

(2012) 09 GAU CK 0055
In the Gauhati High Court
Case No : FAO No. 2 of 2012

Philip Vanlalmawia John

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 2(e), 21, 3, 34
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2013) 2 ARBLR 530 : (2012) 5 GLT 757

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : Micael Zothankhuma, Mr. Lalfakawma, Ms. Dorothy Lalrinchhani and Ms. Nancy Lalruatkimi, for the Appellant; B. Deb, AG and Mr. Lalsawirema, GA, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J.—This appeal u/s 17(2) of the Mizoram Civil Courts Act, 2005 read with section 151 of the Code of Civil Procedure, 1908 is directed against the order dated 6.3.2012 passed by the learned Senior Civil Judge-I, Aizawl in C.M. Application No. 19/2012 arising out of Declaratory Suit No. 2 of 2012 directing the Arbitral Tribunal not to proceed with the arbitration proceeding in ICA Case No. 1758. The facts of the case may be briefly noted.

2. The Government of Mizoram in the Public Health Engineering Department (respondent No. 1) had issued notice inviting tender (NIT) being Tender Notice No. CE/PHE/1 of 1997-98 for the work of execution of Greater Aizawl Water Supply Scheme Phase-II with treatment plant of 36.5 MLD capacity on turnkey basis.

3. Appellant submitted his bid offering 3 (three) alternative schemes as per provision of NIT. On consideration of all the bids, the appellant was adjudged as the lowest bidder and on 2.11.1999, respondent No. 1 issued letter of intent to the appellant for execution of single stage pumping concept i.e. the alternative

scheme No. II on turn-key basis. The offer having been accepted, an agreement was signed between the appellant and the respondent No. 1 on 23.11.1999, clause 16 of which provides for arbitration for resolution of any dispute or difference between the parties arising out of or relating to the contract.

4. Clause 4.39 of the General Conditions of Contract provided that no work which radically changed the original nature of the contract should be ordered by the Engineer and in the event any such deviation was ordered, the contractor should carry it out and any disagreement as to the nature of the work and the rate to be paid for such work should be resolved in accordance with Article 4.69.

5. Clause 3 (vii) of the Commercial Terms and Conditions of Contract provided that it was the obligation of the contractor to carry out any extra work which the Government may instruct the contractor to do in writing.

6. Respondent No. 1 had made radical changes in the scope of the work and had asked the appellant to execute the work as per the modified scheme which was infect the same as the alternative offer given by the appellant at the time of bidding. Appellant executed the work as per modified scheme. Despite such radical changes, the contract continued.

7. Appellant had raised bills for the work done amounting to Rs. 1,38,45,70,282.22. All the invoices were under the agreement dated 23.11.1999. Respondent No. 1 had released payment of Rs. 65,52,45,914/- to the appellant. According to the appellant, respondent No. 1 has admitted that a further amount of Rs. 50,25,00,000/- is payable to the appellant as balance outstanding amount though the appellant claims a higher amount of Rs. 72,85,95,094.41 as due and outstanding.

8. Respondent No. 1 had extended the time for completion of the contract initially upto 27.1.2006 and thereafter upto 28.2.2009. Such extension of time became necessary as the authority decided to change the scheme from single stage pumping to two stage pumping. In view of such change, appellant sought for extension of time upto 28.2.2011. But the respondent No. 1 terminated the contract agreement dated 23.11.1999 by letter dated 18.11.2009.

9. Aggrieved by the termination of contract, appellant filed a writ petition before this Court which was registered as W.P.(C) No. 94/2010. The writ petition was resisted by the State by filing counter affidavit wherein the maintainability of the writ petition was questioned on the ground that there was an arbitration clause, viz., clause 16 in the contract agreement to settle the dispute between the parties in accordance with the Rules of Arbitration of the Indian Council of Arbitration, 1998.

10. In the meanwhile, the appellant moved the Indian Council of Arbitration (respondent No. 2) on 24.5.2010 for resolution of the dispute by way of arbitration. Respondent No. 2 vide letter dated 6.9.2010 gave notice of arbitration to the respondent No. 1 enclosing therewith a copy of the statement

of claim and supporting documents filed by the appellant. Respondent No. 1 was called upon to file the defence statement with documents and also to nominate its arbitrator from the panel of arbitrators. Respondent No. 1 was further asked to deposit the costs and expenses of arbitration.

