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

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Date of decision: 18.01.2022

+ ARB.P. 27/2022

ENVIRAD PROJECTS PVT. LTD. Petitioner

Through Mr. Brijesh Kumar Goel, Mr. Rajeev
Kumar and Mr. Ankit Gupta,
Advocates

versus

NTPC LTD. Respondent

Through Mr. Adarsh Tripathi, Mr. Vikram S
Baid and Mr. Ajitesh Garg, Advs.

**CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

JUDGMENT (oral)

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of sole Arbitrator to adjudicate the disputes inter-se the parties.

2. As per the averments made in the present petition, petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of undertaking civil construction projects. Respondent is also a company registered under the Companies Act, 1956 and is working as a Central Public Sector Undertaking to implement power projects in the country.

3. It is further averred that the respondent-company invited the bid/tender for the subject package, namely, “3rd Raising of Dyke of Ash Pond ‘A’ & ‘B’ at NTPC-Tanda Project” on 05.08.2014 and after final bid, the aforesaid work was awarded to the petitioner vide its Letter of Award in form of Purchase Order dated 07.01.2015 amounting to work value of about Rs.27.50 crores having overall completion period of 20 months wherein the works of Dyke ‘A’ was to be executed within 11 months starting from 10.01.2015 to 09.12.2015, and thereafter, the works of Dyke ‘B’ within 9 months from 10.12.2015 to 09.09.2016. Subsequently, parties entered into a Contract Agreement dated 15.01.2015.

4. It is further averred that though the petitioner mobilised the machineries and manpower to execute the awarded works from day one, yet due to many reasons of delay, work of Dyke ‘A’ and divide bund was handed over to respondent on 09.03.2016. Though the respondent was well aware of the reasons of delay which were not in control of petitioner, respondent deducted huge amount of about Rs.67.51 lacs towards the Liquidated Damages, holding amount from the due payments of running account bills of the petitioner which were raised for the works of Dyke ‘A’ and divide bunds and the same was in complete violation and *de hors* to

terms and conditions of the said Contract Agreement.

5. Learned counsel for petitioner submits that for commencement of Dyke 'B' works, the respondent failed to handover the required working fronts for a period of 57 days and the same were partially made available on 05.05.2016. Thus, a justified revised time schedule to give effect to envisaged original 9 months for completing Dyke 'B' works starting from 05.05.2016 was ought to be fairly extended up to 04.02.2017 by the respondent, yet the respondent issued unfair and unjust time extension stating that "*completion period provisionally extended up to 04.02.2017 without prejudice to levy LD*". Thereafter, for the reasons/delays attributable to the respondent six extensions of time for completion of said awarded works of the Contract were issued by the respondent, coupled with unfair deduction of 7.5 % amount in name of "LD Hold amount" from the RA bills raised for the progressive executed works for Dyke 'B'. The defect liability period of 12 months for such executed works has also ended on 31.10.2019. However, the respondent has not paid the outstanding due payments of Rs.1,65,44,796/- till date to the petitioner and rather it imposed LD amount of Rs.82,44,435/- in May, 2021. Thereafter, disputes arose between the parties.

6. Petitioner served a notice dated 27.12.2021 upon respondent, seeking appointment of Arbitrator as per terms and provisions of Clause No.56 of GCC and the CMD and other senior officials of the respondent's company have received the said 'Notice of Arbitration' on 31.12.2021 as per track consignment/delivery report of India Post websites. Hence, the present petition has been filed.

7. During the course of hearing, learned counsel appearing on behalf of respondent has disputed the averments made in the present petition and submitted that as per Clause 56 and 57 of the General Conditions of Contract of the underlying contract Agreement dated 15.01.2015 postulates that *'the disputes shall be referred to the sole arbitration of the General Manager of NTPC limited, and if 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, willing to act as such Arbitrator.'*

8. The Hon'ble Supreme Court's in *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd. 2019 SCC Online SC 1517*, has categorically stated that *no single party can be permitted to unilaterally appoint the Arbitrator, as it would defeat the purpose of unbiased adjudication of*

dispute between the parties. The aforesaid decision in **Perkins** (Supra) has been followed by a Coordinate Bench of this Court in **Proddatur Cable TV Digi Services Vs. Citi Cable Network Limited: (2020) 267 DLT 51**. Thus, the Arbitrator either has to be appointed with the consensus of the parties or by this Court.

9. Further, recently on 05.01.2022, a Coordinate Bench of this Court in **MAHALAKSHMI INFRAPROJECTS PRIVATE LTD Vs. NTPC LTD** (ARB.P. 230/2020) has dealt with a similar issue and has clearly specified that **'the task of appointing the arbitrator devolves on the Court.'** Relevant portion of the judgment is extracted below:

"11. In U.O.I. v Preco-DKSPL(JV) , it has been clearly held that the arbitration clause in a contract between the parties is sacrosanct 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 DPC , 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 DPC , Bharat Broadband

Network Ltd. v. United Telecoms Ltd. and Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd. 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 Eastman and such other cases, the task of appointing the arbitrator devolves on the Court.”

10. Concurring with the decisions as noted above, the present petition is allowed. Accordingly, **Mr. Justice S.K. Katriar, Judge (Retd.) (Mob.: 8527937916)** is appointed as sole Arbitrator to adjudicate the dispute between the parties.

11. The fee of the learned Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

12. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

13. The present petition stands disposed of accordingly.

14. A copy of this order be sent to the learned Arbitrator for information.

**(SURESH KUMAR KAIT)
JUDGE**

JANUARY 18, 2022/rk