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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 19.03.2025

+ **ARB.P. 1580/2024**

NTPC LIMITEDPetitioner

Through: Mr. Adarsh Tripathi, Mr. Vikram
 Singh Baid, Mr. Ajitesh Garg, Advs.

versus

AADHAR STUMBH TOWNSHIP PVT LTDRespondent

Through: Mr. Vivekanand, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under Section 11 (5) & (6) of the Arbitration and Conciliation Act, 1996, ("*Act 1996*") seeking a direction to appoint a Presiding/Third Arbitrator.
2. Brief facts are that the petitioner is a company engaged in the generation of electricity. The petitioner invited bids for "Construction of Office-cum-Residential Complex for ER-1HQ at Patna and a Letter of Award ("*LOA*") was issued in favour of the respondent being the lowest bidder. On 25.01.2018, a Contract Agreement was signed between the parties which contains an arbitration clause as Clause 7.3 and the same is extracted below:-

"7.3 Arbitration

7.3.1 If the Engineer-in-Charge and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clause 7.1 & 7.2 above, either party may give a notice to the other party of its intention to commence arbitration, as hereinafter provided,



as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. Such notice of intention to commence arbitration shall be given within a period of thirty (30) days from the date of notification of the decision of the Engineer-in-Charge or thirty (30) days from the date of termination of ESC proceedings (applicable only in case where ESC has been constituted).

7.3.2 Any dispute or difference in respect of which a notice of intention to commence arbitration as above has been given, ii shall be finally settled by arbitration.

7.3.3 Any dispute or difference submitted by a party to arbitration shall be heard by an arbitration tribunal consisting of three arbitrators, in accordance with the provisions set forth below.....

.....

7.3.5

The place of arbitration shall be New Delhi or at a place otherwise stated in SCC, unless otherwise agreed between the parties. The language of arbitration shall be the language in which this Contract is being executed.”

3. Since there were disputes between the parties, the respondent being claimant initiated arbitration proceedings against the petitioner which are pending adjudication before an Arbitral Tribunal comprising of Sh. Vilas Karandikar, Former Secretary, PWD, Govt. of Maharashtra (Presiding Arbitrator), Sh. Bharat Bhushan Gupta (Retd.) Additional Director General (CPWD) (Co-Arbitrator) and Sh. Vijay Kumar



Shrotriya, (Retd.) Chief Engineer, UPPWD (Co-Arbitrator). The said Arbitral Tribunal is adjudicating the disputes which are pending before it. The claims pending before the Arbitral Tribunal are as under:-

“CLAIMS OF THE CLAIMANT/RESPONDENT PENDING BEFORE THE AT:

<i>S.NO.</i>	<i>DETAILS OF THE CLAIM</i>	<i>AMOUNT</i>
1.	<i>Work Done in relation to agreement items but less measured/wrongly measured</i>	<i>54,80,529.30/</i>
2.	<i>Work Done in relation to Extra items but not considered for payment</i>	<i>3,75,38,975.80/-</i>
3.	<i>Less/Wrong rates for Deviated Items</i>	<i>47,93,301.06/-</i>
4.	<i>Arbitrary recovery of Hidden items</i>	<i>33,21,032.10/-</i>
5.	<i>Work Done in relation to CCTV Cameras brought at site as per approved drawing but not paid for want of administrative approval of deviated quantities</i>	<i>50,01,150.89/-</i>
6.	<i>Staff Overheads, Establishment Expenses and Reduced Profitability due to prolongation of the contract beyond stipulated period till completion of work @15% (7½ % Overhead & Staff, 7½ % Reduced Profitability) on the awarded value of work for prolonged period which comes 32,63,263/- per month</i>	<i>11,87,17,683.60/-</i>
7.	<i>Loss/Damages by way of increased rates for deviated items under clause 49 of the agreement</i>	<i>1,15,67,427.48/-</i>
8.	<i>Loss/Damages by way of increased rates of materials, labour, fuel, etc. as per cost indices applicable from stipulated period till completion of the value of work done assessed and calculated as PVC formula of contract</i>	<i>2,72,28,490.99/-</i>
9.	<i>To DECLARE and HOLD in the facts and circumstances of the case that the claimant</i>	



