



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Arb.P/2/2024

DSC Hydro Power Private Limited and 2 Ors
having its registered office at Room No.1, 3rd Floor, E-9, south Extension, Part - II,
New Delhi- 110049 represented by its Director, Shri N S Narula 2: Naying DSC
Power Limited

Age:

Occupation :

3: DSC Limited

Age:

Occupation

VERSUS

The State of AP and 2 Ors
represented by the Commissioner and Secretary, Govt of Arunachal Pradesh,
Department of Hydro Power Development, having its registered office at 3JM3 JWH,
Department of of Hydro Power Development, Govt of Arunachal Pradesh, Jal Vidyut
Bhawan, Itanagar, Arunachal Pradesh 791111 2:The Commissioner and

Secretary

Age: 0

Occupation :

3:The Secretary (Power)

Age: 0

Occupation

Advocate for the Petitioner : Vijay Jamoh

Advocate for the Respondent : GA (AP)

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioners : Mr.M. Seshadri, Advocate

For the Respondents : Mr. N Ratan, Additional Advocate General

Date of Hearing : 06.08.2024

Date of Judgment : 16.08.2024

JUDGEMENT & ORDER (CAV)

Heard Mr. M Seshadri, learned counsel for the petitioner. Also heard Mr. N Ratan, learned Additional Advocate General for the State of Arunachal Pradesh.

2. The present application is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act, 1996). It is the case of the petitioner that the petitioner, DSC Hydro Power Private Limited is the succession company of one DSC Limited. Pursuant to an expression of interest submitted by said DSC Limited (formerly known as DS Construction Limited) for development of Hydro Power Project in Arunachal Pradesh, a committee of secretaries was constituted by the Government of Arunachal Pradesh and after negotiation and finalization with the said committee, a Memorandum of Agreement (for short MoA) for implementation 1000 MWNaying Hydro Electric Power Project with DSC Limited was entered on 22.02.2006 on Build, Own, Operate and Transfer basis (for short BOOT). It is the case of the petitioners that due to non-cooperation of the respondent GOA and non-performance of their part of responsibilities under the MoA, the project could not be started within the stipulated time

and accordingly, time was also extended from time to time. It is the further case of the petitioners that the petitioners have expended considerable money, time and resources, however for the fault of the respondent GoA, the petitioner could not earn the profit and thereafter, to their shock, a notice dated 05.03.2020 was issued to the petitioner expressing the intention of the GoA to terminate the MoA. The petitioners by its communication dated 28.07.2020 replied to the notice dated 05.03.2020 and claimed that the GoA failed to grant necessary clearances under the purview of the contract within reasonable time and such reason is attributable to GoA the petitioners could not complete the project. Thereafter, the GoA under its notice dated 27.04.2021 alleging non-compliance of the provisions of the MoA by the petitioners, terminated the contract. Thereafter, the petitioners No. 2 and Petitioner No. 1 by its communication 28.06.2021 and 30.06.2021 replied to the termination notice dated 27.04.2021 and called upon GoA for mutual consultation for settlement of the legitimate dues and claims arose out of the MoA. Such communications were not replied by the respondents and having no alternative, the petitioners had sent a notice dated 01.06.2023 for invocation of arbitration clause, proposing that dispute be referred to an arbitral tribunal comprising of three arbitrators. It is the case of the petitioners that as the GoA had failed to nominate its arbitrator within the statutory period of 30 days in terms of Arbitration & Conciliation Act, 1996, the present petition is filed.

3. Though the learned counsel for the petitioners insisted on appointment of an arbitral tribunal consisting of three arbitrators, however, during the course of the argument, the learned counsel submit that they are not opposed to appointment of a oneman arbitral tribunal consisting of any retired high court Judge.

