

Non-Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6568 OF 2016

(Arising out of SLP (C) No.17475/2008)

ELECTRICAL MFG. CO. LTD.

... APPELLANT

VERSUS

POWER GRID CORPN. OF INDIA LTD. & ANR ... RESPONDENTS

J U D G M E N T

Uday Umesh Lalit.J

1. Leave granted.
2. This appeal is directed against the judgment and order dated 04.07.2008 passed by the Division Bench of the High Court of Delhi allowing FAO (OS) No.196/2006, setting aside the judgment and order dated 10.02.2006

passed by the Single Judge of the High Court of Delhi in CS(OS) No.1201 of 1993.

3. A Contract for “400 KV Transmission Line Power Package for Rihand – Kanpur – Eta – Kanpur Line” was awarded by National Thermal Power Corporation (hereinafter referred to as “NTPC”) to the appellant herein.

Clause 26 of the Contract titled “Arbitration” was to the following effect:-

“26.0 ARBITRATION

26.1 If any dispute or difference of any kind whatsoever shall arise between the Owner and the Contractor, arising out of the Contract for the performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the Owner and the Contractor.

26.2 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence, whether he or the Owner requires arbitration as hereinafter provided or not.

26.3 If after the Engineer has given written notice of his decision to the parties, no claim to arbitration has been communicated to him by either party within thirty (30) days from the receipt of such notice, the said decision shall become final and binding on the parties.

26.4 In the event of the Engineer failing to notify his decision as aforesaid within thirty (30) days after being requested

as aforesaid, or in the event of either the Owner or the Contractor being dissatisfied with any such decision, or within thirty (30) days after the expiry of the first mentioned period of thirty (30) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

26.5 All disputes or differences in respect of which the decision, if any, of the Engineer has not become final or binding as aforesaid, shall be settled by arbitration in the manner hereinafter provided.

26.6.1 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Owner and the third to be named by the President of the Institution of Engineers, India. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration Clause, the President of the Institution of Engineers, India, shall have the power at the request of either of the parties, to appoint the arbitrator. A certified copy of the said President making such an appointment shall be furnished to both the parties.

26.6.2 The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India.

26.7 The decision of the majority of the arbitrators shall be final and binding upon the parties. The expenses of the arbitration shall be paid as may be determined by the arbitrators. The arbitrators may, from time to time, with the consent of all the parties enlarge the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator.

26.8 The arbitrator shall have full powers to review and/or revise any decision, opinion, directions, certification or valuation of the Engineers in consonance with the Contract, and neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments put before the Engineer for the purpose of obtaining the said decision.

26.9 No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him as being called as a witness or giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid.”

4. The Contract was completed and the aforesaid line was taken over by NTPC.

In respect of certain claims and issues raised by the appellant, negotiations took place and thereafter a Committee constituted to consider the claims by its report dated 03.01.1991 recommended that claim in respect of Rs.10.35 lakhs could be accepted, provided the appellant confirmed that there were no further claims. The appellant thereafter vide letter dated 18.07.1991 addressed to the Executive Director (NR), National Thermal Power Corporation Ltd., Indira Bhawan, Civil Lines, Allahabad, sought decision in respect of pending disputes/matters. It was stated that the decision in respect of issues so raised be conveyed to the appellant within 30 days of the date of the letter. It appears that by letter dated 14.08.1991 the appellant was informed that “Engineer” in respect of the Contract in question was General Manager (TL-NR) and that the letter dated 18.07.1991 was forwarded to

him. Soon thereafter i.e., on 02.09.1991 the appellant wrote to General Manager (TL-NR), National Thermal Power Corporation Ltd., Indira Bhawan, Civil Lines, Allahabad that the aforesaid letter dated 18.07.1991 having been forwarded to him as “Engineer” of the Contract, in accordance with Clause 27 of the Contract required notice was deemed to have been served and that the appellant was waiting for reply in return. However, nothing was heard within 30 days.