11. The appellant informed the Court in the writ proceeding by filing rejoinder affidavit that he had moved the Indian Council of Arbitration for resolution of the dispute by way of arbitration.

12. When the writ petition was taken up for hearing, it was argued on behalf of the State that when there is an arbitration clause in a contract, the aggrieved party should approach the arbitral forum and not the writ court and as the writ petitioner had already invoked the arbitration clause, the writ petition should be dismissed.

13. This Court by the judgment and order dated 7.4.2011 dismissed the writ petition as not maintainable on the ground of there being an arbitration clause and the appellant having invoked that clause, without expressing any opinion regarding the claim of the appellant as the same is pending before the respondent No. 2.

14. As the respondent No. 1 did not deposit the arbitration costs and expenses and also did not name its nominee arbitrator, the respondent No. 2 wrote to the respondent No. 1 on 15.7.2011 and 1.8.2011 to do the needful. Ultimately, the appellant had to deposit the arbitration costs and expenses on behalf of the respondent No. 1 on 22.9.2011. Request was also made to the respondent No. 2 to nominate an arbitrator on behalf of the respondent No. 1. Thereafter, Mr. Justice R.C. Lahoti, former Chief Justice of India was appointed as arbitrator on behalf of the respondent No. 1 by the Arbitration Committee of the respondent No. 2. Following the same, the arbitral tribunal was constituted as under:-

15. The arbitration proceeding was registered as Case No. 1758.

16. This was informed by the respondent No. 2 to both the appellant and the respondent No. 1 vide letter dated 11.1.2012. It was stated that the first hearing of the arbitral tribunal would take place on 8.2.2012. In the meantime, respondent No. 1 was requested to file the defence statement before the date of hearing.

17. Respondent No. 1 as the plaintiff then filed a suit in the Court of Senior Civil Judge-I, Aizawl seeking a declaration that respondent No. 2 has no jurisdiction to arbitrate on the dispute raised by the appellant in his claim as the claim is beyond the scope of the contract agreement dated 23.11.1999. The said suit was registered as Declaratory Suit No. 2/2012. Respondent No. 1 also filed an application for stay of the arbitration proceeding, which was registered as CM. Application No. 19/2012.

18. The learned Senior Civil Judge-I, Aizawl passed an ad interim order dated

1.2.2012 staying further proceeding of arbitration Case No. 1758.

19. Appellant entered appearance in the civil proceeding and filed application u/s 8 of the Arbitration and Conciliation Act, 1996 read with sections 5 and 16 thereof with the following prayer:-

i) That the Suit filed by the Plaintiff is not maintainable and Plaintiff be relegated before the Arbitral Tribunal.

ii) The Plaintiff must be directed to take up all the issues before the Arbitral Tribunal, if it so desires.

iii) The ad-interim Order dt. 1.2.2012 be vacated.

iv) Pass such other and further order(s) as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case.

20. However, the learned Senior Civil Judge-I, Aizawl disposed of CM Application No. 19/2012 by passing order dated 6.3.2012 staying further proceeding of Arbitration Case No. 1758 till the disposal of Declaratory Suit No. 2/2012.

21. Aggrieved, the appellant is before this Court by way of this appeal.

22. Heard Mr. M. Zothankhuma, learned Sr. counsel for the appellant. Also heard Mr. B. Deb, learned Advocate General, Mizoram for the respondent State.

23. Learned counsel for the appellant submits that the learned Court below was not justified in passing the impugned order. Referring to the provision of section 2(e) of the Arbitration and Conciliation Act, 1996 (the Act), he contends that the learned court below had clearly acted beyond jurisdiction in staying the arbitration proceeding. He also submits that considering the mandate of the Act as can be seen from sections 5, 8 and 16 thereof, the learned court bellow ought not to have passed the impugned order. He contends that in view of the arbitration clause contained in the contract agreement dated 23.11.1999, interference by the Civil Court is clearly unwarranted and uncalled for. He contended that u/s 16 of the Act, the Arbitral Tribunal is competent to (decide its own jurisdiction. Referring to the stand of the State taken in the writ proceeding, learned counsel for the appellant submits that the State cannot now turn around and say that arbitration is not maintainable. He, therefore, prays for setting aside of the impugned order.

