

(2020) 01 MAN CK 0017

In the Manipur High Court

Case No : Arbitration P (J2) No. 1, 2, 3 Of 2019

M/S Simplex Projects Ltd And Ors

APPELLANT

Vs

State Of Manipur And Ors

RESPONDENT

Date of Decision : 23-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(e), 8, 9, 11, 11(10), 17, 36, 42
Manipur (Courts) Act, 1955 — Section 20, 21
Code Of Civil Procedure, 1908 — Section 15
Constitution Of India, 1950 — Article 14, 136

Citation : (2020) 01 MAN CK 0017

Hon'ble Judges : Mr. Ramalingam Sudhakar, J

Bench : Single Bench

Advocate : S.D.Singh, N.Kumarjit

Final Decision : Dismissed

Judgement

[1] The prayers in the three Arbitration petitions are as follows:-

â??I. Prayer in Arb. P(J2) No.1 of 2019

(a) Stay the operation of the letter No EE/ B.D.-I/ Tombisena/ 18-19/524 dated 5.10.2019 issued by the Respondent no.3 whereby invoked the Bank

Guarantees (i) Bank Guarantee No.11640100002263 dated 19.2.2014 for a sum of Rs.27,77,000/- and (ii) Bank Guarantee No.11640100002462 dated

24.5.2014 for a sum for Rs.1,98,33,700/-.

(b) Restrain the Respondent no.4 from encashing the Bank Guarantees (i) Bank Guarantee No.11640100002263 dated 19.2.2014 for a sum of

Rs.27,77, 000/- and (ii) Bank Guarantee No. 11640100002462 dated 24.5.2014 for a sum of Rs.1,98,33,700/-,

(c) issue directions to the Respondents to make the payment of Rs.

1,25,00,000/- as admitted by them in the letter dated 3.6.2017 as till date it has not

been paid to the Petitioner herein.

(d) Further new bills of the 4th RA bill and the extra work bill submitted by the respondent to be certified and paid as per the certification.

(e) issue directions to the Respondent no.1 to 3 to make the arrangement of the funds and other resources so that the works can be recommenced and

completed and the Respondents, the Respondents are in position to release the payment from time to time, before the recommencement.

(f) issue direction to the govt. of India (urban development) and the Mahud department (PWD nodal agency executing the works) as per the letter

3.6.2017 & 19.6.2017 to make the budgetary allocation before the commencement of this work. This is required as presently there is no sanction of

the budget as per the own admission of the department for ht sum of Rs. 34.00 crore required as per the department letter to complete the works.

(g) issue directions to the Respondents to provide all the drawings, designs etc and to make the entire land/site encumbrances free for execution of the

works and provide security during the course of execution of the works. (Referred to their letter dated admitting the contents above 3rd June 2017)

(h) Restrain the Respondent no.1 to 3 from taking any coercive action against the Petitioner and from creating any hindrances in the smooth execution

of the works as per the terms and conditions of the contract;

(i) Pass such and further order(s) as this Honâ??ble Court may deem fit and proper in the facts and circumstance of the present case.â??

II. Prayer in Arb. P(J2) No.2 of 2019

(a) Stay the operation of the letter No. EE/ MQCD/CORR/2019-20/102 dated 23.09.2019 issued by the Respondent no 3 whereby invoked the Bank

Guarantee 0750215BG0000002 dated 1.1.2015 for a sum of Rs. 6,03,43,14-66.00 and other subsequent letter dated 16.10.2019 and 6.11.2019,

(b) Restrain the Respondent no 4 from encashing the bank guarantee 0750215BG0000002 dated 1.1.2015 for a sum of Rs. 6,03,43, 166.00,

(c) Restrain the Respondent no 1 to 3 from taking any coercive action against the petitioner and from creating any hindrances in the smooth execution

of the works as per the terms and conditions of the contract,

(d) Pass such and further order(s) as this Honâ??ble court may deem fit and

proper in the facts and circumstances of the 789 present case.â??

(iii) â??Prayer in Arb. P(J2) No.3 of 2019

a) set aside the impugned order dated 7.10.2019 passed by the Respondent No.3 and operation thereof be stayed by this Honâ??ble Court during the pendency of present petition.

b) issue directions to the Respondent to take decision relating to the extension sought for by the Petitioner to complete the work/ project and grant the extension of time to the Petitioner to execute the work as sought for up-to 30.6.2020;

c) Issue directions for considering the representation dated 17.10.2019 sent by the Petitioner to the Respondent;

d) Issue directions to the Respondent to supply all the drawings for balance work forthwith as per the terms of the MOU2 signed 5.7.2017 and as per

annexure 4 to the representation dated 17.10.2019 between the respondent and the petitioner, so that the work programme can be submit for

execution of the works and further to take decision relating to the funds by approving the CDA and permit to Petitioner to raise the monthly Bill on

recording of the works executed in the measurement books and the payment be made timely to the Petitioner as per terms and conditions of the

contract clause 7 of the GCC.

e) Issue directions to the Respondents to take decisions which are required under the contract for execution of the works and permit the petitioner to

continue with the execution of works during the pendency of present matter.

f) Restrain the Respondents from taking any coercive action against the petitioner pertaining the Bank Guarantee a submitted and taking any steps for

re-inviting tender for the project known â??IT-SEZâ?? Imphal (Manipur).

g) Release of the payment to the petitioner for the bills submitted to the petitioner.â??

