

\$-8

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

Date of decision: 09th November 2022

+ ARB.P. 582/2020

RAM KRIPAL SINGH CONSTRUCTION PVT. LTD..... Petitioner

Through: Mr. Amit Pawan, Mr. Hassan Zobair
Waris, Mr. Aakarsh & Ms. Shivangi,
Advocates.

versus

NTPC

..... Respondent

Through: Mr. R. Sudhinder, Advocate with Mr.
Nikhil Kumar Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

Brief Facts

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act', for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Letter of Award dated 17.12.2010, which related to the setting-up of a township for the respondent's Super Thermal Power Project at Barh, Bihar; the issuance of the letter of award having culminated in the parties signing a Contract Agreement dated 01.02.2011 ('contract').

2. Notice on the petition was issued on 17.12.2020; whereupon the respondent furnished its reply dated 11.12.2020 (filed on 05.02.2021); to which the petitioner also filed rejoinder dated 26.03.2021.

Petitioner's Submissions

3. Mr. Amit Pawan, learned counsel for the petitioner draws the attention of this court to clause 56 of the General Conditions of Contract ('GCCs' for short) which governs the letter of award; and which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act. Clause 57 of the GCCs, which is the 'governing law' provision, is also noticed. The said provisions read as under :

"ARBITRATION AND LAWS

56. Arbitration

"Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitrator 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....

“...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.”

* * * * *

“57. Laws governing the Contract:

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

(emphasis supplied)

4. Mr. Pawan submits that clause 56, insofar as it contemplates arbitration by the General Manager (‘GM’), NTPC or some other person appointed by the Chairman & Managing Director, NTPC (‘CMD, NTPC’) is inoperative and invalid in view of section 12(5) having been inserted in the A&C Act by way of the Arbitration & Conciliation (Amendment) Act, 2015 (‘Amendment Act-2015’) with retrospective effect from 23.10.2015.

5. In support of the foregoing submissions, counsel for the petitioner relies on the following other verdicts of the Supreme Court and of Co-ordinate Benches of this court :

5.1. ***Dolphin Drilling Limited vs. Oil and Natural Gas Corporation Ltd.***¹, on the point that reference of ‘all disputes’ entails all disputes that exist when the arbitration clause is invoked;

5.2. ***Aravali Power Company Pvt Ltd. vs. Era Infra Engineering Ltd.***², on the applicability of the Amendment Act-2015 to disputes in respect of which arbitration was invoked prior to the amendment having come into force w.e.f. 23.10.2015;

5.3. ***Omaxe Infrastructure and Construction Ltd. vs. Union of India &Anr.***³, on the applicability of the Amendment Act-2015 to disputes where arbitration was invoked pre-amendment, but the appointment of the arbitrator was made post-amendment;

5.4. ***KKR Infra Projects Pvt Ltd. vs. Union of India***⁴, on the applicability of the Amendment Act-2015 to a case where a second arbitrator was appointed in the same arbitral proceedings, however post-amendment;

5.5. ***Hero Wind Energy Pvt Ltd. vs. Inox Renewables Ltd.***⁵, on the correctness of an arbitral tribunal appointed for a specific

¹ (2010) 3 SCC 267

² (2017) 15 SCC 32

³ 2018 SCC Online Del 8914

⁴ 2018 SCC Online Del 12418

⁵ 2020 SCC Online Del 720

dispute, dealing with subsequent disputes, that may have arisen between the same parties;

- 5.6. *Ellora Paper Mills Ltd. vs. State of Madhya Pradesh*⁶, on the applicability of the Amendment Act-2015 to a case where an arbitral tribunal was appointed pre-amendment, however arbitral proceedings had not commenced until post-amendment;
- 5.7. *TRF Ltd. vs. EnergoEngg Projects Ltd.*⁷, on the ineligibility of a party to nominate an arbitrator, when the party itself has become ineligible, by law, to act as arbitrator;
- 5.8. *SREI Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd.*⁸, on termination of arbitral proceedings under section 25 being different from termination under section 32(2) of the A&C Act;
- 5.9. *T.K. Engineering Consortium Pvt Ltd. vs. Director (Project) Rites Ltd &Anr.*⁹, on the appointment of an independent arbitrator when the procedure in an arbitration clause has become void by operation of law;
- 5.10. *ARSS Infrastructure Pvt Ltd. vs. Ircon International Ltd. &Anr.*¹⁰, on the appointment of an independent arbitrator when, by operation of law, it has become impermissible for one party to appoint an arbitrator; and