24. Learned Advocate General, Mizoram on the other hand submits that the State had filed objection before the respondent No. 2 contending that the dispute raised by the appellant is beyond the contract agreement dated 23.11.1999 but without considering such objection, the matter was placed before the Arbitral Tribunal. Referring to Rule 17 (c). of the Rules of Arbitration of the Indian Council of Arbitration, 1998 which provides that any party aggrieved by the decision of the Registrar in accepting or rejecting an application for arbitration, may apply to the Court for suitable directions, learned Advocate General submits that the State therefore rightly moved the court. As such, no wrong has been committed

by the State in moving the Civil Court. The order of the Civil Court has to be viewed in that context, he submits. Alternatively, he submits that this Court may direct the Arbitral Tribunal to first take a decision on the objection raised by the State pertaining to its jurisdiction and thereafter to proceed with the arbitration.

25. The submissions made have been considered.

26. Before proceeding further, the arbitration clause contained in the contract agreement dated 23.11.1999 may be considered, which is as under:-

16. ARBITRATION: Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration 1998 as amended thereof and the award made in pursuance thereof shall be binding on the parties.

27. A careful perusal of the aforesaid arbitration clause would indicate that any dispute or difference arising between the parties that is the appellant and the respondent No. 1 out of or relating to the construction, meaning, scope, operation or effect of the contract or the validity or the breach thereof shall be settled by way of arbitration in accordance with the Rules of Arbitration and the award made in pursuance thereof shall be binding on the parties. Thus, the question as to whether a particular claim falls within the contract or beyond the contract is also a matter for resolution by way of arbitration under the aforesaid clause.

28. Section 2(e) of the Act defines "Court", which means the principal Civil Court of original jurisdiction in a district having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the suit but does not include any Civil Court of a grade inferior to such principal civil court or any court of small causes.

29. Section 5 of the Act restricts judicial intervention in arbitral proceedings except as provided. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, shall refer the parties to arbitration if a party applies for it when submitting his first statement on the substance of his dispute. Section 5 and 8 are extracted hereunder for ready reference:-

5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A Judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the

parties to arbitration.

(2) The application referred to in subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

30. As per section 16 of the Act, the Arbitral Tribunal is competent to rule on its own jurisdiction including on any objection with respect to the existence or validity of the arbitration agreement. Section 16 is as under:-

16. Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or subsection (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

31. u/s 9 of the Act, a party before or during the arbitral proceeding or at any time after making of the arbitral award but before its enforcement can apply to a court for interim measure. u/s 34 of the Act, a party aggrieved by an arbitral award may make an application before the court for setting aside of such award. The court as referred to above would be the court as defined u/s 2(e) of the Act.

32. Having noticed the broad contours of the relevant provisions of the Act, the court may now proceed to examine the impugned order passed by the learned Sr. Civil Judge. This is how the learned court below dealt with the matter:-

FINDINGS AND REASONS

As inevitably, I must look into the legal principles involve on temporary/interim injunction by taking resorts in Midnapore Peoples" Co-op. Bank Ltd. and Others Vs. Chunilal Nanda and Others, , the Supreme Court has held that-

16. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories;

- (i) Orders which finally decide a question or issue in controversy in the main case.
- (ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.
- (iii) Orders which finally decide a collateral issue or question which is not the subject matter of the main case.
- (iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.
- (v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

Also vide, Premji Ratansey Shah and Others Vs. Union of India (UOI) and Others, : Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., : Hindustan Petroleum Corporation Ltd. Vs. Sri. Sriman Narayan & Anr. In connection with Appeal (civil) 3661-62 of 2002 decided on 09/07/2002 reported in Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan and Another, .

And in Zenit Mataplast P. Ltd. Vs. State of Maharashtra and Others, , the Apex Court further held that-

25. Grant of temporary injunction, is governed by three basis principles, i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction (Vide M/S S. M. Dyechem Ltd. Vs. M/S Cadbury (India) Ltd., ; and Anand Prasad Agarwalla (supra).

32. Thus, the law on the issue emerges to the effect that interim injunction should be granted by the Court after considering all the pros and cons of the case in a given set of facts involved therein on the risk and responsibility of the party or in case he looses the case he cannot take any advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e. prima facie, balance of convenience and irreparable loss. The delay in approaching the Court is of course a good ground for refusal of interim relief, but in exceptional circumstances, where the case of a party is based on

fundamental rights guaranteed under the Constitution and there is an apprehension that suit property may be developed in a manner that it acquires irretrievable situation, the Court may grant relief even at a belated stage provided the court is satisfied that the applicant has not been negligent in pursuing the case.

