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

Judgment reserved on: 12.09.2024

Judgment pronounced on: 03.02.2025

+ **O.M.P. (COMM) 304/2018**

ISAR ENGINEERS PRIVATE LTD. Petitioner
Through: Mr Kiran Suri, Sr. Adv. with Mr Hitendra Nath
Rath, Ms Vidushi Garg and Ms Laxmi, Adv.
versus

NTPC-SAIL POWER COMPANY LTD. Respondent
Through: Mr Sanjay Rawat, Adv.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

: **JASMEET SINGH, (J)**

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the ex-parte Award passed by the learned Sole Arbitrator on 13.12.2017 (hereinafter referred to as the 'Impugned Award') received by the petitioner on 15.12.2017.
2. By virtue of the impugned Award, the learned Sole Arbitrator was pleased to allow and award the counter-claims filed by the respondent.

Facts

3. The brief facts encapsulating the present matter are that:-
 - a. The petitioner is a company incorporated under the Companies Act, 2013 engaged in execution of works contract. The respondent is a



joint venture of National Thermal Power Corporation and Steel Authority of India Ltd.

b. The petitioner was awarded the work of “*Civil works for raising of Ash dyke (Lagoon-A from 231M to 235M for Rourkela CPP-II (2 X 60 MW)*” by the Respondent *vide* Letter of Acceptance dated 06.12.2005. The duration for completion of the work was 12 months and the contract value was Rs. 2,59,43,975/-.

c. The petitioner submits that there was delay attributable to the respondent since amongst others delays, the work site was not handed over in time, drawings were provided late and the rate of additional quantities of work were not finalized therefore the respondent granted extension of time but recovered liquidated damages from the petitioner.

d. The respondent on 23.08.2008 terminated the contract. The petitioner being aggrieved by the termination invoked arbitration under Clause 56 of the GCC, being the Arbitration Clause.

e. As per the Arbitration Clause, the General Manager/Business Unit Head was the named Arbitrator to adjudicate the disputes between the parties. Since he was the supervising/controlling authority with regard to the contract in question, held various meetings with the petitioner reviewing the progress of the work and was the authority that took the decision to terminate the contract, the petitioner requested for appointment of an independent Arbitrator for adjudication of the disputes. However, the respondent on 20.12.2010 emphasized that in terms of clause 56 of the GCC, only the General Manager/Business Unit Head can be appointed as the Sole Arbitrator to adjudicate the disputes.



f. The petitioner *vide* letter dated 14.06.2011 once again requested the respondent for appointment of an independent Arbitrator for adjudication of the disputes due to the direct involvement of the named Arbitrator however Shri Debasis Sarkar, the General Manager & Business Unit Head, NSPCL (NTPC-SAIL Power Company Limited), Rourkela entered reference on 12.07.2011 while rejecting the request of the petitioner for appointment of an independent Arbitrator.

g. On 26.07.2011, the petitioner once again requested for appointment of an independent Arbitrator for adjudication of disputes, which was rejected by the Arbitrator on 26.08.2011.

h. Aggrieved by the said action, the petitioner filed an Arbitration Petition No. 59/2011 before Hon'ble High Court of Orissa, Cuttack under Section 11 of the Arbitration & Conciliation Act, 1996 seeking appointment of an independent Arbitrator.

i. On 05.10.2012, the Hon'ble High Court of Orissa, Cuttack kept the arbitration proceedings in abeyance, which was subsequently clarified on 10.03.2017 to state that there was no stay in the matter and the Arbitrator may proceed.

j. Post the order dated 10.03.2017, the petitioner did not file the Statement of Claim and the respondent filed the Counter-Claim on 16.08.2017.

k. On transfer of Shri Debasis Sarkar from the post of General Manager, it is stated by the petitioner that in terms of Clause 56 of the GCC another Arbitrator was to be appointed by the Chairman and Managing Director of the NTPC. However, it transpired that after the transfer of Shri Debasis Sarkar, the successor General Manager of the



respondent-company (i.e. Mr Yogendra Singh) assumed jurisdiction to act as the Sole Arbitrator. On his transfer, Mr Awadhesh Kumar Tiwari, the new General Manager/Business Unit Head once again automatically assumed jurisdiction.

