

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

ARBITRATION PETITION NO. 9 OF 2010

M/S JAYBEE ENERGY P.LTD. Petitioner(s)

VERSUS

NTPC LIMITED & ORS. Respondent(s)

(With appln(s) for exemption from filing c/c of original agreement)

Date: 14/03/2011 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE H.L. GOKHALE

For Petitioner(s) Mr. Rajshekhar Rao, Adv.
Mr. Karan Lahiri, Adv.
Ms. Liz Mathew, Adv.

For Respondent No.1 Ms. Ruchi Gour Narula, Adv
Ms. Sangeeta Bharti, Adv.
Ms. Ruchi Kohli, Adv.

For Respondent No.2 Dr. Sushil Balwada, Adv
Mr. Sharan Thakur, Adv.

For Respondent No.3 Mr. Syed Shahid Hussain Rizvi, Adv
Mr. D.K. Pradhan, Adv.

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Mr. Jiwan Pal Singh, Adv.

UPON hearing counsel the Court made the following

O R D E R

Heard Mr. Rajshekhar Rao, the learned
counsel for the petitioner, Ms. Ruchi Gour Narula,
the learned counsel for respondent No. 1, Dr. Sushil
Balwada, the learned counsel for respondent No. 2
and Mr. Syed Shahid Husain Rizvi, the learned

counsel for respondent No. 3.

2. The petitioner claims to have done the preliminary work of mobilisation for setting up of one Drilling Rig in Changlang District of the State of Arunachal Pradesh. This is in pursuance to the agreement dated 27-11-2008 entered into for that purpose with respondent No. 3. Respondent No. 3

has signed it, as the operator on behalf of the consortium consisting of respondent No. 1-The NTPC Limited, respondent No. 2-Canoro Resources Limited and respondent No. 3-Geopetrol International Incl. There is a prior separate joint operating contract amongst all the three respondents dated 28th March, 2006. Having done mobilisation work the petitioner

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is claiming an amount of about 17 million US Dollors from the respondent.

3. This contract dated 27th November, 2008 contains an arbitration clause at clause No. 13.4 which reads as under :-

"13.4 Any dispute between the Parties which is not settled in accordance with clause #13.1, 13.2 and 13.3 shall be finally and exclusively settled by arbitration in accordance with Arbitration & Conciliation Act, 1996 by a tribunal of Three(3) arbitrators, with one (1) arbitrator each to be appointed by Contractor and company and third arbitrator (who shall be the presiding arbitrator) by the two (2) arbitrators so appointed. Arbitration shall be in the English language. Any arbitration award made by the said Tribunal shall be final and binding on the Parties and shall be enforceable in any court of competent jurisdiction. The venue of arbitration shall be New Delhi"

4. Based on this arbitration clause, the petitioner has appointed Hon'ble Mr. Justice D. Biswas, a retired Judge of the Guwahati High Court (having his Chamber at 51, Shaktigarh Path,

Guwahati-751005) as the petitioner's nominate on

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the three member Arbitral Tribunal to be

constituted as per this clause 13.4.

The three

respondents were supposed to appoint their nominee

on this arbitral tribunal.

Since they have not

done so inspite of a notice from petitioner in

that behalf, the present arbitration petition has

been filed with a prayer that this Hon'ble Court

may appoint a nominee arbitrator on behalf of the

respondents.

The power of this Court

under

Section 11(6) read with section 11 (12) of the

Arbitration & Conciliation Act, 1996 (herein after

referred to as the act) has been invoked for that

purpose.

5. (a) Ms. Ruchi Gour Narula, the learned

counsel appearing for respondent No. 1 has raised

a preliminary objection that if at all the

petitioner has any claim it would be against

respondent No. 3, and NTPC cannot be dragged into

this arbitration because according to respondent

No. 1 there is no privity of contract between

petitioner and respondent No. 1. The learned

counsel for the respondent Nos. 2 and 3, on the

other hand submit that NTPC is very much necessary

party in the present arbitration, and in the event

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the award is rendered in favour of the petitioner,

NTPC will have to share in the out-come on the

basis of the contract dated 27th November, 2008.

(b) The learned counsel for the respondent

Nos. 2 and 3, however, contended that there is no

arbitrable dispute between the petitioner and

respondent Nos. 2 and 3, and which issue be

decided as preliminary issue.

(c) Mr. Rizvi appearing for the respondent No. 3 has raised a further preliminary issue. He pointed out that the respondent No. 3 has raised an additional issue in paragraph 3.3 of their counter namely that conditions precedent to invoke arbitration have not been complied with by the petitioner.

6. Mr. Rajshekhar Rao learned counsel appearing for the petitioner submits that the three issues which the respondents have raised, can be decided under section 16 of the act as preliminary issues by the arbitral tribunal to be appointed. After having taken instructions, he has made an offer that the petitioner will bear the costs until these preliminary issues are decided by the arbitral tribunal. In the event, however,

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the tribunal decides these three issues in favour of the petitioner then in that case, the cost of the proceedings will be borne by all the parties appropriately right from the beginning.

7. Ms. Ruchi Gour Narula, Mr. Syed Shahid Husain Rizvi and Dr. Balwada the learned counsel, have taken instructions from the respective parties and although they have their preliminary objections as stated above, have made a statement that they are leaving it to this Court to pass appropriate orders on appointment of the Arbitral Tribunal and a reference of the claim of the petitioner to this Tribunal, where these three issues shall be decided as preliminary issues.

8. The three learned counsel appearing for the respondents suggest the name of Hon'ble Mr. Justice Anil Dev Singh, retired Chief Justice of the Rajasthan High Court (residing at Delhi) as

their nominee on the Arbitral Tribunal. Since the suggestion is coming from them, there is no reason not to accept the same. The counsel for the parties inform that both the retired Hon'ble Judges have agreed for their appointment on the arbitration panel.

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9. In view of this understanding arrived at between the parties, the following order is passed:-

- i. Hon'ble Mr. Justice Anil Dev Singh is hereby appointed as the nominee of the three respondents on the Arbitral Tribunal consisting of Hon'ble Mr. Justice Anil Dev Singh and Hon'ble Mr. Justice D. Biswas, and the Umpire to be appointed by both of them.
- ii. The three issues mentioned above will be decided by the Arbitral Tribunal as preliminary issues under Section 16 of the Act.
- iii. (a) The petitioner will bear the cost of arbitration to begin with until these preliminary issues are decided.
(b) In the event issue no.(a) is decided in favour of NTPC, the arbitration will conclude as far as NTPC is concerned.
(c) In the event issue nos. (b) or (c) are decided in favour of Respondents Nos. 2 and 3, the entire proceedings will conclude.
(d) In the event, these issues are decided in favour of the petitioner the arbitration will proceed further, and the cost of the proceedings, right from the

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beginning will be borne equally between petitioner on the one hand and respondents on the other.

- iv. It will be for the arbitrators to determine their fees in consultation with the parties.

10. All the parties are agreeable to this order and this order is passed on the basis of their suggestions and by their consent. It is further made clear that submissions of the parties on these three preliminary issues as well as on all

other substantive issues will be available to them before the Arbitral Tribunal.

11. On the request of learned counsel for the parties and as suggested by them, the two Hon'ble Arbitrators are requested to convene the first meeting on or before 9th April, 2011. The Registry is directed to forward a copy of this order to the two learned Arbitrators at the earliest.

12. The Arbitration petitions is disposed of accordingly. Parties will bear their own cost.

.....J.
(H.L. GOKHALE)

NEW DELHI
MARCH 14, 2010