[2] These three petitions are filed under section 9 of the Arbitration and Conciliation Act, 1996. The petitioner seeks an interim order to protect its

right against the respondent State alleging that the Bank Guarantee furnished towards EMD and performance guarantee is to be enforced contrary to

law and against the principle of fair play. It is further alleged that the respondents are acting arbitrarily in violation of the terms and conditions of the

Contract and therefore, the petition is filed for interim protection invoking section 9 of the Arbitration and Conciliation Act, 1996. There are other

reliefs in the nature of direction for release of funds. Notice was taken by respondents on 11.11.2019. The case was not admitted. The respondent raised a preliminary objection on maintainability.

[3] The facts in Arbitration P.(J2) No.1 of 2019 as pleaded by the petitioner are that the second respondent, Public Works Department is the nodal

agency for execution of certain works. The respondents invited tender on 7.2.2014 for execution of works known as "Construction of Tombisana

Market for Rehabilitation of Women Vendors at Khwairamband Bazar, Imphal. The petitioner participated in the bid which was two cover bid and the

petitioner was declared to be technically suitable bidder and was accepted and the financial bid was also accepted. Consequently, the petitioner was

directed to submit Bank Guarantee towards the earnest money deposit and as required by the terms of contract, Bank Guarantee dated 19.02.2014

was submitted for Rs.27,77,000/- which was forwarded to the respondents vide letter dated 19.02.2014. The Bank Guarantee was towards earnest

money deposit to be returned after execution of the agreement and submission of Performance Guarantee on commencing of the work in accordance

with terms and conditions of the contract. The respondents do not have the unfettered right to encash the Bank Guarantee. The respondents issued

the letter of intent dated 4.3.2014 signed by the respondent No.3 and the petitioner's bid was accepted and the value of the contract was specified

as Rs.39,66,72,501/-. The period of completion was shown as 24 months. Thereafter, series of correspondences ensued between the petitioner and the

respondents. The petitioner also submitted another Bank Guarantee dated 24.5.2014 for a sum of Rs.1,98,33,700/- being 5% of the contract value. M/s

Axis Bank issued the Bank Guarantee towards the performance which was submitted to the respondents. One issue of dispute that arose between the

party is relating to mobilisation advance on the basis of the Bank Guarantee furnished. The allegation of the petitioner is that the respondents

committed delay in releasing the mobilisation advance despite submission of Bank Guarantee resulting in delay in execution of work adversely

affecting the petitioner besides mulcting them with interest. The difficulty of the petitioner also mounted because of the various law and order

situations in Manipur. The petitioner relied upon various correspondences between the petitioner and the respondents on various difficulties they have in executing the project and non-co-operation of the respondent department. These details are factual in nature and not very relevant for the present dispensation in view of the preliminary issue raised by the respondent State.

The Bank Guarantee and Performance Guarantee were extended from time to time. Various correspondences are relied upon by the petitioner to

plead that the delay was not on account of the petitioner but inaction on the part of the respondents. The petitioner also refutes the allegation made in

the letters of the respondent where the petitioner is alleged to have not complied with the terms of the contract and delayed the project. The cause of

action for filing these petitions after a series of correspondences relating to complaint against each other appears to be the letter written by the

respondent to the Bank seeking to encash the Bank Guarantee. The petitioner submits that two Bank Guarantee have been encashed. It is pleaded

that Bank Guarantees have been encashed without any justification and contrary to the terms and conditions of the Bank Guarantee. While on one

hand, the respondents by the letter dated 20.9.2018, sought for extension of the Bank Guarantee upto 15.10.2018, they changed their mind to invoke

Bank Guarantee which shows their arbitrary conduct. The petitioners specific plea is at para No.89 and 90 which read as under:-

89. That it is submitted that all four ingredients for grant of the reliefs in the present matter qua the Bank Guarantees i.e. special equities,

irretrievable injury and injustice, fraud and non invocation of the Bank Guarantee in terms of Bank Guarantee itself which is conditional are made out

in the present matter for the grant of reliefs as sought for. It is submitted that irreparable injury would be caused to the Petitioner in case the

Respondent are permitted to invoke and encash the Bank Guarantee, the invocation is palpably bad and it shows the bad intention of the Respondent.

90. That the petitioner submits that the Respondents are State instrumentality and they cannot be permitted to act arbitrarily, illegally in order to cause

prejudice to the Petitioner herein. It is settled position of law that the arbitrary action on the part of the Respondent authority even in contractual

matter would lead to the violation of the article 14 of the Constitution of India. The Petitioner would like to submit before this Hon'ble Court that

the facts of the present matter are sufficient to establish that the Respondents are not acting fairly and they cannot be permitted to take unreasonable action against the Petitioner and would cause a serious prejudice to their legal rights.â??