5. On 28.11.1991 NTPC wrote to the appellant that under the directions of the Government of India, NTPC and National Power Transmission Corporation Ltd. (“NPTC”, for short) had entered into an agreement on 13.08.1991 for management of construction, operation and maintenance of Transmission System and assorted facilities of NTPC, pending completion of legal formalities for transfer of ownership of the Transmission System to NPTC in due course of time. It was further stated that NPTC would administer the Contract for and on behalf of NTPC and all further correspondence be addressed to NPTC.
6. Though letters issued on 18.07.1991 and 02.09.1991 were admittedly received by NTPC which requested the Engineer to act in terms of the relevant Clause of the Contract, no action was taken in that behalf. Even after issuance of letter dated 28.11.1991, for next more than three months

nothing was done either by NTPC or NPTC. Therefore, by letter dated 20.03.1992 addressed to NTPC the appellant informed that in as much as the “Engineer” had failed to notify his decision within the period specified as per Clause 26.4 of the Contract, the appellant was invoking Clause 26.6.1 of the Contract regarding arbitration and nominating Shri J.C. Jain as its Arbitrator. The appellant requested NTPC to appoint its Arbitrator and give intimation to the President of the Institution of Engineer (India) in order to enable appointment of the third Arbitrator so that adjudication proceedings could be proceeded with. A copy of this letter was forwarded to and received by NPTC. However, nothing was done for next more than three months.

7. On 7.07.1992, the appellant wrote to the President, Institution of Engineers (India) drawing his attention to the letter dated 20.03.1992 and stated that despite being called upon to appoint an Arbitrator on their behalf within the period specified, there was complete failure on the part of NTPC. Since the prescribed period of 60 days had expired, a request was made vide said letter to appoint an Arbitrator and that a copy of such appointment be furnished to both the parties and further steps be taken in the matter. A copy of this letter was sent to the Chairman and Managing Director of NTPC. On 24.08.1992 a telegram was sent by Sr. Manager (P&C) of NPTC to the President, Institution of Engineers(India) to the following effect:-

“MESSAGE FORM

TO
PRESIDENT INSTITUTION OF ENGINEERS(INDIA)
8-GOKHLE ROAD, CALCUTTA-700 020.

KINDLY REFER LETTER NO. HC/009/1-1 DTD. 7TH JULY, '92 FROM M/S EMC, REGARDING APPOINTMENT OF ARBITRATOR FOR DISPUTES ARISING OUT OF CONTRACT NO. 01/00-75/177/-al, DTD.7.12.84 FOR KANPUR-ETAH TL (.) REQUEST ACTION REGARDING APPOINTMENT OF ARBITRATOR ON BEHALF OF RESPONDENT BY INSTITUTION OF ENGINEERS MAY BE KEPT IN ABEYANCE(.) DETAIL LETTER FOLLOWS(.) REGARDS(.)

(P.N.GUPTA)
SR. MANAGER(P&C)

Confirmation copy by post to:
By REGD. POST

SIGNATURE (of person
authorized to approve)

- | | |
|--|--|
| 1. President Institution of Engineers(India), 8, Ghokhle Road, Calcutta- 700 029 | NAME:P.N.GUPTA
DESGN.: SR.MANAGER
DEPTT. P&C |
| 2. M/s EMC Stealal Ltd.,
51, Catnal East Road
Calcutta | CHECKED FOR DESPATCH |
| 3. Shri V.L. Dua, S M (C)
N.D. | |
| 4. Shri Gurman Singh,
C.L.D. CC.N.D. | |

Dt. 24.08.92

Regd. Office: Hemkunt Chambers, 10th Floor, 89, Nehru Place,
New Delhi-110 019 (Tel. 646 3390 91-92 Grams: ' NATGRID''

8. Since there was no follow up action and nothing was done for more than a month, the Institution of Engineers (India) on 29.09.1992 appointed Shri P.P.Agrawal, Chief Consulting Engineer, Water and Power Consultancy

Services (India) Ltd. as the Second Arbitrator in terms of the Contract. On the same date Shri Som Gupta, Fellow of Institution of Engineers was appointed as the Third Arbitrator in the matter. Intimation in that behalf was sent by letter dated 29.09.1992 to the Chairman and Managing Director, NTPC.

