

\$~2

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

+ ARB.P. 328/2016 & IA Nos. 10171/2016 & 2051/2017

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD

..... Petitioner

Through: Mr Manoj Kumar Das, Advocate.

versus

NTPC LIMITED, THROUGH CMD & ANR. Respondents

Through: Mr Puneet Taneja and Ms Shaheen,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

16.02.2017

1. National Building Construction Corporation Limited, a Public Sector Undertaking, has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes between the parties.

2. The petitioner has relied on the arbitration clause, as contained in the General Conditions of the Contract, which reads as under:-

“ARBITRATION AND LAWS

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 question, claim, right matter or thing whatsoever in any way arising out of or relating to the

contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure 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 General Manager of National Thermal Power Corporation Ltd., and if the General Manager' is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, National Thermal Power Corporation Ltd., willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd., and that he had to deal with the matters to which the contract relates and that in the courses 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, vacation of office or inability to act, Chairman and Managing Director, 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 this contract that no person other than a person appointed by C.M.D., N.T.P.C. 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.

Subject as aforesaid the provision of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.

The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

The work under this contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator shall give a separate award in respect of each disputes or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitration in his sole discretion.

The award of the arbitrator shall be final, conclusive and binding on all parties to this contract.

The cost of arbitration shall be borne by the parties to the disputes, as may be decided by the arbitrator(s).

In the event of disputes or differences arising between one public sector enterprise and a Govt. Department or between two public sector enterprise the above stipulations shall not apply, the provisions of B.P.E. office memorandum No.BPE/GL-001/76/MAN/2[2{110-75-BPE(GMI-1)}] dated 1st January, 1976 or its amendments for arbitration shall be applicable.”

3. It is seen that the respondent is also a Public Sector Undertaking. The principal objection taken by the respondent in this proceeding is that the arbitration clause is not applicable since both the petitioner and the respondent are Public Sector Undertakings and, therefore, by virtue of the last sub para of the arbitration clause, the arbitration clause is not operative

in respect of the parties.

4. According to the respondent, the disputes between the parties are to be resolved by reference to the Permanent Machinery of Arbitration (PMA) as notified under the Office Memorandum issued by the Ministry of Heavy Industries and Public Enterprises from time to time.

5. The learned counsel for the petitioner submits that in terms of the Office Memorandum dated 22.01.2004, it was necessary for the parties to have entered into the arbitration clause as annexed with the notification, for any reference to be made to PMA. He submits that since the parties have not entered into an arbitration agreement in terms of that Office Memorandum, the dispute resolution mechanism of PMA would not be applicable and, consequently, the arbitration clause as contained in the General Conditions of the Contract would apply.

6. This Court finds that the above submission is not merited as irrespective of whether PMA is applicable or not, the arbitration clause as set out in the General Conditions of Contract is not applicable by virtue of the last sub paragraph which expressly provides that *“in the event of disputes or differences arising between one public sector enterprise and a Government Department or between two public sector enterprises the above stipulations shall not apply”*.

7. This Court is unable to accept that an arbitration agreement exists between the parties. Accordingly, the present petition is dismissed.

VIBHU BAKHRU, J

FEBRUARY 16, 2017
MK