

(2002) 05 GAU CK 0020

Gauhati High Court (Imphal Bench)

Case No: Arbitration Petition No. 23 of 2001

MWC Market Services
Pvt. Ltd. and Another

APPELLANT

Vs

State of Manipur and
Others

RESPONDENT

Date of Decision: May 24, 2002

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 13, 16

Citation: AIR 2003 Guw 25 : (2003) 1 ARBLR 454 : (2003) 2 GLT 308

Hon'ble Judges: N. Surjamani Singh, J

Bench: Single Bench

Advocate: A.K. Chopra and N. Dutt, N. Kotishwar, S. Sarma, I. Choudhury, G. Singh and A. Chopra, for the Appellant; H. Nabakumar Singh, General and Nimaichand Singh, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N. Surjamani Singh, J.

1. Petitioner No. 1, MWC Market Services Private Limited and another, in this application u/s 11(5) of the Arbitration and Conciliation Act. 1996, (hereinafter referred to as "the Act. 1996") sought for appointment of a sole Arbitrator on the basis of a related agreement dated 5-4-2001 by contending, inter alia, that the petitioner-company after a series of discussions with the respondent-authorities and obtaining due approval of the State Cabinet on 5-4-2001 entered into an agreement with the State Government of Manipur to install, commission, promote and market the sale of lottery tickets and operate in all respects the on-line Lottery on behalf of the State of Manipur as seen in the document marked as Annexure 3 to the petition, and after execution of the agreement dated 5-4-2001, the petitioner-company in all

earnest and to fulfil and commit the obligations under the agreement started all preparations for starting the launching of the One-line Computerized lottery of the State of Manipur. The petitioner-company already spent crores of rupees in the process, i.e. for the technology, hardware, software, and for establishing the distribution networks for the sale of lottery tickets and operating. Installing and commissioning of the entire networking system all over India. But, to the utter surprise and shock, the petitioner-company on 23-7-2001 received a Memorandum Notice dated 11-7-2001 for termination of the agreement dated 5-4-2001 issued by the Joint Director of Lotteries, Government of Manipur, respondent No. 3 herein as seen in the document marked Annexure 6 to the petition, and on receiving the said Memorandum/Notice dated 11-7-2001, the petitioner-company immediately sent an objection/representation on 27-7-2001 to respondents-2 and 3 stating their grievance in detail and requesting them to withdraw the said notice of termination which was not taken into consideration by the respondent-authorities, and having no other alternative, the petitioner-company immediately sent a notice on 13-10-2001 to the Government of Manipur stating therein that the petitioner-company is willing to invoke Clause XIX of the agreement dated 5-4-2001 for appointment of a sole Arbitrator as per Section 10(2) of the Act, 1996, and the petitioner-company intimated the respondents its offer to refer all the disputes, differences, questions. and interpretations to the arbitration of a sole Arbitrator, Mr. Justice P.N. Bhagwati, retired Chief Justice of India, and the said notice was duly received by the respondent-authorities. It is also the case of the petitioner-company that being aggrieved by the action of the respondent-authorities, they filed a writ petition, being W.P.(C) 7504/2001 (Imphal Bench) challenging the validity of the impugned termination order dated 11-7-2001, and while issuing notice upon the respondents making the same returnable by 20-11-2001, this Court made an ad interim order/measure to the effect that the State of Manipur would not appoint any third party as an On-line Selling Agent until further orders of the Court and the order of termination would be subject to the outcome of the writ petition, as seen in the document marked Annexure 12 of the writ petition. As the authority concerned failed to appoint Arbitrator in terms of the related clause XIX of the agreement, the petitioner-company filed the present Arbitration petition.

2. The case of the petitioner was resisted by the State-respondents by filing counter-affidavit contending, inter alia, that though the Government had entered into a Memorandum of Understanding (for short, "MOU") on 25-1-2001; in view of the office letter dated 8-2-2001 of the Ministry of Home Affairs, the impugned termination order was issued by the authority as the Ministry of Home Affairs raised some objections to the extent that some of the conditions of the Act, 1996, have not been envisaged in the proposed agreement and the agreement was not in conformity with the Lottery (Regulation) Act, 1998, ("the Act, 1998", for short), and from the Scheme it appears that lotteries are proposed to be organised and run by private agent and the State is only lending its name. This statement of the

respondents is controverted by the petitioner-company by highlighting the facts in their rejoinder-affidavit that placing of documents and submission of documents to the Ministry of Home Affairs were an internal procedure and what documents were placed and submitted was not in the knowledge of the petitioner company. Apart from that under the law, no prior formal approval or sanction was required to be taken by the State of Manipur from the Central Government for the purpose of entering into an agreement to organise on-line lotteries by the State of Manipur. It was also urged that in the letter of Ministry of Home Affairs dated 15-5-2001, the Ministry of Home Affairs talked and highlighted about some proposed agreement of which no date had been given, and, did not in fact speak about the legal, valid and binding agreement dated 5-4-2001, and such agreement which was signed on 5-4-2001 was never even sent to the Ministry of Home Affairs wherein all the required procedures and factors had been followed and complied with in accordance with the provisions of the Act. 1998.

