

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: April 28, 2015

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ARB. PET. 79/2015

SOMA ENTERPRISES LIMITED

..... Petitioner

Through: Mr.Sushant Kumar, Advocate

versus

NATIONAL THERMAL POWER CORPORATION Respondent

Through: Mr.Puneet Taneja, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. This petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act' for short) for appointment of an Arbitrator.
2. It is the case of the petitioner that the respondent while setting up its super thermal power plant at Sipat, District Bilaspur in the State of Chattisgarh had invited tenders for the work of Raw Water Reservoir and lining package as per its bidding document No.CS-9518-319A-9.
3. The petitioner, who had also submitted its bid, was awarded the contract vide letter dated December 8, 2004. A contract agreement dated

February 3, 2005 was executed between the petitioner and the respondent. It is the case of the petitioner that the contract agreement was completed on March 7, 2007 within the extended time duly agreed upon by both the parties. It is also averred that the petitioner submitted a final bill and made certain claims for additional payment. No payment has been made till date. On failure to clear the final bill the petitioner with no option left invoked the arbitration clause as contained in Clause 56 of the GCC vide its letter dated July 26, 2014, in response thereof, the respondent vide its letter dated August 18, 2014 refused to appoint an Arbitrator, *inter alia*, stating that the invocation of arbitration clause for any dispute, was not acceptable to it. The petitioner vide letter dated September 8, 2014, reiterated its stand that disputes have arisen and sought appointment of Arbitrator under clause 56 GCC. A copy of the letter was marked to General Manager, Sipat, Super Thermal Power Project and to Chairman and Director, NTPC Ltd.

4. The present petition was filed on February 4, 2015.
5. On notice the respondent filed its reply. It is the stand of the respondent that the petitioner has signed the final bill in May 2012 without raising any dispute.
6. The additional claims made have been denied. The respondent has given reply on the merits of the dispute between the parties. For the

purpose of this application, it may not be necessary for this Court to go into the same.

7. On the plea of the petitioner regarding appointment of the Arbitrator, the respondent's case is that at no point of time did the petitioner invoke arbitration in terms of clause 56 of GCC. This is so, because at no point of time, the petitioner approached the General Manager of the project for entering reference for adjudicating the disputes and claims raised by it. This, as per the respondent is evident from the letter dated July 26, 2014 which was a letter addressed to Project Incharge who is the Executive Director of Sipat Super Thermal Power Project and not the General Manager of the Project. Since the letter was merely a communication to the Executive Director of the Project, the same was replied by the concerned officer on behalf of the respondent by virtue of letter dated August 18, 2014. According to the respondent the word "General Manager" having been replaced by the words "Project Incharge of the Project.", it was realised that it was not the General Manager of the Sipat Super Thermal Power Project who was to arbitrate the disputes as the Sole Arbitrator but the officer with designation of the Executive Director of the SSTPP who was to Arbitrate being the Project Incharge of the SSTPP.

8. The respondent would submit, it did not consider the letter dated

July 26, 2014 of the petitioner as a letter invoking Clause 56 of the GCC. It was later the respondent realised about the amendment to Clause 56 of the GCC and further appreciated that the letter dated July 26, 2014 addressed to the Project Incharge, SSTPP was an invocation of an arbitration. The said facts were apprised to the Project Incharge, i.e., the Executive Director of SSTPP, i.e., Mr.V.B. Fadnavis who immediately thereupon entered reference on February 12, 2015 and issued order dated February 19, 2015 thereby calling upon the parties to appear before him in his capacity as the Sole Arbitrator.

9. It is also the stand of the respondent even assuming that the letter dated August 18, 2014 of the respondent can be construed as a refusal by the Executive Director to act as the Sole Arbitrator but the said refusal was withdrawn by him before the petitioner had exhausted the procedure as prescribed under Clause 56 of GCC which provides for an appointment of Sole Arbitrator by the CMD of NTPC in case the Sole Arbitrator refuses or does not enter the reference.

10. I may point out here, the petitioner received the letter dated February 19, 2015 from Mr.V.B. Fadnavis on February 23, 2015. A response to the said letter was given by the petitioner vide its letter dated February 24, 2015 wherein the petitioner had informed the respondent about the filing of the petition in this Court and calling upon the

respondent to withdraw the communication dated February 19, 2015.