l. The petitioner was proceeded ex-parte by the Arbitrator on 28.08.2017.

m. The learned Arbitrator *vide* the impugned Award was pleased to allow the Counter-Claims raised by the respondent and directed the petitioner to pay Rs.1,35,60,291.34/- along with Simple Interest at the rate of 10% per annum from cause of action, i.e.01.10.2012 till the date of award and 18% from the date of Award till payment. The costs of arbitration of Rs. 3 lakhs was also directed to be paid by the petitioner.

n. On 09.03.2018, the Hon'ble High Court of Orissa, Cuttack permitted the petitioner to withdraw the petition under section 11 of the Arbitration and Conciliation Act, 1996 with liberty to raise all grievances under Section 34 of the Arbitration and Conciliation Act, 1996. Hence, the present petition.

o. On 02.08.2018, this court held that this court has jurisdiction to deal with the present petition.

p. On 09.12.2019, this Court allowed the I.A. 9391/2018 being an application seeking condonation of 94 days re-filing the petition.

Submissions

4. The petitioner has challenged the Award on the ground that it is violative of basic principles of natural justice as the named Arbitrator, i.e. the General Manager/Business Unit Head of the respondent-company, is directly and intrinsically involved in execution of the awarded work.



5. The petitioner submits that even though prior to the amendment, the Arbitrator being an employee of one of the parties was not an *ipso facto* ground for presumption of bias/lack of independence but the petitioner is within its rights to levy and prove justifiable apprehensions about the independence and impartiality of the named Arbitrator when the Arbitrator is the dealing authority for the contract in question.

6. The petitioner also challenges the automatic transfer of jurisdiction to the successive/successor General Manager/Business Unit Head of the respondent, being contrary to clause 56 of the GCC which requires the Chairman and Managing Director of the NTPC to appoint another person to act as an Arbitrator. The petitioner submits that the new General Manager/Business Unit Head of the respondent automatically assumed jurisdiction without any reference to Chairman and Managing Director of the NTPC, hence, the composition of the Arbitral Tribunal is contrary to the arbitration clause.

7. The petitioner submits that since the petition under Section 11 of the Arbitration & Conciliation Act, 1996 was pending before the Hon'ble High Court of Orissa, Cuttack, the petitioner did not file any claim statement before the Arbitrator. Despite the same, the Arbitrator went on to adjudicate the counter-claims filed by the respondent.

8. On merits, the petitioner has argued that the Award is unreasoned because (i) the Arbitrator has not assigned any reason for holding that the petitioner has abandoned the contract (ii) the Arbitrator has not acted within the four corners of the contract and (iii) the Arbitrator has awarded an amount of Rs. 2,05,66,441 (including interest) whereas the balance work only amounted to Rs. 1,84,78,029/-. Hence, it is against public policy.



9. The respondent submits that despite the order of the Hon'ble High Court of Orissa clarifying that there is no stay in the arbitral proceedings, the petitioner failed to participate in the arbitral proceedings. Therefore, the petitioner cannot be permitted to take benefit of its own wrong.

10. Further, the respondent submits that prior to the amendment of 2015, unilateral appointments were allowed without any restrictions. The petitioner has failed to show any basis for having justifiable doubts regarding the independence or impartiality of the appointment by the petitioner. Therefore, the petitioner was obligated to participate in the proceedings. The respondent relies on the judgments of the Hon'ble Supreme Court in *Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.*, (2017) 15 SCC 32, *S.P. Singla Constructions (P) Ltd. v. State of H.P.*, (2019) 2 SCC 488, *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520, *Union of India v. Pradeep Vinod Construction Co.*, (2020) 2 SCC 464, *Union of India v. Parmar Construction Co.*, (2019) 15 SCC 682 and *M/s Shree Vishnu Constructions v. Engineer in Chief MES* (Civil Appeal No. 3461 of 2023 in SLP (C) no. 5306 of 2022).

Analysis

11. I have heard learned counsel for the parties.

Re: Independence of Arbitrator pre-amendment of 2015

12. The first question that arises for the consideration of this court is whether the unilateral appointment of Arbitrator done pre-amendment of 2015 can be challenged on the grounds of bias, partiality and lack of independence of the Arbitrator.