3. Mr. N. Dutta, learned senior counsel, appearing for the petitioner-company, contended that in terms of the related clause XIX of the agreement dated 5-4-2001, all disputes, questions, differences or any interpretation arising out of or in connection with the said agreement, at the first instance, were to be mutually discussed and resolved by mutual agreement by the representatives of each party failing which they would then be referred to two Arbitrators who would be retired Judges of the Supreme Court of India and High Court. But the respondent-authorities failed to comply with and follow this clause of the agreement despite the petitioner-company approached them thus causing a great injustice and prejudice to the petitioner-company. It was also argued that the respondent-authorities have issued the impugned notice of termination dated 11-7-2001 and the order of termination dated 5-10-2001 with the sole purpose of illegally accommodating other interested and vested party without any justification, and the impugned notice is, therefore, arbitrary, unfair, unreasonable and capricious inasmuch as violative of the rights guaranteed to the petitioner under Articles 14 and 19 of the Constitution of India, Mr. Dutta, learned senior counsel, appearing for the petitioner-company, whose main thrust of argument was that since the agreement contained arbitration clause, it was the lawful duty of the parties that they ought to have discussed and arrived at an agreement before the matter/dispute was referred for arbitration, and if such discussion on mutual agreement failed then In that case the dispute was to be referred to two arbitrators, as mentioned above, and If such effort was resulted in failure, the petitioner-company would have no alternative but to approach the Chief Justice or his designated to appoint arbitrator(s) on the basis of the related agreement. Supporting his case, Mr. N. Dutta, learned senior counsel, has relied on the decisions of the Apex Court rendered in [Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., Nimet](#)

[Resources Inc. and Another Vs. Essar Steels Ltd.,](#) and contended that the Chief Justice or his designate has to make nomination of an arbitrator only if the period of 30 days is over which does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make appointment of arbitrator, the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see, and it would be appropriate to refer the matter to arbitration to secure the ends of justice and the only function of the Chief Justice or his designate u/s 11 of the Act, 1996 is to fill up the gap left by a party to the arbitration agreement and the Arbitral Tribunal should be constituted so as to enable it to commence the proceeding and the nomination of such Arbitrator should be made by a person occupying high judicial office.

4. At the hearing, Mr. H. Nabakumar Singh, learned Advocate General, Manipur, assisted by Mr. Kh. Nimaichand, learned Government Advocate, Manipur, appearing for the State-respondents, contended that as the related agreement was terminated under the related order dated 11-7-2001, such original agreement or contract became invalid and every part of it including the clause as to arbitration contained therein also became invalid, and that being the position, the petitioner-company has no locus standi to approach either the Chief Justice or his designate for appointing arbitrator. Supporting his submission, learned Advocate General has relied on a decision of the Supreme Court rendered in [Jaikishan Dass Mull Vs. Luchhimirain Kanoria and Co.,](#) and a decision of this Court rendered in [Bharat Hydro Power Corporation Ltd., Guwahati Vs. Assam State Electricity Board, Guwahati,](#) According to Mr. Nabakumar, learned Advocate General, as the original agreement dated 5-4-2001 is non est in view of the termination order dated 11-7-2001, all contracts, express or implied or any other arrangement relating to arbitration, etc. etc., stood terminated and, as such, the related arbitration clause cannot be restored for settlement of disputes, if any.

5. Upon hearing the learned counsel for the parties, and on perusal of the available materials on record, and also the related decisions of the Apex Court and this Court on the issue, I am of the view that this is a fit case for appointment of a sole Arbitrator for the following reasons :--

The related arbitration clause, i.e. Clause XIX of the agreement is relevant for better appreciation in the matter and, accordingly, the same is quoted hereinbelow :

"Clause XIX :

GOVERNING LAW AND ARBITRATION

19.1. This agreement is governed by the laws prevalent in India and any modification or amendment thereto.

19.2. All disputes, questions or differences or any interpretation thereof arising out of or in connection with this Agreement shall be at the first instance shall be mutually discussed and resolved by mutual agreement by representatives of each party failing which they shall then be referred to two arbitrators who shall be a retired Judges of the Supreme Court in India and High Court, each to be appointed by the State and Sole Selling agent in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any other enactment or statutory modification thereof for the time being in force. The place of Arbitration shall be Imphal and the language of the arbitration shall be the English language.

19.3. When any dispute occurs and when any dispute is under arbitration, except for the matters under dispute, the parties shall continue to exercise their remaining respective rights, and fulfil their remaining respective obligations under this agreement."