Thus, in the instant application, examination of the meritorious shall be made in terms of prima facie case, balance of convenience and irreparable injury.

Prima facie case.

The very terminology of prima facie is already settled in Deepali Designs & Exhibits Pvt. Ltd. vs. Pico Deepali Overlays Consortium & Ors. decided on 22 February, 2011 in connection with IA Nos. 16915-16916/2010 & IA No. 1218/2011 in CS (OS) No. 2528/2010, Hon'ble Justice Gita Mittal for Delhi High Court termed that- & Ors. decided on 22 February, 2011 in connection with IA Nos. 16915-16916/2010 & IA No. 1218/2011 in CS(OS) No. 2528/2010, Hon'ble Justice Gita Mittal for Delhi High Court termed that-

18. On a consideration of the ordinary meaning of the term "prima facie" and the trend of judicial pronouncement it appears to me that "prima facie case" would mean a case which is not likely to fail on account of any technical defect and is based on some material which if accepted by the tribunal would enable the plaintiff to obtain the relief prayed for by him and would, therefore, justify and investigation.

Firstly, I could not eschew on the reliance taken by learned counsel for the respondent no. 3 in respect of prima facie case/cause of action in the instant case in this court. In Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, , wherein, the Supreme Court has held that -

15.....Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.

The above decision was arrived on original civil suit but bound by arbitral agreement. It was therefore opined to refer the matter to the Arbitral Tribunal as per section 8 of the Arbitration and Conciliation Act, 1996. It therefore reads reference as

8. Power to refer parties to arbitration where there is an arbitration agreement:-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

In the instant case being declaratory suit in respect of the subject matter is within the jurisdiction of Arbitral Tribunal or not, section 8 of the said Act should not have relevance. Furthermore, In *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, , it was held that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned arbitral tribunal and, therefore, the Courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by that arbitral tribunal. Referring to its earlier decision in the case of *P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others*, , the Supreme Court was of the view that in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. The Supreme Court was of the view that once the arbitration clause was admitted, considering the mandatory language of Section 8 of the Arbitration Act, the Court below ought to have referred the dispute to arbitration.

As observed by Supreme Court in *P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others*, , the language of Section 8 of Arbitration & Conciliation Act is preemptory and, therefore, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and in such a case, nothing remains to be decided in the original action. Similar view was taken by the Supreme Court in *The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another*, .

In *Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another* , the Supreme Court has held that-

On 12th February 2002 the respondent No. 1 filed a suit in the City Civil Court at Bombay against the appellant who was named as the defendant No. 1 and the Council which was named as the defendant No. 2. The prayers in the plaint are, inter-alia, for a declaration that the claim petition filed by the appellant before the Council was ultra-vires the provisions of the Act and, therefore, illegal, null

and void. A permanent order of injunction was also asked for restraining further proceedings before the Council. An application was filed in the suit for interim relief by the respondent No. 1. By an order dated 5th February 2002 the City Civil Court granted an ad interim injunction staying the proceedings under the Act. The application for interim relief was, however, ultimately dismissed by the City Civil Court on 28th November, 2002 principally on the ground that the claim had been filed by the appellant u/s 6(2) read with Section 8(1) of the Arbitration and Conciliation Act, 1996 (which we will refer to as the 1996 Act) and in view of Section 5 of the 1996 Act no Court could intervene in arbitration proceedings; except to the extent prescribed under the 1996 Act. According to the City Civil Court, the relief's claimed for the respondent No. 1 in its suit did not fall within the ambit of those situations where interference by Court was permissible and consequently the Court had no jurisdiction to stay the proceedings before the Council.

The respondent No. 1 preferred an appeal from the decision of the City Civil Court before the High Court. The appeal is pending. On an application for interim relief filed by the respondent No. 1 pending the appeal, the High Court by its order dated 21st January 2003 stayed the proceedings before the Council only on the ground that no notice had been served by the appellant on the respondent No. 1 u/s 21 of the 1996 Act. The High Court rejected the appellant's application for expediting the appeal on 2nd May 2003. Both these orders of the High Court are questioned before us in these appeals.

