Arbitration Act, 1940, or any statutory amendments thereof. The Board of arbitrators shall comprise of three arbitrators, one to be nominated by the Contractor, the second by the THDC and the third by the Secretary (Power), Ministry of Energy, Govt. of India.*
- (iii)*
- (iv) If either of the parties fail to appoint its arbitrators in pursuance of sub clause (ii) above, within sixty days after receipt of the notice of the appointment of its arbitrators, then the Secretary (Power), Ministry of Energy, Govt. of India shall have the*

power, at the request of either party to appoint arbitrator. A certified copy of the Secretary (Power)'s order making such appointment shall be furnished to both the parties."

3. As per Table-A of GCC Clause 60, before referring any matter for arbitration in terms of sub-clause (i), such matter shall be placed before the Dispute(s) Review Board (hereinafter referred to as **DRB**) for giving its recommendations/decision. The matter shall be referred to arbitration only if the dispute still remains unresolved. DRB shall provide special expertise to assist in and facilitate the timely and equitable resolution of disputes, claims and controversies between the THDC and the KCT, in an effort to avoid litigation and delay in construction. The manner in which the Board (DRB) is to be set up and disbanded is provided in Clause 3 of Table-A as follows:-

"The THDC and the Contractor shall each select and negotiate the agreement with their respective member within the first six months after award of the Contract. The THDC and Contractor will immediately notify their members to begin selection of the third member. The first two members shall ensure that the third member meets all the criteria listed above. The third member shall be selected within four months after the first two members are notified to proceed with the selection of the third member. In the event of an impasse, in the selection of the third member, that member shall be selected by the President, Institution of Engineers (India), from among the nominees proposed by the first two members.

The THDC, the Contractor, and all the three members of the Disputes Review Board shall execute the Disputes Review Board Tripartite Agreement within two months after the selection of the third member.

If during the contract period, the THDC and the contractor are of the opinion that any member or members of the Disputes Review Board is/are not performing their functions properly or that the Board is not discharging the functions for which it was constituted. THDC and the Contractor may disband the Disputes Review Board and reconstitute the same. The procedure for disbandment and reconstitution of Disputes Review Board shall be as follows:-

- a) The THDC and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a registered letter with AD or delivered personally to each of the members of the Board. A member shall be deemed to have received the delivery of the letter even if he refuses to do so.*
- b) The Board shall stand disbanded from the date specified in the notice.*
- c) The procedure for reconstitution of the Board shall be the same as laid down above for initial constitution of the Board except that the **THDC and the Contractor shall take steps to ensure that the reconstituted Board is in position within three months.***

4. Clause 5 of Table-A provides for the Procedure and Schedule for Disputes Resolutions and states as follows:-

*“5. Disputes shall be considered **as quickly as possible**, taking into consideration the particular circumstances and the time required to prepare detailed documentation.”*

5. Sub-clause (c) of Clause 5 of Table-A provides the time period for resolution of disputes by the DRB in the following terms:-

“(c) When a dispute is referred to the Board, it shall convene the first meeting within one month of the appeal being made to it and the Board’s recommendations/decision shall be conveyed in writing to both the parties within one month of the first meeting. In case of disputes involving large and complex issues requiring elaborate discussions, collection of elaborate data, verification of facts on the site etc. which will require a period longer than one month, the Board shall decide in the first meeting the additional time over one month that it will require to complete its proceedings for giving its recommendations/decision.”

6. Sub-clause (f) of Clause 5 of Table-A, which is also pertinent, *inter alia*, provides as under:-

“(f) Although both the THDC and the Contractor should give great weightage to the recommendations of the Disputes Review Board, these are not binding in respect of the disputes involving individual claims beyond Rs.200.00 lac. If the Board’s recommendations do not result in resolution of dispute, all records and written recommendations, including any minority reports, will be admissible as evidence in any subsequent formal arbitration or litigation.”

7. Clause (IX) relates to Termination of Agreement and reads as under:-

“(IX) TERMINATION OF AGREEMENT

Subject to the provisions relating to the reconstitution of the BOARD as hereinabove contained; this Agreement shall terminate on satisfactory completion of works and issue of a Maintenance Certificate as provided under the Contract referred to above and on settlement of all outstanding disputes involving financial claims. However, parties may by mutual consent decide not to

terminate this Agreement for such further period as may be mutually agreed to.”

8. It is the case of KCT that the provision of the DRB had not been enabled by THDC from 03.01.1996 when the contract agreement was entered into till the date when KCT invoked the arbitration clause. Despite execution of the contract(s) by KCT in the year 1996, and appointment by KCT of its DRB member, namely, Mr. N.N. Singhal on 12.09.1996, THDC nominated its member, namely, Mr. V.V. Badareenarayana on 23.11.2001 and by the same letter communicated its approval of the nomination of Mr. N.N. Singhal. KCT conveyed its approval for the nomination of Mr.V.V. Badareenarayana by its letter of the same day i.e. 29.11.2001. The DRB was constituted even later, i.e., on 10.05.2002, on which date the Tripartite Agreement between DRB members was signed. **Thus, the DRB was constituted six years after the date on which it ought to have been constituted.**

9. It is further the case of KCT that **even after its constitution on 10.05.2002, the DRB out of the 20 disputes referred to it till 2010 decided only 4 disputes between November, 2002 till 02.08.2005.** It is also stated that after resignation of THDC's nominee member on 15.01.2005, **the new DRB member (THDC nominee) was appointed by THDC in March, 2008, i.e., after a lapse of three years.** Since then, the newly constituted DRB has only been harping on the fixation of higher fee structure rather than taking steps to decide the disputes between the parties. **THDC issued completion certificate to KCT on 08.06.2007 for Package-III for substantial**

completion of work as on 30.04.2007,i.e., much prior to the reconstitution of the DRB.

