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

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Pronounced on: 06.08.2018

+ ARB.P. 333/2017

RATNA INFRASTRUCTURE PROJECTS PVT. LTD..... Petitioner

Through: Ms. Kiran Suri, Sr. Advocate with
Mr. Purvesh & Mr. Abhay N Dass
Advocates

versus

MEJA URJA NIGAM PRIVATE LIMITED (MUNPL)....Respondent

Through: Mr. Monish Panda with Ms. Mrinal
Bharat Ram, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The case of the petitioner is that the petitioner was awarded the "Work of Site Leveling and Infrastructure Works Package for Meja Thermal Power projects" vide Letter of Award of work contract on 18.05.2010. The parties executed a contract on 21.09.2010. The respondent is a joint venture company of NTPC and Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. Clause 56 of the Agreement i.e. the Arbitration Clause reads as follows:-

"56. 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 of 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 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. There will be no objection 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 dispute 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, 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 this 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.

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

3. Vide amendment No.1 the contract was amended as under:-

“A) the CMD NTPC stood replaced with CEO MUNPL,

B) in the line 9, 10 and 11, it was mandated to replace

“Shall be referred to unable” with “Shall be referred to the Sole arbitration of the Project-in-Charge concerned of MUNPL and if the Project-in-Charge is unable.....”

C) Arbitration Act 1940 is to be read as Arbitration and Conciliation Act 1996 (necessary Change may also be made in proforma Contract Agreement).”

4. It is pleaded that during the currency of the agreement, disputes arose between the parties regarding the payments demanded by the petitioner. The petitioner invoked the arbitration Clause on 01.03.2013. In response to the said communication, the respondent appointed the then Project In-charge, namely, Mr. Narsingh as the Sole Arbitrator to adjudicate the disputes between the parties. He marked the case as Arb. Case No. 1/2013.

5. However, subsequently on 17.01.2014, the respondent terminated the contract. On 22.02.2014, the respondent raised a demand of Rs.202.43 crores on the petitioner on account of anticipated risk and cost as well as damages/losses. The respondent thereafter also invoked the arbitration Clause on 22.03.2014. Mr. Narshingh was again appointed as the Sole Arbitrator vide communication dated 02.04.2014 of the respondent. The new arbitration case based on the invocation by the respondent was marked as Arb. Case No. 1/2014.

6. It is the case of the petitioner that in the new case being Arb. Case. No. 1/2014, it moved an application under Section 23 of the Arbitration Act on 16.11.2015 seeking leave to file a counter claim for which it had

allegedly reserved its rights in the statement of defence. On 26.05.2016, after hearing the arguments the learned Arbitrator pronounced the order rejecting the application of the petitioner on the ground that there was inexplicable delay in filing the application.

7. While the arbitration proceedings were pending, the petitioner moved a petition under Section 11(6) of the Arbitration Act on 23.08.2016 before this court being Arb. Pet. No.537/2016. The details of the said petition are not stated in the present petition. A perusal of the order dated 11.04.2017 passed by this court, which is attached to the present petition, shows that the plea of the petitioner in the said petition moved under section 11 of the Arbitration Act, was that the sole arbitrator had to be project In-charge and that Mr.Narsingh sole arbitrator appointed by the respondent was no longer the project In-charge and could not continue. Hence, termination of the mandate of the Arbitrator was sought. The petitioner earlier had filed an application under sections 12 and 13 of the Arbitration Act before the learned arbitrator which was dismissed. Hence, the new petition under Section 11(6) of the Act. As a response to the petition, the respondent on 21.08.2016 appointed Sh.Ramesh Kher, one of its General Manager as the new arbitrator in place of Mr.Narsingh. This petition was disposed of on 11.04.2017. This court held that in view of the arbitration clause i.e. Clause 56 of the General Conditions of Contract, the amended arbitration Act would be applicable. Hence in view of section 12(5) of the Arbitration Act, Mr.Ramesh Kher being a serving General Manager of the respondent Company would be disqualified to be an arbitrator. It was in these facts, the petition was allowed and the relief was granted to the petitioner. Vide order dated 11.04.2017 Hon'ble Mr.Justice G.S.Singhvi, Retired Judge, Supreme

Court was appointed as the sole arbitrator.

8. In the meantime while the petition under Section 11(6) of the Act was pending before this court, on 06.01.2017 by a communication addressed to the respondent, the petitioner again sought adjudication of more disputes by way of arbitration for its losses/damages amounting to Rs.118.27 crores. It is the grievance of the petitioner that despite receipt of this invocation request dated 06.01.2017, the respondent has failed to appoint a sole arbitrator in terms of Clause 56 of the agreement. Hence, the present petition.