11. Mr.Sushant Kumar, learned counsel for the petitioner would submit that the petitioner having invoked clause 56 of the GCC vide letter dated July 26, 2014 and the Project Incharge having not responded to the invocation by entering into the reference and the subsequent letter of the petitioner dated September 8, 2014, a copy of which was sent to the Chairman and Managing Director of NTPC to take necessary action and even his failure to appoint an Arbitrator in place of the Project Incharge, the respondent has forfeited its right to appoint an Arbitrator and accordingly the petition under Section 11(6) of the Act seeking an appointment of an Arbitrator by this Court has been filed. In this regard, he would rely upon the judgment of the Supreme Court in the case reported as **(2013) 4 SCC 35, Deep Trading Company Vs. Indian Oil Corporation and Ors.** to contend that if no appointment is made till the contractor has made an application under Section 11(6) of the Act, the employer forfeits its right to appoint, on similar lines in terms of the law laid down by the Supreme Court in **Datar Switchgears Vs. Tata Finance Ltd., (2000) 8 SCC 158.** He would also rely upon the judgment of this Court in the case of **R.S.Avtar Singh and Co. Vs. Indian Tourism Development Corporation Ltd., AIR 2003 Delhi 249** to contend that the order of appointment would be taken to have been made when the order

is communicated and received by the Arbitrator and concerned party.

12. On the other hand, Mr.Puneet Taneja, learned counsel appearing for the respondent would reiterate the stand taken by the respondent in its reply. According to him, clause 56 of GCC postulates the Project Incharge i.e. Sipat Super Thermal Power Project to be the named Arbitrator. On invocation of the arbitration by the other party, the Project Incharge being an Arbitrator has only to enter the reference. He states that there was a misreading of the provision and because of which, the letter dated July 26, 2014 which was addressed to the Project Incharge, and not the General Manager, was construed as a normal communication and not a communication seeking invocation, accordingly the Executive Director did not enter the reference. Having realised the effect of the amendment, Mr.Fadnavis has accordingly entered the reference. Alternatively, he would plead, if the Executive Director, the Project Incharge failed to act as an Arbitrator, the petitioner should have approached the Chairman and Managing Director of the respondent corporation seeking the appointment of another person as an Arbitrator. He would state, that the letter dated September 8, 2014 is not a communication addressed to the Chairman and Managing Director, NTPC Ltd., as was contended by the learned counsel for the petitioner. He would state, that, the latter part of clause 56 of GCC having not been

invoked by the petitioner, and in the interregnum the Project Incharge having entered the reference, the issuance of letter dated February 19, 2014 which is a communication by the Sole Arbitrator giving notice to the parties to appear before him is justified. He would rely upon a judgment of this Court in the case of ***M/s. Gangotri Enterprises Ltd. Vs.M/s. NTPC, Arb.P. 270/2013, decided on January 21, 2014***, wherein, this Court had upheld the reference entered by the General Manager on identical facts.

13. Having heard the learned counsel for the parties, the only issue which arises for my consideration, is in the facts of this case, whether an Arbitrator need to be appointed by this Court in exercise of power under Section 11(6) of the Act or the reference entered upon by Mr.V.B. Fadnavis need to be upheld. Before I answer the question, I reproduce hereunder clause 56 of the GCC:

"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 the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions of otherwise concerning the works, or 1the

execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof shall be referred to the sole arbitration of the General Manager of NTPC Limited {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 for 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."

14. A perusal of the clause 56 of GCC as originally enacted, would reveal that the General Manager of NTPC Ltd. would act as a Sole Arbitrator and in the eventuality, the General Manager is unable or unwilling to act as the Sole Arbitrator, some other person appointed by the Chairman and Managing Director, NTPC Ltd. will act as an Arbitrator. The amendment effected to this provision as is clear from the document at page 34 of the reply, the word “General Manager” has been replaced by the words “Project Incharge of the Project Concern of National Thermal Power Corporation Ltd.” If clause 56 is read from the perspective of the amendment, it is clear that the Project Incharge, which in this case, is the Executive Director need to act as Arbitrator at the first instance. It appears from the stand, which has been taken by the respondent of a misreading of the provision with a belief that it is the General Manager, who was to act as an Arbitrator, need to be accepted as the petitioner has not controverted the stand of the respondent in the reply by filing a rejoinder. Even otherwise, the letter dated September 8, 2014, in no way, can be construed as a letter written to the Chairman and Managing Director of the respondent corporation to appoint another person on failure of the Project Incharge to act as an Arbitrator. This I say so, the letter dated September 8, 2014 was addressed to the AGM