10. It is stated that the *malafides* of THDC are obvious from the fact that on 26.09.2005, THDC sought to fill the vacancy caused in the DRB pursuant to the resignation of its nominee member Mr. V.V. Badareenarayana on 15.01.2005 with Mr. T.K. Dhar, whose father, namely, Mr. Anil Dhar was working with THDC and THDC well knew the fact that the aforesaid filling up of the vacancy would be unacceptable to KCT. KCT vide letters dated 27.01.2007 and 16.05.2007 **requested THDC to disband the DRB as in 11 years of contract execution DRB had given decisions only in 4 matters and totally failed in achieving its objective, i.e., quick resolution of disputes.** Despite such objection from KCT, THDC proposed Dr. B.K. Mittal's name as THDC's nominee in place of Mr. Badareenarayana vide its letter dated 26.06.2007, i.e., after seven and a half years of the entering into of the contract agreement between the parties and after issuance of completion certificate by THDC on 8th June, 2007, again with the knowledge that the said nominee would not be acceptable to KCT as Dr. B.K. Mittal was the presiding arbitrator in the Arbitral Tribunal adjudicating the disputes between KCT and THDC. As anticipated, KCT objected to the appointment of Dr. B.K. Mittal vide its letter dated 10.08.2007. Ultimately, on 29.01.2008, i.e., 3 years after their nominee's resignation, THDC nominated Mr. N.K. Choudhari as their nominee to the DRB. **Thus, the DRB was reconstituted only in January, 2008. This reconstituted DRB held its first meeting six months later on 31.07.2008. No Tripartite**

Agreement has been signed by this reconstituted DRB as required by the contract provisions till date.

11. According to KCT, the reconstitution of the DRB also served no useful purpose as all that the newly constituted DRB did, as is apparent from the material placed on record, was only to harp on the fixation of higher fee structure, rather than taking steps to decide the disputes between the parties. The minutes of the first meeting of the newly formed DRB held on 31.07.2008 bear testimony to the fact that all that was discussed in the meeting was details of the fee structure. Thereafter another meeting was held on 05.05.2009, when again only the fee structure was discussed.

12. On 23.06.2009, the nominee member of KCT in the DRB, namely, Mr. N.N. Singhal vide his letter of the said date addressed to the other members of the DRB raised his concern about non-functioning of the DRB, but to no avail.

13. Faced with the situation as aforesaid, KCT vide its letter dated 22.07.2009 again requested the Chairman and Managing Director of THDC to take steps to disband the DRB and reconstitute the same as the DRB was not functional as per contract provisions. The said request was also reiterated by KCT vide its letter dated 21.08.2009. However, in spite of repeated requests by KCT, THDC took no steps towards reconstitution of the DRB. In the circumstances, KCT vide its letter dated 15.04.2010 wrote to THDC, proposing to disband the DRB and invoke the stage of arbitration.

14. Shortly thereafter, on 24.04.2010, KCT invoked Clause 60 of the Contract Agreement for adjudication of its disputes by the Arbitral

Tribunal, nominating Mr. Y.P. Singh (Retired Chief Engineer) as one of the members of the Arbitral Tribunal and requesting THDC to appoint its nominee as per provisions of the Contract. In the said letter, KCT clearly stated that DRB had failed to discharge its obligations and adjudicate the disputes between the parties effectively and expeditiously. It stated: ***“More than 8 years have elapsed and because of delays on your part nothing substantial has come out of the DRB proceedings. So we are left with no other option.....”***

15. On 15.05.2010, Mr. N.N. Singhal also informed the Petitioner of his intention to resign from DRB, specifically stating therein that: ***“Matters were still at a standstill at exactly the same stage with zero action after the reconstitution of the DRB in March, 2008.”*** Thereupon, KCT sent another letter dated 01.06.2010 whereby it informed THDC that the THDC’s insistence on continuation of DRB was wholly misconceived as DRB had ceased to operate. KCT once again called upon THDC to nominate its arbitrator not later than 30 days from the date of receipt of the said communication.

16. The THDC responded vide letter dated 26.06.2010 and requested KCT to appoint its new nominee DRB member, ostensibly on the plea that KCT had referred Claim No.D-21 vide its letter dated 24.05.2010 to DRB. THDC by the same letter refused to appoint an arbitrator. Due to failure on the part of the THDC to appoint its arbitrator and also for appointment of the Presiding Arbitrator, KCT vide its letter dated 02.08.2010 requested Secretary (Power), Ministry of Energy, Government of India to nominate two arbitrators, i.e., THDC’s nominee arbitrator and the Presiding Arbitrator within 30

days of the receipt of the notice. No action having been taken on the letter of KCT dated 02.08.2010, the present petition for appointment of the two arbitrators is filed by KCT.

17. Response to the petition is filed by THDC, strongly opposing the relief prayed for. KCT filed its rejoinder, reiterating the contents of the petition and denying the averments made in the Opposition filed on behalf of the Respondent.

