

(2015) 07 DEL CK 0007

In the Delhi High Court

Case No : Arb. P. Nos. 539, 540, 541, 542 and 544 of 1999

Power Grid Corpn. of (I) Ltd.

APPELLANT

Vs

RPG Transmission Ltd.

RESPONDENT

Date of Decision : 01-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 4, 4(1), 7, 7(1)
Civil Procedure Code, 1908 (CPC) — Section 20
Stamp Act, 1899 — Section 35

Citation : (2015) 6 AD 625 : (2015) 4 ARBLR 353 : (2015) 221 DLT 388 :
(2015) 151 DRJ 521

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Parag P. Tripathi, Senior Advocate, P.K. Mishra and Kanika Tandon,
for the Appellant; J.M. Mukhi, M.K. Garg and Shakumbri Singh, Advocates for the
Respondent

Final Decision : Disposed off

Judgement

V. Kameswar Rao, J.—These five petitions have been filed by Power Grid Corporation of India Ltd. under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act" in short). These petitions were disposed of by this Court vide order dated August 20, 2001, which order was challenged by the respondent herein initially before the Division Bench of this Court by way of a Writ Petition No. 7226/2000, whereby the Division Bench had dismissed the writ petition vide order dated May 09, 2002.

2. The order dated May 09, 2002 was challenged by the respondent before the Supreme Court in Civil Appeal No. 1389/2003, whereby the Supreme Court vide its order dated April 22, 2009 set aside the impugned order of the High Court and remanded back the petitions to the learned Chief Justice for deciding the case expeditiously in the light of decision of the Supreme Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, AIR 2006 SC 450 : (2005) 3 ARBLR 285 : (2005) 128 CompCas 465 : (2006) 2 CompLJ 7 : (2005) 5 CTC

302 : (2005) 9 JT 219 : (2005) 9 SCALE 1 : (2005) 8 SCC 618 : (2006) 1 UJ 156 : (2005) AIRSCW 5932 : (2005) 7 Supreme 610 .

3. In these petitions it is the case of the petitioner that certain disputes have arisen and as per the arbitration clause contained in the agreements the petitioner had appointed Justice V.A. Mohata (Retired), former Chief Justice of Orissa High Court as its nominee Arbitrator. A request was made to the respondent to appoint its arbitrator. However, the respondent did not appoint the arbitrator and took various objections with regard to invocation of arbitration clause by the petitioner.

4. I note that the prayer in these petitions was for appointment of an Arbitrator and/or Arbitral Tribunal and reference of the claims/disputes of the petitioner.

5. The common facts in all the petitions are, that 26 contracts have been entered into by the predecessors in interest of the petitioner like National Hydroelectric Power Corporation (NHPC), National Thermal Power Corporation (NTPC), North Eastern Electricity Power Corporation (NEEPCO) prior to March, 1988 with the predecessor in interest of the respondent namely SAE (India) Ltd., which name has been changed to RPG Transmissions Ltd. (now called as KEC International Ltd.).

6. By an Act of Parliament namely, Act No. 24 of 1993 the transmission lines inclusive of contracts entered into by the aforesaid three organizations stood transferred to and vested in Law to the petitioner. The petitioner's case is, it was given to believe by the respondent that the fabrication of tower parts was in law exigible to Excise Duty and accordingly the Excise Duty was being regularly paid by the respondent on the said fabrication of tower parts. It was on this basis that the petitioner made the payment year after year from 1982 to 1988 to the respondent. The petitioner's stand is that without informing the petitioner, and keeping the petitioner totally in the dark, the respondent after depositing Excise Duty was also objecting to the imposition, levy and recovery of Excise Duty on the fabrication of tower parts with the Excise Authorities. Without notice to the petitioner and keeping the petitioner in the dark, the respondent regularly filed refund claims with the Excise Authorities. These refund claims were finally allowed by CEGAT and some of the appeals against the same eventually came to be dismissed in the Supreme Court sometime in April/May, 1996. It is also the petitioner's case that in April, 1996 the petitioner wrote to the respondent calling upon the respondent to furnish details of central excise duties paid by the respondent and the refund in respect thereof obtained by the respondent vide notices dated April 30, 1996, May 22, 1996, June 10, 1996 and June 18, 1996 (till date full details have not been furnished). By reply dated June 10, 1996 the respondent claimed that the matter was an old one and sought time. However, the petitioner kept on calling upon the respondent to furnish the details. Thereafter vide letter dated August 16, 1996 the respondent admitted the totality of the refund received by the respondent "from Central Excise Authorities and legally due to petitioner now becomes refundable to petitioner from the date

of judgment." By a subsequent letter dated September 13, 1996 the petitioner submitted detail of the contracts in respect of which the Excise Duty was paid by the petitioner to the respondent. There was repeated correspondence and reminders sent by the petitioner to the respondent. Finally, the respondent by a letter dated October 03, 1996 tried to shift its stand and claimed that "as far as the refunds were concerned, it is still not legally established and these are due". However, simultaneously in the same letter, the respondent pleaded liquidity crunch and requested for adjustment against other payments allegedly due by the petitioner to the respondent. By a subsequent notice dated October 18, 1996 the petitioner demanded the refund of Excise Duty from the respondent. The petitioner made it clear that the claim was provisional and without prejudice to the final claim to be calculated on the basis of details to be furnished by the respondent. The petitioner also demanded interest on the refund of Excise Duty. Vide subsequent letter dated October 24, 1996 the respondent quantified the refunds received during the period April, 1980 to February, 1986 and March, 1986 to February, 1988 at Rs. 3.72 Crores and Rs. 2.36 Crores, aggregating in all to Rs. 6.08 Crores. The petitioner would further submit that in between on November 18, 1996 the respondent wrote a letter to the petitioner stating that the issue regarding unjust enrichment of excise refund is awaiting decision of the Supreme Court. Vide letter dated December 19, 1996 the petitioner demanded refund of interest on Excise Duty provisionally determined at Rs. 26.08 Crores. On December 31, 1996 and January 03, 1997 a meeting was held between the parties. All through, the respondent was representing that a sum of Rs. 6.08 Crores alone had been received by it towards Excise Duty refund. The petitioner was demanding the details of the refunds and interest. Finally on January 15, 1997 the first payment of Rs. 1 Crore towards Excise Duty refund was made by the respondent to the petitioner. Subsequently during the period January 15, 1997, March 04, 1997 and upto April 30, 1997 and May 08, 1997 a total sum of Rs. 6.08 Crores was paid by the respondent to the petitioner. In between several of the cheques issued by the respondent were dishonoured and had to be represented again by the petitioner.

7. It is also the petitioner's case that during February and March, 1997 the petitioner was repeatedly calling upon the respondent to furnish details of the total refund of excise duty received by the respondent in respect of the contracts entered into between the parties. Vide letter dated March 04, 1997 the petitioner informed the respondent that so far as it has been able to obtain information, a total refund of Rs. 17.37 Crores had been received by the respondent. The respondent was claiming that out of the total refund received by it only Rs. 6.08 Crores related to the refund in respect of the contracts entered into between the parties. It is the case of the petitioner that on February 27, 1997, the respondent informed the petitioner that various legal issues relating to refund of Excise Duty were finally decided in favour of the respondent on December 19, 1996 after pronouncement of the judgment in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, (2002) 83 ECC 85 : (1997) 68 ECR

273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 .

8. It is also the petitioner's case, that a meeting was held on May 26, 1997 between the parties where the parties re-stated their respective stand. However, it was agreed by both the parties that they will try and resolve the issues within a period of two months i.e. by July 26, 1997 and that till such time no precipitate action would be taken by either party. It is the petitioner case that the period of limitation in respect of the claims begins at the earliest from the said date i.e. July 26, 1997. On December 15, 1997 another notice was issued to the respondent by the petitioner calling upon the respondent to make the payment of interest and refund of Excise Duty. The said notice was replied by the respondent vide letter dated January 12, 1998 and a defence was raised by the respondent that finality of the issues of refund was reached only on December 19, 1996 after the judgment of Supreme Court in Mafatlal Industries Ltd. (supra). Despite repeated notices and demands the respondent had refused to pay anything over and above the said sum of Rs. 6.08 Crores. The respondent has also refused to furnish the details of the total Excise Duty refund received by it and that portion of the Excise Duty refund which is relatable to the contracts entered into with the petitioner. Consequently the petitioner was left with no option but to issue a notice of demand dated October 06, 1999 and addenda dated October 8, 1999 wherein the petitioner raised the claim that as per the contract entered into between the parties, the liability of the petitioner was limited to payment of Excise Duty provided that the Excise Duty itself was payable in respect of fabrication of tower parts. The petitioner would further submit that it is an admitted case that for the period upto February 29, 1988 the fabrication of tower parts did not attract Excise Duty. The claim of the petitioner is that irrespective of whether Excise Duty was actually paid by the respondent and/or refund was obtained by the respondent, since as a matter of fact and law no Excise Duty was in fact payable on the fabrication of tower parts, the entirety of the amounts received by the respondent from the petitioner towards Excise Duty is liable to be refunded to the petitioner by the respondent. It is the petitioner's case that the amount in respect of the entirety of the 26 contracts prior to March, 1988 was Rs. 11.71 Crores, but the same can be higher. The petitioner would further submit that the total Excise Duty refund received by the respondent was Rs. 17.37 Crores and it is the case of the petitioner that a part of it relates to the contract entered into between the parties and it is also entitled to interest on the amount for which claim made @ 18% per annum.