13. The arbitration clause between the parties, i.e. Clause 56 of the GCC, reads as under:



“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 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 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, 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 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 or any of the matters in disputes 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, 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 C. M D., N. T P. C. Ltd., as aforesaid should act as arbitrator and if for any reasons, 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 arbitrators 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 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 section 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. BPEIGL-001176/MAN/2[110-75-BPE(GMI-1)] dated 1st January 1976 or its amendments for arbitration shall be applicable.”

(Emphasis Supplied)

14. A perusal of the arbitration clause shows that the General Manager/Business Unit Head of the respondent is the named Arbitrator for adjudicating the disputes arising between the parties and in case of inability on his part, the Chairman and Managing Director of the respondent company shall appoint any other person to act as an Arbitrator. There would



be no objection if the Arbitrator, so appointed, is an employee of the respondent company and was the dealing authority.

15. No doubt prior to the amendment of 2015, the fact that the named Arbitrator is an employee, could not *ipso-facto* be a ground for bias of the Arbitrator, as held in the judgment of the Hon'ble Supreme Court in *Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.*, (2017) 15 SCC 32, however the same also held that justifiable apprehension can be raised in case the person was the controlling or dealing authority with respect to the subject matter in dispute. The operative portion of the judgment reads as under:-

“22. The principles which emerge from the decisions referred to above are:

22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

22.1.3. The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

22.1.4. While exercising such power under sub-section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if



other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

(Emphasis Supplied)

16. In a similar matter of *Ellora Paper Mills Ltd. v. State of M.P.*, (2022) 3 SCC 1, wherein the Arbitral Tribunal was constituted unilaterally in 2001 (i.e. pre-amendment of 2015) and the arbitral proceedings were stayed till 2017, the Hon’ble Supreme Court while relying on the judgments of *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 held that the amendment of 2015 will be applicable and the Arbitral Tribunal appointed unilaterally would have lost its mandate in terms of section 12(5) read with Seventh Schedule of the Arbitration and Conciliation Act, 1996. The operative portion of the judgment reads as under:-

“11.3. The learned counsel appearing on behalf of the respondent has also submitted that in the facts and circumstances of the case, the decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] is not applicable. It is submitted that in the said case, the arbitrator was appointed after amendment of the Arbitration Act, 2015. However, in the present case, the arbitrator was appointed approximately 20 years prior thereto and thereafter the arbitration proceedings commenced and even the appellant also participated. It is therefore contended that the amended Section 12(5) of the Arbitration Act which is brought in the statute by way of amendment in 2015 shall not be applicable retrospectively. It is submitted that Section 12(5) of the Arbitration Act shall have to be made applicable prospectively.



12. We have heard the learned counsel for the respective parties at length. Having heard the learned counsel for the respective parties and on considering the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court, the short question which is posed for consideration of this Court is, whether, the Stationery Purchase Committee—Arbitral Tribunal consisting of the officers of the respondent has lost the mandate, considering Section 12(5) read with Seventh Schedule of the Arbitration Act, 1996. If the answer is in the affirmative, in that case, whether a fresh arbitrator has to be appointed as per the Arbitration Act, 1996?

13. It is not in dispute that the High Court earlier constituted the Arbitral Tribunal of Stationery Purchase Committee comprising of officers of the respondent viz. Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members.

14. It may be true that the earlier Arbitral Tribunal—Stationery Purchase Committee was constituted as per the agreement entered into between the parties. It is also true that initially the said Arbitral Tribunal was constituted by the High Court in the year 2001, however, thereafter Stationery Purchase Committee—Arbitral Tribunal could not commence the arbitration proceedings in view of number of proceedings initiated by the appellant. There was a stay granted by the High Court from 4-5-2001 to 24-1-2017 and thereafter in the year 2019, the present application was preferred before the High Court invoking Section 14 read with Sections 11 and 15 of the Arbitration Act, 1996 seeking termination of the mandate of the originally constituted Arbitral Tribunal and to appoint a new arbitrator.



....