18. This Court has heard the submissions advanced by Mr.A.K. Ganguly, the learned senior counsel for KCT and Mr. Gourab Banerjee, the learned Additional Solicitor General on behalf of THDC.

CONTENTIONS OF KCT

19. At the outset, Mr. A.K. Ganguly, the learned senior counsel for KCT submitted that the work pertaining to Package-III was completed on 30.04.2007 and a completion certificate was issued by THDC on 08.06.2007. Thereafter, the DRB has ceased both by operation of contract as also by conscious decision/election by one party, namely, THDC, and also by virtue of the fact that the quorum had not been established owing to the resignation of member(s). He contended that the purpose of the DRB was to expeditiously resolve the disputes during the progress of work. However, **despite a lapse of more than three years after completion of work on 30th April, 2007, the DRB had failed to decide the disputes pending before it.** Hence, the very purpose of existence of DRB stood defeated. He submitted that despite execution of the contract(s) in the year 1996 and the appointment by KCT of its DRB member on 12.09.1996, THDC

nominated its member in 2001 and constituted DRB on 10.05.2002. Even after its constitution, DRB decided only 4 out of the 20 disputes referred to it till 2010. Mr.V.V. Badareenarayana, THDC's nominee member of DRB resigned on 15.01.2005, and the new DRB member (THDC nominee) was appointed only in March, 2008, i.e., after a lapse of three years. This newly constituted DRB also rendered itself unfit to act as an adjudicator as was apparent from the fact that the members of the DRB had only been harping on the fixation of higher fee structure, rather than taking steps to decide the dispute between the parties. The DRB thus explicitly rendered itself nothing more than a party with vested interest.

20. Reference in the aforesaid context was made by Mr. Ganguly to letter dated 30th May, 2008 from KCT to THDC complaining about non-functioning of DRB despite KCT's consent to the nomination of Mr. N.K. Choudhari as DRB member; letter dated 31.05.2008 whereunder Mr. N.K. Choudhari (the THDC nominee) consented to be nominated as member of DRB after a lapse of five months subject to modified payment terms pertaining to retainer fee per calendar month, besides payment of actual sitting days; letter dated 07.06.2008 from THDC to DRB members requesting for initiation of DRB proceedings; letter dated 26.06.2008 from Chairman, DRB to all concerned informing about the meeting to be held on 31st July, 2008 to discuss fee structure of DRB members; Minutes of the first meeting of the newly formed DRB dated 31.07.2008 giving details of fee structure as discussed and suggested in the meeting; letter dated 19th September, 2008 from KCT to DRB Members agreeing to the

enhancement of fee from ₹ 3,000/- to ₹ 5,000/- per hearing without retention fee; Minutes of the meeting of the DRB dated 05.05.2009 pertaining to enhancement of the fee structure; letter dated 23.06.2009 from Mr. N.N. Singhal (KCT's nominee on DRB), the relevant portion whereof is reproduced hereunder:-

“In the last meeting (05-05-09), I had clearly given my views that non-acceptance of fee structure by any party is no ground for non-functioning of DRB, whose members had signed the tripartite agreement, which provides that fee structure can be changed only with agreement of the parties (THDC & KCT). There is no conditional acceptance for being a member of DRB.

I had further stressed that resolution of disputes should be the first aim and be taken up without further waste of time on fee structure.

*I am repeating my earlier views, **already more than 14 months have passed since the new DRB, was formed** during which most of the disputes would have been resolved, justifying the existence of the DRB, otherwise parties to the dispute shall be forced to seek remedies available under the Contract to overcome the present impasse.”*

21. Mr. Ganguly also referred to letter dated 22.07.2009, whereunder KCT wrote to THDC, requesting for reconstituting the DRB in respect of the two members (THDC's nominees) who were not performing their functions properly, and also requesting that the communication be treated as a notice for reconstitution of DRB. He also relied upon the letter dated 21st August, 2009 sent by KCT to THDC for reconstitution of the DRB and for making the same functional and also letter dated 15.04.2010 sent by KCT to THDC stating:

*“.....it is amply clear that it is THDC and the DRB members who are at fault and not us. It is a malafide and mischievous attempt on THDC’s part to try and put the blame on us. We have all through the contract period and even beyond made substantial efforts for effective and proper functioning of the DRB. Unfortunately, THDC because of its indifferent attitude has made sure that DRB fails to discharge its obligations. **The DRB as on date has become redundant as it has failed to discharge its contractual obligations. In view of the existing situation, and the fact that the DRB has given its recommendations in only four out of the eleven disputes referred to it, (presently twenty disputes referred to it with sixteen disputes still remaining unresolved) the parties are left with no option but to disband the DRB and invoke the next stage of dispute settlement, i.e. Arbitration or any other suitable legal recourse.**”*

22. Reference was next made by him to letter dated 24.04.2010 whereby KCT invoked arbitration and to letter dated 15.05.2010 whereunder Mr. N.N. Singhal (KCT’s nominee in DRB) tendered his resignation stating that ***“the matter is stand still at exactly the same state with zero action by anyone As for myself, I have been feeling very embarrassed to continue in the DRB.....”***.