9. It is the respondent's case that the duties have been correctly paid at the time of clearance as approved by the competent authorities and the petitioner cannot make any claim against the respondent. The contracts have all been completed within the stipulated time and excise duties have been paid as adjudicated by the Assistant Collector. It is further submitted that there is no provision in the contract for payment of any amount to the petitioner out of the refund received or otherwise, by the respondent. In any event, there is no

provision for refund to the purchaser under the Central Excise Law itself. The respondent was also depositing the central Excise Duty as otherwise the Central Excise Authorities would not have allowed the clearance of the goods, but was also objecting to the assessment. The respondent had at every stage agitated the matter. The respondent would deny that all the 26 contracts are for fabrication of tower parts supply. According to the respondent, at the time of clearance, the Excise Duty was payable and had been paid by the respondent, which was reflected in the RT12 returns filed with the Central Excise Authorities on each clearance pertaining to all the contracts. It is also submitted that the Central Excise Duty was payable and had been paid as assessed even before March 01, 1988. The petitioner in order to mislead the Court has tried to make submissions with regard to a cut off date of March 01, 1988 as the date on which the fabrication of the tower parts had become exigible to Excise Duty, on account of the fact that an amendment had been introduced to the Central Excise Act from that date. It is submitted that this submission of the petitioner is not valid on the sole ground that even before March 01, 1988 the respondent had to pay the Central Excise Duty at the time of clearance of the goods. The respondent would further submit that there is no obligation on the part of the respondent to make any payment of the refund of the Excise Duty received by it to the petitioner, which they were made to pay at the time of clearance of the goods. It is also submitted that the petitioner is attempting to mislead this Court by referring to correspondence between the parties. It is also submitted that the respondent in its letter dated October 03, 1996 had in the first instance itself made it clear that the petitioner was not entitled either under the contract or otherwise nor was there any obligation on the part of the respondent to pay any sum of money which the respondent may receive, by way of refund of Central Excise Duty or any other amount. The respondent had taken a commercial decision to pay an ex-gratia amount of Rs. 6.08 crores. Further the said amount was not legally due to the petitioner and did not flow out of any rights and obligations arising out of or in relation to the contract. The question of payment of interest did not arise at all as in any event there was no interest clause in the Central Excise Law on the relevant date. This position had been reiterated by the respondent in all its letters. It is further submitted that there is no provision for refund of Excise Duty under the Law to a purchaser. The question of payment of any interest on the said amount also did not arise.

10. The respondent has further submitted that there is no subsisting contract between the petitioner and the respondent. It is also submitted that there is no subsisting Arbitration Clause and no cause of action can be made out against the respondent. The date of July 26, 1997 as pleaded by the petitioner is not a valid date and no case can be made out on the basis of said date. The respondent's stand is also that the Central Excise Duty had been paid by the respondent at the time of clearance of the goods which is the only valid date, when the contract was in existence. It is submitted that any other date is of no relevance. Further the arbitration clause has ceased and the petitioner has forfeited its right to

make any claim. It had been made very clear to the petitioner that it was not entitled to any amount as claimed by it purporting to be entitled to, at the time of payment of the ex-gratia amount. The claim of the petitioner is totally incorrect and the petitioner with malafide motives is making a claim which the petitioner is not entitled to.

11. Further, the notice of demand dated October 06, 1999 and addenda of October 8, 1999 are totally unwarranted and the petitioner cannot raise any claim on the basis of this demand. The specific pleadings, in each of the petitions are as under:-

ARB.P. No. 539/1999

12. This petition concerns two contracts for fabrication of tower parts for 400KV single circuit line Jeypore-Indrawati and Indrawati-Rangali which is also called as Talchar. It is the case of the petitioner that in respect of the two contracts which are subject matter of this petition, an amount of Rs. 1.57 crore is due from the respondent and the petitioner is entitled to interest from the date, the petitioner made payment towards Excise Duty to the respondent till the date, the petitioner received refund on the entirety of the said payment. The petitioner's case is the arbitration clause is contained in para 16, which is reproduced as under:-

"If at any time, any question, dispute or differences whatsoever shall arise between the Purchaser and the Contractor, upon or in relation to, or in connection with the Contract, either party may forthwith give to other, notice in writing of the existence of such question, dispute or differences and the same shall be referred to the adjudication of three Arbitrators, one to be nominated by the Purchaser, the other by the Contractor and the third by the President of the International Chambers of Commerce, in the case of foreign contractors and President of the Institution of Engineers, India, in the case of local Contractors. If either of the parties fail to appoint its arbitrator within sixty (60) days after receipt of notice for the appointment of the Arbitrator, then the President of International Chambers of Commerce or the President of the Institution of Engineers, India as the case may be, shall have the power at the request of either of the parties, to appoint an Arbitrator. A certified copy of the "President" making such an appointment shall be furnished to both the parties."

13. The reply filed by the respondent to arbitration petition 539/1999 is in fact a reply to Arbitration Petition 541 of 1999. Simultaneously, the reply to Arbitration Petition 539 of 1999 was filed in Arbitration Petition 541 of 1999. The respondent in a brief reply to this petition, would state that the two contracts are between the Orissa State Electricity Board and the respondent. They would also state that OSEB is not a predecessor in interest of the Power Grid Corporation Ltd (the petitioner herein). The respondent apart from challenging the jurisdiction of this Court would also contend that there is no privity of contract between the petitioner and the respondent in the instant application and the arbitration clause annexed to the petition and shown as part of schedule D does not form part of

the said schedule with OSEB. The respondent would also refer to its letter dated October 30, 1999 denying the applicability of the Arbitration Clause. That apart, the respondent has replied to the merits of the contentions raised by the petitioner. The respondent has also stated that the contract was not executed within the jurisdiction of this Court. According to the respondent, all the payments were made by OSEB at Bhubaneswar and the application is beyond limitation.

14. In rejoinder to the reply, the petitioner would contend that initially in the year 1982, the OSEB has awarded the contract to the predecessor in interest of the respondent. Vide agreement between OSEB and NHPC the predecessor in interest of the petitioner dated January 11, 1985, the transmission lines which were subject matter of these Contracts were taken over by NHPC and the petitioner being successor in interest of NHPC is fully entitled to raise its claims relating to the contract. The petitioner had also stated that the arbitration clause annexed to the petition and as shown in part of Schedule D was referred to in the agreement dated November 18, 1991 executed between PGCIL and NHPC wherein the transmission lines along with their contracts were taken over from the NHPC by the petitioner as item/serial No. 2 in Annexure II of the said agreement. It is also stated in the rejoinder that the contract relates to the transmission line from Jeypore to Indrawati and from Indrawati to Rangli, also called Talchar. The petitioner reiterates that the present dispute raised is within the territorial jurisdiction of this Court. The respondent's registered office is situated within the territorial jurisdiction of this Court. The tender was given publicity on All India level including Delhi within the territorial jurisdiction of this Court. The correspondence for refund of Excise Duty was made in Delhi. The refund of Excise Duty was made by the respondent and received by the petitioner at Delhi.

