

GAHC010084362024



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

Case No. : I.A.(Civil)/1229/2024

M/S BADRI RAI AND COMPANY
STATION ROAD
P.O.- DULIAJAN- 786602
DISTRICT- DIBRUGARH
ASSAM (LEAD) REPRESENTED BY PRABHAKAR PRASAD SRIVASTAVA
AGE- 59 YEARS.

VERSUS

ASSAM PROJECT ON FOREST BIODIVERSITY CONVERSATION SOCIETY
(APFBCS) AND ANR.
PROJECT MANAGEMENT UNIT
3RD FLOOR
ARANYA BHAWAN PANJABARI
GUWAHATI-781037
ASSAM
REPRESENTED BY ITS DIRECTOR.

2:DIVISIONAL FOREST OFFICER
NAGAON DIVISION
NAGAON
OFFICE OF THE DIVISIONAL FOREST OFFICER
DEPARTMENT OF ENVIRONMENT AND FORESTS
ASSAM- 782001.

Advocate for : SWAMAGAT SHARMA
Advocate for : appearing for ASSAM PROJECT ON FOREST BIODIVERSITY
CONVERSATION SOCIETY (APFBCS) AND ANR.

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 15.05.2024

Heard Mr. P. Bhuttan, learned counsel for the applicant, Mr. B. Choudhury, learned counsel for opposite party no.1 and Mr. R.P. Sharma, learned counsel for opposite party no.2.

2. This Court by an order dated 22.04.2024 had proposed the name of a former Judge of this Court to be appointed as a sole Arbitrator to arbitrate the dispute between the applicant and the opposite parties and upon proposing of such name, notice issued on the learned proposed Arbitrator to make disclosure as per the requirement of sub-section (8) of Section 11 of the Arbitration and Conciliation Act, 1996 was made returnable. The applicant, who is the petitioner in the connected arbitration petition has prayed for modification of the said order dated 22.04.2024.

3. By referring to order dated 10.11.2023 passed in the connected Arbitration Petition no. 18/2023, it is submitted that the Hon'ble Arbitrator, as a Judge of this Court had heard the said Arbitration Petition no. 18/2023 on 10.11.2023 and had expressed an opinion with regard to the construction and interpretation of the clauses 20.2 and 20.3 of the contract agreement dated 04.05.2021.

4. In this regard, by referring to the order dated 08.04.2024, passed by the Supreme Court of India in the Petition(s) for Special Leave to Appeal (C) No(s). 27360 of 2023 he had referred to the objection to the Arbitrator nominated on the ground that he had previously acted as a Judge at the interim stage in the matter arising between the same parties pertaining to the same

arbitration and on the said ground the impugned order of the Gujarat High Court dated 10.11.2023 was set aside by the Supreme Court of India. By referring to the decision of the Delhi High Court dated 01.06.2023 in the proceedings of O.M.P. (COMM) 252/2018 & I.A. 13103/2022 in the case of *Man Industries (India) Ltd. Vs. Indian Oil Corporation Ltd.*, it was submitted that the Delhi High Court had taken the following view in paragraph 25 to 27, which is quoted below:

“25. In Lion Engineering Consultants (supra), the Supreme Court held that even without an amendment in the petition, a plea of lack of jurisdiction of the Arbitrator can be raised even though no such objection was raised under Section 16 of the Act.

26. In Hindustan Zinc Limited (HZL) (supra), the Court held that if there is an inherent lack of jurisdiction of the Arbitrator, the plea can be taken up any stage and also in collateral proceedings. Such plea can be taken even where the party has consented to the appointment of the Arbitrator.

27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being de jure ineligible to act as such is a plea of lack of jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same.”

5. Accordingly, it is submitted that although the appointment of the Hon’ble proposed Arbitrator is not objected to at this stage by both the parties, yet the arbitral award could be susceptible to be interfered with on the ground that the Arbitrator so appointed could be held to be a *de jure*, rendering him ineligible to arbitrate in dispute.

6. Per contra, the learned counsel for the opposite party no.1 has submitted that the leave sought to be taken by the applicant now can otherwise be raised in the manner as prescribed under Section 13(2) on the ground mentioned in sub-section (3) of Section 12 which permits an Arbitrator to be challenged if circumstances exists that give rise to justifiable doubts as to his

independence or in partiality.

7. It is noted from the order dated 08.04.2024 passed by the Supreme Court of India in the case of *JRE Infra Pvt. Ltd. Vs. Deendayal Port Authority*, *Manu/GJ/2136/2023* that having acted as a judge at the interim stage in the same arbitration proceeding had led to setting aside and interference with the order dated 10.11.2023 by which petition under Section 12 (5) of the Arbitration and Conciliation Act was rejected. The judgment of the Delhi High Court, in the case of *Man Industries India (Pvt.) Ltd. (supra)*, had interpreted the issue in light of the provisions of Section 34 of the Arbitration and Conciliation Act as well as in the provisions of Section 12(5) of the said Act to hold that even if the parties had consented for an appointment and/ or take no objection during the entire proceeding, yet such waiver would not come in the way to raise the issue of inherent lack of jurisdiction of an Arbitrator at any stage of the arbitration proceeding or even in a collateral proceeding.

8. Therefore, the objection raised by the leaned counsel for the opposite party no.1, the Court does not find any reason to not to modify the order and prevail upon the parties to arbitrate in the matter through the learned Arbitrator whose name was proposed by order dated 22.04.2024, only because of the fact that even at a subsequent stage the appointment can still be questioned.

9. Therefore, the Court is inclined to modify the order dated 22.04.2024 passed in the Arbitration Petition no. 18/2023 insofar as the name of the proposed Arbitrator is concerned. Accordingly, in respect of the name proposed in paragraph 23 of the order dated 22.04.2024 in Arbitration Petition no. 18/2023 to nominate and appoint Sri Achintya Malla Bujor Barua, Former Judge of this Court as sole Arbitrator would now be substituted by the proposed Arbitrator Justice Basu Deo Agarwal, Former Judge of this Court, resident of

Radha Nagar, Niti Path, VIP Road, Guwahati as a Sole Arbitrator to arbitrate the dispute between the applicant/ petitioner and the opposite party/ respondent.

10. This interlocutory application stands allowed.

11. The consequential order for issuance of notice shall be passed in the connected Arbitration Petition no. 18/2023.

JUDGE

Comparing Assistant