16. As observed hereinabove, the Arbitral Tribunal—Stationery Purchase Committee consisted of officers of the respondent State. Therefore, as per Amendment Act, 2015 — sub-section (5) of Section 12 read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators. Section 12 has been amended by the Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of “neutrality of arbitrators”. To achieve the main purpose for amending the provision, namely, to provide for “neutrality of arbitrators”, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

17. It cannot be disputed that in the present case, the Stationery Purchase Committee—Arbitral Tribunal comprising of officers of the respondent State are all ineligible to become and/or to continue as arbitrators in view of the mandate of sub-section (5) of Section 12 read with Seventh Schedule. Therefore, by operation of law and by amending Section 12 and bringing on statute sub-section (5) of Section 12 read with Seventh Schedule, the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and: (i) Deputy Secretary, Department of Revenue, (ii) Deputy



Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under-Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per the Arbitration Act, 1996.

20. In view of the above and for the reasons stated hereinabove, the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is contrary to the law laid down by this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] and the recent decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] . It is held that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is therefore unsustainable and deserves to be quashed and set aside.”



17. In the present case, in somewhat similar facts, the named Arbitrator entered into reference in 2011 and the petitioner repeatedly displayed its apprehension with the appointment of the Arbitrator, both pre and post commencement of arbitral proceedings. The petitioner approached the Hon'ble High Court of Orissa, Cuttack under section 11 of the Arbitration and Conciliation Act, 1996 to appoint an impartial and independent arbitrator since the named Arbitral was the authority dealing with the contract in question between the parties. The arbitration was initially kept in abeyance by the Hon'ble Orissa High Court *vide* order dated 05.10.2012 and it was only on 10.03.2017 that a clarification regarding no stay on arbitration was given by the court. Applying the dicta of *Ellora Paper Mills Ltd. v. State of M.P.*, (2022), the named arbitrator could not have been permitted to continue, having become *de jure* ineligible under section 12(5) of the Arbitration and Conciliation Act, 1996.

18. The recent judgment of the Hon'ble Supreme Court in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co.*, 2024 SCC OnLine SC 3219 also upheld the finding that unilateral appointments are invalid and are liable to be set aside due to the same being violative of Article 14 of the Constitution of India. However, only unilateral appointments in terms of three member tribunals were said to have prospective ruling. The operative portion reads as under:-

“168. In the present reference, we have upheld the decisions of this Court in TRF (supra) and Perkins (supra) which dealt with situations dealing with sole arbitrators. Thus, TRF (supra) and Perkins (supra) have held the field for years now. However, we have disagreed with Voestalpine (supra) and CORE (supra) which dealt with the appointment of a three-member arbitral tribunal. We are



aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three-member tribunals. J.

Conclusion

169. In view of the above discussion, we conclude that:

- a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;*
- b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;*
- c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;*
- d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;*
- e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;*



f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.”

19. In the present case, it is the General Manager/Business Unit Head of the respondent company who was supervising the work in question and was directly involved in the execution of the work. It is the General Manager/Business Unit Head of the respondent company with whom the petitioner's had repeated meetings regarding the progress of the work and the authority that took the decision of termination of the contract. Hence, the apprehension that the Arbitrator would be biased and partial towards the respondent cannot be said to be an unjustifiable apprehension. In addition, the petitioner approached the High Court of Orissa, Cuttack immediately on getting to know about the appointment of the General Manager/Business Unit Head of the respondent company apprehending partiality and bias on part of the Arbitrator.

20. In view of the above discussion, the Impugned Award is liable to be set aside on this ground alone.

Re: Appointments of Arbitrators contrary to the Arbitration Clause

21. Further, even the appointments of the subsequent Arbitrators, including Mr. Awadhesh Kumar Tiwari who passed the impugned Award, are not according to the procedure prescribed in the Arbitration Clause.



22. According to the Arbitration clause, the General Manager/Business Unit Head of the respondent is the named Arbitrator. In the event the Arbitrator, to whom the matter is originally referred to, is transferred or vacates his office or unable to act for any reason, the Chairman and Managing Director, NTPC was to appoint any other person as an Arbitrator in terms of the contract. No other person other person so appointed by the Chairman and Managing Director, NTPC could act as the Arbitrator. However contrary to the same, after Mr. Debasis Sarkar, initially one Mr. Yogendra Singh, the then General Manager/Business Unit Head of the Respondent Company acted as the sole Arbitrator and upon his transfer one Mr. Awadhesh Kumar Tiwari, General Manager/Business Unit Head of the Respondent Company once again automatically assumed jurisdiction and acted as the sole Arbitrator.