To sum up; The High Court erred in staying proceedings before the Council. It had no jurisdiction to do so. Having regard to our conclusion, and as has been agreed by the parties, the appeal before the High Court has really become infructuous. We, therefore, set aside the decision of the High Court and treat the appeal of respondent No. 1 before the High Court as having been decided by this order. The decision of the City Civil Court is confirmed and the appeal is allowed with costs.

On meticulously look into the above, reliance produced/taken by learned counsel for the defendant/respondent no. 3 fails to ricochet the journey of the lis.

Howsoever, in H.G. Oomor Sait and another Vs. O. Aslam Sait, , Hon''ble Madras High Court has held that-

28. It is true that the discretion of the Civil Court to proceed with the suit is narrowed down, but I am unable read to anything from the Act which would place a total embargo on the Civil Court to continue the proceedings before it only on the mere existence of an arbitration clause. A combined reading of all the provisions of the 1996 Act as well as section 8 discloses that the time-tested reasons which were behind the several judgments of the various Courts as well as the English Courts holding that Civil Court can refuse to stay the suit and can proceed with the suit under certain circumstances continue to hold good even now. The short-comings and deficiencies of the enquiry before an arbitrator is

summary and Rules of procedure and evidence are not binding. The Arbitrator need not be even a law-knowing person. That is the reason why over a century, Courts have repeatedly held that in cases where substantial questions of law arise for consideration or issues which require serious consideration of evidence relating to fraud and misrepresentation etc. are involved, such cases are best left to the civil court and that the Arbitrator will not be competent to go into the said issues.

....39. Considering the nature of the disputes in the present case, it is not necessary for me to proceed further in a comparative study of the jurisdiction and powers of the Civil Court under the old Act and the new Act. The following four circumstances in the present case, would be sufficient to hold that the ultimate conclusion of the Court below in refusing to refer the dispute to the Arbitrator is quite justified.

And in the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , the Supreme Court observed:

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction...

Also in M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others, , wherein, the Apex Court opined that-

The right to have the dispute settled by arbitration has been conferred by agreement of parties and that right should not be deprived of by technical pleas. The court must go into the circumstances and intention of the party in the step taken.

Further in Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, , it was held that-

In the instant case, the existence of a valid agreement stands admitted. There cannot also be any dispute that the matter relating to termination of the contract would be a dispute arising out of a contract and, thus, the arbitration agreement contained in clause 44 of the contract would be squarely attracted. Once the conditions precedent contained in the said proceedings are satisfied, the judicial authority is statutorily mandated to refer the matter to arbitration. What is necessary to be looked into therefore, inter alia, would be as to whether the subject matter of the dispute is covered by the arbitration agreement or not.

In Union of India vs. M/S. Krafters Engineering & Leasing (P) Ltd. decided on 12 July, 2011 in connection with Civil Appeal No. 2005 of 2007, the Supreme Court has held that-

(iii) An arbitrator is the creature of an agreement. It is open to the parties to

confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

Lastly in Food Corporation of India and Another Vs. Yadav Engineer and Contractor, , it was held that-

Arbitration Act carves out an exception to the general rule that the forum for resolution of civil disputes is the civil court having jurisdiction to deal with the same by providing that the parties to a dispute by agreement unto themselves may choose a forum of their choice for settlement of disputes between them in preference to the State Courts. Undoubtedly, for making these agreements enforceable sanction of law is necessary. That is the object underlying the Act. Industrial revolution bringing into existence international commercial transactions led to a search for finding a forum outside the municipal law courts involving protracted and dilatory legal process for simple, uninhibited by intricate rules of evidence and legal grammar. This explains resort to forums for arbitration at international level. No two contracting parties are under any legal obligation to provide for an arbitration agreement. If the parties enter into an arbitration agreement implying that they would like that the disputes covered by the agreement will be resolved by a forum of their choice, the approach of the court must be that parties to the contract are held to their bargain. If in breach or derogation of a solemn contract a party to an arbitration agreement approaches the court and if the other side expeditiously approaches the court invoking the court's jurisdiction to stay the proceedings so that by this negative process the court forces the parties to abide by the bargain, ordinarily the court's approach should be and has been to enforce agreements rather than to find loopholes therein. More often it is found that solemn contracts are entered into on the clearest understanding that any dispute arising out of the contract and covered by the contract shall be referred to arbitration. It may be that one or the other party may not have entered into the contract in the absence of an arbitration agreement. Therefore when in breach of an arbitration agreement a party to the agreement rushes to the court, unless a clear case to the contrary is made out the approach of the court should be to hold parties to their bargain provided necessary conditions for invoking s. 34 are satisfied.