9. The respondent have opposed the present petition and have filed their reply. It has been pleaded in the reply that during the subsistence of the agreement, as disputes arose between the parties the petitioner invoked the arbitration Clause on 01.03.2013 i.e. the first invocation requesting the Appointing Authority to refer the disputes to arbitration. Accordingly, Mr.Narsingh was appointed as the Sole Arbitrator. The petitioner filed its claim in the said arbitration proceeding which was numbed as Arb. Case No. 1/2013 by the learned arbitrator. Again, the petitioner issued a letter dated 28.08.2013 being a second invocation addressed to the respondent where the petitioner made various allegations and gave various reasons for the work being incomplete. Further, claims were also made regarding outstanding amounts being due. The petitioner again requested the Authority to refer the further disputes to the Sole Arbitrator. It is stated that the Appointing Authority again referred all the disputes raised by the petitioner to the Sole Arbitrator-Sh.Narsingh on 16.09.2013. This was the second reference to Arbitration on the request of the petitioner. The Sole Arbitrator permitted the petitioner to file an additional statement of claim by 15.10.2013 vide its communication dated 28.09.2013. It is pleaded that despite reference of the

disputes to arbitration at the request of the petitioner and an opportunity granted by the learned Arbitrator to file an additional claim, the petitioner chose not to file any additional claim in Arb. Case No. 1/2013.

10. The respondent confirms that the contract was terminated on 17.01.2014. The respondent also confirms invoking of the arbitration clause which disputes were also referred to Sh.Narsingh. The respondent filed its statement of claim and the learned Arbitrator marked the said case as Arb.Case No.1/2014. The respondent further pleads that in the said Arb.Case 1/2014, the petitioner filed its statement of defence on 23.08.2014 and reserved its right to file a counter claim. On 25.05.2015, the learned Sole Arbitrator recorded the statement of the petitioner that no further pleadings were to be filed by the petitioner. However, despite the above statement after a delay of more than one year, it is stated that belatedly the petitioner moved an application under Section 23 of the Arbitration Act seeking leave of the learned Arbitrator to file a counter claim. This plea of the petitioner was rejected by the learned Arbitrator on 26.05.2016.

11. Again, now the petitioner on 06.01.2017 by the third invocation letter being a communication addressed to the respondent requested that further disputes be referred to arbitration.

12. Hence, the respondent have strongly opposed the petition. I may spell out their objections in their reply. Firstly it has been pleaded that the communication dated 06.01.2017 raises the same disputes that were raised by the petitioner in its second invocation letter dated 28.08.2013. Pursuant to the said letter dated 28.08.2013, the disputes were referred to the Sole Arbitrator i.e. the second reference to Arbitration. However, the petitioner did not file any additional claim even after permission was granted by the

learned Arbitrator. It is pleaded that now 3 years thereafter, the petitioner has chosen to now again invoke the arbitration clause vide communication dated 06.01.2017 i.e. the third invocation seeking appointment of the learned arbitrator for the same alleged outstanding payments. It is stressed that the disputes now raised sought to be in the present petition already stand referred to the learned Sole Arbitrator on 16.09.2013. Hence, it is pleaded that this court cannot again refer the said disputes to arbitration or appoint an arbitrator under Section 11 of the Arbitration Act. Further it is submitted that the plea raised by the petitioner are barred by res-judicata/constructive res-judicata and on the analogy of Order 2 Rule 2 CPC

Secondly, it is pleaded that it was the petitioner who filed the petition under Section 11(6) under the Amended Act on 23.08.2016 for appointment of a new arbitrator in Arb. Case No. 1/2013 and Arb. Case 1/2014. These petitions were disposed of on 11.04.2017. The petitioner however did not file the present petition at that time for appointment of an arbitrator along with the earlier petitions. The petitioner waited for the disposal of the earlier petition under Section 11(6) of the Arbitration Act and has now chosen to file the present arbitration petition. It is pleaded that the petitioner is only trying to prolong the on-going arbitration proceedings.

The third contention raised by the respondent is regarding limitation. It has been pleaded by the respondent that the petitioner made the second invocation on 28.08.2013. The disputes were referred to Arbitration. An opportunity was granted by the learned Arbitrator to the petitioner to file its additional claims. No such steps were taken by the petitioner. Now, the petitioner has again sought to raise those claims by its third invocation dated 06.01.2017. It is pleaded that the claims now sought to be raised by the

petitioner are clearly barred by limitation.