4. Mr. Seshadri, learned counsel for the petitioners submits that the petitioners have invoked Article 13 of the MoA by its communication dated 01.06.2023. However, such notice has not been responded by the respondents inasmuch as the communication dated 28.06.2021 and 30.06.2021 issued by the petitioners, pursuant to termination notice dated 27.04.2021 had also not been addressed by the GoA. It is contended by the learned counsel that when the respondents have not disputed the existence of the MoA entered into between the parties, have not disputed the privity of the petitioners to the MoA, the dispute should be referred to an Arbitral Tribunal. He further contends that the dispute, which is being raised as regards non-arbitrability of the dispute being barred by limitation, can very well be determined by the Arbitral Tribunal inasmuch as the claim is not barred by limitation, more particularly, when the contract itself was terminated on 27.04.2021 and the petitioners had raised the dispute on 01.06.2023, after being failed evoked any responds to their proposal of mutual settlement.
5. Per contra, Mr. Ratan, learned counsel for the respondents submits that the MoA was executed on 22.02.2006 and in term of the MoA, the petitioners were to achieve the financial closure within 12 months from the date of receipt of Techno Economic Clearance from the Central Electricity Authority, approval from Ministry of Environment and Forest and other statutory clearance. According to him, the MoA has been terminated in term of Clause 12.1 of the contract as the project was abandoned by the petitioners and no claim can be entertained when such project is abandoned long back.
6. According to the learned counsel for the respondents, in terms of the MoA, even otherwise, if implementation of the project is not commenced within a period of four years from the date of signing of this MoA or within a

period of one year from the date of receipt of all statutory clearance, the State shall have exclusive right to re-allot the said project to any third party. Therefore, the learned counsel for the State contends that since the execution of MoA is dated 22.02.2006 and nothing was done by the petitioners in furtherance of MoA, the GoA intimated its intention of termination of MoA by its notice dated 05.02.2020. According to the learned counsel the petitioners had become wise at that stage and filed the representation. Therefore, according to the learned counsel for the respondents, the present petition is liable to be dismissed for the claims being time barred inasmuch as according to the learned counsel for the State the petitioners ought to have raised their grievance against the State long back. In support of such contention, Mr. Ratan relies on the judgment of the Hon'ble Apex Court in the case of **B and TAG Vs. Ministry of Defence** reported in **(2024) 5 SCC 358**.

7. I have given anxious consideration to the arguments advanced by the learned counsel for the parties, perused the MoA and the pleadings made by the parties in the present proceeding.
8. The respondents have not disputed the existence of the arbitration clause. It has not also disputed the existence of the MoA entered into between the respondents and the petitioners herein. It has also not raised any dispute regarding the petitioner's privity to the MoA in question.
9. Under Section 11 (6A) of the Arbitration and Conciliation Act, 1996 while exercising referral jurisdiction, the Referral Court would be required to limit itself to the examination of existence of an arbitration agreement. In the case of **Duro Felguera, S.A. vs. Gangavaram Port Limited** reported in **(2017) 9 SCC 729**, the Hon'ble Apex Court held that by virtue of insertion of Section 11(6A), the referral jurisdiction of a court is limited to examining whether an arbitration agreement exists between the

parties, nothing more- nothing less.

10. Subsequently, in the case of ***NTPC Limited vs M/S SPML Infra Limited*** reported in ***2023 (2) Arb LR 213 (SC)***, the Hon'ble Apex court propounded that at the referral stage, a referral court must undertake two enquiries. The primary enquiry pertains to existence and validity of an arbitration agreement, which includes an enquiry as to the parties to the agreement and the applicant's privity to the said agreement. In the case in hand, neither the existence and the validity of the arbitration agreement is disputed by the respondents nor the petitioners' privity to the said agreement is an issue. What is in dispute is the non-arbitrability of the claim for being barred by time.
11. Law is equally well settled that the secondary enquiry in respect of non-arbitrability of the dispute is preferably to be determined and decided by the arbitral tribunal at its first instance and only in exceptional cases, the Referral Court should reject reference, more particularly, when the claims are manifestly and ex-facie non-arbitrable. Such scrutiny as held in ***NTPC Limited (supra)*** should be a limited scrutiny through the eye of the needle and is interwound with the duty of the referral court to protect the parties from being forced to arbitration, when the matter is demonstrably non-arbitrable.
12. In ***B and TAG*** (supra) relied on by the learned counsel for the respondents, the Hon'ble Apex Court after elaborately dealing with all the earlier judgments as regards the arbitrability of claim more particularly time barred claim and determination, the Hon'ble Apex Court held that whether any particular facts constitute a cause of action, has to be determined with reference to the facts of each case and with reference to the substance, rather than from the form of the action. It was further held that, if an infringement of right happens at a particular time, the whole cause of

action will be said to have been arisen then and there. In such a case, it is not open to a party to seek time and not to file an application for settlement of dispute of his right and allow the right to be extinguished by lapse of time.

