

**IN THE GAUHATI HIGH COURT  
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM &  
ARUNACHAL PRADESH)**

ITANAGAR PERMANENT BENCH

**Arbitration Pet. 02(AP)2015**

**SPML Infra Limited (Formerly known as Subhash  
Projects and Marketing Ltd.)**

A company duly registered under the Companies Act and having its registered office at F-27/2, Okhla Industrial Area, Phase-II, New Delhi 110020 and also having its office at 22, Camac Street, Block A, 3<sup>rd</sup> Floor, Kolkata-700016 and is duly represented by its Manager Legal, Sri Surojit Ganguly.

*.....Petitioner*

**-Versus-**

1. The State of Arunachal Pradesh represented by the Commissioner(Power), Government of Arunachal Pradesh, Jal Vidyut Bhawan, Near I.G. Park, Itanagar, Arunachal Pradesh.
2. The Secretary, Department of Power, Government of Arunachal Pradesh, Jal Vidyut Bhawan, Near I.G. Park, Itanagar, Arunachal Pradesh.
3. The Chief Engineer(WZ), Department of Hydro Power Development, Jal Vidyut Bhawan, Near I.G. Park, Itanagar, Arunachal Pradesh.

*.....Respondents*

Advocates for the Petitioner : Mr. G. Sahewalla, Sr. Advocate  
Mr. G. Tado  
Mr. D. Senapati

Advocate for the Respondents: Mr. T. T. Tara, Additional Advocate  
General, Arunachal Pradesh  
Ms. Geeta Deka, Sr. Govt. Advocate

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

Date of hearing : **24.05.2016**  
Date of Judgment & Order : **10.06.2016**

## **JUDGMENT & ORDER (CAV)**

Heard Mr. D. Senapati, learned counsel for the petitioner. Also heard Mr. T. T. Tara, learned Additional Advocate General, Arunachal Pradesh, assisted by Ms. Geeta Deka, learned Senior Government Advocate, appearing on behalf of State Respondents No. 1 to 3.

2. The petitioner, herein, being found an eligible tenderer, for construction of 3 x 2000 KW MHP in the State of Arunachal Pradesh, tender was awarded in favour of the petitioner and in pursuant to the formal acceptance by the petitioner, an Agreement was executed between the parties as on 18.03.1993.

Clause 23 of the said Agreement, provides as follows:-

***"23. Resolution of disputes/arbitration:***

***23.1. The purchaser and the supplier shall make every effort amicably by direct informal negotiation disagreement or dispute arising between them under or in connection with the contract.***

***23.2. If after 30 days from the commencement of such informal negotiations, the purchaser and the supplier unable to resolve amicably a contract dispute, all such matters shall be referred in writing to the sole arbitrator of the Secretary, Department of Power, Government of Arunachal Pradesh, Itanagar, or a person nominated by him. His submissions shall be deemed to be a submission to an arbitration within the meaning of the Indian Arbitration Act, 1948, the rules made thereafter."***

3. Owing to some dispute between the parties, regarding non-completion of the project and non-release of the mobilization advance, etc., to the petitioner; on an earlier occasion, the petitioner in terms of the aforesaid clause of arbitration, issued letter to the respondent, in the year 2001, but as the respondent did not respond to the same, so the petitioner preferred an application before this Court u/s. 11 of the Arbitration and

Conciliation Act, 1996, for appointment of an arbitrator for adjudication of the dispute, that has arisen between the parties, which was registered as Arb. Case No. 21/2001, and this Court, upon hearing the parties, vide order dated 07.12.2001, was pleased to appoint Hon'ble Late Mr. Justice R. K. Manisena Singh, as the sole arbitrator to adjudicate the dispute that arose between the parties. But prior to conclusion of such arbitration proceeding, Hon'ble Justice, above mentioned, passed away, as on 08.01.2015. Hence, the petitioner approached the respondent authorities to resolve the issue, however, this time also, the petitioner failed to receive any positive response from the authorities concerned. By letter dated 17.07.2015, the respondent authorities denied the dispute and further declined to refer the matter for arbitration, for which, the petitioner has approached this Court, again, for appointment of a substitute arbitrator to decide the dispute that has arisen between the parties.

**4.** It is the contention of the petitioner that since the respondent authorities have failed to adhere to the Agreement dated 18.03.1993, on an earlier occasion, as such, the respondent authorities cannot now seek recourse to the said Agreement(Clause of arbitration). The petitioner has enclosed the copy of Notice dated 30.06.2015 which was addressed to the Secretary, Department of Power, Government of Arunachal Pradesh, Itanagar, apprising all the above facts, that since the mandate of the arbitrator has terminated, a substituted arbitrator has to be appointed in terms of Section 15 of the Arbitration and Conciliation Act, 1996. It was also mentioned that if the respondent authorities are willing to appoint a retired Judge of Supreme Court or High Court Judge, as an arbitrator, they are willing to abide by its decision, for the ends of justice.