9. On 08.01.1993, the “National Thermal Power Corporation Ltd, National Hydro Electric Corporation Ltd. and the North-Eastern Electric Power Corporation Ltd. (Acquisition and Transfer of Power Transmission Systems) Ordinance, 1993” (No.10/1993) was promulgated by the President of India. As per Section 3 of the Ordinance, the Power Transmission System and the right, title and interest of these three companies in relation to their power transmission systems stood transferred to and vested in the Central Government on and with effect from the appointed day. The power transmission system so vested in the Central Government, immediately thereafter was deemed to have been transferred to and vested in the Power Grid Corporation India Ltd., i.e. respondent No.1 herein. The appointed day under the Ordinance was 1st April, 1992.

10. On 13.01.1993, first meeting of the Arbitral Tribunal consisting of three Arbitrators, namely, Shri J.C. Jain, nominated by the appellant, Shri P.P. Agrawal, nominated as the Second Arbitrator by the President, Institution of

Engineers (India) and Shri Om Gupta, nominated as the Third Arbitrator by the President, Institution of Engineers (India) was held. The Arbitral Tribunal entered upon reference in respect of the dispute in question. It was decided in this meeting to hold the next meeting on 11.02.1993 and copies of the minutes of this meeting were forwarded to the appellant and the Chairman and Managing Director, NTPC.

11. On 04.02.1993, a letter was written by respondent No.1 to the appellant that in terms of Clause 26 of the Contract, arbitration could be invoked only if there was failure to settle the dispute amicably and this being pre-condition of the contract, the matter was not mature for arbitration and any step in that behalf would be in violation of the Contract. A copy of this letter was marked to the President, Institution of Engineers (India).

12. On 06.02.1993, the appellant filed its Statement of Claim in the sum of Rs.3.98 crores before the Arbitral Tribunal. On 11.02.1993 second meeting of the Arbitral Tribunal was held. The representative of the appellant brought the aforesaid Ordinance to the notice of the Arbitral Tribunal and submitted that in view of the Ordinance, respondent No.1 be made party to the proceedings. The Statement of Claim along with annexures and copy of the Contract were taken on record and the appellant was directed to supply copies of the Statement of Claim to both NTPC and respondent No.1.

NTPC was directed to submit their reply to the statement of claim by 04.03.1993 and all parties, namely, the appellant, NTPC and respondent No.1 were requested to attend the next meeting of the Arbitral Tribunal which was fixed on 25.03.1993. Copies of the minutes of this meeting were forwarded to NTPC as well as respondent No.1. On 23.02.1993, a letter was written on behalf of NTPC with copies to the Arbitrators and respondent No.1 that after promulgation of the aforesaid Ordinance, NTPC had nothing to do in the matter. Copy of the minutes of the meeting dated 11.02.1993 of the Arbitral Tribunal was forwarded by NTPC to respondent No.1 along with copy of this letter dated 23.02.1993.

13.As the date fixed for the next meeting, i.e., 25.03.1993 was a public holiday, a telegram was sent by the appellant to the Arbitrators and to respondent No.1 that the meeting be adjourned. On 12.03.1993 the Convener Arbitrator sent telegram to the appellant and respondent No.1 confirming the adjournment of the case to 05.04.1993. On 20.03.1993 another telegram was sent by the Convener Arbitrator to the appellant and to respondent No.1 that the date of hearing was shifted to 07.04.1993.

14.On 07.04.1993 third meeting of the Arbitral Tribunal was held. Though the appellant was present, respondent No.1 was absent. It was noted that the minutes of the second meeting held on 11.02.1993 were sent to NTPC and

respondent No.1 and were received by them. The relevant portion of the minutes of the meeting dated 07.04.1993 was as under:

“It was also noted the minutes of the second meeting held on 11.02.1993 had been sent both to M/s NTPC and M/s PGCIL and received by them.

It was however noted with regret that no representative of M/s NTPC and/or M/s PGCIL turned up for the hearing.