ARB. P. No. 540/1999

15. This petition has been filed by the petitioner with regard to three contracts entered into by the predecessor in interest of the applicant-M/s National Hydroelectric Power Corporation (NHPC) with the predecessor in interest of the respondent dated September 07, 1982, June 17, 1982 and May 04, 1983 for fabrication of tower parts for the transmission lines between (i) Siliguri to Dalkhola, (ii) Birpara to Siliguri and (iii) Salal to Jammu, and Salal to Kishanpur/ Udhampur. According to the petitioner, the subject matter of these three contracts is Rs. 60.73 lacs along with interest from the date the petitioner made payment of Excise Duty to the respondent till the date the petitioner received refund on the entirety of the said payments from the respondent. The petitioner refers to para 50 which is an arbitration clause and which reads as under:-

"Except where otherwise provided, all questions, disputes of differences in respect of which the decision has not been final and conclusive, arising between the Contractor the Corporation, in relation to or in connection with the contract shall be referred for arbitration in the manner provided as under and to the sole

arbitration appointed as follows:

i) either of the parties may give to the other notice in writing of the existence of such question, dispute or difference;

ii) Within thirty (30) days of receipt of such notice from either party, the Chief Engineer-in-Charge of work at the time of such dispute shall send to the contractor a panel of three persons who shall not be the employees of the Corporation and thereafter the Contractor, within fifteen (15) days of receipt of such panel, communicate to the Chief Engineer the name of one of the persons from such panel and such a person shall then be appointed sole arbitrator by the Chief Engineer.

iii) Provided that, if the Contractor fails to communicate the selection of a name out of the panel so forwarded to him by the Chief Engineer, then after the expiry of the aforesaid stipulated period the Chief Engineer shall without delay select one person from the aforesaid panel and appoint him as the sole arbitrator."

16. The petitioner vide its notice dated October 6, 1999 nominated Mr. Justice V.A. Mohta (Retd.), former Chief Justice of the High Court of Orissa, Mr. Justice Harbans Lal (Retd.), former Judge of Punjab and Haryana High Court, Mr. Justice P.K. Bahri (Retd.), former Judge of Delhi High Court as a panel of Arbitrators. It is the case of the petitioner, no reply was received to its notice.

17. The respondent has filed its reply to this petition in Arb.P. 544/1999. It is the case of the respondent that the arbitration clause set out as clause 50 is in part in the petition. However, this clause ceases to have any effect as by virtue of clause 50.5, unless served with a notice by either party within 30 days of the expiry of the defects liability period, all rights and claims under the contract shall be deemed to have been waived and thus forfeited and absolutely barred. The respondent would submit that no such notice has been given and hence there being no subsisting arbitration clause, the petition does not lie. The respondent would also challenge the jurisdiction of this Court to entertain the petition under Section 11 of the Act. The respondent would take the stand that that the application is absolutely barred by time and the petitioner had waived and forfeited all its rights and claim. The respondent would state that there is no privity of contract between the parties. The respondent had also stated that only two contracts have been supplied even though reference has been made to three contracts. Rest of the contentions are on the merit of the disputes between the parties, the details of which have already been given above. The respondent has denied that the amount of Rs. 60.73 lacs along with interest is payable. In the rejoinder, the petitioner has placed on record the third contract relating to construction of 220KV transmission lines from Birpara to Siliguri and Birpara to Bongai Gaon. They deny the applicability of clause 50.5. The petitioner would also deny that this Court has no jurisdiction to entertain this petition. It also stated, the petition is within limitation.

ARB.P. No. 541/1999

18. This petition has been filed by the petitioner seeking appointment of Arbitrator with respect to one contract for fabrication of tower parts for transmission line from Sarna to Dasuya awarded to the predecessor in interest to the respondent/Tata Exports. The claim of the petitioner is for an amount of Rs. 8.63 lacs apart from interest from the date the petitioner had made payment towards Excise Duty to the respondent till the petitioner receives refund of the entirety of the said payment from the respondent. The arbitration clause is contained in para 46 of the document annexed as Annexure I to the petition, which is reproduced as under:-

"Except where otherwise provided in the contract, if at any time, any question, dispute or difference whatsoever, shall arise between the contractor and the Purchaser upon or in relation to or in connection with this contract either of the parties may give to the other notice in writing of the existence of such a question, dispute or difference and the same shall be referred to Sole Arbitration of the person appointed by the Corporation Engineer at the time of dispute. It will be no objection in such appointment that the Arbitrator so appointed is Corporation's employee, and in the case of his duty as Corporation's employee, we have expressed view on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason, then to act as Arbitrator, in accordance with the terms of the Contract. Such person shall be entitled to proceed with reference from the stage at which it was left by his predecessor."

19. The petitioner's case is, it, vide notice dated October 6, 1999 had nominated Mr. Justice V.A. Mohta (Retd.), Former Chief Justice of Orissa High Court as an Arbitrator but no reply has been received by the petitioner to the notice dated October 6, 1999 and Addenda dated October 08, 1999.

20. The respondent in its reply filed to Arbitration Petition has stated that the arbitration clause sought to be invoked and set out in the petition does not exist. According to the respondent the clause as set out by the petitioner in the application was deleted and substituted by the following clause:-

"Clause 46.1 of the General Conditions of Contract in respect of Arbitration shall be deemed to have been deleted and substituted by the following:

"Except where otherwise provided for in the contract, all questions, disputes or difference whatsoever, arising between the contractor and the Corporation upon or in relation to or in connection with this contract either of the parties may give to other notice in writing of the existence of such a question, dispute or difference. Within 30 days of receipt of such notice from the either party the Corporation Engineer shall send to the contractor panel of three names of persons who shall be presently not under the employment of the Corporation. The Contractor shall thereupon within 15 days receipt of this list select and communicate to the Accepting Authority the name of one of the persons from the list who shall then be appointed Sole Arbitrator. If the contract fails to

communicate selection of name of one of the persons from the list who shall then be appointed Sole Arbitrator. If the contractor fails to communicate selection of name within the aforesaid stipulated period, the Corporation Engineer shall without delay, select one person from the list and appoint him as the Sole Arbitrator."

The respondent has also referred to clause 46.4. The same is also reproduced as under:-

"46.4 A notice of the existence of any question, dispute or difference in connection with this Contract, shall be served by either party within 180 days of the issue of taking over certificate by the Purchaser failing which all rights and claims under this Contract shall be deemed to have been forfeited and absolutely barred."

21. It is the case of the respondent that the petitioner has not given any notice of the existence of any dispute or difference in connection with the contract within 180 days of the issue of taking over certificate as stipulated in clause 46.4 of the contract and having failed to do so cannot seek to invoke the arbitration clause. The respondent has also taken a stand that the contract was concluded in the year 1981 and no rights are surviving to enforce the contract against the respondent. It has also been averred that this Court has no jurisdiction to entertain the present petition, apart from stating that there is no privity of contract between the petitioner and the respondent. The respondent has also stated that the contract was only for survey and erection and not for fabrication of tower parts and admittedly on which no central Excise Duty is payable. The respondent has also denied the liability of refunding the Excise Duty. The respondent apart from denying the liability of Rs. 8.63 lacs along with interest has also stated that it had by mistake paid to the petitioner a sum of Rs. 1,16,000/-. The respondent referred to its reply dated October 30, 1999 wherein it has denied the applicability and existence of Arbitration Clause.

22. In the rejoinder the petitioner has stated that the present dispute raised in this petition is within the territorial jurisdiction of this Court. According to the petitioner the registered office of the respondent is situated within the territorial jurisdiction of this Court. The tender was floated within the territorial jurisdiction of this Court. Payments to the respondent were made in Delhi. The petitioner has also stated, even it is assumed not admitting that the new clause has been substituted as reproduced by the respondent then also the current dispute between the parties is fully covered by the arbitration clause. According to the petitioner, the interpretation of clause 46.4 given by the respondent is wholly misplaced. The dispute between the parties does not relate to "taking over certificate by the Purchaser". In fact the dispute/difference relate to refund of Excise Duty obtained by the respondent and not transferred to the petitioner. The petitioner in any case would state that the clause 46.4 has no applicability. Alternatively the petitioner would state, even on interpretation, clause 46.4 itself falls within the large and omnibus category, such a dispute/difference can be

decided by recourse to the arbitration clause contained in the contract. The petitioner denied that the petition is barred by time. The contract between NHPC, the predecessor in interest of the present applicant and Tata Exports Ltd. was for supply of tower parts. The Tata Exports Ltd. has further subcontracted to the present respondent with the approval and permission of the petitioner herein. The goods were supplied by the respondent directly to NHPC. It, therefore, follows that the respondent not only had privity of contract with the petitioner but the respondent claimed under Tata Exports Ltd. The contract entered into between the petitioner and the Tata Exports Ltd. contemplate sub-contracting of the work by Tata Exports Ltd. to sub-contractors and defines the sub-contractor as a person to whom any part of the contract has been sub-let with the consent in writing of the Engineer. The Engineer is the employee of the petitioner and as such there is privity between the respondent who was the sub-contractor and the petitioner and the respondent as subcontractor performed part of the contract sub-contracted to it and received payment from the petitioner for the same. It has denied that this Court has no territorial jurisdiction.