[4] The case of the petitioner in the Arbitration P. (J2) No.2 of 2019 is that the present petition has been filed against the illegal action of the

respondents as the respondent no.3 herein without any cause of action and justification issued a letter dated 23.09.2019 to respondent no.4 for

invocation of Bank Guarantee towards the mobilization advance for sum of Rs 6,03,43,166.00 being Bank Guarantee no. 0750215BG0000002 dated

01.01.2015 valid upto 31.12.2015 from the State Bank of India. It is submitted that the said invocation by the respondent no.3 is contrary to the law as

laid down by the Hon'ble Supreme Court in (1999) 8 SCC 436; Hindustan Construction Company Ltd. Vs. State of Bihar and other sand also to the

terms and condition of the said Bank Guarantee and as such the invocation of the same is per se illegal.

That the said letter dated 23.03.2019 only came to notice of the petitioner on 18.10.2019. It is submitted that the bank guarantee of Rs.6,03,43,166/-

was furnished towards the mobilisation advance, could be invoked and encashed only on arising of the contingencies as stipulated in the Bank

Guarantee itself. The stipulations of the Bank Guarantee would also disclose that the bank guarantee is conditional. The letter dated 23.09.2019 would

also show that Bank Guarantees have been invoked and the conditions as prescribed in the bank guarantees have not been fulfilled. Therefore the

invocation of the bank guarantees is per se illegal and cannot be entertained. The decision of the Hon'ble Supreme Court in Hindustan construction

Ltd. versus State of Bihar (supra) is squarely applicable.

It is further pleaded that the invocation letter 23.09.2019 would make it clear that the invocation is totally bad and it has not been done in the terms of

the bank guarantee and as such the invocation is totally bad in law and cannot be acted upon. For all the reasons, the letter dated 23.09.2019 issued by

the Respondent No.3 invoking the bank guarantees needs to be quashed. The mobilisation advance bank guarantee cannot be encashed as the amount

got recovered as per the R.A. Bills raised.

Learned counsel for the petitioner submits that the reliefs as sought for in the

present case clearly fall within the ambit of section 9 of the Act and as such the petitioner is filing the present petition invoking the jurisdiction of this Hon'ble Court for granting the reliefs as prayed for in the present case.

[5] The case of the petitioner in Arbitration P.(J2) No.3 of 2019 is that in terms of the letter dated 7.10.2019 at page No. 273 and 274 issued by the

Executive Engineer, Monitoring & Quality Control Division, PWD, Manipur, the Respondent No.4 herein had issued a letter dated 7.10.2019

purportedly under clause 3 of the agreement/ and arrived at conclusion that as the Petitioner has failed to execute the works. Along with the said letter

annexure-1 has been enclosed and in the said Annexure-1, the reasons on various points have been narrated. The impugned letter dated 7th October,

2019 at page No.273 and 274 is extracted as below:-

GOVERNMENT OF MANIPUR

PUBLIC WORKS DEPARTMENT

No. EE/MQCD/CORR/2019-20/95

Imphal, the 7th Oct. 2019

To

M/S Simplex Projects Limited,

12/1, Nellie Sengupta Sarani,

Kolkata- 700087

Subject- Notice on Final action under clause 3 of the agreement For the work of Setting up of IT-SEZ building-I

Reference: 1. Agreement no. - 6/EE/M&QCD/14-15/SE

2. Work Order No. EE/MQCD/WO/6 dt 22/12/2014

3. Notices: i) EE/MQCD/IT-SEZ/2014-15/94 dt.21/9/2015

ii) EE/MQCD/IT-SEZ/2014-15/19 dt. 27/4/2016)

iii) EE/MQCD/IT-SEZ/2014-15/125 dt. 8/8/2016

iv) EE/MQCD/IT-SEZ/2016-17/191 dt.11/2/2017

v) EE/MQCD/IT-SEZ/2017-18/240 dt. 11/4/2017

vi) EE/MQCD/IT-SEZ/2017-18/103 dt. 24/8/2017 vil) EE/MQCD/IT-SEZ/2017-18/146 dt. 26/10/2017

viii) EE/MQCD/IT-SEZ/2017-18/174 dt. 27/11/2017

ix) EE/MQCD/IT-SEZ/2017-18/199 dt. 22/12/2017

x) EE/MQCD/IT-SEZ/2018-19/37 dt. 25/05/2018

xi) EE/MQCD/Corr/2018-19/17 dt. 22/04/2019

xii) EE/MQCD/Corr/2019-20/78 dt. 18/09/2019

4. MOU dt 04/11/2015

5. MOU-2 dt 05/07/2017

Dear Sir,

Whereas under Clause 3 of the aforesaid agreement the Engineer-in-Charge shall have powers to take action under clause 3 in the event of delay or

suspension in the execution of the aforesaid work by the contractor so that in the opinion of the Engineer-in-Charge (which shall be final and binding)

the contractor have already failed to complete the work by the extended date of completion, whereas you have delayed/suspended the execution of

the aforesaid work and as per the opinion of the undersigned, the Engineer-in-Charge (which is final and binding), you have already failed to complete

the work by the extended date of completion, and whereas you were served with show cause in this regard under this office no.