23. On the basis of the aforesaid correspondence between the parties, it was submitted on behalf of KCT that as per the contract, disputes remaining unresolved through DRB, the applicant KCT is left with no alternate remedy and is hence well within its right to invoke the arbitration clause seeking reference to the Arbitral Tribunal. A number of precedents were cited in support of KCT’s contention that

the DRB having become redundant disputes between the parties could be submitted to arbitration, which are dealt with hereinbelow.

24. In *Expresswell International Ltd. vs. Adhunik Metaliks Ltd., 2006 (Suppl.) Arb. LR 42 (SC)*, the applicant, a Chinese Company and the Respondent, an Indian Company had entered into a contract for supply of low ash metallurgical coke. The contract provided for an Arbitration Agreement between the parties contained in Clause 18. The said clause, however, envisaged that prior to giving notice of arbitration, the parties were required to settle their disputes by negotiation and if no settlement could be reached then, in that case, the dispute could be submitted to arbitration. Disputes arose as to the failure of the parties to work the contract and the applicant was willing to settle the dispute by negotiation. No agreement could be arrived at and a notice of arbitration was thereupon sent by the applicant to the Respondent indicating the points of dispute and also naming its Arbitrator. The Respondent took the plea that the notice of arbitration was premature. The Hon'ble Supreme Court held the case to be a fit case for appointment of Arbitrator, basing its views on the principle that no one can be permitted to take advantage of its own wrong and relying upon its earlier decision in the case of *M.K. Shah Engineers & Contractors vs. State of M.P.* reported in *(1999) 2 SCC 594 = 1999 (1) Arb. LR 646 (SC)*, in which this kind of situation had arisen for consideration and the Court held that the party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligations so as to exclude the applicability and operation of the arbitration clause.

25. In the case of *National Thermal Power Corporation Ltd. vs. WIG Brothers (Builders & Engineers) Ltd.* reported in 2009 (2) Arb. LR 238 (Delhi), the facts were somewhat akin to the facts of the present case. In the said case, the arbitration clause contemplated that a dispute between the parties should first be referred to an Engineer for his decision, and it is only thereafter that it can be carried to arbitration. The question which arose before the Court was what is the recourse open to a contractor for resolution of his disputes if the owner does not appoint an Engineer which it is obliged to do under the contract. The Court observed that a somewhat similar question had come up for decision in the case of *Petron Civil Engineering Limited vs. DLF Industries Ltd. and Others* reported in 2000 (2) RAJ 438 (Del.) = 2003 (3) Arb. LR 536 (Del.), in which this Court had held as under:-

“.....if it is the contention of the respondents that the matter had to be first referred to the “Engineer” for decision, it was obligatory on their part to have such a person continue to be appointed so as to have the matter referred to him for decision. That having not been done, there was no need of the matter being first referred to a person who was not even in existence at the relevant time for his decision.

.....because there was no “Engineer-in-charge” or “Engineer” available at site to whom the matter could be referred for decision, the disputes are required to be referred to an arbitrator.....”

26. On the basis of the aforesaid decision, this Court in the *National Thermal Power Corporation Ltd. (supra)* opined that one party to an Arbitration Agreement cannot by his own act or omission

prevent the other from having its dispute resolved by arbitration. The Court held as follows:-

“.....The fact is that the parties had entered into an arbitration agreement that contemplated one step to be resorted by the parties before carrying the dispute to arbitration. That step was that the Engineer (to be appointed by the petitioner) would first try to resolve the disputes between the parties. Now, if the petitioner fails/refuses or neglects to appoint an Engineer, it cannot be heard to contend that the arbitration agreement itself is frustrated and that the respondent cannot resort to arbitration directly. The intention of the parties was to have their disputes resolved eventually by arbitration. In the absence of the availability of the Engineer, the rest of the agreement must be given effect to, as that would be consistent with the intention of the parties. This interpretation is in accordance with the well accepted principle of interpretation of documents that the intention of the parties, to the extent possible, must be given effect to and each and every term of the contract must be implemented. The contention of the petitioner would mean that they by their own act would render the whole of Clause 27 of the contract nugatory and meaningless. Such a contention is completely unacceptable. The intention of the parties was clearly to seek the resolution of disputes by arbitration though through the route (as per Clause 26) of the Engineer. However, the non-appointment of an Engineer by the petitioner could in no manner undo the intent in the agreement to resolve disputes by arbitration.”

27. A somewhat similar view was taken by the Punjab and Haryana High Court in the case of ***Sunder Dass and Company vs. Jind Co-operative Sugar Mills Ltd (P&H), 2007 (Suppl.) Arb. LR 567***. In the said case, the contract contained an arbitration clause which provided

that all disputes and differences arising out of or in connection with the contract shall be referred to and settled by the Architect and the Engineer-in-charge, who shall state their decision in writing. Such decision with respect to any of the excepted matters shall be final but, if either the employer or the contractor be dissatisfied with the decision of the Architect and the Engineer-in-charge on any matter (except any of the excepted matters), then in any such case either party may invoke the arbitration clause. The material on record disclosed that the Petitioner did take steps to proceed with the matter in accordance with the agreement and it was on the failure of the Architect and Engineer-in-charge to act that the Petitioner invoked the arbitration clause. In such circumstances, the contention of the Respondent that the reference to arbitration was premature or illegal was rejected by the Court and the challenge to the order of appointment of Arbitrator was also rejected.

