

Mahalakshmi Infraprojects Private Ltd vs Ntpc Ltd on 5 January, 2022

Author: C. Hari Shankar

Bench: C. Hari Shankar

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ARB.P. 230/2020 & I.A.5333/2020, I.A.5334/2020

MAHALAKSHMI INFRAPROJECTS PRIVATE LTD.

..... Petitioner

Through: Mr. Brijesh Kumar Goel, Adv.

versus

NTPC LTD.

..... Res

Through: Ms. Madhavi Divan, ASG with
Mr. Rituraj Biswas, Mr. Chandan Kumar
and Mr. Ayush Puri, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

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05.01.2022

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("1996 Act"), whereby the petitioner seeks reference of the disputes between the petitioner and the respondent to arbitration.

2. The arbitrability of the disputes between the parties is not questioned.

3. Clause 7.1 of the contract between the parties, which envisages reference of disputes to arbitration, reads thus:

"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, 2015 shall apply and Delhi Courts alone shall have

exclusive jurisdiction in all matters arising under this Contract. The arbitrator shall give reasoned/speaking award."

4. Clause 56 and Clause 57 of General Conditions of Contract which governs the contract between the parties read thus:

"ARBITRATION AND LAWS Arbitration

56. Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings had instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs drawings, specifications, estimates, instructions, orders or these conditions of otherwise, concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the/ General Manager of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and if the General Manager is unable/ or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, NTPC Limited (Formerly National Thermal Power Corporation Ltd), willing, to act as such arbitrator. There will be no objection if the, arbitrator so appointed is an employee of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the, matters In dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act, Chairman and Managing Director, NTPC Limited (Formerly National Thermal Power Corporation Ltd), shall appoint another person to act as arbitrator in accordance. with the terms of the Contract. It is also a term of this Contract that no person other than a person appointed by CMD., NTPC Ltd. as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. Subject as aforesaid the provision of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being In force shall apply to the arbitration proceeding under this clause. 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 this 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(GM-1)] dated 1st January 1976 or its amendments for arbitration shall be applicable Laws governing the Contract.

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

5. Ms. Divan, learned ASG advanced, essentially, the following submissions.

6. The first submission of learned ASG is that the concluding covenant in Clause 56 of the agreement between the parties provides that no person other than the person appointed by the CMD, NTPC could act as arbitrator and that, if for any reason that was not possible, the matter was not to be referred to arbitration at all. If, therefore, the contention of the petitioner is that the arbitrator could not be appointed in terms of Clause 56, owing to the judgements of the Supreme Court in 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, she submits that the dispute ceases to be arbitrable.

7. The issue stands covered against the respondent by a judgment of a coordinate Bench of this Court (Justice Vibhu Bakhru) in T.K. Engineering Consortium Pvt. Ltd. v. Director (Projects) Rites Ltd.⁴ which has been recently followed by me in ARSS Infrastructure Pvt. Ltd. v Ircon International Ltd.⁵ in which it has been held that the right of the Court to refer the dispute to arbitration cannot be nullified by such a clause. Paras 17 to 21 of ARSS Infrastructure² may, in this context, be reproduced thus:

(2017) 8 SCC 377 2019 SCC OnLine SC 1517 (2019) 5 SCC 755 280 (2021) DLT 11
2021 SCC OnLine Del 5100 "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.⁴ The court has taken the view, in the said case, that the mere fact that, by operation of Perkins Eastman² 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 Eastman² 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. Engineering⁴, 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 (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 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 and Perkins², the said term must also 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.¹

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."

8. Learned ASG further submits that the respondent has, vide letter dated 10th August, 2020, written to the petitioner, suggesting four names, out of which the petitioner was called upon to choose one to arbitrate on the disputes. She submits that the petitioner did not respond to the said communication and suggests that, if the petitioner was amenable to the arbitration of the disputes by one of the names suggested in the said communication, the matter could reach a quietus. She also submits that, in view of the said communication, the petitioner was not entitled to further relief especially in light of the law laid down by the Supreme Court in Central Organisation for Railway

Electrification v. ECI-SPIC-SMO-MCML (JV)6 ("CORE", hereinafter).

(2020) 14 SCC 712

9. Mr. Brijesh Kumar Goel, appearing for the petitioner, submits that the petitioner had, in fact, on 31 st August, 2020, responded to the aforesaid communication of the respondent and had refused the offer to arbitration of the disputes by the persons named in the said communication.

10. Having heard the submissions of learned Counsel on this point, it is clear that the respondent did not have any authority to send such a communication after the petitioner had approached the Court, given the position as laid down by the Supreme Court in Datar Switchgears Ltd. v Tata Finance Ltd.⁷ followed in Punj Lloyd Ltd. v. Petronet MHB Ltd.⁸ and U.O.I. v. Bharat Battery Manufacturing Co. (P) Ltd.⁹ Apropos the judgment in CORE6, the arbitration clause in CORE6 provided for arbitration by a panel of arbitrators to be provided by the appellant before the Supreme Court in that case. There is no such covenant in Clause 56 of the contract between the parties in the present case. The contract does not entitle NTPC to provide a panel of arbitrators, out of which the petitioner would be required to choose anyone. As such, the position which obtained in CORE6 was clearly distinct from that which obtains in the present case.

11. In U.O.I. v Preco-DKSPL(JV)¹⁰, it has been clearly held that the arbitration clause in a contract between the parties is sacrosanct (2000) 8 SCC 151 (2006) 2 SCC 638 (2007) 7 SCC 684 (2016) 14 SCC 651 and that it cannot be departed from. Subject to the law laid down by the Supreme Court in various authorities including, for instance, Perkins Eastman Architects DPC2 , the protocol for appointment of the arbitrator has to abide the contract between the parties. Where Clause 56 of the contract between the parties in the present case does not contemplate providing of a panel of arbitrators by NTPC to the petitioner, NTPC cannot seek to rely on the communication dated 10th August, 2020 whereby such a panel was suggested.

12. Clause 56 is clearly in the teeth of Perkins Eastman Architects DPC2, Bharat Broadband Network Ltd. v. United Telecoms Ltd.³ and Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd.¹¹ as it clothes one of the parties to the contract with the exclusive right to appoint the arbitrator. Such a clause is not enforceable in law and is also violative of Section 12(5) of the 1996 Act.

13. In such a circumstance, applying the law laid down in Perkins Eastman² and such other cases, the task of appointing the arbitrator devolves on the Court.

14. I am informed by Mr. Goel that the amount claimed by the petitioner is in the region of around 60 crores and that there would be a considerable counter claim by NTPC as well.

15. In view thereof, Justice PR Ramachandran Menon, Former Chief Justice of the High Court of Chhattisgarh and an eminent retired judge of the High Court of Kerala, (Mobile No. +91 9446002721) is requested to arbitrate on the disputes between the parties. The learned (2021) 3 SCC 103 arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the

Arbitration and Conciliation Act, 1996.

16. The learned arbitrator is requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

17. The petition alongwith pending applications stands allowed in the aforesaid terms with no orders as to costs.

C. HARI SHANKAR, J JANUARY 5, 2022/kr