

(2004) 05 GAU CK 0010

In the Gauhati High Court

Case No : Writ Petition (C) No's. 9948, 9949, 9950, 9951, 9952 and 9953 of 2003 and 609 of 2004

Subhash Projects and Marketing Limited

APPELLANT

Vs

The Deputy Commissioner and Others

RESPONDENT

Date of Decision : 26-05-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 14

Citation : (2004) 2 ARBLR 232 : (2004) 2 GLT 1671

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : P.C. Markanda, G.N. Sahewalla, R. Markanda, D. Senapati and A. Jallan, for the Appellant; C.K. Sarma Baruah, Advocate General and S. Shyam, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—All the writ petitions having raised common question of law on identical facts were heard together and are being disposed of by this common judgment and order.

2. The writ petitioner, Subhash Projects and Marketing Limited, was awarded as many as 7 (Seven) different contracts for the execution of six Micro Hydel Projects and one Water Supply Scheme in the State of Arunachal Pradesh. The aforesaid contracts were awarded to the writ petitioner sometime in the year 1993. Disputes and differences in matters relating to execution of the aforesaid projects having occurred and the Hon'ble Chief Justice of this Court having been approached by means of an application filed u/s 11 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the Act"), the respondent No. 3 in the present proceeding Mr. Justice R.K. Manisena Singh, a former Chief Justice of the Gauhati High Court was nominated as an Arbitrator to go into and to resolve the disputes and differences that had arisen between the parties with regard to all the seven projects noted above. It may be apposite at this stage to

enumerate the details of the projects in question in respect of which differences and disputes had arisen between the parties which were sought to be resolved by appointment of the respondent No. 3 as the Arbitrator.

"Name of Project Arbitration Case No.

1. Water Supply Scheme of 2/20/99 of 2001 Naharlagun Township 2. Sipit Micro Hydel Project 3/21/97 of 2001 (2x1 MW) 3. Sidip Micro Hydel Project 4/22/99 of 2001 (3x1 MW) 4. Liromoba Micro Hydel Project 5/23/99 of 2001 (2x1 MW) 5. Mukto Micro Hydel Project 6/24/99 of 2001 (1x3 MW) 6. Kitpi Micro Hydel Project 7/25/99 of 2001 (3x1 MW) 7. Nuranang Micro Hydel Project 8/26/99 of 2001 (3x2 MW)"

3. After the appointment of the respondent No. 3 and on receipt of the references made to him, the respondent No. 3 entered into the references in the course of which two separate interim Awards both dated 08.12.2001, were passed by the learned Arbitrator. The aforesaid two interim Awards were passed in the proceedings registered as Arbitration Case No. 3/21/97 of 2001 relating to SIPIT Micro Hydel Project and Arbitration Case No. 4/22/99 of 2001 relating to SIDIP Micro Hydel Project. Two separate amounts of Rs. 2.10 crores and Rs. 3.50 crores, totalling Rs. 5.60 crores, was ordered to be paid to the writ petitioner by the state of Arunachal Pradesh in terms of the two interim Awards dated 08.12.2001. The amounts ordered to be paid to the writ petitioner by the State were to be secured by Bank Guarantees to be furnished by the writ petitioner for an equivalent amount and the State was given the liberty to approach the learned Arbitrator for invocation of the Bank Guarantees, in the event such necessity arose.

4. The requisite Bank Guarantees in terms of the interim Awards dated 08.12.2001 were furnished by the writ petitioner and payment by the State of the amount covered by interim Awards were deposited with the Arbitrator by a cheque and a demand draft in the name of the Arbitrator on 04.10.2002 and 13.01.2003 respectively. As the validity of the Bank Guarantees furnished by the writ petitioner was initially for the period upto 31.03.2002, the same were extended upto 28.02.2003. It must be noticed at this stage that the interim Awards were passed by the learned Arbitrator in order to facilitate the early commissioning of the power projects. However, as according to the State, even after receipt of the money under the interim Awards, the writ petitioner had not shown satisfactory progress in the execution of the projects and as in the meantime, the Bank Guarantees were due to expire on 28.02.2003, the State filed two separate applications in the two Arbitration cases in which the interim Awards were passed, for suitable extension of the Bank Guarantees. According to the State, apart from passing an order in both the cases to the effect that the writ petitioner would not withdraw any amount lying in deposit with the Banks which had issued the Bank Guarantees, no specific order(s) were passed by the learned Arbitrator for extension of the Bank Guarantees in question. The period for which the Bank Guarantees were effective had consequently expired and the