23. A perusal of the Arbitral record shows that the successive Arbitrators have been acting independent to the procedure as contemplated under the arbitration clause. On 04.12.2012, Shri Debasis Sarkar informed that the next date for the third sitting will be informed. The letter of 04.12.2012 reads as under:-



OFFICE OF THE SOLE ARBITRATOR

By Regd. Post with A/D

Ref. No. NSPCL/Arbitrator/LOA-16/2012/Order No.07/532

Dated: 4-12-2012

M/s. ISAR Engineers (Pvt.) Ltd

NTPC SAIL Power Company Pvt Ltd

- Vs -

Claimant

Respondent

Subject: Civil Work for Raising of Ash Dyke (Lagoon-A) from 231M to 235M for Rourkela CPP-II (2x60 MW), LOA No. 01/C&M-0210-331B-9-LOA-16 dated 06.12.2005.

Dear Sir,

Please refer to my letter Ref. No. NSPCL/Arbitrator/LOA-16/2012/Order No.06/497 dated 10.11.2012 wherein the 3rd sitting of subject arbitration was scheduled on 21.12.2012

This is to intimate that the 3rd sitting is hereby further postponed on the ground of order of Hon' High Court of Odisha. The next date of 3rd sitting shall be intimated later.

Thanking you.

Yours faithfully,

Debasis
Sole Arbitrator
Debasis Sarkar
GM & BUH, NSPCL
CPP-II, RSP Complex
Rourkela

24. Thereafter, a letter was sent by Mr. Yogendra Singh on 12.06.2014 informing the parties the next date of hearing being 23.08.2014. The letter reads as under:-



OFFICE OF THE SOLE ARBITRATOR.

Ref.No:- :-NSPCL/Arbitrator/LOA-16/2014/ Order No.8/-590

Dated: 12/06/14

→ M/s. Isar Engineers Private Limited ----- Claimant.
-Vs-
NTPC-SAIL Power Company Pvt. Limited ----- Respondent

Subject: Civil Works For Raising Of Ash Dyke (Lagoon-'A') From 231M To 235M
For Rourkela, CPP- II (2 X 60 MW).LOA No: 01/C&M-0210-331B-9-
LOA-16 dated: 6.12.2005

Dear Sir,

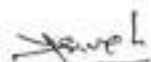
An application has been filed before sole Arbitrator requesting to accept the counter claim of the Respondent and to enter upon reference on the same. The claimant may file objection if any on the said claim on or before 23.06.2014 failing which it will be presumed that you have no say on the matter.

This is to inform you that next date of hearing is scheduled on 23.06.2014 at 11.00 AM in the office of the undersigned.

You are requested to attend the hearing by yourself or through your authorised representative on the day and time mentioned above.

Thanking you,

Yours faithfully,


Sh. Yogendra Singh
Sole Arbitrator,
(GM/BUH- NSPCL)
CPP-II, RSP Complex,
Rourkela-769011

25. On 23.08.2014, Mr. Yogendra Singh informed that he is being released from his post and the new Arbitrator will take over. The letter reads as under:-



OFFICE OF THE SOLE ARBITRATOR.

23785/14

Ref.No:- :NSPCL/Arbitrator/LOA-16/2014/ Order No:-9

Dated:-23-08-2014

M/s. Isar Engineers Private Limited ----- Claimant.

-Vs-

NTPC-SAIL Power Company Pvt. Limited ----- Respondent

Subject: Civil Works For Raising Of Ash Dyke (Lagoon-'A') From 231M To 235M
For Rourkela, CPP- II (2 X 60 MW).LOA No: 01/C&M-0210-331B-9-
LOA-16 dated: 6.12.2005

Ref no:- Your letter no:- HEPL/NSPCL/14-15/017 dated:-17-06-2014

Dear Sir,

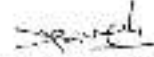
Refer to Arbitrator order no:- ARBP 8/590 dt:-12-06-2014 for hearing of subject case and your subsequent communication vide ref no:- HEPL/NSPCL/14-15/017 dated:-17-06-2014 with request for adjournment of hearing date.