No compliance was made by the aforesaid two respondents to the directive given to them in the second meeting regarding filing their replies to the statement of claim filed by M/s EMC.

During the third meeting Mr. M.K. Kureshi of M/s EMC requested that despite no response from respondents, the case should be proceeded with and the arbitrators were requested to deliver the award within the statutory period of 4 months which expired on 12th May, 1993.

Under the circumstances, it was decided that the next hearing in the matter will commence from 10.30 a.m. on 20.04.1993 and continue on all the days upto 25th April, 1993. Each day the meeting shall commence from 10.30 a.m. and continue during the day in an effort to complete the items on the agenda as specified in the following para.

In the meantime respondents are again requested to file their replies to the statement of claim filed by the claimants and such other documents that they may like to file before the Arbitrators by 14th April, 1993 giving copies to all the three arbitrators and the claimants.

M/s EMC are also requested to file such other documents that they may like to present to the arbitrators by 14.04.1993 giving copies to respondents.

Following matters will be taken up during the hearings from 20th April, 1993 upto 25th April, 1993:

- i) Framing of the issues.
- ii) Admission/Denial of documents filed and taking the same on record.
- iii) Evidences by the claimants and respondents.
- iv) Arguments by claimants; counter arguments by respondents; replies by the claimants.”

15. On 09.04.1993, a letter was addressed by one Mr. Sunil Narula, Advocate, on behalf of respondent No.1 to three Arbitrators and the appellant. It was stated in the letter as under:-

“.....Since M/s Electrical Mfg. Co. Ltd. Calcutta, have raised some disputes in the above-said contract and instead of settling the matter amicably with our client despite our client's repeated requests, have directly invoked the Arbitration Clause which is not in consonance with the terms and conditions of the above referred agreement and therefore, the appointment of the arbitrators in this matter is void ab initio. M/s Electrical Mfg. Co. Ltd., Calcutta have chosen to neglect their own written submissions to our client in which they had agreed to discuss and settle the matter amicably with our client in accordance with the terms and conditions of the agreement and this was also a condition precedent to the invocation of Arbitration Clause 26.1 of the said agreement.

Our clients M/s Power Grid Corporation of India Ltd. are initiating the appropriate legal proceedings in the Hon'ble High Court of Delhi to challenge the appointment of Shri J.C.Jain, Shri P.P. Agarwal and Shri Som Gupta, the addressee No. 1, 2 and 3, herein as Arbitrators in the above mentioned matter. As the dispute in this matter is to the effect of legality of the appointment of all the three learned Arbitrators, you are requested to abstain from and/or postpone the arbitration proceedings for a period of 60 days, which shall be just, reasonable and in the interest of justice and during this period

our client shall be able to obtain necessary orders from the Hon'ble High Court of Delhi.”

16. On 20.4.1993, fourth meeting of the Arbitral Tribunal was held at 10.30 a.m.

as scheduled. The relevant minutes of the meeting were as under:-

“It was noted that the minutes of the third meeting held on 7th April, 1993 were sent to M/s NTPC and M/S PGCIL and have been acknowledged by them. Acknowledgement copy taken into record.

It was, however, noted that regret that no representative of M/s NTPC, M/s PGCIL turned up for the hearing.

No compliance was made by the aforesaid respondents to the directives given to them in the second and third meetings dated 11.02.1993 and 7th April, 1993, respectively.

Despite repeated directives from the Arbitrators respondents did not appear for the hearing of 20.04.1993 at 10.30 a.m.. In pursuance of the decision taken by the Arbitrators at the hearing dated 7.04.1993 the Arbitrators proceeded with the hearing ex-parte.

The Arbitrators received on 17.04.1993 at Lucknow a letter dated 9th April, 1993 from one Mr. Sunil Narula, Advocate claiming to be acting under instructions from PGCIL. The contents of the letter were considered. Arguments of EMC's representative Mr. M.K. Kureshi were also heard. The Arbitrators decided to proceed with the hearing.

