

GAHC040009152023



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

Case No. : Arb.P./6/2023

Bhilwara Energy Limited and Anr.

A Company Duly Registered under the Companies Act, 1956 having its registered office at 40-41, Bhilwara Bhawan, Community Centre, New Friends Colony, New Delhi 110065 2: NJC Hydro Power Limited

VERSUS

The Chief Secretary (Power)
Govt. of Arunachal Pradesh.

Advocate for the Petitioner : Limi Bam

Advocate for the Respondent : GA (AP)

BEFORE
HONBLE MR. JUSTICE SUMAN SHYAM

ORDER

Date : 20-03-2024

Heard Mr. Anant Kannojiya, the learned counsel for the petitioner and Mr. S. Tapin, the learned counsel for the sole respondent.

2. The petitioner No.1 is a company registered under the Companies Act, 1956, having its registered office at New Friends Colony, New Delhi. The petitioner No.2 is also a registered company, a Special Purpose Vehicle (SPV), incorporated in terms of the MOA dated 28.05.2009 entered into by and in between the petitioner No.1 and the respondent, for setting up a Hydel Power Project in the State of Arunachal Pradesh. Both the petitioners have jointly filed this application under Sections 11(5) & (6) of the Arbitration and Conciliation Act, 1996, (herein after referred to as the Act of 1996) seeking an order from this Court for appointment of arbitrator so as to enter into a reference in respect of the disputes and differences arising by and between the parties within the ambit of Memorandum of Agreement (MOA) dated 28.05.2009.

3. The facts of the case, in a nutshell, as evident from the materials on record, are that the Petitioner No.1 herein had signed a Memorandum of Agreement (MOA) with the State Government of Arunachal Pradesh, represented by the Chief Secretary (Power) i.e. the sole respondent herein on 28.05.2009, for setting up of Hydel Power Projects Viz. Nyamjang Chhu Hydro Electric Power(HEP) Stage-I (98MW), Nyamjang Chhu HEP Stage-II(97MW) and Nyamjang Chhu HEP Stage-III(95MW).

4. After the signing of the MOA, a DPR had been prepared and clearance from all the statutory agencies including Environment Clearance (EC) to start the project was also obtained. It is the claim of the petitioners that they had not only deposited a sum of Rs. 25,46,80,000/- as upfront premium for setting up the 900MW power project subsequently reduced to 780MW but had also commenced the work of setting up the power project and in the process had invested more than Rs.200 Crores. However, due to certain environment related issues, a proceeding was instituted before the National Green Tribunal New Delhi, against the power project which had resulted into cancellation of the Environment Clearance (EC). Consequently, the power project also got scrapped.

5. According to the petitioner's counsel, since the power project had to be shelved due to reasons not attributable to the petitioner company nor on account of any default on its part, hence, as per Clause 15.4 of the MOA dated 28.05.2009, the respondent would be liable to refund the upfront amount besides payment of damages and compensation to the petitioners for breach of contract. However, the demand raised by the petitioners to that effect has not been acceded to by the respondent as a result of which, a dispute has arisen by and in between the parties, which requires resolution by the Arbitral Tribunal.

6. Mr. Anant Kannojiya, the learned counsel for the petitioner has also invited the attention of this Court to the Arbitration Clause in the form of Clause of 13.1 in the MOA dated 28.05.2009, as well as the Legal Notice dated 10.07.2020 issued to the sole respondent on behalf of petitioners demanding arbitration, so as to submit that despite receipt of the aforesaid notice, the respondent has not taken any step for appointment of arbitrator. It is also submitted by Mr. Kannojiya, the learned counsel for the petitioners, that in the petition itself, the petitioners have suggested the names of 4(four) former Judges of the Hon'ble Supreme Court of India, any of whom can be appointed as arbitrator. Therefore, the petitioners will be satisfied if any one of the former Judges of the Supreme Court, as suggested in the petition, is appointed as the sole Arbitrator in this case.