	<i>contractor is entitled to clear extension of time without LD beyond stipulated period till actual date of completion</i>	
10.	<i>Interest on the above Claim No. 1 to 9 from due dates till the date of payment @14% p.a.</i>	
11.	<i>Cost of Arbitration</i>	<i>35,00,000.00/-</i>

COUNTER CLAIMS OF THE APPLICANT / NTPC PENDING

BEFORE THE AT:

1.	<i>Liquidated Damages</i>	<i>3,91,59,155/-</i>
2.	<i>Towards additional expenses on account of Overheads</i>	<i>1,64,00,000/-</i>
3.	<i>Towards Loss of Rental Income</i>	<i>3,78,00,000/-</i>
4.	<i>Towards Unauthorized construction of labour hutments within the project site</i>	<i>30,00,000/-</i>
5.	<i>Towards Non-Payment of Royalty Dues</i>	<i>18,29,859/-</i>
6.	<i>Claim for compensation towards interest charges on the counter claim no. 1 to 5 @12% p.a. from the date of cause of action till date of payment</i>	<i>To be quantified later on</i>
7.	<i>Claim for the cost of legal proceedings and arbitration suffered by the respondent</i>	<i>To be quantified later on</i>

4. *Vide* letter dated 12.09.2023, the respondent notified fresh claims after filing of the Statement of Claim before the earlier Arbitral Tribunal. Relevant portion of the said letter is extracted below:-

“That keeping in view of the facts as stated above, we hereby invoke clause 7.2 of contract and as such the matter may be referred to ESC within 15 days of receipt of this email.

1. *Claim for correct market rates of proposed extra items by department amounting to Rs.2,14,94,022.72 as per annexure A.*
2. *Claim for extra items based on market rates executed at site*



amounting to Rs.79,08,237.74 but not approved till date as per Annexure B.

3. Claim for extra items based on market rates submitted by us but not executed on date amount to Rs. 42,57,074.67.

4. Claim for 6% GST amounting to Rs.1.44 crore deposited with the GST department on 15.03.2023 for this contract as per our letter no. Apr/03 dated 21 .04.2023.

5. Claim for Market rate deviated items/substituted items/extra items 12% gst is being added by department as per CPWD DSR/DAR format but 18% gst is payable on contract. Hence claim for multiply our rates by 1.0633 for payments of deviated items/substituted items/extra items including those deviated items/substituted items/extra items claimed in arbitration as per our letter no. Apr/03 dated 21.04.2023.

6. Claim for 6% difference of GST rate on undisputed payments made till date for all the undisputed items as per our letter no. Apr/03 dated 21.04.2023.

7. Claim for Unilateral change in terms of contract and site conditions by NTPC which are not binding on us and the NTPC is liable and responsible for its consequences and increase in cost of work by 5% due to such unilateral change as per our letter no. July/03 dated 09.07.2022.

Since the work is under execution so all the claims are tentative and approximate as on today. However we reserve our right to add, amend and modify the above claims and also add new claims as and when occasion and cause arises.”



5. Thereafter, on 20.11.2023, the respondent wrote another letter requesting the petitioner to agree with the respondent to let the respondent to amend, add or modify claims before the Arbitral Tribunal, failing which appoint a nominee arbitrator. The operative portion of the said letter reads as under:-

“

You are requested to either agree to amend/add/modify the claims in arbitration proceeding before Hon'ble Tribunal already invoked within 15 days of our letter, failing which we will appoint our nominee arbitrator and also request your good office to appoint the nominee arbitrator of on behalf of NTPC unconnected with NTPC within 30 days of receipt of this letter positively.”