....Arbitration agreement generally provides for resolution of disputes either present or future by a forum of the choice of the parties. Ordinarily, arbitration agreement finds its place in contracts. Apprehending that while performing contract some disputes may arise, care is taken to incorporate an arbitration agreement in the contract itself prescribing the forum for resolution of such disputes.

In this catena, Clause 16 of the Commercial Terms of Agreement dt. 23.11.99 requires to inspect which embodied that

Any disputes or difference whatsoever between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration 1998 amended thereof and the award made in pursuance thereof shall be binding on the parties.

At the time of hearing, parties are at rivalry on the provisions of Rules of Arbitration of the Indian Council of Arbitration 1998, learned counsel for the defendant No. 3 contended that it is the authority of the Arbitral Tribunal to take evidence and to examine the case on merit whether the matter is within the ambit of the agreement or not. On the other hand, Mr. Lalsawirema submitted that as per the said Rules of Arbitration of the Indian Council of Arbitration 1998, being aggrieved in the decisions of the Registrar of ICA, resort is permissible to approach the civil courts in respect of the subject matter jurisdiction. In the envisaged of Associated Engineering Co. v. Government of A.P. (supra), I find that this is a fit case to further investigate of the matter under the so called substantive due process towards the purpose of public interest as the instant crux is touching the small economy of the state of Mizoram. In other words, I find a prima facie case as observed in Deepali Designs & Exhibits Pvt. Ltd. vs. Pico Deepali Overlays Consortium & Ors. (supra).

Balance of convenience

Pertinently, being elixir of life, portable drinking water is now incorporated as a part of fundamental rights Vide, Narmada Bachao Andolan Vs. Union of India and Others, : Voice of India (Through its Chairman) Vs. Union of India & Ors. in connection with Writ Petition (Civil) No. 263 of 2010 decided on 20/09/2010. If we talk about balance of convenience is in favour of the petitioner/plaintiff, it will meant that balance of convenience is in favour ruff raff including the pavement dwellers in this emerging Aizawl city. Attending/appearing of big officials of the petitioner before Arbitral Tribunal stationed at Delhi from the isolated landlock hilly terrain like Mizoram will certainly ravage the vulnerable state economy during pendency of the main suit while cause of action is found in the light of the observation in Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, . In another horizon, till this era of globalization, the occupiers of Aizawl city remains in scarcity of drinking water which the petitioner/plaintiff owed to fill up of such lacunae as held in Narmada Bachao Andolan vs. Union of India And Others (supra.). In short, without granting of temporary injunction, huge amount of money to be incurred on the Travelling and Daily Allowances of big officials of the plaintiff/petitioner to ply to Delhi and vice versa will ruin and pause the gearing up of development where augmentation of revenue is far behind due to backward region in all respect. I therefore find that balance of convenience is in favour of the petitioner/plaintiff.

Irreparable injury

As the matter is purely public interest and no reasons is found to vitiate safety

measures for the instant policy as suggested by experts, irreparable injury which can harm public interest will be caused without passing interim injunction. Otherwise, how to re-invest the waste of public money for responding the lis in the Arbitral Tribunal during pendency of the main suit is the moot point, cogently answered as negative.

ORDER

So is the factual matrix and legal principles, without taking prudence for interim measures during pendency of the main case, the main suit will be futile and incapable to adjudicate whether in favour of the plaintiffs or not but except to delay for few times.

By recognizing the hindrances which may cause by this injunction, it is the pleasure and willingness of this court for speedy trial and disposal of the main suit if parties positively and constructively cooperate the proceedings. Thus, the defendants/respondents No. 1 and 2 are directed not to continue/proceed ahead ICA Case No. 1758 and be kept in abeyance unless and until disposal of Declaratory Suit No. 2 of 2012 pending in this court. Give this order copy to all concerned. With this order, the instant petition shall stand disposed of.

