



**THE HIGH COURT OF SIKKIM AT GANGTOK**  
(Civil Appellate Jurisdiction)

DATED : 15.07.2013

**CORAM**

**HON'BLE THE CHIEF JUSTICE  
MR. JUSTICE PIUS C. KURIAKOSE**

Arb. A. No. 1 of 2013

1. Union of India,  
Through Engineer in Chief,  
Military Engineering Service,  
Army Headquarter,  
Kashmir House, DHQ,  
P.O. New Delhi – 110 011.
2. Chief Engineer,  
Military Engineering Service,  
Siliguri Zone,  
Sevoke Road,  
Salugara – Siliguri – 734 318.

..... **Appellants.**

- versus -

Tirtharam Oberoi (since deceased)  
S/o Lt. Karamchand Oberoi,  
substituted by :

- (a) Ashok Oberoi,
- (b) Ashwin Oberoi,
- (c) Anil Oberoi,
- (d) Arun Oberoi

S/o Lt. Tirtharam Oberoi,  
R/o Oberoi Building,  
M.G. Marg, Gangtok.

..... **Respondents.**



For Appellants : M/s. Karma Thinlay, Sr. Advocate with  
Thinlay Dorjee Bhutia and D. K. Siwakoti,  
Advocates.

For Respondents : Mr. B. K. Gupta, Advocate.

## **J U D G M E N T ( O R A L )**

***Pius, CJ***

The Union of India and the Chief Engineer, Military Engineering Service, Siliguri Zone, Sevoke Road, Salugara, Siliguri have preferred this appeal challenging a common order passed by the District Judge, East and North Sikkim in Title Suit (Arbn.) No.03/2004, allowing a petition under Section 30 of the Indian Arbitration Act, 1940 (in short, the Act) filed by the respondent, the contractor for setting aside the award and dismissing a petition under Section 14 of the Act filed by the appellants the principals praying that the Award of the Arbitrator dated 29.12.2001 be made a rule of the Court.

2. On reading through the impugned order, it is seen that even though several grounds were taken by the respondent/contractor against the award of the Arbitrator which was substantially against them, the Id. District Judge in the impugned order set aside the award and remitted the matter back to the competent authority to appoint Arbitrator in terms of the Arbitration Clause applicable in the



case on the reason that the Arbitrator exceeded the limits of the reference given to him by the Court. At paragraph 29 of the impugned order, the Id. District Judge has quoted the reference order dated 09.11.1995 and I re-quote the same as follows: -

“..... I accordingly direct the Engineer-in-chief, Army Head Quarters, Kashmir House, New Delhi to appoint one Arbitrator in accordance with the Arbitration Clause contained in the Contract Agreement within two months from the date of receipt of this order and refer to him the disputes raised in paragraphs 34 and 38 of this amended plaint.”

The Court below noticed that the Arbitrator arbitrated not only on the disputes raised in paragraphs 34 and 38 of the amended plaint as directed but also on certain claims/counter-claims raised by the appellant/Central Government capitalising or taking advantage under the cover of the words in the reference order “in accordance with the Arbitration Clause contained in the Contract Agreement”. According to the Id. District Judge, the words “in accordance with the Arbitration Clause contained in the Contract Agreement” should have been read in conjunction with the qualifying sentence which followed thereafter and found that it was the disputes raised by the petitioner in paragraphs 34 and 38 of the amended plaint which alone were to be referred. In that view of the matter, under the impugned order, the Id. District Judge concluded that the Arbitrator acted beyond the terms of reference contained in the order of the Court dated 09.11.1995 and thus passed an award without jurisdiction. Resultantly, the award was



set aside and the matter was referred back to the appointing authority for appointment of a fresh Arbitrator so that the arbitration will be confined to the disputes contained in paragraphs 34 and 38 of the amended plaint.

**3.** In this Memorandum of Appeal, various grounds are raised challenging the impugned award and I have heard Shri Karma Thinlay, learned Sr. Advocate-cum-Senior Central Govt. Counsel for the appellants and Shri B.K. Gupta, learned counsel for the respondents in detail.