6. Pursuant to the said letter, the petitioner appointed Mr. Sanjay Kumar Srivastava as its nominee arbitrator on 29.02.2024. The respondent in response to the said letter *vide* email dated 01.03.2024 stated that since a three-member Arbitral Tribunal has already been appointed and is well conversant with the facts, subsequent disputes should be referred to the same Arbitral Tribunal.
7. Subsequently, on 23.03.2024, the respondent, while reiterating their request of referring the matter to the same Arbitral Tribunal, appointed Mr. BB Gupta as their nominee arbitrator. Mr. BB Gupta was the nominee arbitrator of the respondent in the earlier Arbitral Tribunal as well. The operative portion of the said letter reads as under:

“With reference to your letter dated 22.03.2024, it is stated that your contention of appointment of a fresh three-member arbitral



tribunal for the additional claims/counter-claims is against the principles laid down by the Hon'ble High Court of Delhi in its decision in "Gammon India Ltd. & Anr. vs. NHAI" OMP(C) 392/2020 (copy of judgement enclosed herewith) whereby it has been held that multiple arbitrations before different arbitral tribunal in respect of same contract is counter productive and ought to be avoided in order to further avoid inconsistent/contradictory awards in respect of the same contract. Therefore, it is requested that the additional claims/counter-claims of the parties be referred to the already appointed arbitral tribunal since the original claims are already pending for adjudication before them and also to avoid any further confusion or complexity in future regarding decision of two arbitral tribunal.

In this regard, we hereby appoint Sh. B.B Gupta Designation Retired Additional Director General (C.P.W.D), L.L.B, R/O 6-68 1st Floor, Chander Nagar, A Block, Janakpuri, New Delhi-58 Email Id : bhharat55@gmail.com Mobile no. :+91-9971828496 as our nominee Arbitrator and request your goodself to further appoint S. Vijay Kumar Shrotiva in place of Sh. Sanjiv Kumar Shrivastav.

Thus, keeping in view of the facts as stated above, it is requested your goodself to confirm your consent for appointment of Sh. Vijay Kuma Shrotiya as your nominee arbitrator within 7 days from today, failing which we shall be constrained to approach the Hon'ble High Court for referring the additional claims/



counter claims to the already appointed arbitral tribunal.”

8. The nominee arbitrator of the petitioner wrote two emails dated 09.06.2024 and 22.06.2024 asking the nominee arbitrator of the respondent to agree to a presiding arbitrator and suggested names of Retired Judges. It is stated that there was no response from the nominee arbitrator of the respondent
9. In addition, in accordance with the terms of the arbitration clause, the petitioner also wrote a letter to the respondent requesting for appointment of a Presiding arbitrator. Since the same was not done, the present petition has been filed.
10. Mr. Vivekanand, learned counsel for the respondent has opposed the present petition and states that the matter should be referred to the same Arbitral Tribunal. In this regard, reliance is placed on “***Gammon India Ltd. & Ors. vs National Highways Authority Of India***” passed in FAO (OS) (COMM) 26/2022 and more particularly on paragraphs 33 and 34 which read as under:-

*“33. Mr. Krishnan also referred to the decision of the Supreme Court in **National Highway Authority of India v. Progressive-MVR (JV): (2018) 14 SCC 688**. In that case, the Supreme Court had authoritatively determined the question relating to an interpretation of a clause of the contract. This was for the reason that the dispute regarding the interpretation of that clause was repeatedly cropping up in various matters and various arbitral tribunals/courts had taken divergent views. In the said matter, the Supreme Court considered it apposite to examine the question to avoid any further uncertainty. We are not persuaded*



to accept that in every case where there is a difference of opinion between two arbitral tribunals, the court would necessarily determine the question involved and test the arbitral awards on the basis of the said determination.