⁶ 2022 SCC Online SC 8

⁷ (2017) 8 SCC 377

⁸ (2018) 11 SCC 470

⁹ 2021 SCC Online Del 1188

¹⁰ 2021 SCC Online Del 5100

5.11. *Bharat Broadband Network vs. United Telecoms Ltd.*¹¹, on whether the filing of a statement of claim before an arbitral tribunal implies a 'written waiver' as envisaged under section 12(5) of the A&C Act.

6. Mr. Pawan lays special emphasis on the decisions of the Supreme Court in *TRF Ltd.* (supra), *Bharat Broadband Network* (supra) and *Perkins Eastman DPC & Anr. vs. HCC (India) Ltd.*¹², which make the said officers ineligible to be, or to appoint, an arbitrator in the matter. Mr. Pawan further submits that the part of clause 56 which says that no person other than an appointee of the CMD, NTPC should act as arbitrator, and, *if that is not possible, disputes cannot be referred to arbitration at all*, is also illegal and void.
7. Counsel for the petitioner also highlights the two judgements of Co-ordinate Benches of this court itself in *T.K Engineering Consortium Pvt Ltd.* (supra) and *ARSS Infrastructure Pvt. Ltd.* (supra), have already dealt with similar arbitration clauses, and have rejected the argument that if the respondent cannot appoint an arbitrator, parties cannot be sent to arbitration at all.
8. It is accordingly the petitioner's submission, that there is a subsisting arbitration agreement between the parties; and since admittedly, disputes have arisen between them from the letter of award and the contract, the same are required to be referred for arbitration to an arbitrator to be appointed by this court.

¹¹ (2019) 5 SCC 755

¹² (2019) SCC Online SC 1517

Respondent's Submissions

9. Opposing the prayer for appointment of an arbitrator, Mr. R. Sudhinder, learned counsel for the respondent argues that an arbitration agreement is founded on the consent of parties and must therefore be restricted to whatever the consenting parties have agreed to. It is argued that as per clause 56 of the GCCs, which contains the arbitration agreement between the petitioner and the respondent, it is quite plain that only the GM, NTPC or other person appointed by the CMD of NTPC can act as arbitrator and “ *...no person other than a person appointed by CMD., NTPC Ltd. as aforesaid should act as arbitrator.*” It is emphasized that the parties have also expressly agreed in clause 56 that “ *...if for any reason, that is not possible, the matter is not to be referred to arbitration at all.*” The argument presented is that, since by reason of insertion of section 12(5) by way of amendment to the A&C Act and the decisions of the Supreme Court in *TRF Ltd* and in *Perkins Eastman* (supra), the GM or other appointee of the CMD, NTPC is rendered ineligible to be appointed as arbitrator, the arbitration clause becomes inoperative and impossible of performance by the respondent, thereby vitiating the agreement for arbitration itself.
10. Mr. Sudhinder further argues that consent of parties is a crucial requirement for reference to arbitration; and that since the respondent has not consented for appointment of an arbitrator otherwise than as agreed to in clause 56, outside of that procedure, the respondent has not consented to arbitration at all.