**5.** The respondent authorities entered their appearance in this matter and filed affidavit-in-opposition as well as additional affidavit along with a copy of the reply, they made on 17.07.2015, towards the letter of the petitioner dated 30.06.2015. Raising various allegations regarding the failure on the part of the petitioner to complete the work, etc., it has been submitted

that as per Clause 23.2 of the aforesaid Agreement, entered into between the parties, Secretary is the sole authority for appointment of an arbitrator. He may nominate other officer as an arbitrator and the petitioner cannot blow hot-and-cold together and cannot take only one part of the Agreement which is favourable to him. It is the contention of the respondent authorities that after expiry of Hon'ble Justice R. K. Manisena Singh, as an arbitrator, the earlier order for appointment ceased to exist and hence, the petitioner can pray for appointment for new arbitrator only as per Clause 23 of the said Agreement and as such, the prayer for substitute arbitrator, under Section 15(2) is not appropriate. Accordingly, it has been submitted that it is not a fit case to be interfered with by this Court invoking Section 15(2) of the Arbitration and Conciliation Act, 1996, and the petition, is, therefore, liable to be dismissed, at the threshold.

**6.** It may be mentioned herein that both the petitioner as well as respondent authorities have agitated certain facts in their respective pleadings, regarding their disputes towards execution of the work, in question, but the same is not discussed here, which is not necessary for adjudication of the sole issue as to whether substitute arbitrator can be appointed by this Court, after the demise of the earlier arbitrator.

**7.** The bone of contention of the petitioner of this case, is that, once the respondent authorities failed to invoke its jurisdiction to refer the matter, to the arbitrator, consequent to which, this Court, appointed the arbitrator, as such, the respondent authorities now cannot take recourse to the clause of the said Agreement as has been submitted. Whereas, according to the respondent authorities, as soon as the sole arbitrator passed away, so the said arbitration ceased to exist and the parties are, now, have to abide by the terms of the said Agreement towards appointment of the arbitrator.

**8. *Now, the sole question raised before this Court is as to whether upon the death, resignation, or termination of a mandate of an arbitrator appointed by the Chief Justice u/s. 11(6) of the***

***Arbitration and Conciliation Act, 1996, the substitute arbitrator can be appointed by the Chief Justice and/or Judges, or, in accordance with the Arbitration Agreement?***

9. Justifying such interference by this Court, the learned counsel for the petitioner has placed his reliance upon the decision of the Hon'ble Apex Court as well as other Hon'ble High Courts, which are mentioned below:

- 1). ***(2006) 2 SCC 638; Punj Lloyd Ltd. V. Petrochemical MHB Ltd.***
- 2). ***(2006) 6 SCC 204; Washwith Construction (P) Ltd. V. Simplex Concrete Piles India Ltd. & anr.***
- 3). ***(2016) 3 SCC 619; Sailesh Bharyan V. Mohan Balkrishna Lulla***
- 4). ***Decision of Calcutta High Court in AP No. 606 of 2008; MANU/WB/1306/2009(Ramjee Power Construction Ltd. V. Damodar Valley Corporation), decided on 05.02.2009***

10. After going through the above decisions, it is to be found that all the above aspects, has been clearly dealt with in the above cited decisions, it has been held that once a party filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, the other party extinguish its right to appoint arbitrator in terms of the clause of Agreement thereafter.

11. Referring to Section 15(2) of the Arbitration and Conciliation Act, 1996, **"where mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the Rules that were applicable to the appointment of the arbitrator being replaced"**, it has been categorically held in the aforesaid decisions that the language and tenor of Section 15(2) is significant. Legislature has in its wisdom very carefully used the expression "substitute arbitrator shall be appointed according to the Rules that were applicable to the appointment of the arbitrator being replaced" instead of using the expression "substitute arbitrator shall be appointed in accordance with the procedure for appointment laid down in the arbitration Agreement executed between the

parties.” If it was the legislative intention that a substitute arbitrator should always be appointed in accordance with the procedure agreed to by the parties, irrespective of whether the arbitrator being replaced, was appointed by the Chief Justice or his judge designate, the legislature will perhaps, have not, used the expression in accordance with the Rules that were applicable to the appointment of the arbitrator, being replaced.