7. Responding to the above, Mr S. Tapin, the learned Senior Government Advocate has argued that his client would not have any objection to the name of Hon'ble Justice Madan B. Lokur (former Judge of the Supreme Court of India) as suggested by the petitioner, to act as an arbitrator in this case but according to Mr. S. Tapin, considering the quantum of the projected claim involved in this case, it should be a 3(three) member Arbitrator Tribunal. He, therefore, submits that the petitioners and the respondent should be allowed to nominate one arbitrator each, for constituting the 3 member Arbitral

Tribunal. Mr. S. Tapin, has also invited the attention of this Court to the rejoinder filed by the petitioners to submit that the petitioners have not opposed the proposal for constitution of a 3(three) member Arbitral Tribunal. The learned counsel for the respondent has, however, not denied that there is an arbitration agreement in the form of Clause 13.1 of the MOA dated 28.05.2009, and as such, the disputes and differences arising by and between the parties ought to be resolved by referring the same to the Arbitral Tribunal.

8. After hearing the submissions of the learned counsel for both the sides, what is apparent is that there is no controversy as regards existence of arbitrable dispute arising by and between the parties or as regards the existence of a valid arbitration agreement. The only dispute, if any, is pertaining to the composition of the Arbitral Tribunal. While the petitioner's counsel has submitted that his clients are insisting for an arbitral tribunal constituted by a sole arbitrator, the respondent is seeking a 3(three) member Arbitral Tribunal.

9. Clause 13.1 of the MOA contains the arbitration agreement which is reproduced herein below for ready reference:-

“13.1 In the event of any difference/dispute arising between the Parties, the same shall be resolved in accordance with the provisions of the Arbitration and Conciliation Act, 1996, unless the same has

not been resolved amicably by mutual consultations within 90(Ninety) days of the reference of dispute by either Party. The venue of the arbitration shall be Itanagar. The language of arbitration shall be English. The cost of arbitration shall be shared equally. In case of any litigation, the Gauhati High Court, Itanagar Permanent Bench shall have the sole jurisdiction."

There is no mention in Clause 13.1 as to the number of arbitrators constituting the Arbitral Tribunal.

10. Section 10 of the Act, 1996 deals with composition of Arbitral Tribunal. Section 10 is reproduced herein below for ready reference:-

"10. Number of arbitrators.-(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

11. From a plain reading of the aforesaid provision, it is clear that while the parties are free to determine the number of arbitrators that should constitute the Arbitral Tribunal, in case of the failure to arrive at a consensus in this regard, the arbitral tribunal will consist of a sole arbitrator. The aforesaid position also finds due reflection in the decision of the Hon'ble Supreme Court rendered in

the case of ***CitiBank, N.A versus TLC Marketing PLC and Another*** reported in ***(2008) 1 SSC 481*** relied upon by the petitioner's counsel.

12. It is no doubt correct that there is no specific stand of the petitioners in the rejoinder as regards the composition of the Arbitral Tribunal. However, the petitioners have not agreed to a 3(three) member Arbitral Tribunal. That apart, petitioner's counsel has also orally objected to the prayer for constituting a 3(three) member Arbitral Tribunal. Under the circumstances, this issue, in the opinion of this Court, would come within the sweep of Sections 10(2) of the Act of 1996. If that be so, there can be hardly any doubt about the fact that the arbitral tribunal in this case will have to be constituted by a sole arbitrator.

13. Since, both the parties are agreeable to Mr. Justice Madan B. Lokur (former Judge of Supreme Court of India) to act as the sole arbitrator, this Court, in exercise of powers conferred under Section 11(6) of the Act of 1996, hereby appoints Hon'ble Mr. Justice Madan B. Lokur to act as the sole arbitrator and enter into a reference in respect of the dispute in question.

14. Registry to transmit the records after obtaining the consent of the learned sole Arbitrator appointed in this case.

15. With the above observation, this arbitration petition stands disposed of.

16. Parties to bear their own cost.

JUDGE

Comparing Assistant