amounts paid by the State to the writ petitioner ceased to be covered by any security. The learned Arbitrator instead of passing any order on the request of the State for extension of the Bank Guarantees, proceeded with the hearing of the cases and some of the cases were closed for verdict in the month of August, 2003. That apart, the learned Arbitrator received the payments of the amounts covered by the interim Award dated 08.12.2001 by cheques/demand drafts issued in his own name. Additionally, according to the State, the Arbitrator had permitted the writ petitioner to bring in additional documents on record in one of the proceedings i.e. 8/26/99 of 2001 relating to Nuranag Micro Hydel Project. Perceiving the aforesaid conduct and action of the learned Arbitrator to be in complete negation of the impartiality and neutrality of the Arbitrator thereby effecting his ability to conduct all the pending Arbitration proceedings between the parties in a fair and unbiased manner, applications were filed in respect of each of the 7 cases pending before the learned Arbitrator u/s 14(1) of the Act. The said applications were filed in the Court of the learned Deputy Commissioner, Papum Pare District as the Principal Civil Court of the district having jurisdiction in the matter. The aforesaid applications, it must be noted, were filed on 13.11.2003 except in W.P, (C) No. 609/2004. The learned Trial Court took cognizance of the applications filed by the State u/s 14 of the Act and by interim orders passed on 13.11.2003 and 22.12.2003 stayed further proceedings of each of the Arbitration cases pending before the learned Arbitrator. Aggrieved and contending that the proceedings u/s 14(1) of the Act, of which cognizance was taken by the learned Trial Court, are not maintainable in law thereby rendering the restraint put on the further conduct of the Arbitration proceedings illegal, the instant writ applications have been filed calling into question each of the proceedings before the learned Trial Court as well as restraint orders 13.11.2003 and 22.12.2003 passed therein.

5. I have heard Mr. P.C. Markanda, learned senior counsel for the writ petitioner in each of the cases and Mr. C.K. Sarma Baruah, learned Advocate General of the State of Arunachal Pradesh appearing for the respondents. The respondent No. 3 i.e. the learned Arbitrator to whom notices were issued has, however, chosen not to appear before this Court.

6. The elaborate and comprehensive arguments advanced by Mr. Markanda, learned counsel, reduced to its essentials are to the effect that having regard to the statements of objects and reasons for the enactment of the Act of 1996 as well as the provisions of Section 5 of the Act, the role of the Court in matters concerning the conduct of Arbitration proceedings must be understood to be minimum. Judicial intervention would be permissible only when specifically provided for by the Act and in all other situations the Court must choose to stay aloof from all such complaints that may be brought by the aggrieved parties with regard to the conduct of the Arbitration proceeding. Learned counsel has further argued that Section 9 of the Act of 1996 which provides for interim measures by the Court must be understood to be all comprehensive and the intervention made by the learned Trial Court in the present cases not being contemplated by

the provisions of Section 9 of the Act, the same must be held by this Court to be wholly without jurisdiction and authority of law. Arguing further, the learned counsel has submitted that if any party to an Arbitration proceeding entertains any doubt with regard to the independence and impartiality of the Arbitrator, the said question must be raised before the Arbitrator and it is the Arbitrator who must be allowed to decide on such objections. If the Arbitrator overrules the objections raised and proceeds to pass an Award, the same can only be challenged u/s 34 of the Act. This, learned counsel contends, is that what has been provided for by Sections 12 and 13 of the Act of 1996. According to the learned counsel for the petitioner, Section 14 of the Act operates in an entirely different field. De jure and de facto inability of the Arbitrator to perform his functions, according to the learned counsel, would be on account of matters which are not specifically covered by Sections 12 and 13 of the Act; any other view, according to the learned counsel, would be inconsistent with the scheme of the Act and such a view may also have the effect of rendering Sections 12 and 13 superfluous and redundant. It is, therefore, submitted by Mr. Markanda, learned counsel for the petitioner that the de jure and de facto inability contemplated by Section 14 of the Act must be construed to be on account of reasons other than those relating to independence and impartiality of the Arbitrator. Learned counsel further contends that judicial intervention u/s 14 of the Act would be appropriate only if the parties cannot resolve the controversy as to whether the Arbitrator has de jure or de facto become unable to perform his duties. In the instant case, no notice indicating the State's stand that the learned Arbitrator had become de jure or de facto unable to perform his functions had been communicated to the writ petitioner. Instead the State had straightway gone to the learned trial Court by means of the applications filed u/s 14 of the Act. Mr. Markanda, learned counsel in support of his arguments has placed reliance on the meaning of the words "de jure" and "de facto" as contained in Stroud's Judicial Dictionary and for the purposes of the contention to the effect that in an application u/s 14 of the Act, the question of impartiality and independence of the Arbitrator cannot be urged has relied on a decision of the Bombay High Court in the case of Hasmukhlal H. Doshi and Anr. v. Justice M.L. Pendse and Ors. reported in 2001(1) ALR 87 . For the proposition that the restraint put by the learned Trial Court on the progress of the Arbitration proceedings before the learned Arbitrator is without jurisdiction, reliance has been placed by Mr. Markanda on a decision of the Apex Court in the case of Bhatia International Vs. Bulk Trading S.A. and Another,

