

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

% *Judgment reserved on: 8th March, 2016*
Judgment pronounced on: 19 April, 2016

+ **Arb. P. No.85/2016**

TRF LTD.

..... Petitioner

Through Mr.Ciccu Mukhopadhaya, Sr. Adv.
with Mr.Kaushik Poddar and
Ms.Rashmi Gogoi, Advs.

versus

ENERGO ENGINEERING PROJECTS LTD

..... Respondent

Through Mr.Rajiv Nayar, Sr. Adv. with
Ms.Anannya Ghose, Ms.Reena
Choudhary and Mr.Saurabh Seth,
Advs.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 11(5) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of a retired Judge of the Supreme Court as an Arbitrator for adjudication of the disputes between the parties by declaring the Arbitrator already appointed by the respondent ineligible and further declaring such appointment void *ab initio*.

2. The petitioner is a Company duly incorporated under the Companies Act, 1956.

3. The respondent is engaged in the business of procuring Bulk Material Handling Equipment for installation in Thermal Power Plants on behalf of its clients like National Thermal Power Corporation ('NTPC' in short) and/or Moser Baer, Lanco Projects Ltd. etc.

4. The respondent issued a Purchase Order dated 9th December, 2013 to the petitioner *inter alia* for the design, manufacturing, testing, supply, supervision of erection and commissioning of TRF make plough feeders as per NIT specification for the Coal Handling Plant at Annupur Thermal Power Project. To secure the performance under the Purchase Order, the petitioner had submitted an Advance Bank Guarantee and a Performance Bank Guarantee.

5. The petitioner approached this Court by way of petition under Section 9 of the Act praying for an injunction against the respondent from exercising its contractual rights to encash the Advance Bank Guarantee and the Performance Bank Guarantee, both of which are admittedly unconditional. Thereafter, the petitioner filed set of petitions under Section 9 of the Act seeking an order for the respondent to furnish security for the purportedly outstanding amounts.

6. The details of the said 1st set of petitions filed by the petitioners under Section 9 of the Act are given as under:-

S. No.	Case Title	Case Number	Section	Details	Amount/ claim	Amount outstanding
1.	TRF Ltd. v. Energo Engineering Projects Ltd	OMP(I) Comm.No.18/ 2016	Petition under Section 9 of the Arbitration and Conciliation Act, 1996	Letter of Intent on 19 th September, 2011 which was followed by Purchase Order dated 22 nd October, 2011 by	Over Rs.2 crores	Rs.5,40,52,473/-

				the respondent for supply of <u>Reversible Bucket Wheel Type Stacker-cum-Reclaimer</u> by the respondent.		
2.	TRF Ltd. v. Energo Engineering Projects Ltd	OMP(I) Comm.No.19/2016	Petition under Section 9 of the Arbitration and Conciliation Act, 1996	The petitioner was issued Letter of Intent dated 21 st November, 2013, which was issued to the petitioner by sole respondent for supply of ' <u>Plough Feeder</u> ' for the end use project of Moser Baer and/or LANCO Projects Ltd. The said LOI was subsequently culminated into Purchase Order dated 9 th December, 2013.	Over Rs.2 crores	Rs. 1, 71,92,000/-
3.	TRF Ltd. v. Energo Engineering Projects Ltd	OMP(I) Comm.No.20/2016	Petition under Section 9 of the Arbitration and Conciliation Act, 1996	Respondent had issued a Letter of Intent dated 1 st January, 2014 for the work of supply, erection and commissioning of ' <u>Wagon Tippler and Side Arm Charger</u> ' in favour of the petitioner. After a lapse of almost five months from the issuance of LOI, a Purchase Order with respect to supply of Wagon Tippler and Side Arm Charger dated 6 th May, 2014 was issued by the sole respondent.	Over Rs.2 crores	Rs.11,13,95,500/-

4.	TRF Ltd. v. Energo Engineering Projects Ltd	OMP(I) Comm.No.21/2016	Petition under Section 9 of the Arbitration and Conciliation Act, 1996	The Respondent had issued Letter of Intent dated 16 th April, 2014, for supply, erection and commissioning of <u>Wagon Tippler and Side Arm Charger</u> . The same was followed by Purchase Order dated 10 th May, 2014 for supply of Wagon Tippler and Side Arm Charger.	Over Rs. 2 crores	Rs. 6,95,99,122/-
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7. The details of the 2nd set of the petitions are given as under:-