ARB.P. No. 542/1999

23. This petition relates to two contracts for fabrication of tower parts for the construction of 132KV (S/C) dated April 24, 1982 and for additional transmission line project vide letter of acceptance dated April 16, 1985 awarded by Northern Eastern Electric Power Corporation Ltd. to the predecessor in interest of the respondent. The amount in respect of these two contracts is Rs. 34.73 lacs. The petitioner has also claimed interest from the date when the Excise Duty was paid till the date the petitioner receives the refund on the entirety. The petitioner would rely upon arbitration clause contained in para 32, which reads as under:-

"32 Arbitration

(a) all disputes or differences shall be as far as possibly mutually settled.

(b) if at time any dispute or difference shall arise between NEEPCO and Contractor which cannot be settled within a reasonable time the same shall be referred to arbitration as per the provision of the Arbitration Act, 1940 at the time in force. The contractor will first submit them to NEEPCO in writing.

(c) Venue for arbitration shall invariably be Shillong in all such cases."

According to the petitioner, it nominated Mr. Justice (Retd) V. Mohta, retired Chief Justice of Orissa High Court vide its notice dated October 6, 1999 but no reply was received from the respondent.

24. The petitioner pleads that this Court has territorial jurisdiction to entertain the petition inasmuch as the contract was given All India Publicity including at Delhi within the territorial jurisdiction of this Court. The entire correspondence for the refund of Excise Duty was made with the respondent and payment received by the petitioner at Delhi.

25. The respondent in its reply has stated that only one contract has been annexed to the petition even though in the Annexure I to the petition two contracts have been mentioned. The arbitration clause which is sought to be invoked by the petitioner has ceased and is not applicable. According to the respondent the arbitration was envisaged only after there was no mutual settlement of the disputes or differences. The contract of 1985 was completed on September 11, 1987 and the final bill has been paid. The respondent would also state that this Court has no jurisdiction to entertain the present petition. The application is barred by time. There is no privity of contract between the petitioner and respondent and on merits the petitioner is not entitled to any refund. The respondent denied the liability of Rs. 34.73 lacs along with interest claimed on the contracts in the present petition.

26. In the rejoinder the petitioner would submit that the dispute between the parties is within the territorial jurisdiction of this Court and within limitation. The respondent has registered office situated within the territorial jurisdiction of this Court. The tender for the contract was floated within the territorial jurisdiction of this Court. The refund of Excise Duty was made by the respondent and received by the applicant in Delhi. Part of the cause of action has arisen within the territorial jurisdiction of this Court.

27. The petitioner in the rejoinder has submitted that initially there was a contract between the petitioner and the answering respondent which contract has already been annexed as Annexure I to the petition. This contract was regarding the transmission line from Haflong to Kumar Ghat. Later on the coverage of the transmission line was extended and contract for additional transmission line project was also granted to the respondent on the same terms and conditions on which the first contract was granted. According to the petitioner a perusal of page 53 of the contract would show that additional transmission line project is in fact a part and parcel of the same contract and, therefore, the earlier transmission line and the additional transmission line project were to be treated as one and the same contract since the respondent had agreed to bind itself to the terms and conditions of the first contract itself. The petitioner would plead that the present petition is within time and it would be better if all the disputes are referred to a single Arbitrator. It is also pleaded that the respondent admits the existence of arbitration clause 32 in the contract.

ARB.P. No. 544/1999

28. This petition relates to 18 contracts for fabrication of tower parts, granted by NTPC to the predecessor in interest of the respondent through letters of acceptance issued between the years 1982-1988 for 400KV (DC) and (SC). The total amount due in respect of the 18 contracts which are subject matter of the present petition is Rs. 9.11 Crores. The petitioner has also claimed interest from the date the petitioner made payments towards Excise Duty to the respondent till the date the petitioner receives refund on the entirety of the said payments from the respondent. The arbitration clause on which reliance has been placed by the

petitioner is contained in para 26.6.1 which reads as under:-

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

It is the case of the petitioner, it had nominated Mr. Justice V.A. Mohta (Retd.), Chief Justice of Orissa High Court vide its notice dated October 6, 1999 but no reply was received from the respondent.

29. The respondent in its reply stated that out of 18 contracts only 17 have been supplied. Even from the 17 contracts one of the contract is with Best and Crompton and there is no privity of contract between the petitioner and the respondent. The Respondent would also submit that insofar as contract Nos. 3, 6, 7, 8, 9, and 16 are concerned, the general conditions of contract, inter-alia contained two clauses numbered as 25 and 26. Clause 25 dealt with settlement of disputes and clause 26 was in respect to arbitration.

30. According to the respondent the arbitration clause under clause 26 can be invoked after exhausting clause 25 and clause 26 is operative during the currency of the contract and not thereafter. According to the respondent the dispatches in contract at item Nos. 1, 2, 3, 6, 7, 8, 9, 15, 16 and 18 were continued to be made after February 29, 1988 which the petitioner itself admits that duty was leviable from March 01, 1988 on transmission towers. It is the case of the respondent that there is no arbitration clause and hence the petition is not maintainable. The respondent would also state that this Court has no territorial jurisdiction to entertain the present petition. It also stated that the petition is barred by time. The respondent has also denied the liability to make payment to the petitioner of the refund of Central Excise Duty.

31. In rejoinder the petitioner has stated that out of the 18 contract 17 contracts have been supplied to the respondent. The remaining one contract has been filed by the petitioner along with the rejoinder. The said contract relates to Kawas Bharuch transmission line which has been mentioned as item No. 17 in Annexure I to the petition. The said contract was between Gujarat Electricity Board (GEB) and the respondent herein. As per the memorandum of understanding between NTPC and GEB dated March 07, 1987 wherein NTPC has assigned to GEB the work of construction of certain transmission lines including the Kawas Bharuch transmission line. Thereafter the GEB has sub-contracted a part of the work relating to the construction of Kawas Bharuch transmission line to the respondent herein vide contract dated June 09, 1987. According to the petitioner, clause 40 of the terms and conditions contains the relevant arbitration clause, which is

reproduced as under:-

"40 Arbitration:

(a) If, at any time, any question, dispute or difference whatsoever shall arise between the Purchaser or the Consulting Engineers and the Seller/Contractor, upon, or in relation to or in connection with the contract either party may forthwith give to other party notice in writing of the existence of such question, dispute or difference and this shall be referred to two arbitrators one to be nominated by the Purchaser and one to be nominated by the Seller/Contractor or in case of disagreement between the arbitrators, to an Umpire appointed by the arbitrators in writing under their hands before proceeding with the arbitration and the decision of such arbitrators or Umpire shall be final and binding on both the parties. Any such reference shall in respects conforms to such statutory enactment or enactments, regulations relating arbitration as from time to time in force and arbitration proceeding shall be conducted at such place in India as the arbitrators may determine. The expenses of the arbitrators shall be paid as the arbitrators may determined. (b) Performance under this contract shall, if reasonably possible, continue during the arbitration proceedings, and no payments due or payable by the Purchaser shall be withheld unless they are the subject-matter of the arbitration proceedings."

32. The petitioner's case is that the arbitration clause is widely worded to cover within its ambit, the present dispute between the parties to be referred to arbitration. Insofar as the contention of the respondent that there is no privity of contract between the respondent and Best and Crompton is concerned, it is clearly mentioned at page 2 of the contract that the respondent herein is the sub-contractor with whom Best and Crompton will be entering into a contract for supply of tower parts. Further the invoices which Best and Crompton had been sending to NTPC, clearly mentions and relies upon the copy of the respondent's invoice which was sent to Best and Crompton. The copy of the form GP1 attached along with Best and Crompton invoice is also one which was drawn and signed by the respondent herein. Hence, there exists a privity of contract.

