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

+ **ARB.P. 984/2023, I.A. 18489/2023**

PROGRESSIVE CONSTRUCTIONS LIMITED Petitioner

Through: Ms.Arundhati Katju, Mr.Himanshu
Suman, Ms.Shristi Borthakur,
Ms.Ritika Meena and Ms.Parkhi Rai,
Advts.

versus

NTPC LIMITED

..... Respondent

Through: Mr.Krishan Kumar, Mr.Seemant
K.Garg and Mr.Nitin Pal, advts.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER
22.02.2024

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I.A. 18489/2023 (delay)

The present application has been filed for condonation of delay of 14 days in re-filing the present petition.

For the reasons mentioned in the application, the delay of 14 days in re-filing the petition is condoned.

The application stands disposed of.

ARB.P. 984/2023

1. The present petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 seeking the appointment of an Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes *inter se* the parties.



2. The parties have entered into a contract agreement dated 16.09.2019, which contains a clause regarding the settlement of disputes. Clause 7 reads as under:

“7.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the Contract or touching the subject matter of the Contract shall be decided by process of Settlement & Arbitration as specified in Clause 56 and 57 of the General Conditions of the Contract as amended and the provisions of the Arbitration & Conciliation Act, 1996 shall apply and Delhi Courts alone shall have exclusive jurisdiction in all matters arising under this Contract. The arbitrator shall give reasoned/speaking award.”

3. Clauses 56 and 57 of the general conditions of the contract provide as under:

56. Except where otherwise provided/or 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 those 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 by the Chairman and Managing Director, NTPC limited (Formerly National Thermal Power Corporation Ltd.), 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 the 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.

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 dispute.

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 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 such place as may be fixed by the Arbitrator 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 dispute, 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 enterprises the above stipulations shall not apply, the



*provisions of B.P.E. office memorandum No. BPE/Gl-001/76/MAN/2 [110-75-BPE (GMI-1)] dated 1st January 1976 or its amendments for arbitration shall be **applicable**.*

57. This contract shall be governed by the Indian Laws for the time being in force.

4. Learned counsel for the petitioner submits that clause 56 provides that in case of dispute it 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, then some other person may be appointed as an arbitrator by the Chairman and Managing Director, NTPC Limited willing to act as arbitrator.

5. Learned counsel for the petitioner submits that such clauses have already been held invalid by the judgment of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.***, (2020) 20 SCC 760. Learned counsel for the petitioner submits that it has also been consistently held that if a clause has been held to be invalid the entire agreement or arbitration clause cannot be held invalid. Learned counsel for the petitioner has also submitted that the present petition has been filed within the period of limitation. The claim amount is stated to be around Rs.47.65 crores. Learned counsel submits that the arbitration has already been invoked vide notice dated 26.06.2020.

6. Learned counsel for the respondents has vehemently opposed referring of the matter to arbitration. Learned counsel has also relied upon clause 56 of the arbitration clause. Learned counsel submits that the bare reading of clause 56 provides that no person other than the person appointed by the CMD, NTPC should act as an arbitrator, and if for any reason that is



not possible, the matter is not to be referred to arbitration. Learned counsel submits that the dispute resolution through arbitration can only be on the basis of mutual agreement between the parties. Learned counsel submits that the arbitrator is a creature of the contract between the parties. Learned counsel submits that in view of the categorical condition in the contract that no person other than the person appointed by CMD, NTPC should act as an arbitrator. Learned counsel submits that since in view of Perkins (Supra), the arbitrator cannot be appointed by CMD, therefore the arbitration in the present case is not possible. Learned counsel therefore submits that the arbitrator cannot be appointed.

7. I have considered the submissions. The jurisdiction of the court under Section 11 has very well been discussed in *M/S Duro Felguera, S.A. vs Gangavaram Port Limited* (2017) 9 SCC 729. The question of unilateral appointment has come up before the Supreme Court in *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*, (2020) 20 SCC 760, *T.K.Engineering Consortium Pvt. Ltd. vs. Director (Projects) Rites Ltd.*, (2021) 280 DLT 11. As far as limitation is concerned, that has also been come up before the Apex Court in several cases including *M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited Versus Northern Coal Field Limited*, (2020) 2 SCC 455. Limitation is a mixed question of facts and law which can be determined by the learned arbitrator. In respect of Clause 56, the same has come up for consideration before the Coordinate bench of this court in *Ram Kirpal Singh Construction Pvt. Ltd. vs. NTPC* 2022 SCC OnLine Delhi 3743. Incidentally, on the very same clause, the coordinate bench of this court has held as under:

17. Upon a conspectus of the averments contained in the



petition and the reply, as also the submissions made by counsel, and on a reading of the judicial precedents cited, the following inferences arise:

17.1. The respondent does not dispute the existence of the arbitration agreement between the parties, except to say, that since a certain procedure for appointment of an arbitrator was embedded in the arbitration clause, which procedure has now become illegal, invalid and unenforceable, the entire arbitration agreement perishes along therewith. The respondent's contention is that it was expressly agreed between the parties that if an arbitrator could not be appointed as per that agreed procedure, there would be no arbitration at all;

17.2. Now, clauses that are same or similar to clause 56 of the GCCs, which contains the arbitration agreement in the present case, have been dealt with by at least three different Co-ordinate Benches of this court; and the consistent view taken is that just because the procedure for appointment of an arbitrator has been rendered invalid or unenforceable by reason of the amendment to the A&C Act, by insertion of section 12(5) and by the subsequent decisions of the Supreme Court in TRF Ltd. and Perkins Eastman (supra), that does not mean that the entire arbitration clause is rendered invalid or void. Such arbitration clauses have been held to be valid and enforceable. Reference in this regard may be made to TK Engineering (supra), ARSS Infrastructure (supra) as also to NIIT Technologies Ltd. v. Directorate General, Border Security Force ;

17.3. Expatiating upon the aforesaid consistent view, in the opinion of this court, an 'arbitration agreement' may narrate and include several other aspects relating to arbitration - such as the procedure for appointment of arbitrator(s); seat or venue of arbitration proceedings; the substantive and procedural law that would govern arbitral proceedings; specifics of disputes that are 'excepted' from the purview of arbitration; liability of costs for arbitral proceedings and such-like other matters – so as to detail-out the arbitral mechanism and to make the arbitration



agreement more comprehensive. Even if embedded in the self-same arbitration clause, these aspects relate to different strands of the agreed arbitral mechanism and are distinct and separable from the core arbitration agreement itself, viz. the primary consent of parties to refer their inter-se disputes arising from a given contract or transaction to arbitration;

17.4. The procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. If therefore, by reason of amendment, restatement or reinterpretation of the law, as has happened in the present case by insertion of section 12(5) in the A&C Act and the verdicts of the Supreme Court in TRF Ltd. and Perkins Eastman (supra), the procedure for appointment of arbitrator at the hands of one of the parties becomes legally invalid, void and unenforceable, that does not mean that the core agreement between the parties to refer their inter -se disputes to arbitration itself perishes. In the opinion of this court - this “my way or the highway” approach - is not tenable in law; and in such circumstances, that part of the arbitration agreement which has been rendered invalid, void and enforceable is to be severed or excised from the arbitration clause, while preserving the rest of the arbitration agreement;

17.5. Accordingly, this court is of the view, that there is a valid and subsisting arbitration agreement between the parties, though the procedure for appointment of the arbitrator at the hands of the CMD, NTPC is no longer valid, and must therefore be severed from the remaining arbitration clause;

17.6. The aforesaid view taken by this court is also in consonance with the extant legislative and judicial policy that arbitration agreements are not to be readily invalidated unless there is compelling basis to do so; and arbitration is to be encouraged as an alternative mode of disputes adjudication (cf. Chloro Controls India Pvt. Ltd. v. Severn Trent Purification Inc.)”



8. It is pertinent to mention that all the contentions raised by the respondent have been rejected by the Coordinate Bench of this court in ***Ram Kirpal Singh Construction Pvt. Ltd.*** (*supra*). The consistent view has already been taken by the coordinate bench of this court and I do not find any reason to differ from it. The view taken is quite reasonable and is in consonance with the consistent law laid down by the apex court.

9. Hence, the plea taken by the respondent is rejected and the matter is referred to the arbitration

10. In the facts and circumstances of the case, the present petition is disposed of with the following directions:

- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
- ii) Justice S.Muralidhar, the former Chief Justice of Orissa High Court (Mob. No.9872727986) is appointed as an Arbitrator to adjudicate the disputes between the parties.
- iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC schedule or as the parties may agree.
- iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.



vi) The parties shall approach the learned arbitrator within two weeks from today.

11. The petition is disposed of in the above terms.

DINESH KUMAR SHARMA, J

FEBRUARY 22, 2024

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