11. It is also contended on behalf of the respondent that the court cannot sever from clause 56, that part by which the parties have agreed to arbitration by the GM or other appointee of the CMD, NTPC; and it is impermissible to give effect only to the part that contains the consent of the parties to go to arbitration, without giving effect to the part that provides as to who would be the arbitrator under the same agreement.
12. On another note, Mr. Sudhinder also submits that the disputes raised by the petitioner that are subject matter of the present proceedings are *ex-facie* time-barred, since they relate to the year 2014; while the remedy is sought to be invoked *vide* notice dated 29.09.2020; and that neither the notice invoking arbitration, nor the present petition, disclose any intervening facts which might extend or exclude limitation. Counsel relies on the judgement of the Supreme Court in ***Bharat Sanchar Nigam Limited and Anr. vs. Nortel Networks India Pvt. Ltd***¹³ to support the submission that time-barred disputes are not to be referred to arbitration.
13. That apart, counsel for the respondent also points-out that notice dated 29.09.2020 invoking arbitration does not specify the quantum of the disputes raised; in contrast to the petitioner's earlier notice invoking arbitration dated 27.01.2014, wherein such specifics were stated. This, counsel argues, is not in conformity with the requirements of the arbitration clause, which requires that specifics of the disputes and amounts claimed are to be stated; and therefore

¹³ (2021) 5 SCC 738

notice dated 29.09.2020 does not amount to valid invocation or commencement of the arbitral proceedings.

14. To support his submissions, counsel for the respondent relies on the following judicial precedents :

14.1. *S.P Singla Constructions Pvt. Ltd. vs. State of Himachal Pradesh and Anr.*¹⁴, for the proposition that a challenge to the appointment of an arbitrator is to be considered as per the terms of the agreement between the parties;

14.2. *Union of India vs. Parmar Constructions*¹⁵, on the applicability of the Amendment Act-2015 on proceedings which have commenced under section 21 of the A&C Act prior to the amendment coming into effect;

14.3. *Veekay General Industries vs. Union of India*¹⁶, on the proposition that arbitration cannot be thrust upon parties, if one of the parties (the Railways in that case) cannot appoint an arbitrator as stipulated in the arbitration clause;

14.4. *Bharat Sanchar Nigam Ltd. and Anr.* (supra), on the period of limitation for filing a petition under section 11 of the A&C Act; and entertaining a reference to arbitration when the claims are *ex-facie* time barred;

14.5. *Indian Oil Corporation Ltd. &Ors vs. Raja Transport Pvt. Ltd.*¹⁷, on the point that the appointment of an employee of one of

¹⁴ (2019) 2 SCC 488

¹⁵ (2019) 15 SCC 482

¹⁶ 2017 SCC Online Cal 5835

¹⁷ (2009) 8 SCC 520

the parties as an arbitrator, in the pre-amendment time, cannot *per-se* be a bar to his acting as an arbitrator;

14.6. *Sapna Gupta vs. Ajay Kumar Gupta & Ors.*¹⁸ and *Bihar State Mineral Dev. Corpn. and Ors. vs. Encon Builders (I) Pvt. Ltd.*¹⁹ on the proposition that consensus *ad-idem* is essential for reference of parties to arbitration;

14.7. *Union of India vs. Pradeep Vinod Construction Company*²⁰, on the proposition that the Amendment Act-2015 is not applicable to arbitrations where notice for arbitration was issued prior to Amendment Act-2015 coming into force; and that therefore appointment of arbitrator should be as per the procedure in the arbitration clause; and

14.8. *Vidya Drolia and Ors. vs. Durga Trading Corporation*²¹, on the proposition that a mere agreement to arbitrate is not legally binding, unless it satisfies the core contractual requirements concerning consent, consideration, legal relationship etc.

Petitioner's Rejoinder

15. In rejoinder, Mr. Pawan submits that the Amendment Act-2015 would apply to the present proceedings, since the notice invoking arbitration was issued on 29.09.2020, which is well after the date the amendment came into effect from 23.10.2015. It is argued that since, as per the amended provision, the procedure for appointment of arbitrator under clause 56 is no longer valid and enforceable, the petitioner had no

¹⁸ 2021 SCC Online Del 5313

¹⁹ (2003) 7 SCC 418

²⁰ (2020) 2 SCC 464

²¹ (2021) 2 SCC 1

alternative but to approach this court under section 11(6) of the A&C Act seeking appointment of a neutral arbitrator.