33. Mr. Parag Tripathi, learned Senior Counsel appearing for the petitioners would contend that there are 26 contracts in total in which the petitioners are seeking appointment of Arbitrator/Arbitral Tribunal. He states, the 26 Contracts executed were between NHPC, NTPC and NEEPCO and the predecessor in interest of the respondent for supply of tower parts etc. The power transmission systems of these three companies with a view to develop a national power grid were transferred and vested first in the Central Government and then with the petitioner herein namely Power Grid Corporation of India Ltd. (PGCIL) vide an Act of Parliament dated April 02, 1993 and became effective from April 01, 1992. He has drawn my attention to Section 3 of the Act of 1993. He has also drawn my attention to Section 4(1) and (2) and Section 7(1) of the Act to contend that the transfer included the rights and powers and debts, liabilities and obligations incurred and to contracts, agreements and other instruments made by any of the

three companies and to legal proceedings relating to those matters pending in any Court, Tribunal or other authority in India. He has taken me through the averments made in the petitions and the documents filed by the petitioner. According to him, the assignment in favour of the petitioner is statutory in nature and PGCIL is no stranger to the contracts. He states that even though original signed copy could not be produced, the respondent had admitted in its pleading about the refund being payable and the existence of the arbitration clause. According to him, in fact, in the earlier round of litigation there was no whisper, that there is no arbitration clause. He would draw my attention to the order passed by the Division Bench in W.P.(C) 7226 of 2001 wherein the Court had noted that there is no dispute that each of the contracts contained an arbitration clause. Even the objection with regard to privity of contract is unsustainable in view of the fact that an amount of Rs. 6.08 Crores has been paid by the respondent to the petitioner. He states, the respondent admits its liability, which is clear from the various communications referred to and annexed with the petitions. The objection that there is no arbitration agreement in writing between the parties in terms of Section 7 of the Act is unsustainable. That apart, he would state, the objection of the respondent, that the petition is barred by limitation is not tenable. He would state that it was only in the year 1996, the petitioner came to know about the refund of the Excise Duty to the respondent; thereafter various letters have been written to the respondent and the respondent has paid an amount of Rs. 6.08 Crores which is also an acknowledgement of the liability and in the meeting held in the month of May 1997, it was agreed between the parties to resolve the issues within two months. According to him, the cause of action arose only after expiry of two months. He would rely upon the judgment of the Supreme Court reported as National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., AIR 2009 SC 170 : (2008) 3 ARBLR 633 : (2011) 2 CompLJ 486 : (2008) 10 JT 448 : (2008) 152 PLR 709 : (2008) 12 SCALE 654 : (2009) 1 SCC 267 to contend that when an issue/claim is dead or alive and where the party has concluded the contract/transaction by recording satisfaction of their mutual rights and obligations or by receiving final payment without objection, such issue(s) can be decided by the Chief Justice or his designate if necessary by taking evidence. Alternatively, he may leave those issue(s) open with a direction to Arbitral Tribunal to decide the same. He would also rely upon the judgment of the Supreme Court reported as Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd., AIR 2011 SC 987 : (2011) 1 ARBLR 373 : (2011) 112 CLT 67 : (2011) 2 CompLJ 19 : (2011) 2 CTC 317 : (2011) 3 RCR(Civil) 335 : (2011) 2 SCALE 291 : (2011) 3 SCC 507 : (2011) 2 SCR 512 : (2011) AIRSCW 3715 : (2011) AIRSCW 4087 : (2011) 5 Supreme 763 to contend that only such claims which are long time barred and there is no need of detail consideration of evidence be dismissed at the threshold and where there is a disputed question whether a claim is barred by limitation or not, such issue be left for decision of the Arbitrator. He would also rely upon the judgment of the Madras High Court in the case of Cash and Gain Finance and Investments and Ors. Vs. Manjula Udaya Shankar, CRP (PD) No. 1337 of 2008 decided in the month of October 2008 to

contend that where a document containing arbitration agreement is admitted and made the basis of the suit itself, such a party cannot complain that there has been non-compliance of the requirement under Section 8(2). In other words, according to him, it was held, filing of the certified copy by the party is adequate to satisfy the requirement of Section 8(2). He would also refer to the judgment of this Court reported as AEZ Infratech Pvt. Ltd. Vs. SNG Developers Ltd., (2014) 211 DLT 215 : (2014) 143 DRJ 616 where this Court has held that where one party had itself relied upon the agreement containing the arbitration clause and has not denied the averment of the other party as to the existence of the arbitration clause, the provision of Section 8(2) ought to not stand in the way of the matter being referred to arbitration. Mr. Tripathi also takes support from the order of this Court dated August 20, 2001 in the earlier round, to contend, the findings given by this Court are relevant and need to be considered by this Court, as being conclusive.

34. On the other hand, Mr.J.M.Mukhi, learned counsel for the respondent would contend that under Section 11 of the Act, it is the function of the Chief Justice or his designate to ascertain the existence of the arbitration agreement between the parties conclusively and not on prima facie basis. In that regard, he would state, the mandatory rule require a request to state the ground and to file an original or authenticated copy of the arbitration agreement as well as the affidavit of satisfaction of the conditions in sub-Section 5 or 6 of Section 11. According to him, it is nowhere stated that the arbitration agreement in writing came into existence in any exchange of letters or by way of admission in any defence to a statement of claim. In other words, there is no arbitration agreement arising by way of exchange of letters or by way of non denial in any defence to a statement of claim. He says, an application under Section 11 which is not in compliance with the mandatory rules need to be rejected. He would state, it is the case of the respondent that there is no arbitration agreement within the meaning of Section 7 of the Act i.e. it is to be in writing signed by both parties or it emerges from an exchange of communications or when there is an exchange of statement of claim and defence, it is essential in the statement of claim, the existence of Arbitration clause is alleged and not denied in the defence statement. According to him, in terms of the Act of 1993, only those agreements relating to the power transmission system that were subsisting or having effect as on April 1, 1992, were transferred to PGCIL. Agreements that were dead performed, satisfied were not be transferred to PGCIL. He would also state in terms of Section 4, no debts or claims of NTPC, NHPC or NEEPCO were transferred to PGCIL. According to him, if any question arises as to the transfer of a contract or agreement from NTPC, NHPC or NEEPCO to PGCIL, the same was to be referred to Central Government.

He would concede to the fact that in the original reply, this point was not taken. He states, that, the absence of original or authenticated copy of the arbitration agreement was canvassed in the Writ Petition and before the Supreme Court. According to him, the 1993 Act has no relevance unless the contracts are

produced in original or an authenticated copy thereof. In any event, according to him, the purported notice of 1999 was hopelessly time barred since it related to refund of receipt in December 1988, January 1989 and June 1993. In this regard, he would state, the limitation period in respect of the same expired on December 15, 1991, January 26, 1992, June 6, 1996. Accordingly, there was no extension of the limitation period by any alleged acknowledgment of liability. According to him, it was only on account of good business relations with the petitioner and on the petitioner's insistence the respondent made an ex-gratia payment of the entire amount to the petitioner stating clearly that it was under no legal liability to do so. According to him, this aspect has been recorded clearly in the Minutes of the meeting held on December 31, 1996, January 3, 1997 and May 26, 1997. He would state that a reply to the application under Section 11 is not a defence to a statement of claim. According to him, under the 1996's Act, the non-denial has to be in a defence to the statement of claim. It is his submission that there was no admission at any time whatsoever. He also refers to the notification dated February 2, 1996 issued by the High Court of Delhi framed in exercise of power under Sub-Section 10 of Section 11 of the Act to contend that an application under Sub-Section 10 of Section 11 of the Act shall be made in writing and accompanied by the original arbitration agreement or a true copy thereof, an affidavit, supported by relevant documents or true copy thereof to the effect that the conditions have been satisfied. In the end, it is his submission that Section 35 of the Stamp Act, 1859 dictates that no Court or Authority shall entertain a document that is not duly stamped. He would rely upon the following judgments:

(i) S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, AIR 2006 SC 450 : (2005) 3 ARBLR 285 : (2005) 128 CompCas 465 : (2006) 2 CompLJ 7 : (2005) 5 CTC 302 : (2005) 9 JT 219 : (2005) 9 SCALE 1 : (2005) 8 SCC 618 : (2006) 1 UJ 156 : (2005) AIRSCW 5932 : (2005) 7 Supreme 610

(ii) Jagdish Chander Vs. Ramesh Chander and Others, (2007) 2 ARBLR 302 : (2007) 3 CompLJ 191 : (2007) 6 JT 375 : (2007) 147 PLR 18 : (2007) 6 SCALE 325 : (2007) 80 SCL 149 : (2007) 5 SCR 720

(iii) National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., AIR 2009 SC 170 : (2008) 3 ARBLR 633 : (2011) 2 CompLJ 486 : (2008) 10 JT 448 : (2008) 152 PLR 709 : (2008) 12 SCALE 654 : (2009) 1 SCC 267

(iv) Yogi Agarwal Vs. Inspiration Clothes and U and Others, AIR 2009 SC 1098 : (2008) 4 ARBLR 663 : (2010) 4 CompLJ 428 : (2009) 1 JT 440 : (2008) 16 SCALE 221 : (2009) 1 SCC 372 : (2009) AIRSCW 261 : (2008) 8 Supreme 768

(v) Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, AIR 2010 SC 1793 : (2010) 4 CompLJ 442 : (2010) 4 JT 619 : (2010) 4 SCALE 395 : (2010) 4 UJ 1961 : (2010) AIRSCW 2884 : (2010) AIRSCW 6112 : (2010) 6 Supreme 565 : (2010) 3 Supreme 669

