

\$~1

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

Date of decision: 10th May, 2023

+ **ARB.P. 1298/2022**

M/S VINDHYA VASINI CONSTRUCTION CO

..... Petitioner

Through: Mr.Somiran Sharma,
Mr.Dhrubajit Saikiaand
Mr.Tabarak Husain, Advs.

versus

M/S BHARAT HEAVY ELECTRICALS LTD

..... Respondent

Through: Mr.Himanshu Gupta,
Mr.Aditya Sikka, Ms.Padamja
Sharma & Ms.Vasudha
Vijaysheel, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Work Order dated 10.03.2016 for receipt of equipment/material at site, unloading, inspection, verification, storage, up keeping during storage, erection, testing, commissioning and handing over of 400/220KV substation at Unchahar in Uttar Pradesh, placed by the respondent on the petitioner.

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.05.2023

11:46:11

ARB.P. 1298/2022

2. The Arbitration Agreement between the parties is contained in Clause 23 of the Work Order, which is reproduced hereinbelow:-

“23.0 ARBITRATION:

23.1 Except where otherwise provided for in the contract all questions & disputes relating to the meaning of the specification designs drawings and instruction 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 of these conditions or otherwise concerning the works, of 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 Head TBG, BHEL, Noida and if the Head TBG is unable or unwilling to act to the sole arbitration of some other person appointed by the Head TBG willing to act as such arbitrator.

A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter.

There will be no objection if the arbitrator so appointed is an employee of BHEL and he had to deal with the matters to which the contract relates, in the course of his duties. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason such Head TBG as aforesaid at the time of such transfer vacation of office or inability to act shall appoint (see note) another person to act as arbitrator in accordance with the terms

of the contract such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Head TBG 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, in all cases where the amount of the claim dispute is Rs. 50,000/- (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.

The provisions of Indian Arbitration and Conciliation Act 1996 or any statutory modification or re- enactment thereof and the rules made thereunder and the time being in force shall apply to the arbitration proceeding under this clause.

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

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

The work under the 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 dispute or difference referred to him.

The Venue of arbitration shall be at New Delhi.

The award of the arbitrator shall be final, conclusive and binding all parties to this contract, subject to the provisions of the Arbitration and Conciliation Act, 1996.

Laws governing the Contract:

The contract shall be governed by the Indians Laws for the time being in force.

NOTE:-The Authority appointing the arbitrator should not be lower in rank than the Authority accepting the Agreement.

23.2 The cost of arbitration shall be borne equally by the parties.

23.3 Neither party shall be entitled for any pre-reference or pendent-lite interest on its claims and any claim for such interest made by any party shall be void."

(Emphasis Supplied)

3. The respondent has opposed the appointment of an Arbitrator, contending that the Arbitration Agreement between the parties is unambiguous when it provides that only the Head TBG, BHEL, Noida or his nominee can act as an Arbitrator. The Agreement further provides that no person other than a person appointed by the Head TBG should act as an Arbitrator and if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

4. The learned counsel for the respondent, placing reliance on the judgments of the Supreme Court in ***Newton Engineering and Chemicals Limited v. Indian Corporation Limited & Ors.***, (2013) 4 SCC 44; and ***TRF Limited v. Energo Engineering Projects Limited***, (2017) 8 SCC 377; and of this Court in ***Capacite Infra projects Limited v. Ramprastha Promoters & Developers Limited***, 2017 SCC OnLine Del 12281, submits that the Arbitration Agreement would

cease to operate in case the Head TBG of the respondent or his nominee cannot be appointed or act as an Arbitrator.

5. On the other hand, the learned counsel for the petitioner submits that the Arbitration Agreement is severable from the latter part which provides that in case the Head TBG or a person nominated by him cannot act as an Arbitrator, the matter shall not be referred to Arbitration. He submits that being severable in nature, the Arbitration Agreement would still survive though in view of the judgments of the Supreme Court in *TRF Limited* (Supra) and *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd.*, (2020) 20 SCC 760, the Head TBG cannot act as an Arbitrator.

6. He further submits that the Agreement, in so far as it provides that no person other than a person appointed by Head TBG should act as an Arbitrator and if for any reason that is not possible, the matter is not to be referred to Arbitration, is an unreasonable and unconscionable bargain which was incorporated in the Agreement only because of the disproportionate bargaining position that the respondent enjoyed. He submits that this plea would necessarily be a mixed plea of fact and law which should be left to be adjudicated by the Arbitrator. In view of the judgment of the Supreme Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*, (2021) 2 SCC 1, this Court would not venture into this issue at this stage. He further places reliance on the judgments of the Supreme Court in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, (2006) 2 SCC 628 and *ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Another*, (2019) 4 SCC 401.

