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

+ **O.M.P. (T) (COMM.) 38/2018**

SIMPLEX INDUSTRIES LTD.

..... Petitioner

Through: Dr P. C. Markanda, Sr. Advocate with
Mr Rajesh Markanda and Mr Dhruv
Sharma, Advocates.

versus

NATIONAL THERMAL POWER CORPORATION
& ANR.

..... Respondents

Through: Mr Puneet Taneja, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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07.05.2018

IA No.6288/2018

1. Allowed, subject to all just exceptions.

O.M.P. (T) (COMM.) 38/2018 & IA No. 6287/2018

2. The petitioner has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“(i) Set aside / dismiss the appointment letter dated 31.01.2018 (Annexure P-5) issued by Additional General Manager (Law) of Respondent No. 1 purportedly conveying decision of the Chairman and Managing Director, Respondent No.1 vide which the arbitrator was appointed to act as Sole Arbitrator and terminate the mandate of the arbitrator to act as arbitrator.”

3. The grievance of the petitioner, as articulated in the petition, is that (i) the appointment of the Arbitrator is not in terms of the arbitration clause; (ii) that the Arbitrator is not competent to act as an Arbitrator in terms of Schedule VII of the Act as introduced by virtue of the Arbitration and Conciliation (Amendment) Act, 2015; (iii) that the appointment of the Arbitrator is invalid in view of the decision of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: AIR 2017 SC 3889***; and (iv) that the Arbitrator does not possess the adequate expertise to adjudicate the disputes between the parties.

4. Mr Markanda, learned senior counsel appearing for the petitioner has drawn the attention of this Court to the biodata of the Arbitrator, which indicates that the Arbitrator has extensive experience in the field of audit and accounts. He had served the Government of India as Deputy CAG of India and had retired on 30.06.2017.

5. Mr Markanda earnestly contends that the disputes involved in the present petition between the parties are highly technical in nature. He has also drawn the attention of this Court to the Minutes of the Discussion held between the parties, which include terms and abbreviations that are not comprehensible to a person who is not well versed in the subject of Engineering. He, therefore, submits that apart from a duly qualified engineer no other person will be able effectively to act as an Arbitrator.

6. This Court is not persuaded to accept the aforesaid contention. The disputes relating to the party may relate to Piling works and may involve certain technical issues. However, the same cannot be a ground for terminating the mandate of the Arbitrator. Clearly, both the parties would be at liberty to produce experts, if necessary, to assist the Arbitral Tribunal

to decide the matter. Merely because a note on discussions indicates abbreviations and terms that are not commonly used, does not mean that a person who is not a qualified engineer will be incompetent to adjudicate the subject disputes.

7. At this stage, it is relevant to refer to the arbitration clause in the agreement entered into between the parties. The same is set out below:-

“ARBITRATION

Except where otherwise provided for in the contract all questions and disputes shall be referred to the sole arbitration of the General Manager of NTPC Limited (Formerly 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, NTPC Limited (Formerly National Thermal Power Corporation Ltd.) willing to act as such arbitrator.....”

8. The contention that the appointment of the Arbitrator is not in terms of the arbitration clause is also unmerited. The arbitration clause provides for the General Manager of NTPC to be appointed as an Arbitrator. This is no longer permissible with the introduction of sub section (5) in section 12 of the Act. Thus, the Arbitrator was required to be appointed by the Chairman and Managing Director of the respondent, which undisputedly has been done.

9. The reliance placed on the decision of the *TRF Ltd. v. Energo Engineering Projects Ltd. (supra)* is also misplaced. In that case, the arbitrator designated in the agreement was disqualified from acting, and it is in that context that the court had held that the arbitrator is disqualified from acting as an arbitrator and his nominee also could not act as an arbitrator. In this case, it is the Chairman-cum-Managing Director of the respondent is not

to act as an arbitrator; he is only the appointing authority. The Arbitrator so appointed is not in the capacity as a nominee of the Chairman-cum-Managing Director of the respondent, who has to act in his place.

10. Since the Chairman-cum-Managing Director was named as an appointing authority he is well within his right to appoint the Arbitrator in terms of the agreement entered into between the parties.

11. The contention that the Arbitrator is disqualified under the seventh schedule to the Act is, plainly, bereft of any merit.

12. The petition is, accordingly, dismissed and the pending application is also disposed of.

MAY 07, 2018
MK

VIBHU BAKHRU, J