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

+ **ARB.P. 498/2020 & I.A. 12746/2021, I.A. 13876/2021**

ARSS INFRASTRUCTURE PVT. LTD. Petitioner
Through **Mr. Ramesh Singh, Sr. Adv.**
with **Mrs. Manisha Hamda and Mr. Mohit D.**
Ram, Advs.

versus

IRCON INTERNATIONAL LTD. & ANR. Respondents
Through **Mr. Rituraj Biswas, Adv Ms.**
Sujaya Bardhan, Adv for R-1 & 2

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)
22.11.2021

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1. This Section 11 petition emanates out of a contract agreement dated 18th July, 2016 executed between NTPC Ltd. (Respondent 2 herein) and the petitioner, in which Respondent 1 IRCON International Ltd. (IRCON) acted as the agent/power of attorney holder of NTPC.

2. The details of the dispute are not relevant for the purposes of the present order, in view of the limited objections raised by the respondent, represented by Mr. Rituraj Biswas.

3. Clause 50.0 of the contract agreement provides for resolution of the disputes arising from the agreement by arbitration. Sub-clause 50.1 thereunder reads thus:

“50.1 This shall be governed by NTPC GCC subject to the provisions of Indian Arbitration and Conciliation Act, 1996 and it's up to date amendments.”

4. The General Conditions of Contract (GCC) of the NTPC which, as per Clause 50.1 of the contract agreement, governs the arbitration, contained the following arbitration clause:

“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 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 NTPC Limited, 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, willing to act as such arbitration. There will be no objection if the arbitrator so appointed is an employee of NTPC Limited 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 related 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, 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.*”

5. Disputes arose between the parties. On 8th February, 2019, the petitioner wrote to the NTPC, invoking arbitration. The NTPC replied

on 26th March, 2019 requiring the petitioner to, in the first instance, attempt an amicable resolution of the dispute. This attempt did not fructify.

6. It appears that, thereafter, the respondent called on the petitioner to submit a no-claim certificate, which the petitioner claims to have submitted under pressure and duress.

7. Thereafter, the petitioner wrote to the respondent, alleging that certain amounts were due from the respondent to the petitioner. The respondent did not pay the said amounts following which, on 14th March, 2020, the petitioner withdrew its no claim certificate and again re-invoked arbitration.

8. The issue of whether the issuance and subsequent withdrawal of no claim certificate would impact the arbitration, or the arbitrability of the dispute between the parties, has, however, not been pressed by Mr. Biswas before this Court in the present petition, reserving his rights to take up the said issue as a ground of defence in the arbitral proceedings.

9. Mr. Biswas, learned Counsel for the respondent, very fairly, restricts his challenge to the prayer of the petitioner to refer the disputes to arbitration, to reliance on the concluding covenant in Clause 56 of the GCC, which stipulates 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”.

10. The contention of Mr. Biswas is that, by operation of Section 12(5) of the 1996 Act read with the judgments of Supreme Court in *TRF Limited v. Energo Engg. Projects Ltd.*¹, *Perkins Eastman Architects DPCC v. HSCC (India) Ltd.*², *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*³, and *Haryana Space Application Centre v. Pan India Consultants Pvt Ltd.*⁴, the CMD, NTPC could neither act as arbitrator nor appoint an arbitrator and hence, the residual covenant in Clause 56, to the effect that dispute is not to be referred to arbitration at all, would apply. In other words, his contention is that, as the person appointed by the CMD, NTPC could not act as an arbitrator, the matter is not to be referred to arbitration at all. The dispute, therefore, according to him, has become non-arbitrable.

11. Mr. Biswas relied, for this purpose, on the judgment of the Supreme Court in *Newton Engineering and Chemicals Ltd. v. Indian Oil Corporation Ltd.*⁵.

12. Para 2 of the report in *Newton Engineering*⁵ sets out the covenants in that arbitration clause in that case and reads thus:

“2. Leave granted. It is not necessary to refer to the facts of the case. Suffice it to say that the arbitration clause in the agreement between the parties provides that all disputes and differences between them shall be referred by any aggrieved party to the contract to the sole arbitration of ED (NR) of Respondent 1, Indian Oil

¹ (2017) 8 SCC 377

² 2019 SCC OnLine SC 1517

³ (2019) 5 SCC 755

⁴ (2021) 3 SCC 103.

⁵ (2013) 4 SCC 44

Corporation (for short “the Corporation”). The arbitration clause further provides that, if such ED (NR) is unable or unwilling to act as the sole arbitrator, the matter shall be referred to the sole arbitration of some other person designated by such ED (NR) in his place who is willing to act as sole arbitrator. The arbitration clause also provides that no person other than ED (NR) or the person designated by the ED (NR) should act as arbitrator.”

13. It appears that the parties in *Newton Engineering*⁵ did not agree to arbitration either by Ex-Directors (NR) or by any person designated by the ED (NR). In these circumstances, the Supreme Court held, in para 7 of the report, that the arbitration clause had become unworkable and the parties would, therefore, have to seek recourse to ordinary civil proceedings to resolve their dispute. Para 7 of the report reads thus:

“7. Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of the ED (NR) of the Corporation and, if ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED (NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. *If the office of ED (NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED (NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in the light of the reasons indicated above*”

14. *Newton Engineering*¹ was a decision rendered prior to the enactment of Section 12(5) of the 1996 Act and prior to the

enunciation of the law by the Supreme Court in *Perkins Eastman Architects DPC*², and the decisions which followed *Perkins*². It pertained to a regime in which arbitration, by the Executive Director of one of the parties to the contract was permissible. In such a scenario, the Supreme Court held that, where the agreement between the parties specifically envisaged arbitration by the ED or by his nominee, and by no one else, and the parties were not agreeable, *ad idem*, to arbitration either by the ED or by his nominee, no arbitration could take place.