7. Mr. Markanda, learned counsel for the petitioner has further argued that "Court" as defined Section 2(e) of the Act of 1996 read with the definition of the "District Judge" as contained in Section 2(17) of the General Clauses Act, 1897 would mean the Court of the District Judge. The Deputy Commissioner before whom the applications u/s 14 of the Act were filed cannot be equated to a District Judge appointed under Article 233 of the Constitution. The Deputy Commissioner is an executive officer who is not under the disciplinary control of

the High Court and, therefore, according to the learned counsel for the petitioner, the Deputy Commissioner is not the Court of competent jurisdiction to entertain the applications filed u/s 14 of the Act. Reliance in this regard has been placed on a Supreme Court judgment in the case of Shri Kumar Padma Prasad Vs. Union of India and others,

8. Controverting the submissions advanced on behalf of the petitioner, Mr. C.K. Sarma Baruah, learned Advocate General for the State of Arunachal Pradesh, has submitted that bias, lack of good faith and corruption are incidence of de jure inability of an Arbitrator from performing his functions. Such inability occurring on account any of the aforesaid reasons will go to the root of the matter raising a question of public policy, to decide which, power and competence of the judicial forum must be recognized and accorded. The provisions of Sections 12 and 13 of the Act of 1996, according to the learned Advocate General, deal with the pre-arbitral stages and question of independence and impartiality of the Arbitrator on account of bias, fraud or corruption cannot be allowed to be decided by the Arbitrator. Such questions being fundamental to the fair conduct of the Arbitration proceeding must necessarily be decided by the Court. In so far as the existence of a controversy contemplated by Section 14(2) of the Act is concerned, the learned Advocate General has argued that the said provision of the Act must be given a reasonable and rational meaning. The pleadings and counter pleadings of the parties in the present bunch of cases amply demonstrates the existence of a controversy which needs to be resolved by the judicial forum. Arguing further, the learned Advocate General has contended that Court as defined by Section 2(e) of the Act of 1996 means the principal Civil Court of original jurisdiction in a district having jurisdiction to decide the question forming the subject matter of Arbitration if the same had been the subject matter of a suit. In Arunachal Pradesh, whether the separation of the executive and judiciary has not yet taken place, the learned Deputy Commissioner is the principal civil and Criminal Court of original jurisdiction in the district exercising powers under the Rules of Administration of Justice as applicable to the State. The projects in question being located within the State of Arunachal Pradesh and the contract agreements between the parties having been executed at Itanagar, the Court of the Deputy Commissioner, Papum Pare district, would be the competent Civil Court to entertain the applications u/s 14 of the Act.

9. Before proceeding to consider and answer the various contentions advanced on behalf of the rival parties as noticed above, this Court would like to put on record that arguments as well as the counter arguments have been advanced on behalf of the parties to contend that the various acts and omissions on the part of the learned Arbitrator does or does not amount to misconduct on the part of the Arbitrator in the conduct of the Arbitration proceedings. According to the writ petitioner, even assuming that the learned Arbitrator had failed to secure suitable extensions of the Bank Guarantees in question, no misconduct can be attributed inasmuch as in terms of the guarantee documents furnished by the bank, the same could not be revoked without the consent of the specified officer of the

State as mentioned in the documents itself. The receipt of the payments of the amounts covered by the interim Awards passed by the Arbitrator by means of cheques in his own name is another bone of contention between the parties. The petitioner contends the same to be an instance similar to deposit of money in a Court or Tribunal, a course of action consistently followed in this country. The above stand taken on behalf of the petitioner had met with stiff resistance from the learned Advocate General, appearing for the respondents, who has argued that when the period of validity of the Bank Guarantees had expired on 28.02.2003, the term contained in the guarantee documents that the same cannot be revoked without permission of the authorized officer would be meaningless. Receipt of the payments by the Arbitrator and his insistence on payments of the amount deducted on account of income tax which had occasioned payment of the amount of Rs. 5.60 crores in two instalments, has been argued to be wholly inconsistent with the concept of impartiality that is inherent in an Arbitrator. Similarly, while the writ petitioner would like this Court to hold the actions of the learned Arbitrator in the proceedings relating to Nuranang Micro Hydel Project as incidental to the conduct of the said proceeding, the State has urged that the same should be viewed by the Court as amounting to an act of established bias on the part of the learned Arbitrator.

