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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **ARB.P. 270/2015**

GANGOTRI ENTERPRISES LTD. Petitioner
Through: Mr. Sanjeev Mahajan, Advocate.

versus

NTPC LTD.
Respondent Through: Mr. Puneet Taneja
with Ms. Shaheen and Mr. G.K. Mishra,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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07.05.2015

Caveat No. 460/2015

1. This caveat is wrongly notified in this matter whereas it has been filed in some other matter.
2. The caveat will stand deleted from this matter.

IA No. 9707/2015 (for exemption)

3. Exemption allowed subject to all just exceptions.
4. The application is disposed of.

ARB.P. 270/2015

5. This is a petition under Section 11(8) of the Arbitration and Conciliation Act, 1996 ('Act') filed by Gangotri Enterprises Ltd.

seeking the appointment of an independent Arbitrator to adjudicate the disputes between the Petitioner and the Respondent arising out of a contract dated 29th October 2008 in respect of the Simhadri Super Thermal Power Project at Andhra Pradesh. The Petitioner had been engaged to undertake certain works in the project.

6. It is not in dispute that under Clause 56 of the Contract, the General Manager (GM) of the Respondent had been named as a sole Arbitrator and if he was unable or unwilling to act then the Chairman & Managing Director ('CMD') could appoint another person in his place. By amendment to the said clause, the words 'General Manager' has been substituted by the words 'Project Incharge'.

7. In response to a letter first issued by the Petitioner on 4th May 2013 seeking reference of the disputes to arbitration, when no immediate reply was forthcoming, the Petitioner filed Arbitration Petition No. 270 of 2013. The Court in its order dated 21st January 2014 noted that the GM (Project) had entered upon reference by issuing a communication dated 18th July 2013 to the parties. In the said order, the Court was of the view that the petition was misconceived since the Petitioner had not invoked the arbitration agreement by approaching the CMD to appoint an Arbitrator. However, since the GM had already entered upon reference, the Court was of the view that he "has the mandate to proceed with the arbitration in the present case." The GM who had entered upon reference got transferred to another project

and by a letter dated 29th March 2014 he informed both parties that he would not be able to conduct the proceedings. He directed the parties to take necessary action for appointment of another Arbitrator in terms of Clause 56 of the contract.

8. On 27th May 2014, a letter was addressed to Mr. A.K. Samanta, CGM and Head of Project, Simhadri STPP informing him of his appointment as the substituted Arbitrator. A copy of the said letter was marked to the Petitioner.

9. On 11th August 2014, the Petitioner addressed a letter to Mr. Samanta referring to the latter's letter dated 6th June 2014 in which he had stated that he was not interested in the subject matter of the dispute. However, the Petitioner pointed out in the said letter dated 11th August 2014 that since the Arbitrator was the Project Incharge of the work he, therefore, would not be able to act independently and impartially. The Petitioner stated that in view of the nature of disputes, the Petitioner would always have a reasonable apprehension that Mr. Samanta would be biased against them. The Petitioner also referred to the decision of the Supreme Court in *Indian Oil Corporation Ltd. v. Raja Transport Private Ltd. (2009) 8 SCC 520* and urged that Mr. Samanta would be unable to function as an Arbitrator. A separate letter was also addressed by the Petitioner to the CMD on 26th September 2014 requesting him to appoint another independent and impartial person as an Arbitrator.

10. On 27th September 2014 an application was filed by the Petitioner before the Arbitrator referring to the above facts and also to the decision of the Supreme Court and requesting that the matter be adjourned by at least 7 weeks in view of the request made by the Petitioner to the CMD to appoint another person who was independent of the parties as an Arbitrator.

11. As far as the aforementioned letter dated 26th September 2014 to the CMD is concerned, the Regional Executive Director (South) replied on 13th November 2014 to the Petitioner inter alia stating that Mr. Samanta had never acted as Engineer-In-Charge in the disputed contract and did not have any interest in the said matter. The Regional Director further took the stand that the decision in ***Raja Transport Private Ltd.*** was not applicable in the present case.

12. It appears that on the same date i.e. 13th November 2014 the counsel for the Petitioner addressed a separate letter to the Arbitrator Mr. A.K. Samanta again referring to the decision in ***Raja Transport Private Ltd.*** and stating that he should cancel any date fixed for arbitration and objected to the recording of certain minutes of the proceedings that took place on 27th September 2014.

13. The learned Arbitrator appears to have addressed a letter to the parties on 27th November 2014 asserting that his appointment was in line with Clause 56 of the contract and that “the parties are at liberty to raise all the issues during the Arbitral proceedings, which will be decided by providing equal opportunity to both the claimant as well as respondent”. He requested the parties to take part in the arbitration proceedings without fail. On 6th January 2015, the Petitioner again addressed another letter to the Regional Executive Director, NTPC objecting to the appointment of Mr. Samanta as Arbitrator and this was replied to on 4th February 2015 refuting the allegation of bias and asking the Petitioner to appear before the Arbitrator.

