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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P.(T) 39/2015

GANGOTRI ENTERPRISES LIMITED

..... Petitioner

Through: Mr. Subhiksh Vasudev, Mr. Mayank
Bamniyal and Mr. Ishaan Madaan, Advocates.

versus

NATIONAL THERMAL POWER CORPORATION
LIMITED

..... Respondent

Through: Mr. G.K. Mishra, Ms. Monika Singh and
Mr. Ayander Mitra, Advocates.

AND

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O.M.P.(T) 42/2015

GANGOTRI ENTERPRISES LIMITED

..... Petitioner

Through: Mr. Subhiksh Vasudev, Mr. Mayank
Bamniyal and Mr. Ishaan Madaan, Advocates.

versus

NATIONAL THERMAL POWER CORPORATION
LIMITED

..... Respondent

Through: Mr. G.K. Mishra, Ms. Monika Singh and
Mr. Ayander Mitra, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

17.11.2016

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1. These are two petitions under Section 14 (2) of the Arbitration and Conciliation Act, 1996 ('Act') filed by Gangotri Enterprises Limited

(‘GEL’) against the National Thermal Power Corporation Limited (‘NTPC’).

2. In OMP (T) 39 of 2015, the following reliefs are claimed:

(a) to declare that the mandate of the sole Arbitrator, Shri K.S. Garbyal, stood terminated *ipso jure* on 7th February 2015 and consequently, to appoint an independent Arbitrator to adjudicate the disputes between the parties arising out of the letter of Award (‘LOA’) dated 30th September, 2009;

(b) to set aside the order dated 7th April 2015 and 13th May 2015 passed by the sole Arbitrator in the said arbitral proceedings;

(c) as an alternative to prayer (a), to quash the impugned order dated 13th May 2015 passed by the sole Arbitrator with liberty to GEL to file its claim petition before the sole Arbitrator.

3. As far as OMP (T) 42 of 2015 is concerned, a similar set of prayers is made except that it is in respect of an LOA dated 11th January 2010.

4. The background to the present petitions is that the GEL was awarded by the NTPC the contract for execution of the work of “Ash Slurry Pipe/Road Embankment Works Package for Barh Super Thermal Power Project, Stage-II”. While LOA dated 30th September 2009 was for stage-II of the project, LOA dated 11th January 2010 was for Stage-I of the project. The period within which the project had to be completed was 14 months. In respect of

both projects, formal contract agreements were entered into between the parties.

5. The disputes arose between the parties in respect of both contracts. In terms of the arbitration clause 56 of the General Conditions of the Contract, the disputes that arose between the parties had to be referred to the sole arbitration of the General Manager of NTPC, and if the General Manager was unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director (C&MD), NTPC Limited, willing to act as such arbitrator. Clause 56 further provided that there would be no objection if the Arbitrator so appointed was an employee of NTPC Limited and that he had to deal with the matters to which the contract related 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. If the arbitrator to whom the matter was originally being referred to was unable to act, being transferred or vacating his office, the C&MD would appoint another person to act as Arbitrator. If it was not possible for the person appointed by the C&MD to act as Arbitrator, then the matter was not to be referred to arbitration at all.

6. GEL invoked the arbitration agreement in respect of both contracts on 4th May 2013. With the named Arbitrator i.e., the General Manager not entering upon reference within 30 days thereafter, GEL filed Arbitration Petition Nos. 270 and 271 of 2013 in this Court. The Court disposed of the said petitions by two separate orders dated 21st January 2014. The Court noted that GEL had not exhausted the arbitration agreement between the parties. It

was noted that after failure of the General Manager to enter upon reference, GEL should have approached the CMD, NTPC for appointment of an Arbitrator rather than straightway approaching the Court. While in one case the GM had entered upon reference after filing of the reference, in the other, the C&MD appointed Shri K.S. Garbyal, the Project Manager to enter upon appearance who issued notice to the parties vide letter dated 28th August 2013. The Court was of the view that since the Arbitrator stood duly appointed before the invocation of the arbitration agreement before the C&MD, the Court was not inclined to entertain the petitions.

7. Meanwhile, Shri K.S. Garbyal proceeded with the arbitration. On 7th February 2015, GEL addressed a letter to Shri K.S. Garbyal pointing out that he had entered in the contract on behalf of NTPC as its employee and, therefore, could not adjudicate the disputes arising out of such contract as he would not be in a position to act independently and impartially. Reference was made to the decision in *Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. (2009) 8 SCC 520*.