EE/MQCD/Corr/2019-20/78 dt. 18/09/2019 but your reply vide letter no. .SPL/C-274 (Civil Secretariat)/196/19-20 dt. 25/09/2019 received in response

to show cause has been considered carefully but not found to the satisfaction of the Engineer-in-charge. The reasons for not accepting the reply are

place in Para-wise in the enclosed Annexure-I

Therefore under powers delegated to me under sub-clause 3(a) & 3(b), I, Shri Ch. Uttam Singh, the Engineer-in-Charge for the aforesaid work under

the aforesaid agreement, for and on behalf of the Governor of Manipur, hereby

(i) Determine the contract as aforesaid upon which determination yours earnest money deposit, security deposit already recovered, Performance

Guarantee and the Bank Guarantee Bond against Mobilization advance stand absolutely forfeited to the Government and shall be absolutely at the

disposal of Government, and

(ii) Take out such part of the work out of your hand, as remains unexecuted, for giving it to another contractor to complete the work, and you shall

have no claim to compensation for any loss sustained by you by reasons of your having purchased or procured any materials or entered into any

engagement or made any advances on account of or with a view to the execution of the work or the performance of the contract. You are also

hereby served with notice to the effect that the work executed by you will be measured up on 15/10/2019 for which you are asked to attend for Joint

measurement failing which the work will be measured, by the department unilaterally in your absence and result of measurement will be final and will

be binding on you.

(iii) You shall not be allowed to participate in the tendering process for the balance work.

This is without prejudice to Government's right to take action under any other clauses or sub-clauses of the agreement and to realize Government dues

and losses and damages whatsoever under such clauses or sub-clauses.

Yours faithfully,

Sd/-

(Ch. Uttam Singh)

Executive Engineer

Monitoring & Quality Control Division

PWD, Manipur

Endt No. No. EE/MOCD/CORR/2018-19/ Imphal, the 7th Oct 2019

Copy to

1. The Chief Engineer (Bldg), PWD, Manipur
2. The Addl. Chief Engineer - II, PWD, Manipur
3. The Superintending Engineer-I, PWD, Manipur
4. The Superintending Engineer (Electrical), PWD, Manipur
5. The Executive Engineer, Electrical Division No.I 1, PWD, Manipur
6. The file

(Ch. Uttam Singh)

Executive Engineer

Monitoring & Quality Control Division

PWD, Manipurâ??

Mere perusal of the said annexure would make it clear that the Respondents are totally unjustified in saying that there was no inaccessibility to the site

or it was responsibility of the Petitioner to get road constructed for accessibilities of the site. The Respondents relied upon the issuance of drawings

along with the letter dated 20.10.2016 and 20.01.2017, by overlooking the fact that after the said letter various communications have been sent and

even mentioned in the Memo of Understanding-2 dated 5.7.2017 as a pre-condition to execute the works to supply the entire drawings by 31.7.2017

and it is not the case of the Respondents that the Respondents have ever supplied the drawings by the aforesaid date. The Respondents by virtue of

the aforesaid letter had determined the contract and thereby they intended to communicate to the Petitioner that all the amount pertaining to the

earnest money, security deposit, performance guarantee and Bank Guarantee towards mobilization advance stand absolutely forfeited to the

Government and would be at the disposal of the Government. The further stipulation has been made in the said letter that as the Petitioner would not

be permitted to participate in tendering process of balance work

It would also be relevant here to mention that although the respondent has relied on the 2(two) letters dated 20.10.2016 and 20.1.2017, the respondent

has kept silent on the letters written by the petitioner for the mentioned subject of the non receipt of drawings & decisions pending pertaining to

technical issues till date.

That the Petitioner herein was surprised to receive the aforesaid letter from the Respondents as the issuance of said letter for coercive action was

totally unjustified and it came to be issued dehors the terms and conditions of the contract as well as true and correct facts relating to the non-

completion of works and completion of the project, accordingly the Petitioner herein has sent a communication dated 17.10.2019 to the Respondents

and pointed out all the relevant facts relating to the failure on the part of Respondents to perform their contractual obligation on various fronts including

the non-supply of drawings, non-accessibility to the site. The Petitioner also relied upon various communications as sent earlier and mentioned in the

present petition also and made it clear that it is the Respondents who are responsible for delay and for non-completion of project. The Petitioner herein

had made it clear that the Petitioner would complete the 75% of leftover work by 21.3.2020 and 100% work would be completed on 30.6.2020. It is

submitted that there is no escalation clause and the execution of works by the Petitioner, particularly when there is no dispute relating to the quality of

works executed by the petitioner and the petitioner is tested contractor throughout, it would be in the interest of public and project itself that the

Respondents should not get enter into the area of inviting the tender from new contractor and waste 3-4 months on such issues and thereafter to fix up

the date for completion of project beyond the period as requested by the Petitioner vide letter dated 17.10.2019 for the completion of the project.

That the said letter would make it clear that the Petitioner herein had bifurcated the value of works which remained to have been executed and then

mentioned the facts for non-availability of the drawings vis-à-vis the balance works pending and mere perusal thereof would make it clear that the

percentage of works as left over would be about 60% and the drawings out of 60% work left over, the drawings pertaining to 48 % are still not

available.