34. Once it is understood that a court, while considering a challenge under section 34 of the A&C Act, does not adjudicate the merits of the disputes in the original action; the question of conflicting awards on the similar questions of fact, absent any of the grounds under section 34 of the A&C Act, does not present an issue that needs to be addressed. This court is not required to adjudicate as to which of the two conflicting awards has returned the correct finding. As stated above, if there are two plausible views and different arbitral tribunals take divergent views, it would be impermissible for the court to set aside the arbitral award solely for the reason that the findings of the arbitral tribunal are inconsistent with another award.”

11. He also relies the judgment of “***Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council (South East) Govt of NCT of Delhi & Anr***” passed in W.P.(C) 4470/2022 and more particularly on paragraph 20 which reads as under:-

*“20. In **Gammon (Supra)**, the position laid down is that in respect of the same contract or interlinked contracts, an attempt ought to be made to have the same Tribunal adjudicate the disputes. If the agreements in the present case are separated and some disputes go into a civil court and some go for arbitration, it could result in multiplicity of proceedings and conflicting*



rulings. All, the agreements relate to the same real estate project. They are all interlinked and are thus inseparable. Since, all work contracts/ agreements out of which the impugned reference orders are arising are interlinked and related to the same projects, appointment of different arbitrators is not deemed appropriate.”

12. It is stated that the said judgment has been upheld by a Division Bench in *Jaiprakash Associates Ltd. v. MSEFC, Delhi, (2023) 4 HCC (Del) 11*. He also relies on the judgment of the Hon’ble Supreme Court in *DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743* and more particularly on paragraphs 40 and 41 which read as under:-

“40. We may now briefly deal with the question whether the disputes should be referred to a consolidated and composite tribunal or should there be two different Arbitral Tribunals to resolve the same. It was urged on behalf of the petitioner that since RCMA and SCMA are inextricably interlinked to each other, the dispute/difference cannot be segregated into two separate proceedings. It was pointed out that the obligation of computation/determination and payment of “fee” to the petitioner arises out of SCMA, RCMA and the fee agreement, and under the fee agreement, the parties have to calculate the “DLF receivables”. Such DLF receivables have to be computed taking into account financial components/accounts of both, the Southern Homes Project and the Rajapura Homes Projects. It was thus submitted that in order to avoid multiplicity of proceedings which



may result in conflicting awards, the sum of disputes may be referred to a single and composite Arbitral Tribunal.

41. The fact remains that RCMA and SCMA, though interlinked and connected, are still two separate agreements. We also cannot lose sight of the fact that the case of the respondent(s) is that the petitioner has committed breaches under both RCMA as well as SCMA, and that the genesis of the disputes lies in separate and distinct facts. Save where the parties have resolved to the contrary, it would be inappropriate to consolidate the proceedings originating out of two separate agreements. However, since the fee agreement provides that the “fee” can only be calculated after taking into consideration various financial components of both the Rajapura Homes Projects and the Southern Homes Project, it would be necessary for the sake of avoiding wastage of time and resources, and to avoid any conflicting awards, that the disputes under Arbitration Petition No. 17 and Arbitration Petition No. 16 are referred to a sole arbitrator. We leave it to the wisdom of the sole arbitrator to decide whether the disputes should be consolidated and adjudicated under one composite award or otherwise. The modalities and manner in which the two separate arbitral proceedings shall be conducted shall also be resolved by the sole arbitrator.”

- 13.** Reliance is also placed on “*DLF Home Developers Ltd. vs. Shipra Estates Ltd. & Ors.*” passed in ARB.P. 762/2021 and more particularly paragraphs 23, 24 and 25 which read as under:-



“23. The afore-noted observations in OMP(I) (COMM) 209/2021 and OMP (I) (COMM) 213/2021 clearly shows that the property in question is connected to the issues in the said petitions. It is also established that the Agreement to Sell in question affects the rights of the parties in the present petition.