28. The alternative submission of Mr. Ganguly, which submission, it was clarified, was being made without prejudice to the first submission, that the DRB had become redundant justifying KCT's resort to invocation of arbitration, is as follows. The rider in Clause 60.0 of GCC that in respect of disputes involving individual claims upto ₹ 200.00 lac, the decision of DRB shall be binding on both the parties is void. Mr. Ganguly contended that as per Section 28 of the Indian Contract Act, every agreement, by which any party thereto is restricted absolutely from enforcing his right, under or in respect of any contract, by usual legal proceedings in the ordinary tribunals is void to that extent, and it has been so held by the Hon'ble Supreme

Court, and that the objectionable part of such clause in an Arbitration Agreement as to waiver of rights of appeal or objection is clearly severable. Thus, the part of Clause 60.0 of GCC making the recommendation of DRB in respect of disputes upto ₹ 200.00 lac final and binding is void, there being no rationale or justification for the same. For this proposition, reference was made to certain decisions of the Supreme Court referred to hereinafter.

29. In *A.V.M. Sales Corporation vs. Anuradha Chemicals Private Limited*, (2012) 2 SCC 315, the Hon'ble Supreme Court, *albeit* in the context of territorial jurisdiction, unequivocally laid down that the provisions of Section 28 read with Section 23 of the Contract Act, 1872 make it very clear that *“if any mutual agreement is intended to restrict or extinguish the right of a party from enforcing his/her right under or in respect of a contract, by the usual legal proceedings in the ordinary tribunals, such an agreement would to that extent be void. In other words, parties cannot contract against a statute.”*

30. In *Shin Satellite Public Co. Ltd. vs. M/s. Jain Studios Ltd.*, AIR 2006 SC 963, the agreement entered into between the parties provided for resolution of disputes, if any, arising between the parties to the agreement by arbitration under the rules of United Nations Commission on International Trade Law (UNCITRAL). The second part of the said clause, however, provided that the Arbitrator's determination shall be final and binding between the parties and the parties waive all rights of appeal or objection in any jurisdiction. The question for consideration before the Supreme Court was whether such an Arbitration Agreement was legal, valid and enforceable in

view of the provisions of Section 28 of the Contract Act, 1872. The Supreme Court opined that the offending and objectionable part of Clause 23 pertaining to the Arbitrator's determination being 'final and binding between the parties' and the declaration contained therein that the parties have waived the right of appeal or objection 'in any jurisdiction' was clearly severable as the same was independent of the dispute being referred to and resolved by an arbitrator. It was further observed as follows: *"Hence, even in the absence of any other clause, the part as to referring the dispute to arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is re-writing the contract which is in the nature of 'novatio'. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a 'blue pencil'."*

31. In *J.G. Engineers Private Limited vs. Union of India and Anr.*, (2011) 5 SCC 758, Clauses (2) and (3) of the contract made certain decisions by the Superintending Engineer and Engineer-in-charge final, binding and conclusive, in regard to certain matters. The question which arose was whether the said clauses of the Agreement stipulated that the decision of any authority was final in regard to the responsibility for the delay in execution and consequential breach of the contract. After analyzing the situation, the Hon'ble Supreme

Court held that even though the decision as to the rate of liquidated damages and certain others were excepted matters, the right to levy liquidated damages would arise only if the contractor was responsible for the delay and was in breach. The question whether the contractor was responsible for the delay or the respondents were responsible for the delay in execution of the work was, therefore, arbitrable. In fact, the question whether the other party committed breach cannot be decided by the party alleging breach. In arriving at the said conclusion, the Supreme Court relied upon its earlier decision in the case of *BSNL vs. Motorola India (P) Ltd.*, (2009) 2 SCC 337, wherein the Supreme Court had held as under:-

“26. Quantification of liquidated damages may be an excepted matter as argued by the appellants, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellants under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.”

32. It is thus contended on behalf of KCT that the plea of THDC that there is a rider in Clause 60.0 of GCC in respect of the disputes involving individual claims upto ₹ 200.00 lac, pertaining to which the

decision of DRB shall be binding on both the parties, is unsustainable. The said rider in Clause 60.0 of GCC would be against public policy, being contrary to Section 28 of the Contract Act, 1872.

CONTENTIONS OF THDC

33. Mr. Gourabh Banerjee, Additional Solicitor General on behalf of THDC, sought to rebut the submissions of KCT by contending that Clause 60.0 GCC and Table-A provided an elaborate mechanism for the constitution of the DRB, its functions, reconstitution, etc. and that reference to DRB was a condition precedent before the matter could be referred to arbitration as was clear from the fact that in Clause 1 of Table-A it was specifically provided: *“The matter shall be referred for arbitration only if the dispute still remains unresolved.”* He contended that there were inherent checks and balances in the composition of the DRB, in that THDC’s nominee member was to be approved by KCT and the KCT’s member was to be approved by THDC and they were to select the Chairman. Thus, the DRB for all intents and purposes was an impartial body. In any event, the DRB could only be disbanded if both THDC and KCT agreed, as per the prescribed procedure set out in Table-A as to the disbandment, which states that THDC and the contractor may disband the Disputes Review Board and reconstitute the same.

34. Mr. Banerjee also contended that the DRB report was not waste paper. As per Sub-Clause (v) of Clause 60.0 GCC, any member of the DRB could be called as a witness for the purpose of *“giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid”*.