S.No.	Case Name	Case Number	Section	Details	Amount /Claim	Prayer
1.	TRF Ltd. vs. Energo Engineering Projects Ltd.,	O.M.P(I) (Comm) 65/2015	Petition under Section 9 of the Arbitration and Conciliation Act, for interim orders.	Respondent No.1 issued purchase order to the petitioner dated 6 th May, 2014 for supply of Wagon Tippler and Side Arm Charger. The petitioner was issued another work order for erection and commissioning of Wagon Tippler and Side Arm Charger dated 26 th May, 2014.	Over Rs. 2 crore	Restrain the respondent from encashing the Bank Guarantee Nos. 1403831BGA00007 for Rs.4,62,92,400/- and 1403831BGP00026 for Rs.5,01,09,200/- executed by the petitioner in favour of the respondent in pursuance to the agreement entered between the parties.
2.	TRF Ltd. vs. Energo Engineering Projects Ltd.,	O.M.P(I) (Comm) 66/2015	Petition under Section 9 of the Arbitration and Conciliation Act, for interim orders.	Respondent No.1 issued purchase orders to the petitioner dated 10 th May, 2014 for supply of Wagon Tippler and Side Arm Charger and for erection and commissioning of Wagon Tippler and	Over Rs. 2 crore	Restrain the respondent from encashing the Bank Guarantee Nos. 1403831BGP00028 for Rs.1,21,76,700/- and 1403831BGA00010 for Rs.1,12,26,700/- executed by the

				Side Arm Charger dated.		petitioner in favour of the respondent in pursuance to the agreement entered between the parties.
3.	TRF Ltd. vs. Energo Engineering Projects Ltd.,	O.M.P(I) (Comm) 68/2015	Petition under Section 9 of the Arbitration and Conciliation Act, for interim orders.	Respondent No.1 issued to the petitioner purchase order dated 22 nd October, 2011 for supply of Reversible Bucket Wheel Type Stack- cum- Reclaimer.	Over Rs. 2 crore	Restrain the respondent from encashing the Bank Guarantee Nos. 00191GPER004511 for Rs.3,51,50,000/- and 00191GPER004411 for Rs.3,51,50,000/- executed by the petitioner in favour of the respondent in pursuance to the agreement entered between the parties.
4.	TRF Ltd. vs. Energo Engineering Projects Ltd.,	O.M.P(I) (Comm) 69/2015	Petition under Section 9 of the Arbitration and Conciliation Act, for interim orders.	The respondent No.1 issued a purchase order to the petitioner dated 10 th May, 2014 for supply of Wagon Tippler and Side Arm Charger.	Over Rs. 2 crore	Restrain the respondent from encashing the Bank Guarantee 1403831BGA00009 for Rs.1,12,26,700/- and 1403831BGP00027 for Rs.1,21,76,700/- executed by the petitioner in favour of the respondent in pursuance to the agreement entered between the parties.
5.	TRF Ltd. vs. Energo Engineering Projects Ltd.,	O.M.P(I) (Comm) 70/2015	Petition under Section 9 of the Arbitration and Conciliation Act, for interim orders.	The respondent No.1 issued a purchase order to the petitioner dated 9 th December, 2013 for supply, erection and commissioning of Plough Feeder.	Over Rs. 2 crore	Restrain the respondent from encashing the Bank Guarantee 1403831BGA00006 for Rs.31,26,000/- and 1403831BGP00025 for Rs.31,26,000/- executed by the petitioner in favour of the respondent in pursuance to the agreement entered between the parties.

8. The said petitions under Section 9 of the Act are presently pending consideration before this Court.

9. The petitioner by letter dated 28th December, 2015 invoked the arbitration in terms of Clause 33 of the General Terms and Conditions of the Purchase Order (“GTCPO”) for reference of disputes between the parties to arbitration.

10. However, the petitioner objected to the procedure for appointment of Arbitrator provided under the Purchase Order, who communicated to the respondent its consent for appointment of an Arbitrator *de hors* the specific terms of the Purchase Order.

11. The contention of the respondent is that the submission of the petitioner is contrary to the binding contractual terms between the parties. The respondent denied such suggestion and by letter dated 27th January, 2016 informed the petitioner about the appointment of Justice A.P.Shah (Retd.) as the sole Arbitrator in terms of clause 33.d of the Purchase Order.

12. Later on, admittedly, Justice A.P.Shah (Retd.) (“Arbitral Tribunal”) by letter dated 29th January, 2016 addressed to both the parties directed them to appear before the Arbitral Tribunal for a preliminary meeting to be held on 9th February, 2016.

13. It is alleged by the respondent that with the sole purpose of defeating the arbitration proceedings, the petitioner has sought to invoke the jurisdiction of this Court under Section 11(5) read with Section 11(6) of the Act by way of the present petition.

14. The present petition has been filed under both Sections 11(5) and 11(6) of the Act. The fundamental procedure for invocation of this Court's jurisdiction under Section 11(5) of the Act, i.e. failure on part of the parties to agree on a procedure for appointment of Arbitrator under Section 11(2) of the Act is not made out.

15. Clause 33.b of the GTCPO states that if the parties fail to amicably resolve the disputes, then either party may require that the dispute be referred to arbitration.

16. Clause 33.d of the GTCPO provides that any dispute between the parties in connection with the Purchase Order "*shall be referred to sole arbitration of the Managing Director of the Buyer or his nominee*".