24. It is not disputed that order appointing Mr. Justice (Retd.) Pankaj Jaiswal as Arbitrator was passed on the day when the present petition was filed before this Court. It is also not disputed that the counsel for respondents did not oppose to the appointment of Arbitrator by this Court. But the fact remains that prior to passing of order dated 12.08.2021 by this Court, a Coordinate Bench of this Court in [ARB.P. 513, 514 & 516 of 2021] had appointed Mr. Justice (Retd.) Vikramajit Sen sole Arbitrator and the said fact was not mentioned in the petition. Had this fact been brought in the knowledge of this Court by counsel for the parties, this Court would have referred this petition to the same Arbitral Tribunal. However, without commenting on the merits of the disputes between the parties, in the considered opinion of this Court it would be just and proper if the disputes are referred to the Arbitral Tribunal, who is already ceased of the related matters.

25. In view of aforesaid, the present application is allowed. Accordingly, Mr. Justice (Retd.) Vikramajit Sen is appointed Arbitrator in this case.”

14. I have heard learned counsels for the parties.

15. In the present case, the arbitration mechanism has been clearly spelt out



in Clause 7.3 extracted above. Pursuant to the said clause, the petitioner has already appointed its nominee arbitrator and the respondent has also appointed its nominee arbitrator albeit the same arbitrator as in the earlier Tribunal. The parties to the arbitral dispute between the present petition and the earlier Arbitral Tribunal are the same, the Contract also remains the same, but the disputes raised by the respondent are post the disputes raised in the earlier Statement of Claims.

16. The respondent always had the right to amend, alter or modify its earlier Statement of Claim and required no permission of the petitioner. However, the respondent did not undertake the said exercise. What the respondent is seeking from this Court in the present petition filed by the petitioner is to remove the nominee arbitrator appointed by the petitioner in accordance with the arbitration clause and refer the disputes to the same Arbitral Tribunal. The same will amount to substitution of Arbitrator as the petitioner has already nominated its nominee arbitrator. To my mind, the same can only be done by recourse to Section 14 and 15 of Arbitration and Conciliation Act, 1996 which gives the power to a Court to remove an arbitrator or terminate the mandate and substitute the arbitrator. The same is not the case here.
17. In arbitration proceedings, the utmost importance is the party autonomy. Once the respondent by virtue of letter dated 20.11.2023 sought the response of the petitioner for its nominee arbitrator and in addition, sought to appoint its nominee arbitrator also, the respondent cannot take a plea to refer to the same Arbitral Tribunal. Even more, the respondent *vide* its letter dated 29.02.2024 appointed its nominee arbitrator after the petitioner appointed its nominee arbitrator.



18. The common thread in all the judgments relied upon by the learned counsel for the respondent is that in all the cases, the Arbitrator had not yet been appointed and it was at the stage of appointment of an Arbitrator except the case of *Shipra Estates Ltd. (supra)*.
19. In the case of *Shipra Estates Ltd. (supra)*., learned counsel for the defendant No. 1 therein made a statement that it had not consented to the subsequent arbitrator and it was on account of inadvertence that the concession had been granted and that is not the factual matrix here.
20. For the said reasons, the petition is allowed only with respect to appointment of the Presiding Arbitrator. It is made clear that there is no adjudication on merits of the claim. The following directions are issued:-
- i) Mr. Justice (Retd.) Vipin Sanghi, Former Chief Justice, Uttarakhand High Court (Mob. No.: +91 9871300037) is appointed as the Presiding Arbitrator to adjudicate the disputes between the parties.
 - ii) 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').
 - iii) The remuneration of the learned Presiding Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.
 - iv) The learned Presiding 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/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the Arbitral Tribunal.
- vi) The parties shall approach the Arbitral Tribunal within two weeks from today.

21. The present petition is disposed of in the aforesaid terms.

JASMEET SINGH, J

MARCH 19, 2025/sp

(Corrected and released on 29.03.2025)

Click here to check corrigendum, if any