10. The aforesaid arguments advanced before the Court have been noted only for the purpose of making the catalogue of arguments complete. No adjudication on the correctness either of the versions, in the considered view of the Court would be called for as the aforesaid are matters which must be left to be decided by the learned Trial Court in the first instance if the proceedings before the said Court can be held to be maintainable in law. It is the maintainability of the proceedings before the learned Trial Court alone, that this Court has been called upon to decide in the present bunch of cases. Any decision on the issues already noted must be rendered by the Court of competent jurisdiction once such Court is recognised to have any such power and competence.

11. This, should bring us to a consideration of the respective submissions advanced. Section 12 of the Act of 1996 requires an Arbitrator from the time of his appointment and throughout the Arbitral proceeding to disclose to the parties all such circumstances as may give rise to a justifiable doubt as to his independence and impartiality. Section 12(3) of the Act contemplates a challenge to the jurisdiction of the Arbitrator in the event such a situation arises. u/s 13(3) of the Act, it is the Arbitrator who alone has been made competent to decide any such challenge that may be made. Section 13(4) of the Act contemplates that if the challenge to the jurisdiction of an Arbitrator made u/s 13(3) is negated by the Arbitrator, the Arbitrator shall continue with the proceeding and make an Award which however, would be open to challenge u/s 34 of the Act. In the present case, notwithstanding the language and expressions deployed by the State in its applications u/s 14 of the Act, what is contended, in sum and substance, is that the learned Arbitrator by his conduct and actions particularly with regard to the extension of the Bank Guarantees and the receipt of the

amounts covered by the Bank Guarantees, had displayed conduct which gives rise to a justifiable doubt as to his impartiality and independence. If that be so, under the scheme of the Act, it is the Arbitrator and the Arbitrator alone who has been made the appropriate forum to decide the said question. While the learned Advocate General may be correct that such actions and conduct may amount to de jure inability of the Arbitrator to exercise his functions, such de jure inability occurring due to circumstances noted above cannot be agitated in a proceeding u/s 14 of the Act. The de jure inability contemplated by Section 14 of the Act would cover instances other than such inability occurring due to reasons covered by Sections 12 and 13 of the Act. When a specific forum has been provided by the Act to take care of a certain situation i.e. the Arbitrator to decide on a challenge on the ground of his independence or impartiality, resort to an alternative forum i.e. the Court, by an extension of the concept of de jure inability, in the considered view of the Court would be doing violence to the scheme contemplated by the Act. The decision of the Bombay High Court in the case of H.H. Doshi (supra), fortifies the above view taken by this Court. Though the Hon"ble Bombay High Court in the case before it was considering the maintainability of a petition filed u/s 14 of the Act in respect of an order of the Arbitrator u/s 13(3) of the Act. This Court is, therefore, inclined to hold that as u/s 13 of the Act, it is the Arbitrator who has been made competent to decide on a challenge made with regard to his independence and impartiality, Section 14 of the Act cannot be stretched to confer powers on the Courts to decide such a challenge brought before the Court on grounds contemplated by Section 12 of the Act. All the applications filed by the State u/s 14 of the Act before the learned Deputy Commissioner, Papum Pare District must, therefore, be held to be not maintainable in law and the restraint orders dated 13.11.2003 and 22.12.2003 passed on the further conduct of the proceedings by the Arbitrator must be held to be legally infirm and invalid.

12. As the writ petitions will have to be allowed in view of the conclusion reached by the Court on the aforesaid issue, it will not be necessary for this Court to go into the second question raised by the petitioner i.e. whether the Deputy Commissioner would be the competent Court having jurisdiction in the matter. The aforesaid question, therefore, is left open to be decided in an appropriate case.

13. For all the aforesaid reasons, these writ petitions will have to be allowed, which I hereby do. The proceedings pending before the learned Deputy Commissioner, Papum Pare District u/s 14 of the Act including the orders dated 13.11.2003 and 22.12.2003 passed therein shall stand interfered with.