13. I have heard learned counsel for the parties. Parties have also filed written submissions.

14. Learned senior counsel for the petitioner has urged that the cause of action in the present case arises on 17.01.2014 when the contract was wrongly terminated by the respondent and thereafter. The present invocation is of 06.01.2017 and is hence within the period of limitation being within the period of three years. It is further pleaded that merely because the learned Arbitrator had dismissed the application under Section 23 of the Arbitration Act cannot be a ground to deny the right to the petitioner to file its claim keeping in view that the claim of the petitioner is within limitation. The said dismissal of the application by the learned Arbitrator cannot operate as *res-judicata*. It is also denied that the disputes raised in the second invocation dated 28.08.2013 are identical to the disputes raised in the third invocation letter dated 06.01.2017. It is pleaded that the disputes now raised on 06.01.2017 arise on illegal termination of the contract by the respondent on 17.01.2017.

15. Learned counsel for the respondent has reiterated the pleas raised in the reply. Learned counsel has relied upon the judgment of the Supreme Court in ***K.V. George v. Secretary Government Water and Power Department, Trivendram, 1989 4 SCC 595*** to contend that the claim now sought to be raised by the petitioner is barred by the principles of *res-judicata*/constructive *res-judicata* and also Order 2 Rule 2 CPC. It is pleaded that the petitioner cannot repeatedly keep invoking the arbitration clause in this manner. Further, when the invocation was done earlier, all disputes should have been sought to be referred to arbitration.

16. I may deal with the first objection of the respondent i.e. that the disputes already stand referred to Arbitration. It is a matter of fact that on 28.08.2013 i.e. the second invocation, the petitioner had invoked the arbitration clause again with a request that the disputes be referred to the Sole Arbitrator. The respondent accepted the said request of the petitioner on 16.09.2013 and referred the disputes to Mr. Narsingh, the learned Arbitrator appointed on the first invocation of the petitioner. On 28.09.2013, the learned Arbitrator permitted two weeks' time to the petitioner to file an additional claim in Arb. Case No. 1/2013. It is not denied that no additional claims were filed by the petitioner.

17. I may look at the two communications dated 28.08.2013 (Second Invocation) and 06.01.2017 (Third Invocation). The communication dated 28.08.2013 had been issued before the termination of the contract on 17.01.2014. In the communication dated 28.08.2013, the petitioner raised the following claims:-

S.No.	Description	Amount (Rs.)
1	Para 3 Blasting Works	27,28,26,000
2.	Para 5 Excavation Works	86,00,000
3.	Para 5 Soil Works	44,04,000
4.	Boundary Wall Excavation	9,00,000
5.	TD-7&8 Excavation	17,85,500
6.	Kheri Road Drain Excavation	1,25,000
7.	Porta Cabin (FOA)	16,00,000
8.	Porta Cabin Electrical	4,50,000
9.	Reservoir Earth Work	23,00,000

18. In its communication dated 06.01.2017 (3rd invocation), the petitioner has reiterated claims No. 2 to 9 above. However, additional claims have also been sought to be raised. The additional claims are explained as follows:-

“Further, on the basis of the aforesaid termination, which in the view of the Contractor was totally illegal in the given facts and circumstances and the terms of the Contract, M/s. MUNPL encashed three Bank Guarantees of the Contractor, cumulatively amounting to Rs.13,03,57,106/- on 21.01.2014, thereby, committing further illegality, apart from inflicting huge losses to the Contractor and the same was in addition to the non-payment of the pending/outstanding amounts of the Contractor, which were overdue against the work done, and the costs incurred by the Contractor in the Extended Period of the Contract till the date of termination that have not been paid till date.

Needless to say that the Contractor also suffered loss of profits due to the said illegal termination of the Contract, as at the time of the illegal termination, the Contractor had executed work of approximately Rs. 85,17,29,665/- of billed works and unbilled executed value of works amounting to Rs.1,69,54,461/- (excluding other pending payments for different items as summarized later in this submission) out of a total Contract Price of Rs.137,21,75,327/-. Therefore, Contractor suffered loss of profits @ 10% in the balance Contract value of Rs.50,34,91,201/- along with interest accrued thereon @ 18%/annum, calculated from the date of illegal termination of the Contract. It may be noted that unbilled amount equivalent of works executed remains unpaid to the Contractor till date and, therefore, the Contractor is also entitled to interest @ 18% from the date of termination till the realization of the same. Please note that the interest shall also accrue on the unbilled value of the works so executed by the Contractor.

Further, the Contractor suffered loss of interest due to the

encashment of the Bank Guarantees @ 18% of the total encashed amount of Rs. 13,03,57,106/- from the date of encashment; please note that the same is in addition to the refund of the encashed amount as principal. Additionally, LD illegally retained by M/s.MUNPL, amounting to Rs.2,24,52,847/-, is also liable to be returned to the Contract with interest @ 18%/annum from the date, first demand for the same was made.”