7. He further submits that this Court should place an interpretation on the Agreement which would encourage arbitration rather than negate the intent of the parties to have their disputes resolved through arbitration. In support, he places reliance on the judgment of the Supreme Court in ***Enercon (India) Limited and Others v. Enercon GMBH and Another***, (2014) 5 SCC 1.

8. I have considered the submissions made by the learned counsels for the parties.

9. A reading of Clause 23 of the Work Order makes it abundantly clear that the parties intended that their disputes under the Work Order be referred to the Sole Arbitration of the Head TBG, BHEL, Noida, and if the Head TBG is unable or unwilling to act, to the sole arbitration of some other person appointed by the Head TBG willing to act as an Arbitrator. It further provides that no person other than a person appointed by such Head TBG should act as the Arbitrator and *“if for any reason that is not possible, the matter is not to be referred to Arbitration at all.”*

10. It needs no reiteration that Arbitration is an alternate dispute resolution mechanism to which the parties voluntarily submit themselves as an alternate to the dispute resolution mechanism established by the State, that is, the Courts of Law. It is voluntary and is, therefore, to be resorted to only where the parties voluntarily agree to such procedure. In ***Vidya Drolia*** (supra), the Supreme Court observed that *“Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual*

agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties.....Arbitration being a matter of contract, the parties are entitled to fix boundaries as to confer and limit the jurisdiction and legal authority of the arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or could be confined to specific disputes. The issue of scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for exclusions as in case of "excepted matters". The arbitration agreement may be valid, but the Arbitral Tribunal in view of the will of the parties expressed in the arbitration agreement, may not have jurisdiction to adjudicate the dispute. The will of the parties as to the scope of arbitration is a subjective act and personal to the parties".

11. Section 7 of the Act defines "arbitration agreement" as under:

"7. Arbitration agreement.- (1) In this Part, "arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

12. As repeatedly held, party autonomy is virtually the backbone of arbitration. It is the brooding and guiding spirit in arbitration. The parties while agreeing to Arbitration may also stipulate conditions necessary for their reference. They may also agree that this consent/agreement for Arbitration would not bind them in case one or

other circumstance exists or for one or more nature of disputes. It need only be emphasized: without an arbitration agreement, party cannot be compelled to arbitration.

13. As rightly contended by the learned counsel for the petitioner, there may be a dispute in relation to the existence of circumstances which discharge a party from the arbitration agreement, which in terms of the judgment of the Supreme Court in ***Vidya Drolia*** (supra), may have to be left to be adjudicated by the Arbitrator, however, the present case does not involve such a disputed question of fact. In the present case, the Arbitration Agreement unambiguously provides that in case the person appointed by the Head TBG cannot act as an Arbitrator, the dispute is not to be referred to Arbitration at all. It, therefore, reflects the conditional acceptance of Arbitration by the respondent. In absence of an express waiver by the petitioner and in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC*** (supra), the Head TBG of the respondent or his nominee cannot be appointed as an Arbitrator. In that view, the Arbitration Agreement would cease to operate in terms of the Agreement itself, and the parties would have to be relegated to their ordinary civil remedies in case of a dispute.

14. In ***Newton Engineering and Chemicals Limited*** (supra), the Supreme Court faced with an almost similar Clause, observed as under:-

“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.”

15. In **TRF Limited** (supra), the Supreme Court while considering the effect of Section 12(5) of the Act on the eligibility of an arbitrator, took note of the judgment of the Supreme Court in **Newton Engineering and Chemicals Limited** (supra), the different Arbitration Agreements that may exist and bind the parties, and the effect of Section 12(5) of the Act on such Agreements. The Supreme Court on such consideration observed as under:-

“42. We are referring to the same as learned counsel for the parties have argued at length with regard to the disclosure made by the arbitrator and that has also been referred to by the designated Judge. In this context, we may profitably refer to sub-section (6A) of Section 11 of the Act which reads as follows:

“11.(6A). 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.”