[6] The petitioner pleaded that they are willing to complete the work and also seek protection of Court to restrain respondents from enforcing the

Bank Guarantee. The petitioner pleads that if the Bank Guarantee is invoked, it will jeopardise their interest. Hence, these petitions under section 9 of

the Act have been filed before this Court. It was taken up for hearing on 11.11.2019 and adjourned to 12.11.2019. A preliminary objection was raised

by the learned Advocate General and the following statement was recorded in the common order dated 13.11.2019 passed in all the three cases as

extracted below:-

13.11.2019

IN THE HIGH COURT OF MANIPUR

AT IMPHAL

Arb. P. (J2) No. 1 of 2019 With

Arb. P (J2) No. 2 of 2019 With

Arb. P. (J2) No. 3 of 2019

M/S. Simplex Projects Ltd. Petitioner

- Versus

State of Manipur & Ors. vs. Respondents

BEFORE

HONOURABLE THE CHIEF JUSTICE MR. RAMALINGAM SUDHAKAR

13.11.2019

[1] Mr. S.D. Singh, learned counsel appears for the petitioner. Mr. R.K. Umakanta, learned Government Advocate states that he will appear on

behalf of the State in all the cases and assist Mr. N. Kumarjit, learned Advocate General in all these matters.

[2] There is preliminary objection raised by the State referring to Section 9 read with Section 2(1)(e) of the Arbitration and Conciliation Act, 1996. It is

pleaded that the High court of Manipur does not have original jurisdiction. Therefore, the arbitration petitions are not maintainable.

[A] Section 9 of the Arbitration and Conciliation Act, 1996 reads as follows:-

9. Interim measures, etc., by Court. (1) A party may, before or during arbitral proceedings or at any time after the making of the

arbitral award but before it is enforced in accordance with section 36, apply to a court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which

any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the

possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be

necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power

for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-

section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further

time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds

the circumstances exist which may not render the remedy provided under section 17 efficacious]

[B] Section 2(1) (e) of the Arbitration and Conciliation Act, 1996 reads as follows :

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a

district, and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming

the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade

inferior to such Principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having

jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in

other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court.

[3] Learned counsel for the State refers to APPENDIX â?" 15 of the High Court of Manipur Rules, 2019, which provides only for appointment of

Arbitrator by the Chief Justice of the High Court of Manipur, and not for entertaining an application under Section 9 of the Arbitration and Conciliation

act, 1996. He pleaded that this High Court has no jurisdiction to entertain the petition as it is not a Court within the meaning of Section 2(1)(e) of the

Arbitration and Conciliation Act, 1996.

In this regard, it will be useful to refer to Appendix-15 of the High Court of Manipur Rules, 2019 which is as follows:-

APPENDIX â?" 15

APPOINTMENT OF ARBITRATOR BY THE CHIEF JUSTICE OF THE HIGH COURT OF MANIPUR SCHEME, 2019 THE HIGH COURT OF MANIPUR AT IMPHAL

In exercise of the powers conferred on the Chief Justice of the High Court of Manipur under sub-Section (10) of Section 11 of the

Arbitration and Conciliation Act, 1996, I hereby make the following scheme :

1. Short title: This scheme may be called the Appointment of Arbitrators by the Chief Justice of the High Court of Manipur Scheme, 2019.?

[4] Mr. S.D. Singh, learned counsel appearing for the petitioner seeks some time to argue on the objection on the maintainability of the petition.

Pleading that the petitioner is facing extreme hardship consequent to the enforcement of the Bank Guarantee, he stated that to prove the petitioner

bonafide, a letter of Bank of Baroda addressed to Axis Bank dated 15.06.2019 for extending the Bank Guarantee in favour of the respondents upto

31.12.2019 in all the three cases totaling to a sum of Rs. 6,30,15,836/- is available. The learned counsel undertakes to produce the extended Bank

guarantee issued by Axis Bank on or before 20.11.2019. He, therefore, pleaded that respondents should refrain from enforcing the Bank guarantee till

then or until orders of this Court.

[5] On the preliminary issue, both sides will be heard on the next hearing date or thereafter. In so far as enforcement of the Bank guarantee is

concerned, respondents are agreeable to keep the issue in abeyance subject to the plea of non-maintainability of the petition as a preliminary issue, and

that too only till the next date of effective hearing.

[6] In view of the above, list the matter on 20.11.2019 so as to enable the petitioner in all the three cases to produce the extended bank guarantee valid

upto 31.12.2019 or later as per Bank of Barodaâ??s letter dated 15.06.2019 and its Annexure issued in favour of the respondents.

[7] The respondents undertaking, not to enforce bank the guarantee till 20.11.2019 is recorded, subject to the petitioner furnishing the extended Bank guarantee.

[8] At the request, list the matter on 20.11.2019.

CHIEF JUSTICE

Sandeep??

[7] Thereafter, the case was adjourned to 20.11.2019 at the request of Mr.S.D.Singh to furnish the Bank Guarantee which, however, was not

furnished as undertaken and therefore, on 20.11.2019, the following order was passed:-

??20.11.2019

Ms. Binarani, learned advocate appears on behalf of Mr. T. Sadananda, learned counsel for the petitioner and Mr. N. Kumarjit, learned Advocate

General, Manipur appears for the respondents assisted by Mr. R.K. Umakanta, learned Government Advocate.