Further, Clause 5(f) of Table A unequivocally provided that: ***“If the Board’s recommendations do not result in resolution of dispute, all records and written recommendations, including any minority reports, will be admissible as evidence in any subsequent formal arbitration or litigation”***.

35. Mr. Banerjee urged that KCT’s submission that DRB can simply be bypassed, cannot and should not be countenanced by this Court. The DRB is functional and operative and KCT cannot be allowed to take advantage of its own wrong conduct to sabotage the functioning of DRB, whose one member and Chairman are continuing and KCT is required to nominate its member as per the procedure, which THDC requested KCT to follow on 26.6.2010.

36. Rebutting KCT’s submission that DRB was only relevant till 08.06.2007 or a maximum of one year thereafter, Mr. Banerjee contended that this was contrary to the conduct of KCT itself and also contrary to Clause (IX) pertaining to termination of the Agreement. He submitted that two aspects were not in dispute, viz., that the DRB was reconstituted in 2008 and held its first meeting on 31st July, 2008 and the second that KCT made various claims before the DRB on 20th July, 2009, 8th August, 2009, 19th August, 2009, 4th October, 2009 and 9th October, 2009. A further claim was submitted to the DRB on 24th May, 2010, i.e., after issuance of notice by KCT dated 24.04.2010 invoking arbitration. Thus, it is now not open to KCT to urge that DRB had ceased to function upon the completion of contract. He also submitted that Clause (IX) titled “Termination of Agreement” is crystal clear. The Agreement will only terminate upon issuance of a

Maintenance Certificate as provided under the contract between the parties and *on settlement of all outstanding disputes involving financial claims*. Disputes have not been settled and, therefore, the DRB continues to be effective. In any event, the dispute resolution clause is not tied to the contract.

37. With regard to KCT's second submission regarding the inordinate delay in the functioning of DRB and the non-functionality of DRB, Mr. Banerjee referred to and relied upon the chart of fifteen claims made by KCT (Amended Annexure A-8 to IA No.11309/2011), and summarized it in the following manner:-

<i>Claim Nos.</i>	<i>Total Principal Amount</i>	<i>Date of Reference to DRB</i>
<i>1-5</i>	<i>44.47 lakhs</i>	<i>August 2003</i>
<i>6-13</i>	<i>1019.00 lakhs</i>	<i>20.7.2009, 8.8.2009, 4.10.2009, 9.10.2009</i>
<i>14-15</i>	<i>3228.40 lakhs</i>	<i>7.5.2010 & 25.4.2011 (to CMD)</i>

The above table, it was contended on behalf of THDC shows that out of the total principal amount claimed of Rs.4291.87 lakhs, (approximately Rs.43 crores), Claims amounting to Rs.42.5 Crore (approximately) have been raised from 2009 onwards. Thus, the issue of delay is merely an excuse and nothing more. In any event, delay cannot be a ground for KCT to unilaterally repudiate part of the dispute resolution clause.

38. It was further contended that the non-functionality of the DRB on account of fee disputes was a red herring. Prior to the reconstitution of the DRB in 2008, it was in fact KCT's nominee, Mr.

N.N. Singhal, who, by his letter dated 27.11.2007, had raised the issue of higher fees, including retention fee on the model of NHPC. A perusal of the minutes of the reconstituted DRB dated 31.07.2008 and 05.05.2009 read with letters dated 27.08.2008, 19.09.2008, 03.11.2008, 04.03.2009, 24.03.2009 and 12.05.2009, exchanged between THDC and KCT, clearly brings out the fact that it was KCT who was questioning the aspect of retention fee for the members of the reconstituted Board, to which THDC had agreed. Reference was also made to letter dated 3rd August, 2009 whereunder THDC pointed out to KCT that the fee implication, considering the stakes involved, was minimal and that the total financial implication to each party in a year, over and above the fee already agreed by KCT, on account of acceptance of fee schedule in the meeting held on 05.05.2009, shall be in the range of ₹ 2.40 lac and ₹ 0.72 lac for four days and three days respectively. Despite this, KCT decided to take the view, on 15.04.2010, that the DRB had become redundant and sought to invoke arbitration by letter dated 24.04.2010. Such a course of conduct was demonstrative of the fact that the fee issue was being used by KCT as an excuse to frustrate the DRB.

39. It was next urged by Mr. Banerjee that notwithstanding KCT's request on 15.04.2010 to THDC to disband the DRB mutually, KCT submitted new claims to DRB on 24.05.2010, wherefrom it is clear that KCT adopted an inconsistent stand about the functioning of DRB. The oscillating stand of KCT is also stated to be evident from the notice for invocation of arbitration dated 05.05.2011 sent by KCT to THDC in the matter of KCT's claim for extra expenditure due to

delays under Package III, to the tune of ₹ 32 crores, wherein KCT stated that if under any order of the appropriate court of law the DRB is held to be existing or is reconstituted, KCT reserves its rights to refer the dispute to DRB in future, notwithstanding KCT's stand that DRB is non-functional. In any event, he submitted that there is no delay as regards claims worth ₹ 42.5 crores out of ₹ 43 crores, and, therefore, delay cannot be a ground to by-pass the DRB.