**12.** In *Sailesh Bhairyan*(supra), the Hon’ble Apex Court has emphasized that the statutory interpretation of a provision is never static but always dynamic. Though the liberal rule of interpretation till some time ago, was treated as golden rule, it is now the doctrine of purposive interpretation which is predominant particularly in those cases where liberal interpretation may not serve or may lead to absurdity. It is concluded in the aforesaid decision that once you keep in mind the aforesaid fundamental aspect of the arbitration, the irresistible conclusion would be that whenever parties agree for mediation or even name a specific arbitrator with no specific provision for appointment of another arbitrator, on the recusal/withdrawal of the said arbitrator, the said omission is made up by Section 15(2) of the Act and unless arbitration Agreement between the parties provides a categorical prohibition or debarment in resolving the question or dispute, or difference between the parties by a substitute arbitrator in case of death of the main arbitrator or non-availability of the said arbitrator, the Court has power to appoint substitute arbitrator which power is given by Section 15(2) of the Act as this provision is to be given liberal interpretation so as to apply all possible circumstances under which the mandate of the earlier arbitrator may be terminated.

**13.** The learned counsel for the respondent authorities, on the other hand, has relied upon the decision of *Union of India & ors. V. Tushar Ranjan Mohanty & ors.*; *MANU/SC/0809/1994* and also upon the decision of *(2016) 3 SCC 619; Sailesh Bhairyan V. Mohan Balkrishna Lulla*.

**14.** On the basis of the aforesaid decisions, it has been contended by the respondent authorities that though the legislature have the power to make laws with retrospective effect but such power cannot be used to justify arbitrary, illegal or unconstitutional acts of the executive so as to deprive a person from accrued right vested in him under a statute. By giving a different interpretation to the decision in *Sailesh Bhairyan*(supra), it has been contended by the learned counsel for the respondent authorities that section 15(2) of the Arbitration and Conciliation Act, 1996, provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the arbitrator being replaced. Accordingly, it has been urged that as soon as the earlier arbitrator passed away, the parties will abide by the original Deed of Agreement. But in view of such conclusion so reached in the aforesaid decision in Sailesh Bhairyan, as mentioned above, I am unable to accept such contention of the learned counsel for and on behalf of the respondent authorities.

**15.** It is another piece of argument by the learned counsel for the petitioner that in view of amended provision of the Arbitration and Conciliation Act, 1996, by the Arbitration and Conciliation Ordinance 2015, which has newly inserted 5<sup>th</sup> Schedule of the Act, as mandated u/s. 12(5) of the Act, the Secretary, Department of Power, Government of Arunachal Pradesh, Itanagar, cannot be permitted to act as an arbitrator which may give rise to justifiable doubt as to the independence or impartiality of an arbitrator that has been mentioned in the 5<sup>th</sup> Schedule of the new Act. Section 12(5) of the Act, is quoted hereinbelow, for ready reference:

**"12. Grounds for challenge.**

**(1)** .....

**(2)** .....

**(3)** .....

**(4)** .....

**(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:**

***Provided that parties, may subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."***

**16.** It is another limb of argument of learned counsel for the petitioner that if the authority i.e. the Secretary, Department of Power, Government of Arunachal Pradesh, Itanagar, who is to nominate an arbitrator; it is to be in consonance with the amended provision. By giving a counter reply to the said submission, learned counsel for the respondent authorities has referred the above decision ***Union of India & ors. V. Tushar Ranjan Mohanty & ors. MANU/SC/0809/1994*** raising the contention that such a new provision cannot defeat the right of the respondents so accrued to them earlier by virtue of the Agreement Clause 23, as mentioned above.

**17.** I have considered the rival submissions of both the parties as well as the decisions rendered by the Hon'ble Apex Court on the core issue before this Court, and it is apparent that the said issue has been clearly settled by the decision of the Hon'ble Apex Court, referred to above, that this Court by virtue of the provision of Section 15(2) of the Arbitration and Conciliation Act, 1996, has the power to appoint substitute arbitrator where the mandate of previous arbitrator came to an end. There is no denial that earlier arbitrator was appointed by this Court on the petition so preferred by the petitioner and there was no objection on the part of the respondent authorities while at the time of such appointment and at present, while the petitioner has again approached the respondent authorities to appoint a fresh arbitrator under Section 15(2) of the said Act, who should be a Judge of the Supreme Court or the High Court, but the respondent authorities have refused to accede to such prayer of the petitioner for which the petitioner has approached this Court.

**18.** In view of the legal pronouncements as well as the facts and circumstances of the case, at hand, there is no difficulty and legal bar to hold that a substitute arbitrator can be appointed by this Court. The objection so

raised by the respondent authorities is not liable to be sustained. Accordingly, the same is hereby rejected.

**19.** Resultantly, the prayer of the petitioner is allowed. The Hon'ble Justice (Retd.) Mr. C. R. Sarma, Gauhati High Court, is hereby appointed as the sole arbitrator, to decide the dispute between the parties. Inform the Hon'ble Justice accordingly.

**20.** With the above directions, this arbitration petition stands disposed of.

**JUDGE**

*Bikash*