(Civil), Sipat, and not to the Chairman and Managing Director. That apart, mere sending a copy of the letter to the Chairman and Managing Director for taking necessary action, cannot be construed as a communication, calling upon the Chairman and Managing Director to appoint another person in lieu of the Project Incharge. No such express request was made. Rather, I find, from the reading of letter dated September 8, 2014 was a reiteration of the contents of the earlier letter dated July 26, 2014 relating to invocation of the arbitration in terms of clause 56 of GCC for settling the claims, which is clear from the request made by the petitioner in the said letter, which I quote:

“We request you to take immediate steps as per the provision of clause 56 of GCC”.

I agree with the submission of the learned counsel for the respondent that the petitioner had never invoked the later part of clause 56 of GCC calling upon the Chairman and Managing Director to appoint another person in lieu of the Project Incharge till the filing of the petition and in fact till date. The Project Incharge having entered the reference and having issued letter dated February 19, 2015, it cannot be said that there was a failure to invoke clause 56 of GCC. The issuance of letter dated February 19, 2015 is justified. I note, for benefit the following conclusion of this Court in the case of ***M/s. Gangotri Enterprises Ltd. (supra)***:

“9. Having heard learned counsels for the parties and perused the arbitration clause, aforesaid, I am of the view that after the invocation of the arbitration agreement, if the petitioner was aggrieved on account of inaction of the GM to enter upon the reference within 30 days of the said invocation, it was for the petitioner to inform the CMD of the same and to seek appointment of an arbitrator. Once the arbitration agreement is invoked, it is not necessary for the named arbitrator to act within 30 days of the said invocation. He may act even thereafter and if he so acts, he would have jurisdiction. However, if he does not act within 30 days, and before he acts and enters upon reference, one of the parties either approaches the court or triggers the mechanism for appointment of an arbitrator as provided in the contract, the named arbitrator may lose his authority/mandate to act as an arbitrator and enter upon reference, as held by the Supreme Court in the case of Datar Switchgears Ltd. v. Tata Finance, (2000) 8 SCC 151.

10. In the present case, the petitioner never gave an opportunity to the CMD to appoint the arbitrator, if, according to the petitioner, the GM was unable, unwilling or failed to act. The CMD may not even have been aware of the invocation of the arbitration agreement by the petitioner, since the same was not addressed to him. He may, therefore, not even be

aware of the fact that the GM has either expressed his inability, or unwillingness, to act or that he has failed to act. Even otherwise, merely because the named arbitrator, namely, the GM did not act within 30 days, cannot lead to the conclusion that he has expressed his inability or unwillingness to act in the matter as an arbitrator.

11. Therefore, the filing of the present petition appears to be misconceived, since the petitioner has not invoked the arbitration agreement in its terms by approaching the CMD to appoint the arbitrator. Even before the CMD has been called upon to appoint an arbitrator, the GM has already entered upon reference on 18.07.2013. Therefore, in my view, the GM has the mandate to proceed with the arbitration in the present case. Accordingly, this petition does not survive and the same is dismissed as such”.

15. In view of the aforesaid position, the reliance placed by the learned counsel for the petitioner in the case of ***Deep Trading Co. (supra)*** is untenable and would have no applicability. Insofar as ***R.S.Avtar Singh Co. case (supra)*** is concerned, in view of peculiarity of clause 56 of the GCC, which postulates a named Arbitrator, who has to enter the reference pursuant to the invocation of arbitration by the other party, the said judgment also has no applicability.

16. In view of my above discussion, I do not see any merit in the present petition. The same is accordingly dismissed. The parties would be at liberty to raise all their claims and counter claims and objections before the learned Sole Arbitrator.

(V.KAMESWAR RAO)
JUDGE

APRIL 28, 2015
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