19. The above claims are further elaborated in Exhibit 1 and Annexure 1 to Annexure 9 to the above communication. It is claimed that substantial part of this claim arises subsequent to the termination of the contract by the respondent on 17.01.2014.

20. It is clear from the perusal of the above two invocation letters, namely, the second invocation dated 28.08.2013 and the third invocation dated 06.01.2017 that there is some overlapping in the claims raised in the two communications. The commonality between the two invocations relates to claims 2 to 9 as described above which form part of the second invocation dated 28.08.2013. Other than this overlapping, there is no commonality between the two invocations. In fact, the bulk of the claims which are sought to be raised by the third invocation letter dated 06.01.2017 as noted above arise after termination of the contract on 17.01.2014 and could not have been raised along with the second invocation. Hence, to that extent the submission of the learned counsel for the respondent cannot be accepted that the two invocations deal with the same set of claims. It cannot be said that all the disputes raised in the third invocation dated 06.01.2017 stand referred to arbitration.

21. The next contention that was strongly raised by the respondent is the issue of res-judicata/constructive res-judicata/Order 2 Rule 2 CPC. It has

been pleaded that when Mr.Narsingh was appointed as the Sole Arbitrator and he was hearing the Arb. Case. No. 1/2014 which was the case initiated by the respondent, the petitioner while filing its statement of defence on 23.08.2014 had reserved its right to file a counter claim. Thereafter after a delay of more than 1 year, it moved an application under Section 23 of the Arbitration Act seeking leave to the learned Arbitrator to file a counter claim. This plea was rejected on 26.05.2016.

Further pursuant to the second invocation dated 28.08.2013, the matter was referred to the learned Sole Arbitrator Sh. Narsingh. Despite opportunity granted by the learned Arbitrator, no claim petition was filed.

In view of the above two events, it is pleaded that the claim of the petitioner is barred by res-judicata/constructive res-judicata/Order 2 Rule 2 CPC.

22. For the reasons stated herein below, I do not propose to go into the merits of the above contentions raised by the learned counsel for the respondent. It would be appropriate that these issues are decided by the learned Arbitrator. I may only note that in the two arbitration proceedings that had commenced which the former learned Arbitrator-Sh. Narsingh had marked as Arb. Case. No. 1/2013 and Arb. Case. No. 1/2014, the Award has not been passed.

23. I may also note that this court in its order dated 11.04.2017 in Arb. Pet. No. 537/2016 which was filed by the petitioner under Section 11(6) of the Arbitration Act/also reported as ***Ratna Infrastructure Projects Pvt. Ltd v. Meja Urja Nigam Pvt. Ltd. (MUNPL), 2017 SCC OnLine Delhi 7808*** had noted that in terms of the arbitration Clause, it would be the Amended Arbitration Act as amended w.e.f. 24.10.2015 that would apply to the

present petition. This court had accordingly, terminated the mandate of the Arbitrator appointed by the respondent as he was an employee of the respondent and had appointed Justice G.S.Singhvi (Retd.) as the Sole Arbitrator to adjudicate the disputes between the parties.

24. As the Amended Arbitration Act is what is applicable, reference may be had to Section 11(6-A) of the Arbitration Act. The same reads as follows:-

"xxx

6-A The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

xxx"

25. Reference may also be had to the judgment of the Supreme Court in ***Duro Felguera, S.A. vs. Gangavaram Port Ltd., (2017) 9 SCC 729*** where the Supreme Court held as follows:-

"58. This position was further clarified in National Insurance Company Limited v. Boghara Polyfab Private Limited To quote (SCC p.283, para 22):

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co.* [*SBP and Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing

less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

26. Hence, while considering an application under Section 11(6) of the Arbitration Act, the court shall confine itself to the examination of the existence of an arbitration agreement only.

27. The pleas which are now strongly urged, namely, of res-judicata/constructive res-judicata and limitation are issues which the respondent may raise before the learned Arbitrator as noted above. In view of Section 11(6A) of the Act, this court has to confine its examination to the existence of an arbitration agreement. As the arbitration agreement undoubtedly exists, it would be appropriate to refer the parties to arbitration.

28. In the course of hearing on 10.07.2018, I was informed that the proceedings are still pending before the learned Arbitrator appointed by this court by its order dated 11.04.2017 in Arb. Pet. No. 537/2016. Accordingly, I appoint Justice G.S. Singhvi (Retd.), Former Judge of the Supreme Court as the Sole Arbitrator to adjudicate the disputes between the parties. He shall be free to fix his fees in consultation with the parties.

29. The parties are free to raise all their pleas before the learned Arbitrator as per law.

30. Petition stands accordingly disposed of.

JAYANT NATH, J.

AUGUST06, 2018/v