33. From a reading of the above long order, it is clear that the learned court below did not consider at all and was quite unmindful of the relevant provisions of the Act while passing the impugned order. Moreover, the learned Civil Judge has made certain observations in the order which besides being extraneous to the legal issue involved, also borders on absurdity, to say the least. According to the learned Civil Judge, allowing the arbitration proceeding to commence will harm public interest as it will lead to wastage of public money. Large sums of money will be spent on the traveling and other allowances of the officials of the plaintiff (respondent No. 1) while attending the arbitration proceeding at Delhi which will ruin the small economy of the State. Learned Civil Judge then goes on to pose a question to himself as how to reinvest the public money that will be wasted in the arbitration proceeding which according to him is the moot point! Therefore, he concluded that the arbitration proceeding should be stayed till the disposal of the suit.

34. The approach of the learned Civil Judge cannot be appreciated. He has to confine his attention to the legal issues only which are before him and should not be influenced by other factors.

35. Coming back to the impugned order, in view of section 2(e) of the Act read with the other provisions thereof which clearly says that the Civil Court means the Principal Civil Court of original jurisdiction in the district and does not include any Civil court of a grade inferior to such Principal Civil court, the learned Senior Civil Judge clearly lacked jurisdiction to entertain the suit and to pass the order dated 6.03.2012. Moreover, sections 5 and 8 of the Act have to be read together. When the appellant had filed application u/s 8(1) of the Act, the court ought to have referred the parties to arbitration, more so when the appellant had already

invoked the arbitration clause which was earlier brought to the notice of the High Court and also to the notice of the court below. In this connection, decision of the Hon"ble Supreme Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, may be referred to. Examining the scope of section 5 of the Act, the Hon"ble Supreme Court observed that section 5 brings out clearly the object of the Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the court's intervention should be minimal Referring to section 8 of the Act, the Apex Court held that the language of section 8 is peremptory, it is obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement and that nothing remains to be decided in the original action.

36. In the writ petition before the High Court, the stand of the State was that as there was an arbitration clause in the contract agreement, the appellant should avail his remedy under the arbitration law and therefore the writ petition was not maintainable. The High Court agreed with the said submission and did not entertain the writ petition on the ground that the appellant had already invoked the arbitration clause. This aspect of the matter, it appears, also escaped the attention of the learned court below.

37. Coming to section 16 of the Act, it is evident from the language of the section itself that the Arbitral Tribunal is competent to decide on its own jurisdiction. Therefore, the Arbitral Tribunal as constituted to arbitrate on the claim of the appellant is competent to decide on the objection of the State that the claim is beyond the contract. The submission of the learned Advocate General that as the objection of the respondent No. 1 was not considered before the matter was placed before the Arbitral Tribunal, respondent No. 1 was justified in moving the court under Rule 17(c) of the Rules of Arbitration is wholly misplaced and untenable. From a reading of Rule 17 it is evident that it confers discretion on the Registrar of Indian Council of Arbitration (respondent No. 2) to accept or reject an application for arbitration. Any party who is aggrieved by the decision of the Registrar either in accepting or rejecting an application for arbitration may apply to the court for suitable direction. Therefore, it is quite clear that the aforesaid Rule would not be applicable to a party objecting to the claim of arbitration, which would be covered by section 16 of the Act.

38. Therefore, on a totality of the facts and circumstances of the case and taking an overall view, this Court is of the considered opinion that the learned court below was not justified and committed a manifest error in passing the impugned order dated 6.3.2012. Accordingly, the said order dated 6.3.2012 is hereby set aside and quashed. Parties to appear before the Arbitral Tribunal on 08.10.2012 and thereafter the Arbitral Tribunal may commence the proceeding.

39. Before parting with the record, this court would like to make an observation about the manner in which the State has conducted itself in this case. As noticed above, in the writ proceeding, it had taken the stand that as there is an

arbitration clause in the contract agreement, the appellant should avail the forum of alternative remedy by view of arbitration but when the appellant invoked the arbitration clause and Arbitral Tribunal has been constituted, it made a complete volte-face to contend that the claim raised by the appellant is beyond the contractual agreement by relying on some stray observations of the Court in the writ proceeding. And thereafter moved the court below to frustrate the arbitration proceeding. The State is not expected to act like an ordinary litigant. Beyond this, the court would not like to comment any further.

40. With the above observations and finding, the appeal stands allowed. There will, however, be no order as to cost.