At 11.10 a.m. Mr. Sunil Narula accompanied by an officer of PGCIL came to the hearing. Since Mr. Narula did not have a proper letter of authority to appear before the Arbitrators on behalf of PGCIL in respect of the dispute under arbitration, and since the directives given by the Arbitrators in the previous meetings had not been complied with by PGCIL, the Arbitrators

were unable to entertain any submission of Mr. Narula. The hearing proceeded further thereafter.

M/s EMC submitted through their letter No. EMC/009/ARB dated 20.4.1993 additional documents (12 nos.) as per list attached with the letter. These were taken on record.

The following issues were framed:

1. Whether EMC is entitled to the various claims mentioned in para 6, Clause (i) to (xvi) and para 7, 8, 9 and 17(d) of the Statement of Claim? If so, to what effect and extent.
2. Whether EMC is entitled to claim interest mentioned at the end of Para 17(d)? If so, to what effect and extent.
3. Whether EMC is entitled to say other relief in the present circumstances? If so, to what effect and extent.

Mr. M.K. Kureshi proceeded to get various documents produced by him before Arbitrators, proved by Mr. Kalyan Kumar Ghosh, Manager (Project Monitoring) EMC Ltd., Exhibit I to XXV as per details enclosed with minutes were got proved.

The hearing will continue on Wednesday the 21st April, 1993 at the same place and venue i.e. 89, Sundar Nagar, New Delhi at 10.30 a.m.”

17. The aforesaid minutes noted the appearance of Mr. Sunil Narula at about 11.10 a.m. and that since he did not have appropriate authority, and the directives given in the previous meeting were not complied with, no submissions were entertained by the Arbitrators. Said Mr. Narula within an hour thereafter sent an Express Telegram to the Convener Arbitrator as under:-

“EXPRESS TELEGRAM

Sh. Som Gupta
Convenor Arbitrator
89, Sunder Nagar (Ist Floor)
New Delhi

Sh Som Gupta
C-8/3, Park Road
Lucknow-226 001

Ref.: Arbitration proceedings regarding contract 01/CC/75-77
for 400KV Kanpur-Etah & Kanpur-Kanpur Line.

I appeared on 20.4.93 on behalf of POWERGRID before the learned arbitrators at 89, Sunder Nagar, New Delhi and submitted a Vakalatnama duly authorizing me to represent (POWERGRID CORPORATION before the learned Arbitrators. The learned arbitrators refused to accept the Vakalatnama and made a pre-condition to the effect that POWERGRID should first make the payment of expenses of the Arbitration Proceedings and also submit a proper authority letter granting extension of time for making the award by another 4 months in order to allow the POWERGRID to present the case before the Learned Arbitrators.

In the above circumstances, the arbitration proceedings being held by the Learned Arbitrators in the above matter is illegal, arbitrary and against the principles of natural justice.

(SUNIL NARULA)
ADVOCATE, DELHI
20.4.1993”

18. Nobody appeared on behalf of respondent No.1 before the Arbitral Tribunal on 21st, 22nd and 23rd April, 1993. The matter having been concluded by 23.04.1993, the Arbitral Tribunal by its award dated 05.05.1993 found that the appellant had proved its case and was entitled to a

sum of Rs. 72,69,096/- as against its claim of Rs.3.98 crores. The award was then forwarded to the Court to be made Rule of the Court in terms of the provisions of the Arbitration Act, 1940 (hereinafter referred to as the “Act”). Copy of the award and notice of filing of the award in Court were given to all the parties. The application for making the award Rule of the Court was registered as CS(OS) No.1201 of 1993 and objections under Section 30 and 33 of the Act filed by respondent No.1 were numbered as IA No.8638 of 1993.