**4.** Learned senior counsel for the appellants would submit that the respondents on entering appearance before the Arbitrator and on noticing the various claims, which had been raised by the appellants before the Arbitrator, filed an interlocutory application on 10.05.2001, wherein he contended that six number of claims which the appellant-Union of India raised before the competent authority and the Arbitrator cannot be adjudicated by the Arbitrator as they are outside the scope of the reference given by the Court to the Arbitrator in its order dated 09.11.1995 and he prayed that the issue as to whether the Arbitrator is entitled to adjudicate on the claims raised by the Government which will be outside the jurisdiction of the Arbitrator be raised as a preliminary issue. Mr. Karma Thinlay submitted that



the Arbitrator vide his order dated 01.06.2001 passed a detailed order on that application deciding that he had the jurisdiction to go into the claims raised by the appellants also. According to the learned senior counsel, thereafter (though the filing of the application was professed to be without prejudice to the contention of the contractor) i.e. after the verdict was given by the Arbitrator, the contractor participated in the proceedings of the Arbitrator and only when he finds that the award has gone against him as he chosen to challenge the award before the Court. This vital aspect of the matter was brought to the notice of the Id. District Judge, who unfortunately did not pay serious attention to the same. In the teeth of the above order passed by the Arbitrator deciding on his own jurisdiction to adjudicate on the claims of the principals also, it was not proper on the part of the Court below to set aside the award/order solely on the ground that the Arbitrator exceeded his jurisdiction.

**5.** Drawing my attention to the Contract Agreement, it was submitted by Mr. Karma Thinlay that under clause 5 thereof the General Conditions of Contracts IAFW-2249 was to be read as part of the Contract Agreement. He would then draw my attention to the above General Conditions of Contracts and submit that the very first part of clause 70 which is the Arbitration Clause in those General Conditions of Contracts provides that all disputes between the parties



and not disputes raised by one party alone should be referred to arbitration. Mr. Karma Thinlay would submit that if all the disputes/claims are not referred, there will not be any full and final settlement of the disputes between the parties of the contract, which is the objective sought to be achieved by the arbitration proceedings as in any other form of Alternative Disputes Resolution.

6. Mr. Karma Thinlay would fortify his submission by a number of judicial precedents. Referring to the judgment of the Supreme Court in ***D.D. Sharma vs. Union of India : (2004) 5 SCC 325***, Mr. Karma Thinlay submitted that Section 30 of the Act which is applicable in the present case as providing for cancelling of award is restrictive in operation. No condition contained under Section 30 has been satisfied in the present case. Nobody could legitimately argue that the reasons assigned by the Arbitrator in support of his award are perverse or that award is passed on a wrong exposition of law. The view taken by the Arbitrator regarding his own jurisdiction which he is competent to decide is quite plausible and hence the Id. District Judge is not at all justified in interfering with the award. He would rely on paragraph 34 of the judgment and argue that the Arbitrator was justified in relying on the Agreement of Contract also apart from the order of reference to understand the scope of his own jurisdiction.



7. Mr. Karma Thinlay referred to the judgment of the Supreme Court in ***Paradip Port Trust and others vs. Unique Builders : (2001) 2 SCC 680*** and submit that as in the present case, in that case also the arbitration clause contained in the Agreement of Contract provided for reference of all disputes and claims between the parties and the Supreme Court justified the action of the trial Court and the Arbitrator in relying on the terms of the Contract Agreement for understanding the scope of the proceedings for an arbitration.

8. Referring to the judgment of the Supreme Court in ***Madhya Pradesh Housing Board vs. Progressive Writers and Publishers : (2009) 5 SCC 678***, Mr. Karma Thinlay submitted that in that case the Supreme Court had approved the framing of an additional issue by an Arbitrator based on the pleadings raised before him by the parties. Mr. Karma Thinlay referred to the judgment of the Supreme Court in ***Punjab State and Others vs. Dina Nath*** and connected case reported in ***(2007) 5 SCC 28*** and submitted that the Supreme Court has ruled that when the work order/agreement of contract provides for referring any dispute or all disputes preferred by the parties to an arbitration, then the Arbitrator will be justified in settling all disputes between the parties to the contract.