By order dated 13.11.2019 interim protection was granted to the petitioners. Respondents were directed not to enforce the bank guarantee subject to

the petitioner furnishing an extended bank guarantee. Para No. 5, 6, 7 & 8 of the order dated 13.11.2019 read as follows :

??[5] On the preliminary issue, both sides will be heard on the next hearing date or thereafter. In so far as enforcement of the Bank guarantee is

concerned, respondents are agreeable to keep the issue in abeyance subject to the plea of non-maintainability of the petition as a preliminary issue, and

that too only till the next date of effective hearing.

[6] In view of the above, list the matter on 20.11.2019 so as to enable the petitioner in all the three cases to produce the extended bank guarantee valid

upto 31.12.2019 or later as per Bank of Baroda's letter dated 15.06.2019 and its Annexure issued in favour of the respondents.

[7] The respondents undertaking, not to enforce bank the guarantee till 20.11.2019 is recorded, subject to the petitioner furnishing the extended Bank guarantee.

[8] At the request, list the matter on 20.11.2019.??

Today, when the matter is taken up, Ms. Binarani, learned advocate states that Mr. T. Sadananda, learned counsel for the petitioner is not able to

appear in the matter and therefore, she seeks another date. She did not produce the extended Bank guarantee as undertaken. Petitioners have failed

to comply with undertaking given.

In view of the specific order passed by this Court to furnish the extended bank guarantee which has not been furnished or proof submitted, there is

breach. Hence, the embargo on respondents in the order dated 13.11.2019 stands vacated. Respondents are at liberty to proceed with their claim in accordance with law.

At the request of the learned Advocate General and counsel appearing on behalf of the petitioner, list the matter again on 03.12.2019.â??

[8] Thereafter, the case was taken up for hearing on the issue of maintainability and the counsel for either sides argued only on the issue of maintainability.

[9] Heard Mr.S.D.Singh, learned counsel for the petitioner in all the three cases and Mr.N.Kumarjit, learned AG for the respondents.

[10] LEGAL CONTENTIONS

Learned counsel for the petitioner relied upon the provisions of Section 2 (1) (e), Sec. 9 and Sec. 42 of the Arbitration and Conciliation Act, 1996

which are as under:-

â??2. Definitions.

(1) In this Part, unless the context otherwise requires,

(e) ?Court? means â?

(i) In the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes

the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the

arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any

Court of Small Causes;

(ii) In the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide

the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, and in other cases, a High Court having

jurisdiction to hear appeals from decrees of courts subordinate to that High Court.?

***** *****

9. Interim measures etc. by Court.

(1) A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance

with section 36, apply to a Court

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:

(a) The preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any

question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any

party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the

purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for

making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section

(1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court

may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that

circumstances exist which may not render remedy provided under Section 17 efficacious.

42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to

an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings

and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Referring to Section 2(1)(e), the petitioner's counsel pleads that Court of principal civil original jurisdiction in the district is the Court for the

purpose of Section 9 application, however, Section 2(1)(e) also includes High Court in exercise of its ordinary original civil jurisdiction. Hence, the

High Court of Manipur is competent to entertain Section 9 application and therefore, the application for interim protection is justified. In terms of

section 42, since an application was filed by the same petitioner, on an earlier occasion on a different cause of action, the High Court of Manipur has

jurisdiction. He also refers to the contract dated 4th March, 2014 and specifically to clause 13 wherein parties have agreed to the jurisdiction of

Manipur High Court. Hence, Section 9 application is maintainable. The respondents have themselves agreed to the jurisdiction of this Court.

[11] He also relied upon two decisions of the Hon'ble Supreme Court in the cases of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals

(P) Ltd. reported in (2007) 7 SCC 125 and State of West Bengal and others vs. Association Contractors reported in (2015) 1 SCC 32 to support the

above plea.

[12] Learned Advocate General, Mr.N.Kumarjit opposes the Section 9 petitions stating that Sections 20 and 21 of the Manipur (Courts) Act, 1955(Act

56 of 1955) alone will apply and pleaded that a reading of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 read with Manipur (Courts)

Act, 1955 (Act 56 of 1955) and Section 15 of the Code of Civil Procedure, the Court of original jurisdiction to deal with cases in terms of Section 9 of

the Arbitration and Conciliation Act, 1996 and for granting any relief as an interim measure would be a Civil Court of original jurisdiction at Manipur as

provided under Manipur (Courts) Act, 1955 (Act 56 of 1955). Sections 20 and 21 of the Manipur (Courts) Act, 1955(Act 56 of 1955) read as under:-

20. District Court to be principal civil court of original jurisdiction.- The district court shall be principal civil of original jurisdiction in the

district.

21. Original jurisdiction of district courts.- Save as otherwise provided by any other law for the time being in force, the district court, shall, subject

to the provisions of section 15 of the Code of Civil Procedure, 1908, have original jurisdiction in all civil suits without limits as regards the value.?

