

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

% *Judgment reserved on: 19th July, 2016*
Judgment delivered on: 29th July, 2016

+ **O.M.P. (T) (COMM.) No.13/2016**

M/S ERA INFRA ENGINEERING LTD. Petitioner
Through: Mr.Harish Malhotra, Sr. Adv. with
Mr.Nilava Bandhyopadhyay &
Mr.Rahul Pandey, Advs.
versus

ARAVALI POWER COMPANY PVT. LTD. Respondent
Through: Mr.Vikas Singh, Sr. Adv. with
Mr.Bharat Sangal, Mr.Kapish
Seth, Ms.Daggarr Malhotra &
Ms.Vernika Tomar, Advs.

+ **Arb. P. No.136/2016**

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CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this order, I propose to decide the above mentioned two petitions filed by the same petitioner on 10th February, 2016 against the respondent. The first petition being O.M.P. (T) (COMM.)

No.13/2016 under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") and the second being Arb. P. No.136/2016 under Section 11(6) of the Act.

2. Few facts, which are relevant and mentioned in the pleadings, are that the respondent issued Notice Inviting Tender (NIT) bearing No.CS-0330-364-9 dated 13th June, 2008, inviting tenders/bids regarding construction work of 'Permanent Township package for Indira Gandhi Super Thermal Power Project, Jhajjar, Haryana [3 X 500 MW]' (hereinafter referred to as the "Contract Work").

2.1. In furtherance of the aforesaid NIT, the petitioner submitted its tender/bid, upon scrutiny of which, the respondent issued the Letter of Award (LoA) dated 20th May, 2009, awarding the aforesaid Contract Work to the petitioner. A formal Contract/Agreement came to be executed between the parties on 17th November, 2009. Clause 56 of the General Conditions of Contract (GCC) provides for resolution of disputes by way of arbitration.

2.2. It is the case of the petitioner that after having awarded of the aforesaid Contract/Agreement, the petitioner mobilized all its resources and manpower for timely execution of the Contract Works. However, the respondent failed to adhere to the covenants undertaken by it under the aforesaid Contract/ Agreement, on account of which the Contract Works got delayed. In this regard, the petitioner time and again put the respondent to notice of the various delays and lapses attributable to the respondent, all of which contributed to the delay in execution of Contract Works. In nutshell, some of the following deficiencies on the part of the respondent were made known to it by the petitioner through various communications addressed from time to time.

- i. Delay in issuance of Drawings, Technical decisions from the respondent.
- ii. Delay due to constraints on account of non-availability of Work Front on time.
- iii. Hold up/Delay in supply of FOC material.
- iv. Delay in release of RA Bills, hold payments and various claims.
- v. Delay due to extraordinary increase in prices/shortage of crushed stone aggregate and coarse/fine aggregate consequent to the ban on queries by the state Administration.
- vi. Delay due to Power Supply Problem.

2.3. The petitioner has alleged that the respondent issued letter dated 18th July, 2014 of part cancellation (being the 1st Part cancellation) to the petitioner whereby the remaining work of "C-Type Quarters" was cancelled/withdrawn from the scope of work awarded to the petitioner. By way of the said communication, the respondent erroneously and illegally sought to intimate the petitioner of its intent to get the said withdrawn work completed at the risk and cost of the petitioner and the respondent, yet again in a complete erroneous and illegal manner, further sought to withdraw part of the work contracted to the petitioner by way of communication dated 24th October, 2014 (being the 2nd Part cancellation), whereby the fencing work of Transformers came to be withdrawn from the petitioner's scope of work with the intent of getting the same done at the risk and cost of the petitioner. The relevant date of 3rd Part Cancellation in respect of the balance work of C & D Type Quarters under PTC Package is 30th June, 2015 and

4th Part cancellation dated 8th July, 2015 in respect of balance work of hospital, community centre and training centre under PTC Package.