According to the State-respondents, the related agreement dated 5-4-2001 has been terminated under the impugned order dated 5-10-2001 after serving due notice dated 11-7-2001. At this stage, Section 16 of the Act, 1996, is relevant and, accordingly, the same is quoted below :

"16. Competence of arbitral tribunal to rule on its jurisdiction.--(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose.-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

In terms of Section 16 of the Act, 1996, the Arbitral Tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for this purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Emphasis is given at this stage to any objections with respect to the validity of the arbitration agreement, i.e. Clause XIX in the case in hand. In [Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.](#), the Apex Court held thus (at p. 2824 of AIR) :

".....Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motions. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act....."

According to me before issuing the impugned order of termination dated 5-10-2001 and the related notice dated 11-7-2001, the State-respondents concerned ought to have invoked Clause XIX of the related agreement dated 5-4-2001. The decision of the Apex Court rendered in [Jaikishan Dass Mull Vs. Luchhimirain Kanoria and Co.](#), cited by the learned Advocate General, Manipur does not support the case of the State-respondents inasmuch as the said case was pertaining to a contract which was invalid and the matter was within the purview of Section 22 of the Arbitration Act, 1940, and Section 10 of the Contract Act, and the case in hand is a case u/s 11 of the Act, 1996. In this regard, the Apex Court in [Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.](#), (supra), held thus :

".....A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that the 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject-matter of judicial scrutiny of a Court of law. Under the new law the grounds on which an award of an arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters.

Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection, it will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time-limit for making awards has been deleted. The existing provisions in the 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed."

6. In [Bharat Hydro Power Corporation Ltd., Guwahati Vs. Assam State Electricity Board, Guwahati](#), cited by the learned Advocate General, Manipur, in support of the case of the State-respondents, all the contracts, express or implied, or any other arrangements relating to the affairs of the Corporation stood terminated under the Acquisition Act and in that view of the matter, the disputed Memorandum of Understanding did not also survive, and the arbitration clause reflected in the MOU could not be restored for settlement of disputes. This case is quite different from the instant case as there was no acquisition of work by the State Government from the petitioner company under any related provisions of law though there was existence of the impugned termination order pertaining to the agreement dated 5-4-2001. Hence, the decision of this Court rendered in M/s. Bharat Hydro Power Corporation Ltd. (supra), does not apply to the present case.

7. It is well-settled that when the matter is placed before the Chief Justice or his nominee u/s 11 of the Act, 1996, it is imperative on the part of the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself, and at that stage, it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act, 1996, makes it crystal clear that the questions with regard to the qualification, independence and impartiality of the arbitrator, and in respect of the Jurisdiction of the arbitrator can be raised before the Arbitrator who would decide the same. In the instant case, the petitioner-company sent notice dated 13-10-2001 as in Annexure 11 to the petition to the concerned State-respondent for appointment of sole Arbitrator and highlighted all disputes and/or questions and/or differences to be referred to arbitration, which run as hereunder :

"(i) Whether the Memorandum/notice of Termination dated 11th July, 2001 and the order of termination dated 5th October, 2001 are legal and valid.

(ii) Whether Memorandum/Notice of termination and order of termination are bad in law and arbitrary.

- (iii) Whether the Memorandum/Notice of termination as well as consequential order of termination conforms to the provisions of Clause 14 of the agreement.
- (iv) Whether there is sufficient legal and valid ground for termination of the agreement.
- (v) Whether the Memorandum/Notice of termination as well as final order of termination dated 5th October, 2001 can be issued based upon the points raised by the Ministry of Home Affairs to the validity of the legal frame work of the agreement.
- (vi) Whether the points raised by the Ministry of Home Affairs is covered in the agreement dated 5-4-2001.
- (vii) Whether the points raised by MHA is covered in Clauses 4, 6, 3.3 and Schedule 1A7 of the agreement as stated by the Agent.
- (viii) Whether the State of Manipur, at this stage, can in fact and in law resile from its clear and unequivocal promise made to the Agent in its agreement dated 5-4-2001 as well as in course of all negotiations made between the State of Manipur and the Sole Selling Agent leading to the aforesaid agreement dated 5-4-2001, more so when the Sole Selling Agent has in fact acted upon the said clear and unequivocal promise to its own prejudice and has consequently changed its own position by investing crores of rupees pursuant to the said promise?
- (ix) Whether the notice of termination dated 11-7-2001 and the consequential order of termination dated 5-10-2001 are in violation of the principles of natural justice?
- (x) Whether the Memorandum/Notice as well as final order of termination are, therefore, liable to be quashed.
- (xi) Whether the parties including the State of Manipur and the Sole Selling Agent are obliged to continue with the agreement.
- (xii) Whether save and except the disputes under arbitration and those matters connected thereto all other rights obligations between the parties have to continue.
- (xiii) Any other issues dispute which may be referred to at the time of Arbitration."