The sole Arbitrator is being released on 23-08-2014 from his post as GM/ BUH, NSPCL, Rourkela and the Arbitration matter may proceed further on joining of the new Arbitrator.

Any further direction regarding subject Arbitration case will be communicated by the New Arbitrator in due course of time.

Thanking you,

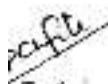
Yours faith/fully,
Sole Arbitrator

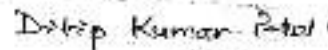

Sh.Yogendra Singh
(GM/BUH- NSPCL)

Copy to:

Claimant: M/s ISAR Engineers (Pvt.) ltd,
Old Cinema Hall Road,
Sundargarh-770002 (Orissa)

Respondent: M/s.NSPCL – Rourkela
S.K.Mahapatra, (Addln.G.M-Civil)
CPP-II, NSPCL, Rourkela-769011
Dist: Sundargarh




Dileep Kumar Patel

26. Thereafter, on the next date, i.e. 08.12.2015, Mr. Awadhesh Kumar Tiwari also on his own volition and automatically assumed jurisdiction. The letter of the said date is reproduced below:-



OFFICE OF THE SOLE ARBITRATOR.

Ref.No: NSPCL/Arbitrator/LOA-16/2015/ Order No.10/ 264

Date:-08.12.2015

BY REGD. POST WITH AD

To,
M/s ISAR Engineers (Pvt.) Ltd,
Old Cinema Hall Road,
Sundargarh-770002 (Orissa)

In the matter of Arbitration between,

M/s. Isar Engineers Private Limited ----- Claimant.

-Vs-

NTPC-SAIL Power Company Pvt. Limited ----- Respondent

Subject:- Civil Works For Raising Of Ash Dyke (Lagoon-'A') From 231^M To 235^M For Rourkela,
CPP- II (2 X 60 MW).

LOA No: 01/C&M-0210-331B-9-LOA-16 dated: 6.12.2005

Dear Sir,

This is to inform you that Sole Arbitrator for the above case has been transferred and released from NSPCL, Rourkela on 09.9.2015.

I have joined NSPCL-Rourkela on 10.09.2015(F/N) vide office order no: 144/2015-16 dated:-10-09-2015 as General Manager/Business Unit Head and shall be working as Head of Project.

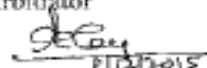
As per clause no:- 56 of General Conditions of Contract of subject contract the GM/BUH of NSPCL, Rourkela will act as Arbitrator. Therefore the undersigned will be acting as Arbitrator for the subject contract.

Further date of arbitration proceedings shall be intimated later after receipt of Order of Honourable High Court of Odisha in connection with your petition vide case No ARBP-59/2011.

You are requested to give an acknowledgement of the receipt of the letter.

Thanking you,

Yours faithfully,
Sole Arbitrator


Sh.Awadhesh Kumar Tiwary
(GM/BUH- NSPCL)

Copy To: M/s NSPCL-Rourkela
Sh.S.K.mishra, (AGM-Civil)
CPP-II, NSPCL, Rourkela
Dist.Sundargarh,Odisha

27. Thereafter, on 28.08.2017, Mr Awadhesh Kumar Tiwari was pleased to proceed *ex-parte* against the petitioner. The order is reproduced as under:-



Before Sri A. K. Tiwary, Sole Arbitrator

Ref No : NSPCL/Arbitrator/C&M-0210-331B-9-LOA-16 dt:06.12.2015 / 1397

M/s Isar Engineers (P) Ltd..... Claimant

Vs

NTPC-SAIL Power Company Ltd..... Respondent

Order No : 11

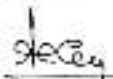
Dated : 28 August 2017

The Respondent is present. The Claimant has remained absent. The orders passed on dated 18 July 2017 has been sent by registered post and duly served on them on dated 18 July 2017.

The Claimant has not taken any step. The Respondent has filed a memo stating to have tendered copy of Counter Claim statement to the Claimant and postal receipts and PODs are placed on records showing the service of the documents.