40. Further, Mr. Banerjee submitted that the parties having agreed for reference to DRB as a pre-condition to reference to arbitration, it is not open to KCT unilaterally to rely on one part of the clause which suits its purpose and ignore the other part which requires reference to DRB. Reference in this context was placed on a judgment of the Hon'ble Supreme Court in *Indian Oil Corporation Ltd and Ors vs. Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520, wherein it is held that:-

“No party can say that he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement.....A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitration contained in the arbitration clause.”

41. Adverting next to the submission of KCT that the portion of the Agreement which gives finality to the DRB's decision in respect of claims below ₹ 200 lacs, is contrary to public policy, being contrary to Section 28 of the Contract Act, Mr. Banerjee submitted that a correct

reading of the said clause would mean that for disputes below ₹ 200 lacs, THDC and KCT would normally be bound but would always have the option of challenging the decision by way of civil proceedings, i.e., civil suit, whereas for larger claims the arbitration option is provided. In this context, reference was made by Mr. Banerjee to the judgment of a learned Single Judge of this Court (Hon'ble Mr. Justice Rajiv Sahai Endlaw) in ***Karam Chand Thapar and Bros (CS) Ltd. vs. National Hydroelectric Power Corp. and Anr., [CS(OS) No.2143A/2002 and OMP No.21/2004 dated 13.10.2009]***. In the said case, in proceedings for setting aside of the interim award on the arbitrability of the claims of the petitioner against the respondent, this Court held that it had not been stated that any clause of the Agreement barred claim No.3 held by the arbitrator to be arbitrable and proceeded to make the following observations:-

“Again, it is not as if the petitioner is remediless with the claims being held to be non-arbitrable. The petitioner has the remedy of a civil suit available to it with respect thereto, though it is a different matter whether the civil court also would allow the said claim or not, if the parties had agreed to such claim being not entertainable under the contract.”

FINDINGS

42. On a careful consideration of the material on record and the rival submissions of the parties made at the bar, I am of the considered opinion that the unconscionable delay in the constitution and re-constitution of the DRB and its failure to resolve the disputes between the parties are glaring facts which cannot be easily brushed aside.

Though Mr. Banerjee is correct in his submission that ordinarily Clause 60.0 of GCC, which envisages a four-tier dispute resolution mechanism, ought not to be given a go-bye, I have serious reservations in accepting his submission that the DRB has not been rendered redundant with the passage of fourteen years which have elapsed from the time when the parties penned the contract(s). It is also noteworthy that KCT had followed the procedure prescribed in the contract from the inception of the contract by appointing its nominee DRB member in the year 1996 itself, but due to delay in constituting the DRB by THDC and the rigid attitude of the DRB members, only four disputes could be adjudicated upon by the DRB in a span of fourteen years. KCT appointed Mr. N.N. Singhal as nominee DRB member vide its letter dated 12.09.1996, whereas THDC appointed its nominee DRB member, Mr. V.V. Badareenarayana after five years and that too after repeated requests made by KCT and after completion of the original contract period. The tripartite agreement was signed by the DRB on 10.05.2002, i.e., six years after the appointment of KCT's nominee DRB member. Between November, 2002 to August, 2005, only four out of eleven disputes were decided and right up till 2006 no further progress was made by DRB.

43. The malafides of THDC are also apparent from the fact that in lieu of its nominee DRB member Mr. V.V. Badareenarayana, who had resigned, THDC sought to nominate Mr. T.K. Dhar, the father of Mr. Anil Dhar, who was working with THDC. KCT, as was expected, protested to the said nomination and refused to accept the same.

THDC, after a span of two years and after completion of the contract work on 08.06.2007, then proposed the name of Dr. B.K. Mittal as its nominee on 26.06.2007, who, to the knowledge of THDC was the Presiding Arbitrator in the Arbitral Tribunal adjudicating existing disputes between KCT and THDC, and to whose nomination the KCT was entitled to object and did in fact object.

44. THDC finally nominated Mr. N.K. Choudhari on 29.01.2008 as their nominee to DRB, but even this newly constituted DRB failed to prove effective. In its first meeting held on 31.07.2008, the members of the DRB sought to engage in a fee wrangle. While it is the case of THDC that Mr. N.N. Singhal, the nominee member of KCT was to blame for the same, this is not borne out by the record. Mr. N.N. Singhal vide his letter dated 27.11.2007, on which reliance is sought to be placed by THDC, specifically informed THDC and KCT that the DRB had not been functioning since the end of 2005, i.e., after resignation of Mr. Badareenarayana and his replacement should have been finalized within 30 days or so. He requested the parties to reconstitute the Board without further delay and requested for revised fee structure. The Board was eventually reconstituted on 31st May, 2008, on which date Mr. N.K. Choudhari (new THDC nominee) wrote a letter dated 31.05.2008 accepting the nomination as new DRB member *subject to modified payment terms as per the Standard Dispute Review Board's Rules and Procedures*, which included payment of retainer fee per calendar month equivalent to three times daily fee established from time to time, besides payment for actual sitting days. It was thus the nominee of THDC who insisted upon

enhanced fee structure from the date of his appointment and even during the two meetings held by the newly constituted DRB.