16. Responding to the objection that the claims are time-barred, Mr.Pawan submits that the (second) notice invoking arbitration dated 29.09.2020 has been issued in relation to claims that have arisen *subsequent* to issuance of the (first) notice dated 27.01.2014; and it is in relation to such later claims that the petitioner is now seeking appointment of an arbitrator through court. It is stated that though some of the disputes that are subject matter of invocation notice dated 29.09.2020 arise under the same ‘heads of claim’ as those in invocation notice dated 27.01.2014, since the project is still on-going, the claims relate to a subsequent period and the cause of action for such subsequent claims has arisen after the earlier notice and the claims are within time.

Discussion & Conclusions

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*²² (supra), *ARSS Infrastructure*²³ (supra) as also to *NIIT Technologies Ltd. vs. Directorate General, Border Security Force*²⁴;

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

²² paras 19, 22, 33, 34.

²³ para 17, 19.

²⁴ 2017 SCCOnLine Del 12538; para 11

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, re-statement or re-interpretation 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 vs. Severn Trent Purification Inc. and Ors.*²⁵)

17.7. Insofar as the respondent's objection that the claims sought to be raised by the petitioner are time-barred is concerned, a plain reading of the (second) invocation notice dated 29.09.2020, which is the basis of the present arbitration petition, it is seen that *the petitioner's assertion is* that the claims sought to be raised and referred to arbitration by seeking appointment of an arbitrator in the present proceedings, are subsequent claims, which are not time-barred. Reference in this behalf may be made to the following portions of invocation notice dated 29.09.2020 issued by the petitioner to the respondent :

“Disputes had earlier arisen between the parties and the Contractor M/s Ram Kripal Singh Construction Pvt. Ltd. had invoked the arbitration clause vide its notice dated 27.01.2014, whereafter arbitral proceedings had commenced. However, the said arbitral proceedings were terminated by the Sole Arbitrator vide order dated

²⁵ (2013) 1 SCC 641; para 96.

22.06.2016, *The Contractor M/s Ram Kripal Singh Construction Pvt. Ltd, has moved an application seeking recall of the aforesaid order dated, 22.06.2016, under Section 25 of the Arbitration & Conciliation Act, 1996, which is yet to be adjudicated.*

Meanwhile, the work in question, awarded by the Owner to the Contractor is still going on. Further disputes have arisen between the parties, even after the previous invocation of arbitration, which can be briefly summarised under the following four broad heads.

- 1. Non handing over of work front by the Owner to the Contractor at multiple places.*
- 2. Non supply of all the approved working drawings by the Owner to the Contractor.*
- 3. Change of specifications by the Owner.*
- 4. Claim on account of change in law- introduction of GST, Change In Labour Law etc.*
- 5. Breach of multiple clauses of the Agreement and other Contract Documents by the Owner.*

The aforesaid are the broad heads of the disputes and the Contractor reserves the right to raise any and all further claims arising out of or in connection with the disputed matters described in this Notice or otherwise arising between the parties. The Contractor further reserves the right to Add, amend, elaborate, explain, revise and/or supplement the claim.”

(emphasis supplied)

Though, as is evident from the aforesaid extracts from the (second) invocation notice, the petitioner has not detailed the claims sought be made by it, it is not the remit of this court to get into the specifics of the claims; and, as enunciated by the

Supreme Court in *Bharat Sanchar Nigam Ltd.*(supra), this court is persuaded to proceed on the basis that unless claims are *ex-facie* time-barred, the court would lean in favour of reference to arbitration on the principle '*when in doubt, do refer*'. In this view of the matter, the allegation that the claims are time-barred will not deter this court from appointing an arbitrator, of course leaving it to the arbitrator to decide the issue of limitation, as may be raised, as a mixed question of fact and law, in the course of arbitral proceedings.

18. Accordingly, the present petition is allowed and Hon'ble Mr. Justice Aftab Alam, former Judge, Supreme Court of India (Cellphone No.: +91 9868219005) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
19. The learned Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
20. The learned Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Arbitrator.
21. Parties shall share the arbitrator's fee and arbitral costs, equally.
22. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their own merits, in accordance with law.

23. Parties are directed to approach the learned Arbitrator appointed within 10 days.
24. The petition stands disposed-of in the above terms.
25. Other pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

NOVEMBER 09, 2022

Ne/uj/ds