43. *The purpose of referring to the said provision is that the amended law requires the Court to confine the examination of the existence of an arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of the Act. As the impugned order would indicate, the learned Judge has opined that there had been no failure of procedure, for there was a request for appointment of an arbitrator and an arbitrator has been appointed. It is apt to state here that the present factual score projects a different picture altogether and we have to carefully analyse the same.*

44. *We are required to sit in a time machine and analyse the judgments in this regard. In Datar Switchgears (supra), it has been held that the appointment made by the respondent was invalid inasmuch as there was no proper notice by the appellant to appoint an arbitrator and before an application under Section 11(6) of the Act was filed, the arbitrator was appointed. Relevant part of clause 20.9 of the agreement in the said case postulates thus:*

“9.....20.9. It is agreed by and between the parties that in case of any dispute under this lease the same shall be referred to an arbitrator to be nominated by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned.”

The aforesaid clause lays down that the lessor shall nominate the arbitrator.

45. *In Newton Engineering (supra), though the agreement has not been produced in the judgment, the Court has analysed in detail the purport of the arbitration clause in the agreement and ruled that the matter shall be referred to the sole arbitration of ED (NR) of*

the respondent Corporation and if the said authority is unable and unwilling to act, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who is willing to act as a sole arbitrator. The said post had ceased to exist and as the parties intended the matter to go to arbitration, the respondent substituted the arbitrator with the Director (Marketing) in the arbitration clause subject to the written confirmation giving the consent by the contractor. The contractor informed the Corporation that it would like to have the arbitrator appointed under the Act whereby each of the parties would be appointing one arbitrator each to which the Corporation did not accede. At that juncture the contractor moved an application under Section 11(6C) of the Act and the High Court appointed a retired Judge. Taking exception to the view of the High Court, the two-Judge Bench held, as stated earlier, that the arbitration clause postulated sole arbitrator would be ED (NR) or his nominee and no one else and, therefore, Section 11(6C) was not applicable. The Court ruled that as the parties had not been able to reach the agreed decision, the arbitration clause did not survive.

46. *In Deep Trading Company (supra) while approving the view expressed in Newton Engineering (supra), the Court observed that in the said case the Court was not concerned with the question of forfeiture of the right of the Corporation for appointment of an arbitrator and accordingly while setting aside the order sent for fresh consideration by the Chief Justice or the Designated Judge.*

47. *The aforesaid three cases exposit three different situations. The first one relates to non-failure of the procedure and the authority of the owner to appoint the arbitrator; the second relates to non-survival of the arbitration clause; and the third pertains to forfeiture of the right of the Corporation to appoint the sole arbitrator because of the*

failure to act with the procedure agreed upon by the parties in clause 29 which was the arbitration clause in the agreement. It is interesting to note that clause 29 in Deep Trading Company (supra) does not mention unlike Newton Engineering (supra) that no one else shall arbitrate upon.

48. One aspect needs to be noted. In the first and third case, the parties had not stipulated that there will be no one else who can arbitrate while in the second case, i.e., Newton Engineering (supra), such a stipulation was postulated.

49. Regard being had to the same, we have to compare and analyse the arbitration clause in the present case. Clause (c), which we have reproduced earlier, states that all disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Act, as amended. Clause (c) is independent of Clause (d). Clause (d) provides that unless otherwise provided, any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee.”

(Emphasis supplied)

16. A reading of the above would show that the Supreme Court highlighted the distinction between the Arbitration Agreements as existing in ***Datar Switchgears Limited v. Tata Finance Limited and Anr.***, (2000) 8 SCC 151 and ***Deep Trading Company v. Indian Oil Corporation and Ors.***, (2013) 4 SCC 35, on one hand, and ***Newton Engineering and Chemicals Limited*** (supra), on the other. The Court held that while ***Datar Switchgear*** (supra) and ***Deep Trading Company*** (supra) merely relate to the failure of the procedure and the authority of the owner to appoint the Arbitrator, ***Newton Engineering and Chemicals Limited*** (supra) represented a case of non-survival of

the Arbitration Clause itself. In the present case, the issue again is of survival of the arbitration agreement on the agreed upon procedure to appoint arbitrator failing.

17. I must herein also make reference to the judgment of this Court in *M/s Arvind Construction Co. Pvt Ltd v. UOI*, Neutral Citation Number: 2009:DHC:707, wherein a learned Single Judge of this Court while considering a similar arbitration clause between the parties, has held as under:

“7. From a bare perusal of the Arbitration Clause, it is obvious that the parties had agreed that the matter would either be referred to the Arbitrator appointed by the respondent in accordance with clause 2900(a) or there shall be no arbitration at all in view of clause 2900(c) of the contract.