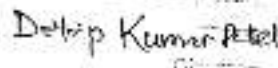
The Claimant is ~~is~~ ex parte.

The Respondent is directed to file evidence on next date. The next date of proceeding is fixed on Dt 26/09/2017 at 03.00 PM in the Administrative Building at NSPCL, Rourkela. The parties are to make conveniences of their appearances without fail.


(A. K. Tiwary) 28/8/2017
Sole Arbitrator

Copy To :

1. M/s ISAR Engineers Pvt. Ltd,
Old Cinema Hall Road,
Sundargarh-770002 (Odisha)
2. M/s ISAR Engineers Pvt. Ltd,
312, Kharvel Nagar, Bhubaneswar-I, Odisha
3. M/s ISAR Engineers Pvt. Ltd,
80, (1st Floor), Saheed nagar, Bhubaneswar-07, Odisha
4. M/S NTPC-SAIL Power Company Ltd,
CPP-II, Administrative Building,
SAIL-RSP Complex, Rourkela-769011 Odisha


Deep Kumar Patel

28. It is settled law that the Arbitrator is a creature of the contract and has to function within four corners of contract. If a particular mechanism is contemplated for his appointment, the same must be followed in its true



letter, spirit and intent, failing which the Arbitrator is without jurisdiction and the appointment is *non-est and* invalid. This court in *M/s. M.V. Omni Projects (India) ltd. V. Union of India, 2024:DHC:7874* has held as under:-

“25. There is also no merit in the contention that the present petition is not maintainable because an arbitral tribunal already stands constituted in terms of the contractual provisions. It has been consistently held in a series of judgments that where the appointment procedure is invalid, any proceedings before an improperly constituted arbitral tribunal are non-est.....”

(Emphasis Supplied)

29. Further, section 34(2)(v)(a) of Arbitration and Conciliation Act, 1996 reads as under:-

“34. Application for setting aside arbitral award.

(2) An arbitral award may be set aside by the Court only if—

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or”

30. The clause clearly contemplates that in a situation where the Arbitrator (to whom the matter is originally referred) is transferred, vacates the office or is unable to act, then only the Chairman and Managing Director of the NTPC shall appoint another person to act as an Arbitrator in accordance with the terms of the contract. Nowhere does the Arbitration clause contemplates the automatic assumption of jurisdiction by the successor General Manager/Business Unit Head as the Arbitrator.



31. The situation in the present case, i.e. Shri Debasis Sarkar having been transferred and thereafter the successive General Managers/Business Unit Heads of the respondent, i.e. Mr. Yogendra Singh and Mr. Awadhesh Kumar Tiwari taking over as Arbitrators by virtue of their office of is clearly in contravention of the Arbitration Clause.

32. There is no document to show that the subsequent Arbitrators, especially Mr. AK Tiwari (the Arbitrator who passed the Impugned Award), were appointed by the Chairman and Managing Director of the NTPC or even had the consent/concurrence of the Chairman and Managing Director of the NTPC and hence, the same is violative of the arbitration clause. The above-reproduced automatic assumption of jurisdiction by the Arbitrators have no basis in law. The sanctity of appointment of Arbitrator and the scope of its jurisdiction is solely based on the express agreement between the parties. The invalidity of the appointment of the arbitrator goes to the root of the matter and clearly falls within the parameters of section 34(2)(a)(v) of the Arbitration and Conciliation Act, 1996. Since the appointment procedure was not followed, the appointment of the subsequent Arbitrators, including Mr. Awadhesh Kumar Tiwari who passed the award, is *non-est* and invalid in law.

Conclusion

33. In view of the above, the Impugned Award dated 13.12.2017 titled “*Mr. Isar Engineers Private Limited v. M/s. NTPC-SAIL Power Company Limited*” is set aside since (i) the appointments of the subsequent Arbitrators, namely Mr. Yogendra Singh and Mr. Awadhesh Kumar Tiwari, were in contravention to the appointment procedure contemplated under the contract and (ii) the appointments were made unilaterally by the respondent.



34. Since the Impugned Award is being set aside on the above two foundational facts, I need not go into the merits of the Award.
35. The present petition is allowed and pending applications are disposed of.

FEBRUARY 03, 2025
dj

JASMEET SINGH, J