8. On 7th April 2015, the sole Arbitrator dealt with the above letter dated 7th February 2015. By a reasoned order, the sole Arbitrator rejected the plea of GEL for change of Arbitrator. The arbitration proceeding was next fixed for 25th April 2015 with a direction to GEL to file its claim. The order stated that if GEL failed to appear then the proceedings will continue ex parte.

9. On 25th April 2015, the sole Arbitrator noted that GEL had neither filed a statement of claim nor had sought extension of time for filing the claim. A final opportunity was granted to GEL to file its claim within 15 days

thereafter. The next date was fixed for 13th May 2015.

10. On 13th May 2015, the sole Arbitrator held the proceedings and noted that nobody had appeared on behalf of GEL and that the statement of claims had also not been filed. GEL had failed to furnish sufficient reason for not filing such statement of claims. The learned Arbitrator, accordingly, terminated the arbitration proceedings for the default of GEL.

11. In the meanwhile on 12th March 2015 and 4th April 2015, NTPC “encashed the bank guarantees furnished to it” by GEL in respect of both contracts and also terminated the contracts.

12. This Court has heard learned counsel for the parties. As far as prayer for setting aside the order dated 7th April 2015 is concerned, Sections 13(4) and 13(5) of the Act are a complete answer and read as under:

"13. Challenge procedure. (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.

13. It is, therefore, apparent that where the party does not succeed in the challenge to the Arbitrator, such party has to await the final Award and then raise it as a ground regarding the impartiality of the Arbitrator. The question of setting aside the order dated 7th April 2015 in these proceedings, therefore, does not arise.

14. As regards prayer under Section 14 for appointment of another Arbitrator by terminating the mandate of Shri K.S. Garbyal, in view of the decision of the Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited*** 180 (2011) DLT 714 which has been followed by this Court in ***Steel Authority of India Ltd. v. British Marine PLC. (OMP (T) (COMM.) 48/2016 decided on 20th October 2016)***, such recourse is not available to the Petitioner having failed in the challenge under Section 12 read with Section 13 of the Act.

15. As regards the prayer for setting aside the order dated 13th May 2015 terminating the arbitration proceedings, learned counsel for the Petitioner has relied upon the decision of Supreme Court in ***Lalitkumar V. Sanghavi v. Dharamdas V. Sanghavi*** (2014) 4 SCC 255. He submitted that this Court can, in the present petitions, under Section 14 (2) of the Act examine the legality and validity of the above order passed by the learned Arbitrator.

16. Having heard learned counsel for the parties, the Court is of the view that notwithstanding that GEL failed to file statement of claim within the time granted to it by the learned Arbitrator, it must be given one last opportunity to do so, subject to terms.

17. While it is true that the learned Arbitrator did give the Petitioner a number of opportunities, GEL appears to have awaited the outcome of the challenge procedure before deciding to file a claim. Even thereafter, GEL appears not to have gone ahead with filing its claim in the expectation that it could further question the order passed by the learned Arbitrator rejecting the challenge.

18. It is pointed out by learned counsel for the Petitioner that the correctness of the decision of this Court in *Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited* has been considered by the Supreme Court although no stay of the said judgment has been granted. It is arguable, therefore, that the stand of GEL that the decision of the learned Arbitrator dated 7th April 2015 rejecting GEL's challenge merits consideration was justified.

19. From the point of view of NTPC, if GEL is given one final opportunity to file its statement of claims, subject to terms, no serious prejudice can be said to be caused to it. The sole Arbitrator before whom the proceedings will continue, is an in-house Arbitrator, as far as NTPC is concerned. It may not be prejudicial even in terms of costs.

20. Keeping in view the above factors, the Court issues the following directions:

(i) Subject to the GEL paying costs of Rs.50,000 in each of the petitions to NTPC not later than 16th December 2016 and placing before the learned Arbitrator i.e., Shri K.S. Garbyal proof of such payment of costs, the order dated 13th May 2015 passed by the sole Arbitrator is hereby set aside.

(ii) GEL will, on or before 16th December 2016, file its statement of claims in each of the matters before Shri K.S. Garbyal and no further time will be granted for that purpose.

(iii) The matter will be fixed before Shri K.S. Garbyal on 16th December 2016 or on any other date and time that may be convenient to him and

communicated to the parties at least one week in advance.

(iv) No unnecessary adjournment will be sought by either party for any purpose including completion of pleadings, filing of documents, examination of witnesses etc. They will strictly abide by the time schedule set by the sole Arbitrator.

(v) The plea of GEL as regards impartiality of the sole Arbitrator and all other contentions it may have, including those raised in these petitions are reserved to be advanced at the appropriate stage in accordance with law.

21. The petitions are disposed of in the above terms.

S. MURALIDHAR, J

NOVEMBER 17, 2016

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