15. Since then, however, the law has changed. *Perkins Eastman*² and its sequelae are, today, the ruling legal dispensation. Where the arbitration clause requires one of the parties to the agreement to be the arbitrator or empowers one of the parties to the agreement to appoint the arbitrator, the Supreme Court has held that the clause would be unworkable and, in such a situation, the court could appoint the arbitrator. This is the law as it emerges from a long line of authorities starting from *Perkins Eastman Architects DPC*² and *Bharat Broadband Network Ltd.*³ This is also the statutory position which emanates from Section 12(5) of the 1996 Act read with the Seventh Schedule thereto.

16. Mr. Biswas does not dispute the position that, by operation of *Perkins Eastman*², the CMD, NTPC could neither act as, nor appoint, the arbitrator. The consequence, however, according to him, is that the dispute cannot be referred to arbitration at all, in view of the express words to the said effect as contained in Clause 56 of the GCC.

17. A coordinate bench of this Court of Vibhu Bakhru, J. has considered an identical clause, and similar arguments, in *T.K. Engineering Consortium Pvt. Ltd. v. Director (Projects) Rites Ltd.*⁶. The court has taken the view, in the said case, that the mere fact that, by operation of *Perkins Eastman*², and its succeeding judgments, the person named as the arbitrator in the agreement could not act as arbitrator, would not render the dispute non-arbitrable.

18. The second part of the covenant, to the effect that the matter is not to be referred to the arbitration at all, according to Bakhru, J., would perish with the first part, as it is a consequence to the first part which itself has become incapable of implementation because of *Perkins Eastman*² and Section 12(5). Where the premise becomes incapable of implementation, in other words, Bakhru, J. has held that the consequence must equally to be incapable of implementation. It is not, according to Bakhru, J. , therefore, permissible to implement one part of the covenant and ignore the other. Para 22 of the report in *T.K. Engineering*⁴, which lucidly exposits this legal position, reads as under:

“22. The Appointing Authority is an Executive Director of RITES and in view of the decisions of the Supreme Court in *TRF Ltd.*¹ (supra) and *Perkins*² (supra), the Appointing Authority cannot appoint an arbitrator, without the written consent of TKE after disputes have arisen. However, this Court is of the view that the same does not mean that the arbitration clause itself stands nullified. The term that no person other than the person appointed by Appointing Authority should act as an arbitrator, is no longer valid, in view of the aforementioned decisions of the Supreme Court. The next limb of the said term that in case it is not possible for such

⁶ 280 (2021) DLT 11

person to act as an arbitrator, the matter would not be referred to arbitration is intended to ensure that the arbitration is conducted only by an arbitrator appointed by the Appointing Authority. This term cannot be read as a standalone term but must be read in conjunction with the term of the contract requiring the Appointing Authority to appoint an arbitrator. However, since the said term has been rendered inoperative by virtue of the amendments introduced in Section 12 of the A&C Act by the Arbitration and Conciliation (Amendment) Act, 2015 as interpreted by the Supreme Court in *TRF Ltd.*¹ (supra) and *Perkins*² (supra), the said term must also be considered as rendered inoperative rather than as a term that invalidates the arbitration agreement.”

19. I express my respectful and complete concurrence with the view expressed by Bakhru, J. in *T.K. Engineering*⁴.

20. Empirically, a consequence stipulated in the contract as a consequence of failing to enforce an illegal covenant, is itself also incapable of enforcement. Appointment of arbitrator would be illegal. Non arbitrability of the dispute is the contractually envisaged consequence that follows in the event of default in performing the illegal act. The consequence must, of needs, perish with the default.

21. As such, the submission of Mr. Biswas that, by operation of the concluding covenant in Clause 56 of the GCC, the present dispute has been rendered non-arbitrable, cannot be accepted.

22. Mr. Biswas has very fairly stated that he would urge all other pleas, including the arbitrability of the dispute in the wake of the no-claim certificate issued by the petitioner, before the Arbitral Tribunal.

23. Accordingly, it is made clear that this Court has ruled only on

the issue of arbitrability of the dispute in the light of concluding covenant in Clause 56 of the GCC and has not ruled on any other aspect of the dispute, including the arbitrability/non-arbitrability of the dispute on any other ground whatsoever.

24. All these issues of fact and law, including the issue of maintainability, would be left open to be agitated in the arbitral proceedings.

25. The disputes between the parties are in the realm of ₹ 3 crores.

26. Accordingly, the parties are referred to the Delhi International Arbitration and Centre (DIAC) to appoint a suitable arbitrator to arbitrate on the dispute between the parties.

27. The arbitration would take place under the aegis of the DIAC and would abide by its rules and regulations. The arbitrator would also be entitled to fees in accordance with the schedule of fees maintained by DIAC.

28. The petition stands disposed of in the aforesaid terms and to the aforesaid extent, with no orders as to costs.

C. HARI SHANKAR, J

NOVEMBER 22, 2021

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