3. It is alleged by the petitioner that in the meantime, in view of the action of the respondent, the petitioner by way of its letter dated 29th July, 2015, *inter-alia*, highlighting various reasons of delay in the project which were solely attributable to the respondent. As the dispute arose the petitioner by virtue of the said letter invoked the Arbitration Clause for appointment of an independent Arbitrator for settlement of its claims. By way of the said letter, the respondent was informed by the petitioner that as the order of part cancellation had been taken at the highest level of the respondent/employer, any forum for resolution of disputes constituted by the said authority and in particular, its subordinate was of no legal consequence. Therefore, the petitioner sought for appointment of an independent Arbitrator, preferably by a retired High Court Judge, to adjudicate the disputes and to provide the petitioner with a panel of independent Arbitrators from which it could choose an independent Arbitrator. In the alternative, the petitioner desired for appointment of a three Members Arbitral Tribunal, comprising of one Arbitrator each appointed by both the parties, which nominee Arbitrators would then appoint the Presiding/Umpire Arbitrator.

4. At the time of invocation of arbitration clause, the request was made to the respondent by the petitioner by way of letter dated 29th July, 2015 for appointment of an independent sole Arbitrator, who was not agreeable to appoint the Arbitrator who is the employee/Officer of the respondent-Company, as it has personal interest and an aggrieved party to the disputes having arisen

between the parties. It is also a matter of fact that the respondent by letter dated 19th August, 2015 informed the petitioner that the Chief Executive Officer of the respondent-Company has been appointed as sole Arbitrator. On 26th September, 2015 it was informed to the petitioner by the respondent that Sh.S.K.Sinha was appointed as sole Arbitrator. It is not denied that he is from the same Department. The petitioner within the period of less than 3 days raised its concern by letter dated 29th September, 2015 and it was also brought to the notice of the respondent that NTPC, who is part of the respondent's Joint Venture, had in similar circumstances appointed sole Arbitrator who is not from the same department being independent person, for which even the petitioner has no objection.

5. The first hearing was held on 7th October, 2015 by the Arbitrator and the petitioner sought time to file the Statement of Claim within 60 days therefrom i.e. by 5th December, 2015. Thereafter, the petitioners vide its letter dated 4th December, 2015 sought further time of one month to file the Statement of Claim. The time was allowed by the Arbitrator vide his Order dated 7th December, 2015.

6. On 12th January, 2016 the petitioner informed the respondent (including Sh.S.K.Sinha, Chief Executive Officer, APCPL – the Arbitrator), that the constitution of the alleged Arbitral Tribunal was against the settled principles of law and it was further informed by the petitioner that it would be approaching this Court for appointment of an independent Arbitral Tribunal, on account of which the Official of the respondent (appointed as the alleged Arbitrator) should not proceed with the proceedings. However, on

22nd January, 2016 Sh.S.K.Sinha vide his communication did not agree with the contentions of the petitioner made in letter dated 12th January, 2016 and advised the petitioner to attend the hearing of the alleged arbitration proceedings on 16th February, 2016.

7. Before the next date, the present two petitions were filed, mainly, on the grounds that the respondent has failed to appoint an independent Arbitrator for adjudication of the disputes between the parties. The petitioner is seeking appointment of an independent Arbitral Tribunal to adjudicate upon the disputes between the parties.

8. In the meanwhile, the balance works of 5th to 8th Parts were cancelled as per schedule, as the petitioner was time and again insisting for an independent Arbitral Tribunal.

9. Counter-affidavit on behalf of the respondent was filed, wherein it was stated that the present petition under Section 14 of the Act is not maintainable, as the said provision provides that a party can apply to the Court under Section 14(2) of the Act only if there is a controversy regarding the mandate of an Arbitrator requiring to be terminated if he becomes *de jure* or *de facto* unable to perform his functions or fails to act without undue delay or if he withdraws from his office or the parties agreed to the termination of his mandate. However, in the present case, the Arbitrator has neither withdrawn from his office nor have the parties agreed to terminate the mandate of the Arbitrator. There can be no controversy in regard to the ground mentioned in Section 14(1)(b) of the Act. It is further submitted that the Arbitrator has been appointed strictly in accordance with Clause 56 of the GCC with its amendments of the contract in question between the parties.

Therefore, the Arbitrator has not *de jure* become unable to perform his functions. The Arbitrator is conducting the arbitral proceedings on each of the dates fixed and, therefore, it cannot be said that he is failing to act without undue delay. In fact, it is the petitioner who has got the matter adjourned on several occasions so as to file the present petition. Even though, the petitioner on 7th October, 2015 participated in the proceedings and agreed to file its Statement of Claim but had not raised any challenge to the appointment of the Arbitrator.