19. By his judgment and order dated 10.02.2006, the Single Judge of the High Court dismissed the objections preferred by respondent No.1 and made award dated 5.05.1993 awarding a sum of Rs. 72,69,096/- in favour of appellant, Rule of the Court against respondent No.1. The appellant was also held entitled to simple interest @ 12 % per annum from the date of the award till the date of the decree and to simple interest @ 9% per annum from the date of the decree till its realization. The appellant was also held entitled to costs from respondent No.1 which were quantified at Rs.7,500/-. During the course of his judgment, the learned Single Judge observed as under:-

“29.It is not in dispute that notices were duly served upon respondent No.1. It is also not in dispute that respondent No.2

had knowledge of the proceedings as the relevant documents had been forwarded to respondent No.2. Despite this fact respondent No.2 failed to enter appearance. I am also unable to accept the plea of the learned senior counsel for the respondent No.1 that there was no power in the Arbitrators to add respondent No.2 as a party. In fact no such addition was necessary and what ought to have been done was only to substitute respondent No.2 in place of respondent No.1.

30. The respondent No.2 even appeared subsequently but instead of participating in the matter was only interested in adjournment. The Arbitrators, even assuming the arguments of the counsel appearing before the Arbitrator to be correct, wanted an extension of time failing which they wanted to proceed with the Arbitration so that the award could be made within the statutory period of time. Respondent No.2 was not willing to join in the extension of time. In such a situation respondent No.2 ought to have taken immediate legal remedy to at least challenge the constitution of the Tribunal if so advised. This respondent No.2 did not do but just kept silent over the matter. The allegations and submissions that the statement of claim was not available with respondent No.2 or that the record is silent about the same or as to what transpired on 20.4.1993 are clearly afterthoughts. It is also to be kept in mind that there was a panel of Arbitrators. Two Arbitrators were appointed by an independent agency. There could have been hardly any grievance made by respondent No.2 about the composition of the Tribunal.
31. Respondent No.2 itself had addressed a communication dated 24.8.1992 to the Institute of Engineers and have made admission themselves in paragraph 2.26 (iii) of the objections that they had received intimation of the appointment of Arbitrators on 12.11.1992. The proceedings have also been sent to respondent No. 2. Respondent No. 2 having not appeared negligently or willfully, a further opportunity was given by the Arbitrators to the said respondent on 7.4.1993..... Respondent No. 2 apparently was not willing to join the Arbitration proceedings and negligently kept away and did not even take steps to challenge such Arbitration proceedings. There cannot be an indefinite

period for pre-Arbitration settlement proceedings to continue. The Contract stood concluded in 1988 and despite all discussions no settlement could be finalized right till 1991. The dispute resolution mechanism was followed in view of the letter of the petitioner dated 18.7.1991 with a copy marked to the Engineer of the project and the petitioner clarified in terms of letter dated 2.09.1991 that the disputes raised by its earlier letter had been raised before the Engineer or the Contract in terms of Clause 26.4 of the terms and conditions of Contract. The Engineer did not answer to the claim within thirty(30) days of the receipt of the notice as was required to be done and it is in view thereof that the Arbitration Clause was invoked on 20.3.1992.”

20. The matter was carried further by respondent No.1 by filing FAO(OS) No.196 of 2006 which appeal came to be allowed by the Division Bench of the High Court vide its judgment and order dated 4.07.2008. The Division Bench found that the Arbitral Tribunal had acted in utter haste in rushing through the arbitration proceedings without affording proper and adequate opportunity to respondent No.1 in presenting its case. The Division Bench felt that the interest of justice would be best served if the matter was referred again to a Sole Arbitrator to adjudicate the dispute between the parties afresh after giving due opportunity to both the parties. Allowing the appeal and setting aside the order passed by the learned Single Judge and the award made by the Arbitrator, the matter was referred to the Sole Arbitrator. During the course of its judgment, the Division Bench of the High Court observed, inter alia:-

“.....We are of the view that the Arbitrators have unnecessarily acted in haste in concluding the arbitral proceedings. Once the appellant had appeared before them, the least they should have done was to afford some reasonable time to the appellant to file its objections to the statement of claim filed by the respondent EMC. The Arbitrators also could have given a pre-emptory notice to the appellant before proceeding ex parte against them. Even after proceeding ex-parte against the appellant the Arbitrators still could have called upon them to cause appearance in the matter.....”