45. Thereafter, KCT vide its letter dated 19.09.2008 sought to expedite the process of adjudication of disputes, and to prevent an impasse conveyed its consent to the new DRB for enhancement of the fee from ₹ 3,000/- to ₹ 5,000/- along with ₹ 1,000/- towards secretarial expense and requested the reconstituted DRB to commence its proceedings. The THDC, however, continued to press KCT to accept the hiked fee demanded by its nominee member. KCT vide its letters dated 06.11.2008, 31.12.2008 and 18.02.2009 to DRB members requested them to confirm their acceptance so that dispute resolution was not delayed further and could start expeditiously. Mr. N.N. Singhal (KCT's nominee) vide his letter dated 23.06.2009 addressed to the members of DRB also raised his concern about the non-functioning of the new DRB. The said letter reflects his insistence upon resolution of disputes being the first aim of DRB instead of wasting time on fee structure, and wholly belies the contention of THDC that it was KCT's nominee who was insisting on a fee hike at the cost of early adjudication of disputes. This was followed by a request letter dated 22.07.2009 from KCT to the Chairman and M.D., THDC, specifically requesting THDC to take steps to disband the DRB and reconstitute the same on account of its non-functionality, to which also the THDC paid no heed. KCT vide its letter dated 21.08.2009 while replying to THDC's letter dated 03.08.2009 (informing KCT that as per the revised proposal of DRB vide minutes dated 05.05.2009, the financial implication to each party in a year was

minimal) again requested THDC to take steps to reconstitute DRB in respect of the said two members under the contract provision mentioned in GCC Clause 60.0.

46. The aforesaid request of KCT to reconstitute DRB, in my opinion, was in consonance with Clause 60.0 GCC Table-A, which states that *“if during the contract period, the THDC and the contractor are of opinion that any member of the Board is not discharging the functions for which it was constituted, THDC and the contractor may disband the Board and reconstitute the same.”* Thus, KCT’s request for disbandment of the existing DRB was in terms of the Agreement between the parties and THDC’s refusal to constitute a fresh DRB was wholly without any basis. KCT vide its letter dated 04.02.2010 again pointedly brought to the notice of THDC the failure of the newly constituted DRB in discharging its obligations as per the contract provisions and to provide a mechanism for speedy redressal of all disputes. THDC paid no heed, leaving no other option to KCT except to invoke arbitration on 24.04.2010, leading to the resignation of Mr. N.N. Singhal from DRB on 15.05.2010. In such circumstances, in my opinion, it is not open to THDC to contest the position that the non-functionality of the DRB and the adamant refusal of THDC to reconstitute the DRB in order to make it functional constitute sufficient reason for KCT to invoke the arbitration clause.

47. As regards the contention of THDC that the total principal amount claimed is ₹ 4,291.87 lacs, out of which claims amounting to ₹ 44.47 lacs only are relatable to claims made till 2003 (i.e., out of claims amounting to ₹ 43 crores only, claims amounting to ₹ 42.50

crores have been raised from 2009 onwards) and, therefore, the issue of delay is a red herring of no consequence, I find the said contention wholly untenable. In terms of the contract between the parties, the DRB was to become operational within six months, but THDC all along adopted a lackadaisical attitude with regard to the constitution of the DRB – the dispute resolution system envisaged under the Agreement. It again took its own time to reconstitute the DRB which was eventually constituted after the contract period had expired. Even this reconstituted DRB was rendered non-operational by the attitude of THDC's nominee members. The net result is that even after a lapse of fourteen years from the date of entering into the contract, the disputes of KCT with THDC remained unresolved. Notwithstanding, the KCT is being told that the invocation of arbitration by it is premature, and that it ought to agree to its claims being referred to a DRB to be constituted at this juncture.

48. From the aforesaid, it is crystal clear that KCT cannot be faulted for the non-functionality of the DRB. With regard to the contention of THDC that in respect of disputes involving individual claims up to ₹ 200 lacs, the decision of DRB shall be binding on both the parties also, I have no hesitation in holding that the said part of Clause 60.0 of GCC is against public policy, being contrary to the provisions of Section 28 of the Indian Contract Act. I am buttressed in coming to the aforesaid conclusion from the legal position adumbrated by the Hon'ble Supreme Court in *A.V.M. Sales Corporation (supra)*, *Shin Satellite Public Co. Ltd. (supra)* and *J.G. Engineers Private Limited (supra)*. In fairness to Mr. Gourab Banerjee, learned Additional

Solicitor General, he rightly conceded that there is no bar to questioning the decision of DRB by way of filing a civil suit, but, in my considered opinion, the DRB having proved redundant as a dispute resolution mechanism, the process of arbitration must be made available to the KCT, which has invoked the same. The THDC having totally failed to comply with its obligation to set up and make functional the DRB as an adjudicatory body cannot be allowed to take advantage of its own inaction/wrong. In any event, no premium can be given to THDC for its inaction. Applying the ratio of the law laid down in *Shin Satellite Public Co. Ltd. (supra)*, this is a fit case for severing the lawful part of the Agreement with regard to referring the dispute to arbitration from the offending part as to finality with regard to the decisions of DRB in respect of certain disputes by using a blue pencil.

49. I accordingly appoint Mr. Justice Y.K. Sabharwal, retired Chief Justice of India to arbitrate upon the disputes between the parties. The arbitration shall take place under the aegis of Delhi High Court Arbitration Centre. The fees of the arbitrator shall also be in terms of the Delhi High Court Arbitration Centre (Arbitrator's Fees) Rules.

50. The petition is allowed in the above terms.

A copy of this order be sent to the learned arbitrator as well as to the Delhi High Court Arbitration Centre.

**REVA KHETRAPAL
JUDGE**

November 09, 2012
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