17. The said terms of the Purchase Order makes it clear that the petitioner and the respondent have agreed on a procedure for appointing an Arbitrator as contemplated by Section 11(2) of the Act. In these circumstances, the disputes between the parties have to be decided in accordance with such procedure and recourse to Section 11(5) of the Act cannot be taken by the petitioner.

18. The petitioner has also contended that since the respondent's Managing Director has himself become "ineligible" to be appointed as an Arbitrator, he cannot also nominate any other person as an Arbitrator and any such appointment is contrary to the rule of law and that is the intent and purpose of the recent amendments to the Act. The petitioner has also alleged that the arbitration agreement under clause 33.d of the GTCPO is rendered void. The petitioner's arguments in this regard are without any merit, as the right of the Managing Director to nominate a sole Arbitrator under the

Purchase Order is independent of his right to himself act as the sole Arbitrator.

19. The mere reason that the Managing Director of the respondent cannot act as a sole Arbitrator in the disputes between the parties does not take away his right to nominate an independent and neutral Arbitrator.

20. Appointment of an independent and impartial Arbitral Tribunal does not append the recent changes brought about in the Act, including Section 12(5) and the Seventh Schedule to the Act or in any manner contrary to the rule of law. Although, I must mention here and appreciate the fairness of the learned Senior counsel for the petitioner who has made his submission that he is merely arguing the matter on legal issue otherwise he and his client have full faith and respect for the learned sole Arbitrator appointed. He submits that since it is an important legal issue therefore, he is making his submissions on legal issue only.

21. The Fifth and the Seventh Schedule reveal that the grounds provided thereunder are in relation to the appointed Arbitrator himself and thus, the petitioner's argument that the nominee Arbitrator being ineligible to act as an Arbitrator is without any force and against the scheme of the Act. The Purchase Order does not stipulate that the Managing Director of the respondent will have a right to nominate a sole Arbitrator only so long as he is also qualified to act as such.

22. The right of one party to a dispute to appoint a sole Arbitrator prior to the amended Act has been well-recognized and the amended Act does not take away such a right. Had the intent of the amended Act been to take away a party's right to nominate a sole Arbitrator as suggested by the

petitioner, the same would have found mentioned in the detailed list of ineligibility criteria enumerated under the Seventh Schedule to the Act. Therefore, the petitioner's submission that the arbitration clause under clause 33.d of the GTCPO has been rendered void, is without any merit. Thus, the petitioner has been able to make out a case for exercise of powers by this Court under Section 11(5) of the Act.

23. The recourse to Section 11(6) of the Act can be had only if there are any of the contingencies provided under Section 11(6) (a), (b) or (c). The petitioner is not able to indicate as to how any of the contingencies contemplated by Section 11(6) of the Act arise in the present case.

24. The petitioner has contended that the appointment of the Arbitral Tribunal is contrary to Item Nos.22 and 24 of the Fifth Schedule to the Act. The Fifth Schedule to the Act does not *per se* provide for grounds for disqualification of an Arbitrator. The said Schedule merely provides an indicative list of the grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators. Under Section 12(1) of the Act, a person who is approached in connection with his possible appointment as an Arbitrator is to be guided by the Fifth Schedule while determining whether the circumstances exist which give rise to justifiable doubts and if so, he shall disclose the same in the form specified in the Sixth Schedule.

25. The petitioner's argument that the appointment of the Arbitral Tribunal is bad in view of Item 22 of the Fifth Schedule to the Act is entirely frivolous and without any basis whatsoever. Insofar as the petitioner's challenge in terms of Item 24 of the Fifth Schedule is concerned, the said argument has no consequence as Justice Shah (Retd.) has been appointed as

an Arbitrator in relation to similar disputes between the same parties under two Purchase Orders pertaining to the same project at Annupur. With regard to Item 29 of the Fifth Schedule to the Act, it stipulates that if the Arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm, the Item would show that the same is in relation to the counsel or the law firm who *makes* the appointment and does not pertain to the counsel or the law firm of the opposite side to an arbitration proceeding.

26. Even otherwise, I agree with the suggestion of learned counsel for the respondent that the objections, if any, against the constitution of the Arbitral Tribunal on any ground whatsoever including under the Fifth and the Seventh Schedule of the Act can only be raised before the Arbitral Tribunal.

27. Before consenting to act as the learned sole Arbitrator, Justice Shah (Retd.) by letter dated 26th January, 2016 had given the requisite disclosures under the Sixth Schedule wherein he had indicated that as per him, there are no circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality.

28. The Arbitral Tribunal has already been constituted and has entered into reference who has already ensured the compliance of the provision under the amended Act about no conflict. Now, the petitioner cannot be allowed to change the Arbitral Tribunal.

29. Even, besides the stipulation of the agreement/purchase order governing the parties, this Court inclines to appoint Hon'ble Mr. Justice A.P. Shah (Retd. Chief Justice) as sole Arbitrator to decide the dispute between the parties.

30. For the reasons stated above, there is no merit in the petition and the same is accordingly dismissed.

(MANMOHAN SINGH)
JUDGE

APRIL 19, 2016