“... The appellant had appeared on 9th April, 1993 as well as on 20th April, 1993, but they were not allowed to participate in the proceedings¹ and thereafter within four days i.e. from 21.4.1993 to 25.04.1993 the same were concluded.”

“.....Although, the conduct of both the corporations i.e., NTPC & NPTC, (appellant) in adopting a very casual and lackadaisical approach, in not timely taking the actions including for an appointment of an arbitrator and also for their non-appearance before the Arbitral Tribunal exhibits their total insensitivity to the monetary claims of the duly appointed contractor and their own financial interests yet at the same time the said contractor i.e., EMC cannot completely absolve itself to share the blame by not adhering to the said communication dated 28.11.1992. The respondent EMC was not oblivious of the said fact of transfer of ownership of the transmission system by NPTC in favour of the appellant (NPTC), although the same came to be notified through an ordinance on 8.1.1993.”

21. While issuing notice in the petition for special leave to appeal preferred by the appellant, this Court by its order dated 01.08.2008 stayed

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This observation is not correct. On 9.4.1993 a letter was addressed by the Advocate. No hearing was fixed on 9.4.1993.

the operation of the judgment and order passed by the Division Bench. Consequently, the matter did not proceed before the Sole Arbitrator named in the judgment of the Division Bench. The parties having exchanged the pleadings, we heard Mr. C.Mukund, learned Advocate in support of the appellant and Mr. Parag Tripathi, learned Senior Advocate for respondent No.1.

22. Having heard the learned Counsel and gone through the record, in our view, the instant matter raises questions ; a) Whether arbitration was validly invoked in the matter; b) Whether the appointment of the Arbitrators was in terms of the relevant Clauses of the Contract; c) Whether respondent No.1 was aware of such invocation and consequential proceedings; and d) Whether the Arbitral Tribunal was right in refusing to adjourn the proceedings and proceed with the matter. Our answers to these questions are as under:-

a) In terms of the provisions of Clause 26 (1) of the Contract, the appellant vide letters dated 18.7.1991 and 02.09.1991 had requested the “Engineer” to look into the disputes as raised by the appellant. These letters were admittedly received by NTPC. As stipulated in Clause 26 (1) read with Clause 26 (4), in the event of the “Engineer” failing to notify his decision

within 30 days after being requested, the concerned party would be within its rights to require that the matters in dispute be referred to arbitration. Since nothing was done with respect to the request made by the appellant within 30 days of the receipt of communication dated 18.07.1991 or even the one dated 02.09.1991, the appellant could validly require that the matters in dispute be referred to arbitration. Even assuming that in terms of letter dated 28.11.1991, it was NPTC who was to be concerned with the matters in dispute, no appropriate decision was taken even within 30 days of this communication. In the circumstances, invocation of arbitration by the appellant vide its letter dated 20.03.1992 was perfectly valid and in terms of the Contract.

b) A copy of aforesaid letter dated 20.03.1992 addressed to NTPC was admittedly forwarded to and received by NPTC. Neither of them took appropriate and required steps in the matter within 60 days as contemplated by Clause 26.6.1 of the Contract. In the circumstances, the step taken by the appellant to approach Institution of Engineers (India) requesting its President to appoint the arbitrator in terms of said Clause, vide its letter dated 07.07.1992 was also in keeping with the express terms of the Contract. It is crucial to note that a telegram was sent on 24.08.1992 on behalf of NPTC requesting the President, Institution of Engineers (India) to keep the action

regarding appointment of arbitrator on their behalf in abeyance. It was stated that a detailed letter was to follow. However nothing was done in the matter for more than a month and the detailed letter was never sent. In the circumstances, the President, Institution of Engineers (India) was absolutely right and justified in making the appointment of the Second Arbitrator on 29.09.1992. The appointment of the Third Arbitrator was in any case within the powers of the President. Thus, appointment of the Second and Third Arbitrator and constitution of the Tribunal cannot be found fault with.