8. It is settled law that parties are bound by the contract entered into between them including the arbitration clause. If the Arbitration Clause provides that the arbitration proceedings shall be conducted only by a particular arbitrator otherwise there shall be no arbitration and the matter can be taken up under ordinary civil law, the petitioner does not have a right to get other arbitrator appointed through the Court under Section 11(6) of the said Act. The petitioner entered into this Arbitration Clause knowing fully well the implication of the Arbitration Clause. The petitioner is bound by the entire arbitration clause and not only a part thereof. Since no Arbitration had been appointed by the respondent, the petitioner was at liberty to approach the civil court. The petitioner has asked for appointment of an arbitrator through this court. In view of the judgement of the Supreme Court in Patel Engineering (supra) considering that emphasis of the Court has to be on the terms of the agreement being adhered to and given effect as closely as possible, I consider the Court cannot write

new terms of the agreement between the parties and appoint an arbitrator outside the agreement."

18. In ***Shin Satellite Public Company Limited*** (supra), the Supreme Court was considering the Arbitration Agreement and Clause 20 of the Agreement, which were in the following terms:-

"10.

"23. ARBITRATION Any dispute arising from the interpretation or from any matter relating to the performance of this Agreement or relating to any right or obligation herein contained which cannot be resolved by the parties shall be referred to and finally resolved by arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL). The arbitration shall be held in New Delhi and shall be in the English language. The arbitrator's determination shall be final and binding between the parties and the parties waive all rights of appeal or objection in any jurisdiction. The costs of the arbitration shall be shared by the parties equally."

(emphasis supplied)

Clause 20 is another relevant clause providing severability and reads thus:

"20. SEVERABILITY If any provision of this agreement is held invalid, illegal or unenforceable for any reason, including by judgment of, or interpretation of relevant law, by any Court of competent jurisdiction, the continuation in full force and effect of the remainder of them shall not be prejudiced."

19. The Court held that the subsequent part of the Agreement, which provides that the Arbitrator's determination shall be final, and

binding and the parties waive all rights of appeal or objection in any jurisdiction, is severable from the first part which is an unequivocal Agreement of the parties to refer their disputes to Arbitration. The said judgment would have no application to the facts of the present case inasmuch as the Arbitration Agreement, as noted hereinabove, expressly ceases to operate in case the nominee of the Head TBG cannot act as an Arbitrator.

20. In **ICOMM Tele Limited** (Supra), the Court was again considering an Arbitration Agreement which required parties invoking Arbitration to make a pre-deposit. The Clause read as under:-

“25...viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a “deposit-at-call” for ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with reference to the amount claimed and the balance, if any, shall be forfeited and paid to the other party.”

21. The Court struck down the said Clause and also observed that the same being severable from the rest of Clause 25, will not affect the remaining part of Clause 25. However, in the present case, it cannot be said that the condition stipulated in the subsequent part of Clause 23 in the Agreement in the question is severable. In fact, it is an express stipulation of non-enforceability of the Arbitration Agreement in case the condition mentioned therein exists.

22. There can be no dispute on the proposition laid down in *Enercon (India) Limited and Others* (supra), which holds that in interpreting or construing terms of the Arbitration Agreement, the Courts must adopt a pragmatic approach and not a pedantic or technical approach, however, in the present case, the Agreement being unambiguous, question of interpretation thereof does not arise. The learned counsel for the petitioner submits that the dominant intention of the parties was to have their disputes resolved through Arbitration and therefore, such intent be not defeated by the subsequent portion of the Clause. I do not find merit in the submission inasmuch as the parties themselves agreed that in case the nominee of the Head TBG cannot act as an Arbitrator, there shall be no Arbitration. Having expressly agreed to such stipulation, the parties are bound by this.

23. The submission of the learned counsel for the petitioner that the stipulation in Clause 23 of the Work Order insofar as it provides that in case the nominee of the Head TBG cannot act as an Arbitrator, the dispute shall not be referred to Arbitration, is unconscionable or unenforceable, also does not impress me. As noted hereinabove, arbitration is by the consent of the parties. It provides for an alternate dispute resolution mechanism. The parties in fact voluntarily agreed to have their disputes resolved through a mechanism other than the one provided by the State in form of Courts of Law. There is no mandate on the parties to necessarily have their matters resolved through Arbitration in case they do not wish to provide for the same in their Agreement. The remedy to have the disputes resolved through the mechanism of ordinary Civil Courts is still open to the petitioner. It is

not as if the petitioner is left remediless by the stipulation in Clause 23.

24. I, therefore, find no merit in the present petition. The same is dismissed, leaving it open to the petitioner to avail the legal remedy that may be open in accordance with the law.

NAVIN CHAWLA, J

MAY 10, 2023/rv