10. The provision in the Act to challenge the appointment of an Arbitrator on the ground of alleged bias or non independence exists in Section 12 of the Act. Section 12(3) provides that an Arbitrator may be challenged only if the circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties and an aggrieved party can challenge the Arbitrator under Section 13(2) of the Act within 15 days of becoming aware of the constitution of the Arbitral Tribunal. In the present case, the petitioner was informed by DGM (CCD-Township) of the respondent-Company on 19th August, 2015 regarding appointment of the sole Arbitrator under Clause 56 of the GCC to the Contract. However, the petitioner had not taken any steps to challenge the appointment. The said challenge was made before this Court after the expiry of more than four months.

11. It is submitted by the respondent that in the present case, the Arbitrator by his letter dated 22nd January, 2016 rejected the said challenge under Section 13 (4) of the Act on the grounds, firstly, that the appointment was in terms of the Arbitration Clause and secondly, that the challenge was not raised within time. Even if the

challenge is rejected by the Arbitrator under Section 13(4), the Arbitrator has to continue with the arbitral proceedings and to make an Arbitral Award. There is no appeal under the Act against the said order under Section 13(4), though Section 13(5) provides that once the Award is pronounced, the party challenging the Award can make an application under Section 13(5) read with Section 34 of the Act.

12. The appointment of the Arbitrator i.e. the Chief Executive Officer of the respondent-Company was in accordance with Clause 56 of the GCC which provides that all disputes would be referred to the sole Arbitration of the Project In-charge of the Project concerned of the owner. It was also provided that there would be no objection on the ground that the Arbitrator so appointed is an employee of respondent (APCPL) and has dealt with the matter to which the contract relates and that in the course of his duties as such he has expressed views on all or any of the matters in dispute. The contract in relation to the present dispute was signed by the petitioner on 17th November, 2009 and no objection was raised to the arbitration clause as contained in Clause 56 of the GCC to the Contract.

13. The Arbitrator, though the CEO of the respondent-Company and the Project In-charge of the Indira Gandhi Super Thermal Power Project, P.O. Jharri, Distt. Jhajjar, Haryana, was not the Engineer In-charge or the day-to-day In-charge of the work, which was to be performed by the petitioner under the contract in question. In fact, the Engineer In-charge for this project is AGM (CCD-Township) who is supported by Group of Engineers (Dy. Managers, Managers & Sr. Managers) working under him for execution of the work. Further, the AGM (CCD-Township) reports to AGM (ME/CCD) who in turn reports to CEO (APCPL).

14. It is also submitted that the letter dated 21st July, 2015 granting extension of time to the petitioner for completing the work, was not issued by the CEO but only the approval was granted by Dy. CEO (APCPL) based on the proposal initiated/concurred by Sr. Manager (Civil), DGM (CCD Township), AGM (ME, CCD), AGM (F&A). Thus, it cannot be construed from the mere approval granted to the extension of time that the CEO was either in day-to-day charge of the contractual work or was involved in the work or was subordinate to any such officer.

15. The following decision were referred by the respondent:

- i) The Supreme Court in its judgment reported as ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.***, 2009 (8) SCC 520, has categorically held as under:

"13. Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for Governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Government /statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party.

14. No party can say 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. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties, etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause.

15. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable. We may refer to a few decisions on this aspect."

- ii) Similar view was taken by the Supreme Court in ***Secretary to Government Transport Department v. Munnuswamy Mudlaliar***, 1988 (Supp.) SCC 651.

16. In view of facts and circumstances of the present case, it is to be considered as to whether there is a reasonable apprehension of bias in the mind of petitioner or not or as to whether there is a reasonable apprehension of bias in the mind of petitioner or not or as to whether the grounds are just vague and general objections without any material or not or the petitioner's doubt about the independence or impartiality is genuine or not.

