

(2019) 11 SIK CK 0005
In the Sikkim High Court
Case No : Arb. A. No. 02 Of 2019

Border Roads Organization (Bro)	Vs	APPELLANT
M/S Abhyudaya Housing And Consruction Pvt. Ltd. & Anr		RESPONDENT

Date of Decision : 11-11-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 17, 37

Citation : (2019) 11 SIK CK 0005

Hon'ble Judges : Arup Kumar Goswami, CJ

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. Heard Mr. Karma Thinlay, learned Central Government Counsel for the appellant. Also heard Mr. Jorgay Namka, learned Counsel for the respondent no.1 and Mr. A.K Upadhyaya, learned Senior Counsel assisted by Mr. Loknath Khanal, for respondent no.2.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, (for short, the Act) is preferred against the order dated 11.03.2019, passed by the learned Commercial Court, East Sikkim at Gangtok in Arbitration Case no.01/2019, which was registered on the basis of an application filed by respondent no.1 under Section 9 of the Act.

3. The respondent no.1 was awarded a contract on 24.02.2011 by the appellant herein for execution of construction work of National Highways double lane specifications for realignment of stretches between Km 20.00 to Km 27.70 along with the construction of some major and minor bridges of various spans on the Sevoke-Gangtok road on NH-31A.

4. By the aforesaid application under Section 9 of the Act, the respondent no.1

sought interim injunction restraining the appellant from encashing the Bank Guarantees furnished by the respondent no.1 pursuant to the terms and conditions of the contract.

5. A dispute having arisen in between the parties, the respondent no.1 invoked arbitration in terms of Clause 25.3 of the agreement and Clause -3 of

Special Condition of Contract by notice dated 23.08.2018.

6. There was some dispute with regard to the appointment of arbitrator as well. However, it is not necessary for this Court to dwell upon this aspect

of the matter in view of a subsequent development, which the Court will take notice of in detail, at an appropriate juncture.

7. A perusal of the impugned order goes to show that by the time the order came to be passed, two Arbitrators had already been appointed and only

the third Arbitrator was to be appointed. The learned Commercial Court had directed the parties to take necessary steps for appointment of third

Arbitrator within thirty days. The learned Commercial Court observed as follows:

“However, I am of the considered view that till such time, it would be appropriate and beneficial for the parties, if the rights, interest and liabilities

of the parties in disputes is protected by the order of Status quo till the appointment of the third Arbitrator and adjudication of the matter. Thus, parties

are directed to maintain Status-quo till appointment of third Arbitrator in terms of clause 3 (General Conditions of Contract (GCC) 25.3 (a) (b) (c).

However, the observations made hereinabove shall not affect the merits of the case. Accordingly the petition is disposed of with the above

observations and directions.”

8. During the course of the proceeding today, Mr. Thinlay has drawn the notice of the Court to an order dated 09.11.2019 passed by the Arbitral

Tribunal comprising of three Arbitrators to go into the dispute between the parties. This is the subsequent development that this Court had noted in an

earlier part of its order.

9. By the aforesaid order, the appellant is restrained from encashing the four Bank Guarantees, till conclusion of arbitration proceeding. The

respondent no.1 is also directed to keep alive the four Bank Guarantees during the pendency of the arbitration proceeding.

10. Mr. Thinlay submits that notwithstanding the fact that a fresh interim order had been passed by the Arbitral Tribunal, this appeal survives for

consideration on merits as the learned Commercial Court had directed that the interim order passed by the learned Commercial Court would continue

till adjudication by the Arbitral Tribunal. He, however, submits that the order passed by the Arbitral Tribunal will also have to be challenged.

11. Mr. A.K Upadhyaya submits that he has nothing much to contribute as the primary dispute is between the appellant and respondent no.1.

12. Mr. Namka, on the other hand, submits that because of the aforesaid order dated 09.11.2019 passed by the learned Arbitral Tribunal, this appeal

has been rendered infructuous. He submits that it is not correct, as submitted by Mr. Thinlay, that the interim order passed by the learned Commercial

Court will continue till adjudication of the dispute by the learned Arbitral Tribunal. He contends that the order passed by the learned Commercial Court

has a life span till the appointment of third Arbitrator and therefore, the respondent no.1 had filed an application on 06.04.2019 praying for fresh

interim order before the learned Arbitral Tribunal. Mr. Namka further submits that the first sitting of the Arbitral Tribunal had taken place on

30.03.2019. Accordingly, he submits that this appeal is not necessary to be adjudicated on merit, as the same has been rendered infructuous.

13. I find sufficient force in the submission of Mr. Namka.

14. Though the date of constitution of Arbitral Tribunal is not on record, it appears from the order dated 09.11.2019 that the application under Section

17 of the Act was filed on 06.04.2019. In other words, the Arbitral Tribunal, in terms of the order of the learned Commercial Court, came to be

constituted before 06.04.2019. This appeal was filed on 07.04.2019 and it appears that it had been re-submitted on 22.05.2019. It is submitted by Mr.

Thinlay that the re-submission was necessary due to certain inadvertent mistakes committed at the time of filing of the appeal at the initial stage.

15. The appellant had contested the application before the learned Arbitral Tribunal.

16. The direction of the learned Commercial Court is limited to maintenance of the status quo till the appointment of the third Arbitrator. Even though

preceding the direction issued, observation was made by the learned Commercial Court that the rights, interests and liabilities of the parties in dispute

are to be protected by the order of status quo till the appointment of third Arbitrator and adjudication of matter, such observation has to be understood

in the context of direction issued. The term “adjudication” referred to has to be understood to mean that status quo is to be maintained till

appointment of the third Arbitrator, so that the Arbitral Tribunal duly constituted can enter into the reference to adjudicate the dispute. Therefore,

there is no live issue to be decided in the appeal.

17. In view of the above discussion, this appeal is disposed of as infructuous.

18. Needless to say, it will be open for the appellant to avail remedy as per law to challenge the order dated 09.11.2019 passed by the learned Arbitral

Tribunal.