(vi) Andhra Pradesh Tourism Development Corpn. and Another Vs. Pampa Hotels

Ltd., AIR 2010 SC 1806 : (2010) 1 CompCas 160 : (2010) 3 CompLJ 21 : (2010) 4 JT 343 : (2010) 4 SCALE 195 : (2010) 5 SCC 425 : (2011) 105 SCL 765 : (2010) 4 SCR 942 : (2010) AIRSCW 2906

(vii) Alva Aluminium Ltd., Bangkok Vs. Gabriel India Limited, (2010) 12 JT 210 : (2011) 1 RCR(Civil) 849 : (2010) 12 SCALE 93 : (2011) 1 SCC 167

(viii) Reva Electric Car Company P. Ltd. Vs. Green Mobil, AIR 2012 SC 739 : (2012) 106 CLA 1 : (2012) 4 RCR(Civil) 574 : (2011) 13 SCALE 169 : (2012) 2 SCC 93 : (2012) 1 UJ 224 : (2012) AIRSCW 472

(ix) M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd., AIR 1999 SC 504 : (1999) 1 ARBLR 1 : (1999) 1 CompLJ 13 : (1998) 8 JT 85 : (1999) 121 PLR 842 : (1998) 6 SCALE 197 : (1999) 1 SCC 1 : (1998) 3 SCR 42 Supp : (1998) AIRSCW 3672 : (1998) 8 Supreme 464

(x) Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., (2007) 1 ARBLR 517 : (2007) 3 CompLJ 200 : (2007) 4 JT 501 : (2007) 4 SCALE 571 : (2007) 4 SCC 599 : (2007) 5 SCR 279

(xi) Union of India (UOI) and Others Vs. Onkar Nath Bhalla and Sons, (2009) 5 JT 682 : (2009) 6 SCALE 602 : (2009) 7 SCC 350 : (2009) 5 UJ 2346 : (2009) AIRSCW 5085

(xii) Anil Kumar Vs. B.S. Neelkanta and Others, AIR 2010 SC 2715 : (2010) 6 JT 255 : (2010) 5 SCALE 742 : (2010) 5 SCC 407 : (2010) 5 UJ 2570 : (2010) AIRSCW 2971 : (2010) AIRSCW 3715 : (2010) 3 Supreme 124

(xiii) Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd., AIR 2011 SC 987 : (2011) 1 ARBLR 373 : (2011) 112 CLT 67 : (2011) 2 CompLJ 19 : (2011) 2 CTC 317 : (2011) 3 RCR(Civil) 335 : (2011) 2 SCALE 291 : (2011) 3 SCC 507 : (2011) 2 SCR 512 : (2011) AIRSCW 3715 : (2011) AIRSCW 4087 : (2011) 5 Supreme 763

(xiv) The Iron and Steel Company Limited Vs. Tiwari Road Lines, AIR 2007 SC 2064 : (2007) 2 ARBLR 270 : (2007) 5 CompLJ 1 : (2007) 6 JT 526 : (2007) 6 SCALE 682 : (2007) 5 SCC 703 : (2007) 6 SCR 156 : (2007) AIRSCW 3172 : (2007) 3 Supreme 1066

(xv) N. Radhakrishnan Vs. Maestro Engineers and Others, (2010) 1 CompLJ 154 : (2010) 2 CTC 327 : (2009) 13 JT 491(1) : (2009) 13 SCALE 403 : (2010) 1 SCC 72 : (2009) 15 SCR 371 : (2009) 10 UJ 4831 : (2010) AIRSCW 331 : (2009) 7 Supreme 80

35. Having heard the learned Counsel for the parties and considered the detail submissions, both oral and written made, before I deal with the same, as the matters were remanded back by the Supreme Court to be decided in terms of its judgement in S.B.P. and Co. (Supra), I deem it appropriate to first refer to the said decision wherein the Court had determined the scope and power exercised under Section 11 of the Act, by the Chief Justice or his designate. The Court was

of the view that while exercising power under Section 11, the following need to be seen:

- (i) The party making the motion has approached the right High Court;
- (ii) There is a valid Arbitration Agreement as defined in the Act;
- (iii) The person who has made the request under Section 11 is a party to such agreement.

36. The Court also held that when an application is made under Section 11 of the Act, the Chief Justice has to decide whether the applicant has satisfied the aforesaid conditions for appointing an Arbitrator and to determine whether the claim was a dead one or a time barred claim that was sought to be resurrected or whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations and receiving the final payment without objection. However, the question whether the live claim come within the purview of the Arbitration Clause may not be possible to be decided at this stage. Such a question, must be left to be decided by the Arbitral Tribunal, on taking evidence and deciding it with the merits of the claims, raised in the Arbitration.

37. In a subsequent judgment, rendered in Jagdish Chandra (supra), which was also referred to by learned counsel for the respondent, the Supreme Court has inter-alia held that the Chief Justice or his designate under Section 11 is not empowered to appoint an Arbitrator in the absence of Arbitration Agreement. In fact, in a still later judgment in National Insurance Company (supra) also referred to by learned Counsel for the respondent, the Court identified and segregated the preliminary issues that would arise for consideration in an application under Section 11 of the Act into three categories. The issues in the first category, which this Court as a designate of the Chief Justice, has to decide are;

- a. Whether the party making the application has approached the appropriate High Court;
- b. Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act is a party to such an agreement.

38. The issues in the second category which this Court may choose to decide or leave to the Arbitral Tribunal or Chief Justice/his designate are;

- a. Whether the claim is a dead (time barred) claim or a right claim
- b. Whether the parties have concluded Contract/transaction by recording satisfaction of their mutual rights and obligations and receiving the final payment without objection.

39. The third category of issues which would be left exclusively to the Arbitral Tribunal and which are;

- a. Whether a claim made false within the Arbitration Clause for example, a

matter which is reserved for final decision of a departmental authority and expected or excluded from arbitration;

b. Merits of any claim involved in the Arbitration.

40. It is in the aforesaid background, the submissions made by learned counsel for the parties need to be considered.

Privity of Contract

41. The submission of learned counsel for the respondent was that there was no privity of contract between it and the petitioner. Suffice to state, given the correspondence, exchanged between the parties, a reference of which has already been given above and the fact that the respondent has paid an amount of Rs. 6.08 crores and on a reading of the provisions of the Act of 1993, it is clear that the rights and liabilities stood transferred to the petitioner as is clear from the words "subsisting or having effect immediately before the appointed date". The plain meaning of the words are, those agreements etc. subsisting or having effect immediately before April 1, 1992. The issue of refund of Excise Duty for the year 1982-88 was sub-judice pending adjudication, finally decided in the year 1997. I note from the judgment in Mafat Lal Industries (supra), Supreme Court was concerned with an issue, where Excise Duty has been paid under mistake of law and whether the same was liable to be returned back. The issue having been decided in favour of the respondent, surely a corresponding duty is cast on the respondent to refund the amount to the petitioner. Surely, such a claim is subsisting on the appointed date, as such a claim, relates to the rights and obligations of the parties to the agreements. Even otherwise, it is noted from the facts, the respondent has never disputed its liability inasmuch as the respondent in its communication dated June 10, 1996 had claimed that the matter was an old one and sought time. Thereafter, in the communication dated August, 16, 1996 the respondent admitted that the totality of the refund received by the respondent from the Central Excise Authority and legally due to the petitioner, becomes refundable to the petitioner. Even, in its communication dated October 24, 1996, the respondent quantified the refund received during the period April 1980 to February 1986 and March 1986 to February 1988 at Rs. 3.72 crores and Rs. 2.36 crores, aggregating in all, Rs. 6.08 crores. In the meetings dated December 31, 1996 and January 3, 1997, the respondent represented that only a sum of Rs. 6.08 crores has been received towards the Excise Duty refund and accordingly, a total sum of Rs. 6.08 crores was paid by the petitioner to the respondent. That apart, in its communication dated October 30, 1999, which was a response to the notices issued by the petitioner on October 6, 1999 and October 8, 1999 respectively, the respondent did not challenge the privity of contract between it and the petitioner. Payment of Rs. 6.08 crores by the respondent to the petitioner even as a commercial decision only to maintain business relations would also reflect the acceptance of liability by the respondent.

42. Accordingly, I hold that there exist privity of contract between the petitioner and the respondent, by operation of law and on facts. I may only add, this conclusion of mine is with regard to all the contracts which are subject matter of these petitions except in Arbitration Petition No. 541/1999 and two contracts in Arbitration Petition No. 544/1999 which I would deal with, while considering the individual petitions.