17. Clause 56 of the GCC read with Amendment/Errata No.1 provides for resolution of disputes by way of Arbitration, which has been reproduced herein below:

"56. ARBITRATION:-

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 questions, claim, rights, matter or thing whatsoever in any way arising out of or relating to the contract, design, drawing, specifications, estimates, instructions, orders or these conditions of otherwise concerning the works, or the executions or failures to execute the same whether arising during the progress of the work or after the completion or abandonment **thereof shall be referred to the Sole Arbitration** of the Project In-charge of the Project concerned of the owner, and if the Project In-charge is unable or unwilling to act, to the sole arbitration of some other persons 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 objections, 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 disputes 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, vacations of office or inability to act, Chairman and Managing Directors, 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 his 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."

18. The respondent has, no doubt, admitted that Mr.S.K.Sinha is the CEO of the respondent-Company and he was appointed by Engineer-in-Chief of the respondent-Company. The respondent-Company is a Private Limited Company who is also a Joint Venture of NTPC and other Companies. He was appointed by the respondent

itself who is a party to the agreement and not by the Chairman and the Managing Director of the NTPC.

19. Let me now discuss the contentions of the respondent who has strongly opposed the prayers of the petitions. Firstly, the relevant provision of Sections 12 and 13 of the un-amended Act have been reproduced here as under:-

"12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12,

send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

Section 14 of the amended Act reads as under:

"14. Failure or impossibility to act.-(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if -]

- (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
- (b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

20. Section 12 of the amended Act reads as under:-

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.— The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.— The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

21. The petitioner had not specifically challenged the appointment of sole Arbitrator by filing the written statement before him within the period of 15 days, however, at the same time, in the letter of invocation which was prior to the appointment the petitioner had requested the respondent to appoint an independent Arbitrator i.e. before his appointment by the respondent. The extracts of the relevant part are reproduced here as under:

"In view of the above circumstances and inaction of APCPL towards settlement of our claims/payments, we hereby invoke Arbitration Clause of the Contract Agreement request your good self to appoint Arbitrator for settlement of our claims according to Clause 56 of GCC of the Contract Agreement.

However, we want to draw your attention to the legal point that once the order of part cancellation has been passed at the Highest Level of the Owner/Employer, hence, any forum for resolution of dispute constituted by the said authority & particularly its subordinate is of no legal consequence. It is a well settled proposition of law that nobody can be judge in its own cause.

Therefore, in light of the aforesaid settled position of law, we see an independent arbitration, through a retired Hon'ble Judge of the Hon'ble High Court so as to seek vindication of our grievance as mentioned in foregoing paras. Since the matter is of utmost importance, we hereby request that a panel of independent Arbitrators may kindly be made available to us so that we can choose from the panel. We would also be agreeable to the constitution of an Arbitral Tribunal comprising of nominee of your company; our nominee and both the nominee arbitrators appointing the Presiding/Umpire Arbitrator. We request that an early action in this regard may kindly be taken, in accordance with law."

22. In case the decisions referred by both the sides are read in a meaningful manner, it is evident that the reasonable apprehension must be based on cogent evidence. Raising the vague and general objection that the Arbitrator is biased with material is not sufficient reason as per un-amended Act as to why the Arbitrator should not have proceeded with the arbitration proceedings and if the Senior Officer had nothing to do with execution of the subject contract, there cannot be no justification for anyone doubting his independence or impartiality.

23. In ***Indian Oil Corporation Limited & Ors. v. Raja Transport Private Limited (supra)***, paragraph 48, it has been observed by the Supreme Court as under:

"If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

24. It is true that in various cases, many Courts have consistently held and observed that the policy of the Government/Statutory Authorities/Public Sector Undertakings to provide/appoint for arbitration by an Employee-Arbitrator, is a vexed problem, which requires reconsideration, which is more so in deference to the specific provisions of the new Act reiterating the need for an independent and impartial Arbitrator which is now being implemented by the Courts in India.

25. It is also settled law that nobody can be a judge in his own cause. A party to the Agreement cannot be an arbiter in his own

cause. The interest of justice and equity require that where a party to the contract disputes the committing of any breach of the condition, the adjudication should be by an independent person or body. As per un-amended Act, 1996 and the Amended Act, 2015, the main sum and substance is that if the provision of Section 12 is read, there would be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, such person was the controlling/ dealing authority in regard to the subject contract or if he is a direct subordinate to the Officer whose decision is the subject matter of the dispute, in such a case, it would be appropriate to appoint an independent Arbitral Tribunal to secure justice.