8. At this stage, it would not be appropriate for me to entertain any contentious issue between the parties, as discussed above, and decide the same as the said questions and issues can be decided and determined by the Arbitrator only. I made this observation keeping in view the above settled principles of law laid down by the Apex Court. In [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.](#), the Apex Court held thus (Paras 18 and 19 of AIR) :

There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any

controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

As we see it, the only function of the Chief Justice or his designate u/s 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated."

9. It is highly astounding so far the arguments advanced by the learned Advocate General, Manipur, are concerned, who has all along been resisting appointment of an arbitrator in the matter despite existence of a judicial order dated 14-3-2001 passed by this Court in Writ Petition (Civil) No. 301/ 2002. In the said writ petition, the State-respondents are also parties, and the State-respondents were quite aware of the existence of the said order dated 14-3-2002. For just determination of the real points in controversy between the parties. It is necessary at this stage to know the relevant observations made by this Court in the said order dated 14-3-2002 and, accordingly, the relevant observations are quoted hereinbelow:

"..... Now, at this juncture the present writ petition being W.P. (C) No. 301 of 2002 has been filed. As noted above, an interim order has also been sought for in this petition for not proceeding with the appointment of Arbitrator(s) and also subsequent arbitration proceedings by any arbitrator(s) if appointed.

After hearing the learned counsel on both sides at length, Mr. S. Pal, learned senior counsel for the petitioner, has suggested that all the three writ petitions, i.e. WP(C) Nos. 1780/2001, 1975/2001 and 301/2002 may be heard and decided jointly and in the meantime the Arbitration Petition No. 6 of 2001 may be continued and any Award that may be made by the Arbitrator may not be published without the leave

of the Court and also that the award should be subject to the result of any order that may be passed in the aforesaid writ petitions and without prejudice to any rights and contentions of all the parties in the aforesaid writ petitions. This suggestion made by Mr. S. Pal, learned senior counsel, has also been agreed to by Mr. N. Dutta, learned senior counsel for respondent No. 3.

Mr. Kh. Nimalchand Singh, learned Addl. Government Advocate, submits that this order may not affect the executive power to be exercised by the Chief Justice or person designated at the time of exercising the power u/s 11 of the Arbitration and Conciliation Act, 1996.

As suggested by the learned counsel for the petitioner and as agreed to by the learned counsel of the respondent No. 3 and also after hearing the learned Government Advocate for respondent No. 1, in the interim and until further orders, it is ordered that if any arbitrator be appointed and if any award be made by the Arbitrator, no action may be taken by any party for execution or enforcement of the same without the leave of this Court. This order is passed without any prejudice to any right or contentions of all the parties in the aforesaid writ petitions. Further, it is also clarified that this order will not in any way influence the Chief Justice or his designate in exercise of his power u/s 11 of the Arbitration and Conciliation Act, 1996".

10. Be that as it may, this Court need not highlight more in the matter as the above-quoted order dated 14-3-2002 of this Court is a speaking one and apart from that suffice is made for making the following further orders :--

It is an admitted fact that as many as two retired Chief Justices of Supreme Court of India and two retired Judges of the Supreme Court, of India consented for their appointment as Presiding Arbitrator in the instant case. Particulars and Identity of those retired Chief Justices and retired Judges are given below:

(1) Justice R. S. Pathak,
Hony. Master of the Bench, Gray's Inn (London)
Formerly Chief Justice of India
Formerly Judge, International Court of Justice (The Hague) Member, Permanent Court of Arbitration
(The Hague)

(2) Justice Ranganath Misra
Member of Parliament (RS)
AB-89, Shahjahan Road
New Delhi-110 011

(3) Dr. K. N. Saikia
Former Judge, Supreme Court of India
Former Chief Justice, Gauhati High Court

C-99790, Vasaht Kunj,
New Delhi-110 070

or

Dr. S. K. Bhuayan Road
Dighalipukhuri East
Guwahati-781001

(4) Justice Kuldip Singh
House No. 88, Sector 10-A
Chandigarh-160010

After proper application of my mind in the matter, I do hereby appoint Justice Kuldip Singh (Retd.) as the sole Arbitrator who shall enter upon the references within 30 days from the date of receipt of a copy of this Judgment and order from the Registry of this office and/or a certified copy thereof from the end of any of the parties whichever is earlier, and the Sole Arbitrator would decide the disputes and differences between the parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996. It is made clear the honorarium/remuneration of the required fee of the Sole Arbitrator shall be borne by both the parties in equal share.

11. With the aforesaid observations and discussions, this Arbitration petition is allowed and finally disposed. Registry of this office is directed to send a copy of this judgment and order to the above-named Arbitrator Justice Kuldip Singh (Retd.) immediately.