14. In the above circumstances, the present petition has been filed praying *inter alia* that the Court should appoint an independent sole Arbitrator to adjudicate the disputes between the parties.

15. The Petitioner has also filed an additional affidavit dated 28th April 2015 stating that after service of an advance copy of the petition on Respondent, the Respondent had on 15th April 2015 encashed the performance bank guarantee furnished by the Petitioner and in addition to that the corporate office of the Respondent had issued a show cause notice dated 20th April 2015 to the Petitioner seeking to blacklist it for a period of three years. It is stated in the affidavit that the aforementioned prejudicial actions were initiated solely in view of

the fact that the Petitioner had sought appointment of an independent and impartial Arbitrator.

16. Mr. Sanjeev Mahajan, learned counsel appearing for the Petitioner has taken the Court through the decision in ***Raja Transport Private Ltd.*** He urges that it is open to the Chief Justice or his designate to appoint any other person as Arbitrator i.e. a person other than the one named in the contract “if circumstances exist giving rise to justifiable doubts as to the independence and impartiality of the person nominated.” According to Mr. Mahajan it was abundantly clear that Mr. Samanta was a person interested in the subject matter of the dispute and could not be expected to act independently and impartially in the matter. According to him notwithstanding that Mr. Samanta had entered upon reference almost a year ago, the Petitioner is not precluded from approaching this Court with the present petition. He points out that the Petitioner has been in continuous correspondence with the Respondent on this issue and only after his attempts of having an independent Arbitrator appointed failed, that he approached this Court.

17. Appearing on advance notice, Mr. Puneet Taneja, learned counsel for the Respondent, first submits that the present petition is misconceived since the Petitioner is seeking in effect the removal of an existing Arbitrator for which the remedy under Section 11 (8) of the Act is inappropriate. He points out that the allegations by the

Petitioner regarding the alleged bias of the Arbitrator are unfounded since the Petitioner has been repeatedly told that Mr. Samanta has no interest in the subject matter of the dispute. He submits that in any event the remedy for the Petitioner lay in approaching the learned Arbitrator with an appropriate application which would then have to be decided by the learned Arbitrator in accordance with law. He submitted that even the decision in *Raja Transport Private Ltd.* recognises that the mere fact that the named Arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias and unless he was shown to be controlling or dealing with the subject matter, there was no reason to doubt his impartiality.

18. At the outset it must be noted that the stage at which the Petitioner has approached this Court is almost a year after Mr. Samanta has entered upon reference. Further, the Petitioner has repeatedly urged before the Arbitrator Mr. Samanta himself and the CMD on the basis of the decision in *Raja Transport Private Ltd.* that he should not continue as an Arbitrator and the Petitioner's pleas have been negatived. The fact of the matter therefore is that there is an Arbitrator in place and the Petitioner is seeking his removal and substitution by another Arbitrator. The Court, therefore, finds merit in the preliminary objection of Mr. Taneja, learned counsel appearing for the Respondent that the present petition under Section 11(8) of the Act in such circumstances is wholly misconceived. In a petition under Section 11(8) of the Act, the Court cannot possibly remove an existing

Arbitrator and substitute him with another. Consequently, the question of applying the decision in *Raja Transport Private Ltd.* at this stage does not arise. No satisfactory explanation has been given by Mr. Mahajan as to why the Petitioner had to wait almost for a year to approach this Court. The Petitioner did not approach this Court prior to Mr. Samanta entering upon reference. Under Clause 56 the CMD could replace the earlier Arbitrator and there was no failure on his part to do so. In the circumstances, the question of the Petitioner seeking a remedy under Section 11 (8) of the Act does not arise.

19. The challenge to the appointment of an Arbitrator is provided for under Section 12 and the procedure under Section 13 of the Act. It is open to a party to raise objection as to the impartiality of an Arbitrator and invite the Arbitrator to give decision on such a plea. It could be said that the letters addressed by the Petitioner to the learned Arbitrator dated 11th August 2014 and 13th November 2014 have already been considered by the Arbitrator and negated by his letter dated 27th November 2014. Nevertheless, considering that in his letter dated 27th November 2014, the Arbitrator has given the parties liberty to raise all the issues during the arbitration proceedings, the Court is of the view that notwithstanding the said letter dated 27th November 2014 it is open to the Petitioner if so advised to again apply to the learned Arbitrator in terms of Sections 12 and 13 of the Act inviting the learned Arbitrator to rule on the issue. As regards the allegations of any retributive action by the Respondent, it is open to the Petitioner to

seek other appropriate remedies as may be available in accordance with law.

20. Consequently, the Court is not prepared to entertain the present petition. Subject to the above observations, the petition is dismissed.

MAY 07, 2015

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S. MURALIDHAR, J

