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

Date of decision:03.08.2015

+ W.P.(C) 7297/2015 & CM No.13406/2015 (*directions*)

M/S FITWELL CONSTRUCTION (P) LTD. Petitioner
Through: Mr.Wills Mathews with Mr.Ginesh
P., Advs.
Versus

UNION OF INDIA & ANR Respondents
Through: Mr. Jaswinder Singh, Adv. for R-1.
Ms. Monika Arora, CGSC with Mr. Gaurav
Upadhyay, Adv. for R-9.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The present writ petition is filed seeking a Writ in the nature of Mandamus declaring Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'The Arbitration Act') as unconstitutional to the extent it does not prescribe the qualifications of an Arbitrator particularly in the case of appointment of a Sole Arbitrator. Other connected reliefs are also sought.

2. The brief facts which led to filing of the present Writ Petition are that The Himachal Pradesh Power Corporation Ltd. awarded the works of Kashan Hydro Electric Project at Kinnaur District, Himachal Pradesh to respondent No.2. The petitioner entered into a contract with the said respondent No.2 for works of the said Hydro Electric Project vide contract/purchase order dated 22.2.2012 and 23.2.2012.

3. As per the purchase order the contract period was 24 months excluding three months grace period. It is the contention of the petitioner that on account of heavy snowfall and bad weather, work has been disrupted on various occasions. On 12.3.2014, the petitioner received a notice of termination of the Contract from respondent No.2 which is stated to be on the wrong reasons of sub-leasing of the contract, non compliance of labour laws, lackadaisical attitude on slow progress etc.

4. In the contract between the parties, there exists an Arbitration Clause which reads as follows:-

“22- ARBITRATION

The parties hereby agree that all disputes and differences and/or claims arising out of/or connected with this purchase order, or as to the rights and liabilities of the parties hereunder, failing an amicable settlement, shall be referred to arbitration of sole arbitrator of a person to be appointed by the Managing Director of ANDRITZ Hydro Private Limited. The Arbitration shall be governed by Indian Arbitration and Conciliation Act, 1996 or any statutory amendment/ modification thereof for the time being in force. The venue of arbitration shall be New Delhi.”

5. The petitioner aggrieved by the aforesaid acts of respondent No.2 of termination of the Contract, filed a petition under section 9 of the Arbitration Act in the District Court at Patiala House Courts, New Delhi seeking an interim injunction against termination of the contract. The petition is stated to be pending.

6. The petitioner has also issued a notice to respondent No.2 demanding appointment of a sole Arbitrator to adjudicate the dispute with respondent No.2. Pursuant to the said communication the respondent No.2 has appointed Shri Vinod Kumar Abbey as the sole Arbitrator on 13.5.2015.

The petitioner is stated to have objected to the said appointment and demanded appointment of a retired Judge as the Sole Arbitrator vide communication dated 28.5.2015. Some correspondence has thereafter taken place between the parties.

7. In the present petition it is averred that the Arbitration Act has ignored the importance of a requirement of legal knowledge for the Arbitrators who are appointed under the Act. It is urged that this causes serious prejudice to a fair trial and amounts to violation of the fundamental rights of the petitioner.

8. The issue raised by the petitioner has been dealt with by the Supreme Court in the case of *You One Engineering and Construction Co.Ltd. & Anr. v. National Highways Authority of India (NHAI)*, AIR 2006 SC 3453.

The Court in the said judgment held as follows:-

“9. The learned Counsel for the petitioners then contended that the dispute between the parties was basically a legal issue as to the competence of the respondent to terminate the contract between the parties and that, if at all, the Presiding Arbitrator was to be appointed S/he should be a person well-versed in law. He further contended that the IRC was a body of technical persons and the nominee of the IRC Shri E.V. Narayanan was also a technical person who was not well-versed in law. According to the counsel, the institution mentioned in Section 11(6)(c) must adhere to the statutory standards of appointing an arbitrator who is competent to handle the dispute that has arisen between the parties. In the submission of the petitioners, the appointed Presiding Officer, not being a legal person, would be unable to handle the legal dispute that has arisen between the parties, and, therefore, an occasion has arisen for exercise of powers of Section 11(6) of the Act.

10. In my view, the contention has no merit. The Arbitration Agreement clearly envisages the appointment of Presiding Arbitrator by the IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

11. On all overall assessment, I am satisfied that the appointment of the Presiding Officer by the IRC is perfectly valid and justified, as no occasion had arisen for the petitioner to move the Chief Justice of India under Section 11(6) of the Act.”

9. The ratio laid down by the Supreme Court in the above decision squarely applies to the case on hand. Having voluntarily entered into the agreement which contained a specific Arbitration clause providing for any disputes, failing an amicable settlement, be referred to arbitration of a sole Arbitrator of a person to be appointed by the Managing Director of ANDRITZ Hydro Pvt. Ltd. and particularly, in the absence of any clause in the agreement with regard to the qualifications that the Arbitrator shall possess, it is not open to the petitioner now to contend that Section 11 of the Arbitration Act itself is unconstitutional on any ground whatsoever.

10. Accordingly, the writ petition is dismissed.

**JAYANT NATH
(JUDGE)**

CHIEF JUSTICE

AUGUST 03, 2015/n