There is no Arbitration Agreement:

Before, I deal with this submission of Mr. Mukhi, I note, section 7 of the Act stipulates that an Arbitration Agreement has to be in writing when;

- a. It is signed by both the parties;
- b. When it emerges from an exchange of communication;
- c. When there is an exchange of statements of claim and defence; it is asserted in the statement of claim and is not denied in the defence.

43. It was contended by Mr. Mukhi that there was no Arbitration Agreement signed between the parties i.e. PGCIL and RPG Transmission, nor any exchange of communications which provides a record of an Arbitration Agreement between the two parties nor there is a statement of claim and defence in which the existence of Arbitration Agreement between the parties has been alleged by one party and not denied by other. Such an issue was never raised by the respondent in the earlier round of litigation. Rather, I find, that the Division Bench of this Court while deciding Writ Petition No. 7226/2007 has observed; "It is not disputed that each of the Contract contains an Arbitration Clause". That apart, I note, that in response to the notice(s) of the petitioner dated October 6, 1999 and October 8, 1999 invoking the Arbitration Clause, the respondent, vide its letter dated October 30, 1999 has not denied the existence of Arbitration Clause except stating that the invocation of Arbitration Clause of the Contracts are not applicable to the facts and circumstances.

44. Now I deal with the individual petitions, wherein I would examine the issue raised by the respondent of there being no Arbitration Agreement between the parties and whether the petitioner has filed the Arbitration Agreement in original or attested copy thereof.

ARB.P. No. 539/1999

45. In this petition, the petitioner has pleaded that it had issued a notice dated October 6, 1999 and addenda dated October 8, 1999, wherein the petitioner has referred to Arbitration Clause contained in para 16 and reproduced the same. The claim of the petitioner was for an amount of Rs. 1.57 crores as principal amount alongwith interest @ 18 % per annum. On the objection of the respondent that the contracts were executed by the OSEB and the predecessor in interest of the respondent, the petitioner in the rejoinder has clarified that in terms of agreement dated January 11, 1985, the NHPC has taken over the

contracts and contracts were referred to in the agreement dated November 18, 1991 between NHPC and PGCIL. In view of the stand of the petitioner, the objection of the respondent on this aspect need to be rejected. The respondent has denied that the arbitration clause annexed to the petition is part of Schedule D in the contract with OSEB. It is clarified by the petitioner in the agreement between the petitioner and NHPC dated November 18, 1991, the contract which is the subject matter of the petition, is mentioned at Serial No. 2. Further, as admitted by the respondent in its reply, that the notices dated October 6 and 8, 1999 were replied by it vide its letter dated October 30, 1999 wherein the respondent has not challenged the locus of the petitioner herein to claim the refund of the Excise Duty made by the predecessor in interest of the petitioner. Rather, I note, the respondent has only disputed the claim of the petitioner on merit as well as the petition being beyond the statutory time limit. The objection of the respondent that there is no arbitration clause needs to be rejected.

ARB.P. 540/1999

46. This petition relates to three Contracts being NH/CPG/BC/13/81/DTD dated September 7, 1982; NH/CPG/EC/13 and 15/81 dated June 17, 1982; NH/CPG/EC/3B/83-84 dated May 4, 1983 wherein the claim of the petitioner is for Rs. 60.73 Lacs alongwith interest @ 18 % per annum. It is noted that the petitioner has annexed with the petition only two contracts and the third one has been annexed along with the rejoinder i.e. Birpara to Siliguri and Birpara to Bongaigaon. Be that as it may, a reference of issuance of notice invoking arbitration, vide letter dated October 6, 1999 has been made by the petitioner in this petition. According to the petitioner, in terms of the Arbitration Clause contained in para 50, it had nominated a panel of three Arbitrators. The respondent in its reply to the petition in this Court has referred to clause 50.5 to state that if within 30 days of the expiry of the defects liability period a notice with regard to all claims, is not served, they are deemed to be waived. The existence of the arbitration clause is not denied, except the manner of invocation is contested. Even in its reply of October 30, 1999, the respondent has not consented to the appointment of panel of arbitrators as alleged. In its reply to the notice, the petitioner has not denied the existence of Contracts between NTPC, NHPC and NEEPCO with the respondent nor has denied the Arbitration Clause (clause 50) which was referred to by the petitioner in its notice dated October 6, 1999 except stating that the said Arbitration Clauses in the Contracts is not applicable to the facts and circumstances. The objection of the respondent that there is no arbitration clause needs to be rejected.

ARB.P. 541/1999

47. In this petition, it transpires from the pleadings of the parties that the respondent was Sub-contractor, having given the contract by M/s. Tata Exports Ltd.. The case of the petitioner is that the respondent, even though Sub-contractor, the Sub-contract was awarded with the consent of the Engineer, who is the employee of the petitioner. The material was supplied by the respondent

directly to the petitioner and the respondent received payment from the petitioner. This would still not prove any privity of contract between the petitioner and the respondent. The reliance placed on the arbitration clause in the petition would not show, that would bind the petitioner and the respondent. The present petition needs to be dismissed.

ARB.P. 542/1999

48. In this petition the petitioner has referred to its notice dated October 6, 1999 making a claim for refund of Excise Duty alongwith interest @ 18% per annum and nominating a sole Arbitrator. The petitioner in this petition has referred to Arbitration Clause contained in para 32 and in rejoinder has explained how a subsequent contract for additional line was considered part of the first contract on the same terms and conditions. In reply to the petition, the respondent relied upon its reply dated October 30, 1999 wherein a stand has been taken that the invocation of the Arbitration Clause in the Contract is not applicable to the facts and circumstances. The respondent in its reply does not dispute the existence of an Arbitration Clause, except that it cease to exist, as the final bill paid. The objection of the respondent that there is no arbitration clause needs to be rejected.

ARB.P. 544/1999

49. This petition as observed in para 28 above, relates to 18 contracts. The petitioner relied upon clause 26.6.1 which relates to the arbitration. The clause stipulates the arbitration to be conducted by the 3 Arbitrators, one each to be nominated by the contractor and the owner, and the third to be nominated by the President of Institution of Engineers India. The petitioner nominated Justice V.A.Mohta. The respondent has taken an objection that out of 18 contracts, only 17 contracts have been supplied. The petitioner has filed the 18th contract along with the rejoinder. One of the contracts is with Best and Crompton, as such, there is no privity between the petitioner and the respondent. There is also one contract executed between Gujarat Electricity Board and the respondent. In terms of an understanding between the NTPC and the Gujarat Electricity Board, the NTPC has assigned GEB the work of construction of transmission lines including Kawas Bharuch line. Thereafter, the GEB subcontracted a part of the work of Kawas Bharuch line to the respondent. The contract between the petitioner and the respondent cannot be a subject matter of this petition as there is no privity of contract between the parties herein. The dispute if any in this contract was between the petitioner and Gujarat Electricity Board and not with the respondent. Such a dispute cannot be referred to the Arbitrator in these petitions. Similar is the position with regard to the contract between the petitioner and Best and Crompton. The respondent was the subcontractor of the Best and Crompton. The dispute could be between the petitioner and Best and Crompton and not between the petitioner and the respondent in the absence of any privity of contract. Insofar as the rest of the contracts are concerned, the respondent has stated that the clause 26 can be invoked only after exhausting

clause 25. Suffice to state, the existence of the arbitration clause has not been denied. The objection of limitation has already been dealt above. The objection of the respondent on arbitration clause, except with regard to two contracts with GEB and Best and Crompton, needs to be rejected.

50. Insofar as the objection of Mr. Mukhi based on the notification dated February 2, 1996, issued by this Court is concerned, the same is liable to be rejected in view of the two judgments of this Court. In *Johnson's Rubber Industries Vs. General Manager, Eastern Railways and Anr.*, 2000 (54) DRJ 59 has held as under:

"A pedantic approach to statutory provisions, which approach would have the effect of defeating the purpose of law, is to be eschewed. Surely, the intent of Section 8 is to en-sure that frivolous objections should not be raised. Having incorporated the Arbitration Clause in the application itself, it would serve no further purpose if the contract or a certified copy thereof is still to be additionally filed. In fact, greater sanctity is bestowed on the pleadings of the parties, especially where these are also supported by the affidavits. Greater reliance should be placed on them, rather than on documents which are yet to be admitted and/or proved. In my view the requirements of Section 8 of the 1996 Act have been substantially and sufficiently met in the present case. This is all the more so since the Agreement between the parties is what is loosely called a "Standard Form Agreement". In this genre of contracts, the specific points pertaining to the particular contract at hand, are negotiated, spelt out and thereafter reduced to writing. There is, however, an overriding understanding that if an Agreement is arrived at between the parties, it would be subject to the "general terms", applicable to all other contracts entered into between that party and other individuals."