c) The record is clear that NPTC was aware of the communications dated 18.07.1991 and 02.09.1991. If under the directions of the Government of India, NPTC was to take over matters including those related with the Contract in question, NPTC ought to have been appraised of the issues in question by NPTC. In any case, the telegram dated 24.08.1992 as stated above, expressly shows complete awareness on part of NPTC and yet no further steps were taken by NPTC. No detailed letter as stated in the telegram was ever sent. Further, respondent No.1 which is the successor-in-interest was made aware of the pendency of proceedings before the Arbitral Tribunal but chose not to appear and take part. Minutes of first two meetings of the Arbitral Tribunal were forwarded to and received by respondent No.1. Even telegrams seeking and granting adjournment of the proceedings

were sent to respondent No.1. When in the meeting dated 07.04.1993 the Schedule for days beginning from 20.04.1993 was fixed and copy of the minutes was sent to respondent No.1, the Advocate for the respondent No.1 addressed a letter to the Arbitration on 09.04.1993. This letter not only indicates complete awareness of the proceedings but displays definite idea having crystallized to initiate appropriate proceedings in the High Court. If that be so, nothing stopped respondent No.1 from initiating such challenge, which never happened. The least that it could do in the circumstances was to be ready to participate in the proceedings and be ready on merits of the matter. However even on 20.04.1993, i.e. eleven days after the letter was sent, it was not willing to participate. If it wanted adjournment in the matter, it ought to have consented to the extension of time as the Arbitral Tribunal had rightly indicated. The conduct of respondent No.1 as rightly commented by the Division Bench of the High Court, was extremely casual.

d) The Arbitral Tribunal in the present case had entered upon reference and held its first meeting on 13.01.1993. The mandate of Section 28(1) and (2) of the Act read with Schedule I, Clause 3 of the Act was that the statutory period to complete the proceedings and make the award was four months after entering on the reference. The minutes of the meeting dated 07.04.1993 show awareness that the period would expire on 12.05.1993. The law on the

point is clear that in such circumstances, the enlargement of time could be possible if parties to the arbitration agreement consent to such enlargement.

The decision of this Court in *Hari Krishna Wattal v. Vaikunth Nath Pandya by L.R.S. & Ors.*² is quite eloquent and relevant paragraphs thereof are:-

“6. Section 3 of the Arbitration Act, 1940 provides:

“An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference.”

7. The First Schedule has 8 clauses describing the implied conditions of an arbitration agreement. Clause 3 reads as follows:

“The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.”

10. The question depends upon the true construction of Section 28. There is no doubt that the Arbitrator is expected to make his award within four months of his entering on the reference or on his being called upon to act or within such extended time as the Court may allow. Reading Clause 3 of the Schedule along with Section 28 one finds that the power to

enlarge the time is vested in the Court and not in the Arbitrator. Clause 3 and Section 28(1) exclude by necessary implication the power of the Arbitrator to enlarge the time. This is emphasised by Section 28(2) which provides that even when such a provision giving the Arbitrator power to enlarge the time is contained in the agreement, that provision shall be void and of no effect. The head-note of Section 28 brings out the force of this position in law by providing that the power is of the Court only to enlarge time for making the award.

11. Sub-section (2) of Section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the Arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the Arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore, clear that the Arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the Arbitration the parties to the arbitration agreement consent to such enlargement of time.”

In the circumstances, if the Arbitral Tribunal insisted upon appropriate consent to extend the time, no fault could be found with. At the same time, if respondent No.1 was not willing to give such consent, the Arbitral Tribunal had to go on with the matter and make the award within the statutory period.

The Division Bench was not right in observing that the Arbitral Tribunal showed undue haste in the matter.

23. In our view, the Division Bench was not right and justified in allowing the appeal and setting aside the judgment and order passed by the Single Judge. We, therefore, allow this appeal, set aside the judgment and order passed by the Division Bench of the High Court of Delhi and restore the judgment and order dated 10.02.2006 passed by the Single Judge of the High Court of Delhi.

24. This appeal is allowed with no order as to costs.

.....J.
(Fakkir Mohamed Ibrahim Kalifulla,)

.....J.
(Uday Umesh Lalit)

New Delhi,
July 20, 2016