26. The case of the petitioner was that the main dispute between the parties, *inter-alia*, relates to the part cancellation of the Contract Works awarded to the petitioner. Clause 41 of the GCC provides for '*cancellation of contract in full or in part*'. Reading of the said Clause would show that upon fulfillment of either of the conditions, as prescribed under the various sub-clauses [sub-Clauses namely (a) to G)] as provided for in Clause 41 of the GCC, the "Accepting Authority" may by a written notice cancel the contract as a whole or only such items of work in default from the contract. Further, in terms of Schedule-A to the GCC, the "Accepting Authority" has been defined as the C.M.D., N.T.P.C. Ltd. or his authorized Executive.

27. It is a matter of fact that he is CEO and from the same department of the respondent Company who is interested/aggrieved party in the dispute. Admittedly, when first time it was informed to the petitioner by Sh.S.K.Sinha, sole Arbitrator by letter dated 28th

September, 2015 about his appointment, the petitioner on the next day itself i.e. 29th September, 2015 after the petitioner became aware about his name and status in the respondent-Company, it brought to the notice of the respondent that NTPC, who is part of the respondent's Joint Venture, had in similar circumstances appointed sole Arbitrator who is not from the same department being independent person, for which even the petitioner has no objection. Copy of the letter was also sent to the sole Arbitrator.

28. The petitioner has also mentioned in the petition that the appointed Arbitrator Sh.S.K.Sinha has also been previously involved in cases/Contract Works similar to the one involved in the present case (including the same) on account of his official capacity as held in the respondent-Company. In counter-affidavit, there is no denial on behalf of the respondent on this aspect as to whether Sh.S.K. Sinha was involved in the other cases of similar nature or not on account of official capacity as alleged.

29. The respondent cannot deny and has not disputed that by way of the said letter of invocation dated 29th July, 2015, the respondent was pointed out by the petitioner that as the order of part cancellation had been taken at the highest level of the respondent/employer, any forum for resolution of disputes constituted by the said authority and in particular, its subordinate was of no legal consequence. Therefore, the petitioner sought for appointment of an independent Arbitrator, preferably a retired High Court Judge to adjudicate the disputes and to provide the petitioner with a panel of independent Arbitrators from which it could choose an independent Arbitrator. In the alternative, the petitioner desired for appointment of a three Members Arbitral Tribunal, comprising of

one Arbitrator each appointed by both the parties, which nominee Arbitrators would then appoint the Presiding/Umpire Arbitrator.

30. In view of the circumstances mentioned above, I do not agree with the submissions of Mr. Vikas Singh that the petition is not maintainable as the petitioner has not raised its protest within 15 days as provided under Section 13 of the Act, as admittedly the name of Sh.S.K.Sinha was communicated to the petitioner by the respondent and the protest was raised by the petitioner by letter dated 29th September, 2015 with a copy thereof to the sole Arbitrator as well. Even otherwise, in the letter of invocation dated 29th July, 2015 the first demand was made by the petitioner to appoint an independent sole Arbitrator. In the present case, before the commencement of proceedings, the Arbitrator had knowledge about the said objection raised by the petitioner. No doubt, Section 13 provided a statutory period of 15 days time to raise the protest. The petitioner in the present case in advance, i.e. 29th July, 2015 itself raised its grievance. The notice of appointment of Mr.Sinha was issued on 26th September, 2015 by the respondent. The petitioner within three days referred its earlier letter and raised its objections with the copy thereof to the sole Arbitrator. Therefore, I do not agree that there is no compliance at all.

31. The other objection of Mr. Vikas Singh has also no force that since the petitioner has joined the proceedings, therefore, the present petition is not maintainable. Admittedly, the petitioner appeared before the Arbitrator under protest and informed him as well as the respondent in advance that the petitioner has objection for his appointment.

32. Although the plea/objection of the petitioner may not be covered under the un-amended Act but it is directly covered under the Amended Act, 2015. No doubt, the invocation is based on un-amended Act i.e. on 29th July, 2015. The amendment was effective from 23rd October, 2015 but the petitioner in its invocation letter itself has requested for an independent sole Arbitrator who had informed the respondent that the appointed Arbitrator is an Executive of the respondent-Company and he has been involved in the execution of some contracts. The appointment of an independent Arbitrator will strength the cause of justice and it will enhance the faith of each party in the arbitral process.