Section 15 of the Code of Civil Procedure reads as under:-

â??15. Court in which suits to be instituted. â?" Every suit shall be instituted in the Court of the lowest grade competent to try it.â??

Hence, the petitions before the High Court is not maintainable as it will be without jurisdiction.

[13] It is further pleaded that the High Court of Manipur does not exercise the power of ordinary original civil jurisdiction. The petitioner is, therefore,

not entitled to move this Court for such relief. Hence, the petitions should be dismissed. The earlier application said to have been filed by the same

petitioner was disposed of as infructuous. No decision on merits was passed. In any event, it has no relevance to the present case and the cause of

action is different. The petitioner is misreading all the provisions of Arbitration Act without referring the Manipur (Courts) Act, 1955.

[14] In the present case, the petitionerâ??s specific plea is that this Court has got jurisdiction to hear Section 9 applications in view of the proceeding

of the respondent, Public Works Department dated 4th March,2014 accepting the tender submitted by the petitioner on certain terms and conditions.

The petitioner specifically refers to clause 13 of the Public Works Departmentâ??s acceptance letter dated 4.3.2014 at page No.72 which is quoted

below:-

â??GOVERNMENT OF MANIPUR

PUBLIC WORKS DEPARTMENT

No.EE/BD-I/Tombisana Market/2013-14/ Imphal, the 4th March,2014

To,

M/S. Simplex Projects Ltd.

12/1/Nellie Sengupta Sarani,

Kolkata â?" 700 087

Subject:- Letter of Intent for the work, ?Construction of Tombisana Market for rehabilitation of Women Vendors at Khwairamband Bazar, Imphal?

Ref:- Notice Inviting E-tender No.EE/BD-I/Tombisana Market/2013:

Dt.07.02.2014

Dear Sir (s)

Your tender for the work mentioned above has been accepted on behalf of the Governor of Manipur at your negotiated tender amount of

Rs.39,66,72,512.20 (Rupees thirty nine crores sixty six lakhs seventy-two thousand five hundred twelve and point two zero only) which is 5.02 %

above the estimated cost of Rs.37,77,13,045/- (Rupees thirty seven crores seventy-seven lakhs thirteen thousand and forty-five only).

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13. Jurisdiction of court in respect of any dispute cases shall be under High Court of Manipur at Imphal.

**** **

Sd/-

(Kh.Randhir Singh)

Executive Engineer,

Building Division No.I, PWD, Manipur.?

[15] It is therefore pleaded by the petitioner that since the respondents themselves had agreed that in respect of any dispute, the jurisdiction Court will

be the High Court of Manipur at Imphal, these applications are maintainable and legally justified.

[16] In the present case, the factual dispute apart, the primary objection is on the maintainability of Section 9 application. A specific question was

made to the petitioner's counsel, Shri S.D.Singh as to whether the High Court of Manipur exercises ordinary original civil jurisdiction. He fairly

stated that it does not exercise ordinary original civil jurisdiction. If that be the case, a reading of Section 2(1)(e) makes it clear that the principal Civil

Court of original jurisdiction in the district alone will have jurisdiction to entertain an application dealing with the subject matter of the arbitration. The

inclusion of the High Court is only when it exercises ordinary original civil jurisdiction like in the case of chartered High Courts like Calcutta High

Court, Bombay High Court, Madras High Court and such other High Courts which by specific provision, exercise ordinary original civil jurisdiction.

The High Court of Manipur does not exercise ordinary original civil jurisdiction and therefore, it is not a Court within the meaning of Section 2(1) (e) of

the Arbitration and Conciliation Act, 1996. As a result, Section 9 application is not maintainable before this Court.

Section 42, which was relied upon by the learned counsel for the petitioner, deals with jurisdiction of the Court in relation to any proceeding relating to

an arbitration agreement where an application has already been made in a Court and that Court alone will have jurisdiction over the arbitral proceeding

and subsequent application arising out of the agreement. In the present case, there is no application pending in respect of the arbitration agreement

before this Court prior to the filing of the present application. Hence, reference to Section 42 of the Arbitration and Conciliation Act, 1996 is of no

relevance and a misconception.

[17] Learned Advocate General was correct in referring to Manipur (Courts) Act, 1955 (Act 56 of 1955) where the definition of district Court is

clearly stated to be the Principal Court of civil original jurisdiction. A reading of Sec. 20 and Sec. 21 of the Manipur (Courts) Act, 1955 (Act 56 of

1955) which have been already extracted above makes it very clear that district court alone has the power of original civil jurisdiction and to entertain

an application under Section 9 of the Arbitration and Conciliation Act, 1996 in terms of Section 2(1)(e) of the Arbitration and Conciliation Act.

[18] In the case of Adhunik Steels Ltd. (supra), the affected party already moved the district Court at Sundargarh under section 9 of the Act against

the opposite party to restrain them from terminating the contract. It is a case relating to contract in respect of mines. The primary and core legal issue

that was considered in that case was what are the relevant parameters for grant of interim relief under section 9 of the Arbitration and Conciliation

Act, 1996. Para No.21 of the said case is extracted as below:-

â??21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration

agreement. According to learned counsel for Adhunik Steels, the subject matter of the arbitration agreement in the case on hand, is the mining and

lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private

Limited and the dispute before the arbitrator would be the effect of the

agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.â??

