

Arb. P. No.02 of 2020

CHHABIL DASS AGARWAL

...PETITIONER

VERSUS

STATE OF SIKKIM AND ORS.

...RESPONDENTS

Date: **08.10.2020**

CORAM:

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE

Heard Mr. A. Moulik, learned Senior Counsel appearing for the petitioner and Mr. Sudesh Joshi, learned Additional Advocate General, Sikkim appearing for the respondents.

2. By this application under Section 11 of the Arbitration and Conciliation Act, 1996 the petitioner has prayed for appointment of an arbitrator.

3. It may be noted at the very outset that this application is not opposed by Mr. Joshi.

4. The petitioner was awarded a work order dated 16.02.2004 for a work which was subsequently renamed as "CONSTRUCTION OF 2X5MVA, 66/11 KV SUB/STATION WITH LILO FROM PHODONG 66KV S/S AND MEYONG-C-POWER HOUSE AT MANGAN".

5. A detailed narration of the developments that had taken place during all these years is not considered necessary for the purpose of this application. Suffice it is to say that a Contract Agreement was entered into by and between the parties on 24.02.2004. General Conditions of Contract governing the parties contain an arbitration clause at Clause 16. The same reads as follows: -

"Arbitration

In the event of any question, dispute or difference arising under these conditions or any special conditions of

contract, or in connection with the contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of an officer appointed to be the arbitrator by the Secretary. It will be no objection that the arbitrator is as Government Servant that he had to deal with the matters to which the contract relates or that in the course of his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the Secretary to appoint another arbitrator in place of the out going arbitrator in the matter aforesaid.

It is further a term of this contract that no person other than the person appointed by the Secretary as aforesaid should act as arbitrator, and that, if for any reason that is not possible, the matter is not to be referred to arbitration at all.

The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award. Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

Subject as aforesaid, the Arbitration Act, 1940, and the rules there under any statutory modification thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause. The venue of the arbitration shall be the place from the acceptance note issued or such other place as the arbitrator at desecration may determine.”

6. The clause refers to Arbitration Act, 1940. However, when the agreement was executed, Arbitration and Conciliation Act, 1996 had come into effect. It is also to be noted that the clause contains many mistakes. It demonstrates a very casual approach.

7. As disputes had arisen between the parties, a legal notice dated 22.02.2020 was issued on behalf of the petitioner requesting to appoint an independent arbitrator, preferably a retired High Court Judge, within a period of thirty days from the date of receipt of the notice for adjudication of the claims. However, no arbitrator was appointed.

8. Although the arbitration clause refers to sole arbitration of an officer appointed to be the arbitrator by the Secretary, it is to be noticed that Section 12(5) of the Arbitration and Conciliation Act, 1996, which came into force with effect from 23.10.2015, provides that 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. An employee is ineligible to be appointed as an arbitrator under the Seventh Schedule. However, proviso to Section 12(5) stipulates that parties may, subsequent to disputes having arisen between them,

waive the applicability of this sub-section by an express agreement in writing.

9. Having heard the learned Counsel for the parties and on being suggested by both Mr. Moulik and Mr. Joshi, I dispose of this petition by appointing Mr. B. C. Sharma, Former District & Sessions Judge, C/o Shri B. Sharma, Sr. Advocate, Church Road, Near NABARD Office, Gangtok – 737101 as the Arbitrator.

10. Registry will immediately communicate this order to the Arbitrator.

Chief Justice

pm/