33. The Fifth Schedule i.e. supplementary provision read with Section 12(l)(b) mandates that the appointment made by any party which would give rise to justifiable doubts as to the independence or impartiality of Arbitrator if he has relationship with the parties or counsel or the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, the same would give rise to justifiable doubts. Similarly, the Seventh Schedule read with Section 12 (5) mandates that there shall not be any Arbitrator's relationship with the parties or counsel who should also not be an employee, consultant, advisor or has any other past or present business relationship with a party.

34. When all these facts were pointed out to the learned counsel for the respondent and ask him to take the instruction as to whether his client is agreeable to provide the list of panel Arbitrators of the respondent-Company so that the independent Arbitrator be appointed, his answer was that the matter be decided on merit.

35. In the present case, this Court finds reasonable apprehension in the mind of the petitioner. It is not a vague and general objection. The reasons are mentioned in earlier part of paras 25 & 26 of my judgment. This case is at the initial stage. The Arbitrator as per clause, appointed by the respondent is the CEO of the respondent Company and from the same department. The respondent Company is a Private Limited Company.

36. The most surprising factor is about the language of the arbitration clause. For the sake of convenience, the relevant part of clause is extracted as under:

"It is also a term of his 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."

The language used in part of arbitration clause is very peculiar and unacceptable to the Court. It indicates that if any Arbitrator as per the respondent's choice is not appointed, the Company would not even go for arbitration. The said expression does not convey the message of neutrality and the air of independence and/or impartiality, though the respondent at the end of the day may be impartial. Even on applying this simple logic of any case, in order to get any work of the project, party has to accept the said arbitration clause on dotted lines, otherwise, it may not be awarded the work at the project.

37. It is common parlance oft-quoted aphorism *"Not only must Justice be done; it must also be seen to be done."* The reason is that rules are moral constructs that are meant to serve higher value. The amendment of 2015 emphasize that the existence of any relationship or interest of any kind is likely to give rise to justifiable

doubts as to his neutrality is to be avoided or any employee, manager, director, or has past or present business or has a controlling influence, relationship with a party to the dispute should not be appointed as an Arbitrator. Similarly, it is rightly mandated in the Fifth Schedule of the Amended Act, 2015 (3 of 2016) that if the Arbitrator has within the past three years been appointed on two or more occasions by one of the parties and the Arbitrator has served within the three years in another arbitration on a related issue involving one of the parties, his appointment would give rise to justifiable doubts as to the independence or impartiality of arbitrators. No doubt, the invocation was about three months prior to amendment. But the Court has to keep in mind about the purpose and scope of the Act.

38. In the present case, no doubt, the invocation was on the basis of un-amended Act but still under Section 12 of the Act would give the similar indication. The sole Arbitrator appointed by the respondent admittedly is CEO and Executive of the respondent-Company who is also from the same office/department. In order to maintain the neutrality, or to avoid any doubt in the mind of the petitioner and the reasons given in the petition, it would be appropriate that independent sole Arbitrator should be appointed as ultimately neutral person has merely to decide the dispute between the parties. Even, the object and scope of the Act says so, that an arbitration procedure should be fair and unbiased. Thus, the appointment of Mr.S.K. Sinha, CEO of the respondent Company is terminated and once the Arbitrator's appointment is terminated, the Court can consider the prayer of the petitioner.

39. The prayers in both the petitions are allowed, to the extent that within four weeks, the respondent would suggest the names of three panel Arbitrators which are from different departments of the respondent to the petitioner who may choose one of them within the next two weeks and the said Arbitral Tribunal would adjudicate the disputes between the parties. In failure to do so by the respondent within the time granted, the petitioner would be entitled to revive the petitions and under those circumstances, the Court shall appoint the sole Arbitrator from the list maintained by the Delhi International Arbitration Centre.

40. Both petitions are accordingly disposed of. No costs.

JULY 29, 2016

**(MANMOHAN SINGH)
JUDGE**