It did not deal with case of jurisdiction of the High Courts to entertain an application under section 9, when it does not exercise ordinary original civil jurisdiction. Hence, it is of no relevance.

[19] In the case of State of West Bengal and others vs. Association Contractors (supra), it is a reference by a Division Bench of the Honâ??ble

Supreme Court and decided by a larger Bench of three judges. The scope of referral order is as follows:-

In this appeal, the question that arises for decision is which Court will have the jurisdiction to entertain and decide an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act')??

[20] It was a case where Section 9 application was commenced before the Calcutta High Court exercising ordinary original civil jurisdiction . It was a

case where before the arbitration award, Section 9 application was moved before the Calcutta High Court exercising ordinary original civil jurisdiction

and thereafter, application under Section 34 of the Act was moved before the principal Civil Court which came to be contested by the parties and on

the interpretation of Section 2(1) (e) and Section 42 of the Arbitration and Conciliation Act, 1996, the Honâ??ble Supreme Court interpreted the

definition of the word 'Court' in Section 2(1)(e) with reference to Section 42 of the Act. It will be useful to refer to the view of the Honâ??ble

Supreme Court on the scope of definition of word 'Court' of section 2(1)(e) in relation to Section 42 and which court is the competent Court under

section 2(1)(e). Para Nos.18 and 20 reads as under:-

â??18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the ""court"" as defined for the

passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral Award but before its enforcement. In

case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all

subsequent applications under Part-I to any court except the court to which an application has been made under Section 9 of the Act.â??

(Emphasis supplied).

**** *

â??20. As noted above, the definition of ""court"" in Section 2(1)(e) is materially different from its predecessor contained in Section 2(c) of the 1940

Act. There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be ""court"" within the meaning of Section 2(1)(e)

even if it retains seisin over the arbitral proceedings. Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts

that could be ""court"" for the purpose of Section 2(1)(e). Secondly, under the 1940 Act, the expression ""civil court"" has been held to be wide enough to

include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act.

Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary Appellate Court,

suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court

exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available. Any further appeal to the Supreme Court under Article 136 would also not be available. The only other argument that could possibly be made is that all definition sections are subject to context to the contrary. The context of Section 42 does not in any manner lead to a conclusion that the word "court" in Section 42 should be construed otherwise than as defined. The context of Section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a "court" within the meaning of Section 42. It has aptly been stated that the rule of forum conveniens is expressly excluded by section 42. See: JSW Steel Ltd. vs. Jindal Praxair Oxygen Co.Ltd., (2006) 11 SCC 521 at para 59. Section 42 is also markedly different from Section 31(4) of the 1940 Act in that the expression "has been made in a court competent to entertain it" does not find place in Section 42. This is for the reason that, under Section 2(1)(e), the competent Court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other court. For all these reasons, we hold that the decisions under the 1940 Act would not obtain under the 1996 Act, and the Supreme Court cannot be "court" for the purposes of Section 42.â??

(Emphasis supplied)

[21] In para No.25 of the aforesaid judgement, it has been clearly held that the definition of Section 2(1)(e) is exhaustive and specific in that only the principal Court of civil original jurisdiction (i.e.) the district court and the High Court exercising ordinary original civil jurisdiction alone will be the Court in terms of Section 2(1)(e) and no other Court. Para No.25 reads as follows:-

â??25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court

having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996.

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**** *

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain

seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State

or a Principal Civil court having original jurisdiction in the district as the case may be.

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(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original

jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject

matter jurisdiction would be outside Section 42. The reference is answered accordingly.â??

As observed earlier, the High Court of Manipur does not exercise ordinary original civil jurisdiction. The above clearly answers the point in issue

against the petitioners.

[22] Another plea made by the petitionerâ??s counsel that in respect of any dispute, it will be the High Court of Manipur at Imphal which will have

jurisdiction is no ground to entertain this application under section 9 because the High Court of Manipur does not exercise ordinary original civil

jurisdiction for the reasons already stated above. Manipur High Court does not fall within the definition of a Court in terms of Section 2(1)(e) of the

Arbitration Act. The parties cannot by agreement bestow jurisdiction when under the provision of Section 2(1)(e), the High Court of Manipur does not

exercise ordinary original civil jurisdiction. The Hon'ble Supreme Court in the case of Hakam Singh vs. M/s Gammon (India) Ltd.; 1971 (1) SCC 286

held in para No.4 as under:-

â??4.The Code of Civil Procedure in its entirety applies to proceedings under the Arbitration Act. The jurisdiction of the Courts under the Arbitration

Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure. By Clause 13 of the

agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the

City of Bombay. In any event the, respondent have their principal office in Bombay and they were liable in respect of a cause of action- arising under

the terms of the tender to be sued in the Courts at Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a

Court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or

proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such

an agreement does not contravene Section 28 of the Contract Act.â??

(emphasis supplied)

The same principle applies to the Arbitration Act as well.

[23] Accordingly, the objection raised by the respondents on maintainability is sustained and all the applications are rejected.