Further, this Court in *Aez Infratech Pvt. Ltd. (supra)* has held as under: "13. The objective of filing certified copy is to ensure that there is no dispute apropos existence of the arbitration clause. However, it would be pedantic to insist upon compliance of the said provision in a situation like the present where the agreement containing the arbitration clause itself forms the basis of the suit and the said clause itself is clearly admitted by the respondent. The consideration before the Court would be that it should refer the matter to arbitration, when it is brought to the notice of the Court that such an agreement exists between the parties, and such request is made before filing of the Written Statement. It is not as if the Court's jurisdiction is ousted by the non-filing of the certified copy or the original copy of the agreement. Conversely, it cannot be said that it is the filing of the certified copy of the original agreement or its certified copy that vests jurisdiction on the Court. What the Court is required to see as per the scheme of the Arbitration Act is that an arbitration clause exists which is accepted by the parties. During the course of the arguments a query was put to counsel for the respondent where he disputed the existence or contents of flat buyer's agreement. His answer was in negative. Therefore, it is admitted that the flat buyer's agreement (containing the arbitration clause) which forms basis

of the suit exists. Therefore, quite clearly, the Trial Court fell into error in not referring the parties to arbitration. This view also appears to be in consonance with various pronouncements of the High Courts as well as the Supreme Court, where applications under section 8 of the Act were allowed, except where the plaintiff denied the existence of the agreement itself, or of the dispute actually arising out of the agreement".

In view of my above conclusion read with the individual facts as noted above, the objection of the respondent is not sustainable. The aforesaid shall answer the objection of the respondent that the original of the agreements or certified copies thereof have not been filed.

Limitation:

51. Insofar as the objection of limitation taken by the respondent is concerned, the same was primarily for the reasons; (1) that the petitioner has referred to document in its possession which shows the knowledge of the petitioner that the refunds that are claimed were received by the respondent on December 16, 1988, January 27, 1989 and June 10, 1990 and the limitation having expired on December 15, 1991, January 26, 1992 and June 9, 1993; (2) the PGCIL having come into existence on April 1, 1992; (3) to maintain good business relations with the petitioner and on the petitioner's insistence, the respondent made an ex-gratia payment of the entire amount of the refund to the petitioner stating clearly that it was and had been under no legal obligation to do so which are clearly recorded in the minutes of the meeting held on December 31, 1996, January 3, 1997 and May 26, 1997. In other words, the claim/invocation is beyond the period of three years in terms of Article 24 of the Limitation Act. On the other hand, it is the case of the petitioner that it was only in the year 1996, the petitioner had come to know that the respondent has received the refund of the Central Excise duty and it was thereafter, only the petitioner wrote to the respondent calling upon it to furnish the details of the Central Excise duty paid by the respondent and the refund in respect thereof, obtained by the respondent. Vide letter dated June 10, 1996, the respondent had claimed that an issue was an old one and sought time. In its letter dated August 16, 1996, the respondent admitted that the totality of the refunds received by the respondent are legally due to the petitioner and it is averred by the petitioner that vide letter dated October 24, 1996, the respondent quantified the refunds received during the period April 1980 to February 1986 and March 1986 to February 1988 aggregating in all, Rs. 6.08 crores. Further, it is the case of the petitioner that vide letter November 18, 1996, the respondent has stated that the issue regarding refund of Excise Duty is awaiting decision of the Supreme Court and which was ultimately decided by the Supreme Court only in December, 1996. It is also the case of the petitioner that the respondent had paid a sum of Rs. 6.08 crores on different dates i.e. January 15, 1997 March 4, 1997 and upto April 30, 1997 and May 8, 1997 aggregating to Rs. 6.08 crores and in the meeting held on May 26, 1997 between the parties the parties have agreed that they will try

and resolve the issue within a period of two months i.e. July 26, 1997 and till such time, no precipitate action would be taken by either of the parties and it is the case of the petitioner that the limitation would start only from July 26, 1997, after the expiry of two months period, and the invocation having been made vide notice dated October 6, 1999 and the petition having been filed on October 14, 1999, the petition is within limitation. The facts as noted above, shows the issue of limitation is not conclusive but a debatable one. Keeping in view the ratio of the judgment of the Supreme Court in the case of National Insurance Co. Ltd (supra) wherein the Supreme Court has culled out three categories determining the preliminary issues that may arise for consideration in an application under Section 11 of the Act, the issue of limitation being an issue, which falls in second category, as determined by the Supreme Court, and the issue being a debatable one, in view of divergent stands of the parties, I am of the view that this issue should be left to be examined by the Arbitral Tribunal.

Jurisdiction:

52. The respondent has taken the objection of jurisdiction of this Court to entertain the present petitions. The respondent did not elaborate as to how this Court would have no jurisdiction to entertain the present petition. The issue of jurisdiction would depend upon whether part of cause of action has arisen within the jurisdiction of this Court; the situs of the Registered Office of the respondent on the principle enshrined in Section 20 of the Code of Civil Procedure; the venue of arbitration; the jurisdiction is ousted if the parties have decided so; Nothing has been placed on record by the respondent to show that in terms of the Contracts executed by the parties, the jurisdiction of the Courts in Delhi has been ousted. There is no denial to the fact that the Registered Office of the respondent is in Delhi. It has been also averred by the petitioner that the refund of the Excise Duty was made by the respondent and received by the petitioner in Delhi. Although, it is stated, in some petitions, that the tender has been floated within the territorial jurisdiction of this Court. Such a submission may not be available with respect to those tenders which have been floated outside Delhi. Be that as it may, since the Registered Office of the respondent is in Delhi, so also, the Registered Office of the petitioner and there is nothing on record to suggest that the jurisdiction of the Courts in Delhi has been ousted. Keeping in view the judgment of this Court in Barco Electronics Systems Pvt. Ltd. Vs. Mrs. Kiran Malik 187 (2012) Delhi Law Times 19, I proceed on the premise that this Court has jurisdiction.

53. Insofar as the submission of Mr. Mukhi that in view of the Section 35 of the Stamp Act, 1859, no Court shall entertain a document that is not duly stamped is concerned, the same is also liable to be rejected inasmuch as no such objection was taken by the respondent in its reply to enable the petitioner to respond to such a plea. Even otherwise, Mr. Mukhi has not elaborated the said submission as to which document is not duly stamped. It has to be seen whether the document as referred to by Mr. Mukhi is required to be stamped in accordance with the law.

In other words, the plea is vague. Insofar as the judgments which have been referred to by Mr. Mukhi and not dealt in this judgment, suffice to state, the same are all on the aspect of the scope of power and function of a Court under Section 11 of the Act and it may not be necessary to deal with those judgments in view of the judgment of the Constitution Bench in *SBP and Co.* (supra) to which a reference has been made by this Court.

Relief:

54. From the above, it is clear that the contracts, which are subject matter of the five arbitration petitions, contains arbitration clause, (except Arb. Pet. 541/1999 and two contracts in Arb. Pet. 544/1999, where it is held that there is no privity of contract between the petitioner and the respondent). In some petitions, the clause stipulates adjudication by three arbitrators, one each to be appointed by both the parties and the third by an Institution (Arb.Pet. 542/1999 and Arb. Pet. 544/1999); in some petitions, the clause stipulates appointment of Sole Arbitrator from the panel of three persons (Arb.Pet. 540/1999); in some petitions, the clause stipulates adjudication by a Sole Arbitrator (Arb.Pet. 542/1999). Keeping in view, that the petitions have been pending adjudication since 1999, and noting the factual position, that, the arbitration agreements, provide a particular procedure for appointment of the Arbitrator, and keeping in view the judgment of the Supreme Court in the case of *North Eastern Railway Vs. Tripple Engineering Works*, (2014) AIRSCW 4669 : (2014) 9 SCALE 351 : (2014) 9 SCC 288 , wherein the Supreme Court, noticing that the pendency of the arbitration proceedings, for the last two decades, and in such situation, the power of the Court to depart from the agreed terms of appointment of the Arbitrators must be acknowledged, this Court is of the view, one Arbitrator be appointed who can adjudicate the disputes, with regard to all contracts being common. This Court accordingly appoints Justice S.S. Nijjar, Retd. Judge of the Supreme Court of India as the Sole Arbitrator in respect of all the contracts, which are subject matter of these petitions (except Arb. Pet. 541/1999 and two contracts in Arb. P. Nos. 544/1999, Gujarat Electricity Board and Best and Crompton) to adjudicate the disputes and differences between the parties in terms of claims and counter claims if any. The learned Arbitrator would fix his fee for conducting the proceedings and incidental charges to be incurred for holding the proceedings, which would be shared equally by both the parties.

55. The petitions are disposed of.