13. In the case in hand, the contract was terminated on 27.04.2021 and the application for settlement of the dispute was filed on 28.06.2021 and on 30.06.2021 and the notice invoking arbitration was issued on 01.06.2021. Thus, when the right of the petitioners was alleged to be infringed, it raised the claim immediately inasmuch as the respondents during this period the State neither expressed its intention to terminate the contract nor did it terminated the contract for alleged failure on the part of the petitioners.
14. However, serious emphasis has been given by the learned counsel for the respondents upon the clauses 2.2, 2.6, 12.1 and 12.3 to contend that in view of such clause the claim is time barred, let this court dealt with such clauses.

In terms of clause 2.2, the petitioners were to implement the project on Build, Own, Operate and Transfer basis for a period of 40 years from the date of commercial operation. After expiry of 40 years, the project is to be reverted to the State free of cost, in good working condition.

Clause 2.6 prescribes that all clearances, as required from Central Government, in connection with the project implementation, shall be arranged by the petitioners' company itself and the State Government shall accord necessary clearance under its purview, within a reasonable period and that the State Government shall extend all need based assistance in obtaining such clearance.

Clause 12.1 mandates for financial closure within a period of 12 months from receipt of Techno Economic Clearance from Central Electricity

Authority, approval from Ministry of Environment and Forest and other statutory clearances. Under such clause, the GoA had reserved its right to terminate the contract, if financial closure is not achieved within the stipulated time, for reasons other than those, attributable to the Government of Arunachal Pradesh.

15. In the aforesaid backdrop, it is the argument of Mr. Ratan learned Additional Advocate General that the responsibility to get clearance was upon the petitioners' company and the financial closure was to be achieved within 12 months and therefore, on failure to achieve such milestone, the contract was terminated. According to learned counsel, the petitioners' company slept over the matter without raising any grievance as regards the action of the State and therefore, the termination date should not be treated to be the cause of action of the claim.
16. However, this court is not in acceptance of such contention raised by the learned Additional Advocate General. After scrutinizing the issue through the eye of the needle, this court has not found that the matter is demonstratively non-arbitrable for being time barred inasmuch as to come to such a conclusion a complete determination is to be made by this court that the respondent State has performed its part under Clause 2.6 and the non-grant of required approval as mandated under clause 12.1 is not attributable to the Government of Arunachal Pradesh and that the company has abandoned the project. In the considered opinion of this court, such determination shall require assertion of factual dispute more particularly that the State has performed its part and it is only the petitioner for whom the closure could not be made within 12 months period. This court cannot also be oblivious of the fact that contract was not terminated till the year 2021. Therefore such factual dispute cannot be done through the eye of needle.

17. This court cannot also be oblivious of the settled proposition of law that at referral stage, a prima-facie review is required to be taken to weed out manifestly and ex-facie nonexistent and invalid arbitration agreement and non arbitrable dispute.
18. As there is no dispute as regards the existence of the arbitration clause and also no dispute regarding privity of the contract and that the petitioners have demanded arbitration in terms of clause 13.1 of the MoA and the time prescribed under Clause 13.1 has been elapsed and no communication has been made regarding appointment of arbitrator, the present petition stands allowed by appointing Hon'ble Mr. Justice, (retired), Mr. HN Sarma, a former Justice of Gauhati High Court as arbitrator to adjudicate the disputes in question.
19. While parting with the record, it is made clear that the respondents shall be at liberty to raise the issue of arbitrability of the claim being barred by limitation before the arbitrator and in the event such claim is raised the arbitrator shall deal with the same as per law.
20. Registry to communicate a copy of this judgment and order to the learned Arbitrator. Parties to bear their own costs.

JUDGE

Comparing Assistant