**9.** The submissions of Mr. Karma Thinlay were strongly resisted by Mr. B.K. Gupta, learned counsel for the respondents. Mr. Gupta submitted that the appellant did not raise any claims or counter claims at all before the District Court though in paragraphs 34 and 38 the respondents had raised specific claims against the appellants. Even though the appellants had filed a very lengthy written statement, they had not chosen to touch the merits of the claims of the respondents raised by them in paragraphs 34 and 38. The only contention which was raised by the appellants was that the application for reference submitted by the respondents was premature. Interestingly, there was a further contention that there was no dispute between the parties. Having contended before the District Court that there were no disputes between the parties, it is idle for the appellants to contend now that they have claims against the respondent and those claims ought to be considered by the arbitrator.

**10.** Drawing my attention specifically to the paragraph 36 (a), (c), (e) and (f), Mr. Gupta submitted that the appellants had no such allegations against the respondents before the Court. Referring to clause (f) of paragraph 36, Mr. Gupta submitted that the respondents/contractor was not given opportunity to cross-examine the examiner who investigated into the questioned documents and





submitted a report which appears to be against the contractor. Mr. Gupta submitted that the contractor was not even supplied with a copy of the so called investigation report. According to Mr. Gupta, the Court below was perfectly justified in interfering with the award which was clearly without jurisdiction.

**11.** I have given my anxious consideration to the rival submissions addressed at the bar. I have read through the impugned order carefully and I have gone through the materials which were placed on record by the parties. The impugned order has been passed by the Court below invoking its power under Section 30 of the Act. The above Section contemplates certain conditions subject to the existence of which alone the award passed by the Arbitrator can be set aside. The Section 30 can be conveniently quoted as follows:

**“ 30. Grounds for setting aside award. –** An award shall not be set aside except on one or more of the following grounds, namely,-

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
- (c) that an award has been improperly procured or is otherwise invalid.”

**12.** It is not at all difficult to find that Section 30 (a) or 30 (b) are not applicable in the present case. Coming to the Section 30 (c)



also it is not possible to say that the award was procured by the appellants improperly as the award was passed by the Arbitrator pursuant to a proceeding initiated on the basis of a reference order passed by the competent Court and in which both the contracting parties participated. The only ground on which the award in this case could be set aside is the ground under the second limb of Section 30 (c) that the award is "otherwise invalid". If the award has been passed by the Arbitrator in excess of the jurisdiction conferred on it by the original reference order pursuant to which the Tribunal was constituted then the award will certainly be invalid. Therefore, the question to be considered is whether the award in question was passed in excess of jurisdiction or whether the award is invalid due to any other reason.

**13.** As already noticed, under the order of reference passed on 09.11.1995, the District Court directed the appointing authority, namely the Engineer-in-Chief, Army Headquarters, Kashmir House, New Delhi to appoint an Arbitrator in accordance with the Arbitration Clause contained in the Contract Agreement within a stipulated period and refer to him the disputes raised in paragraphs 34 and 38 of the amended plaint. The direction was to appoint an Arbitrator in accordance with the Arbitration Clause. As already noticed the General Conditions of Contracts formed part of the Agreement and in



that way the appointment of Arbitrator in accordance with Arbitration Clause would ordinarily take in reference to him of all disputes which existed between the parties. In other words, adjudication of claims and counter claims of the principal also. But then the reference order passed in the present case was subject to a further clarification that the appointing authority after appointing the Arbitrator need reference to him only the disputes raised in paragraphs 34 and 38 of the amended plaint. This is the logic and reason for the argument that Court referred only the disputes and claims raised by the contractor in paragraphs 34 and 38 of his plaint. The above logic and reason is somewhat strong when we find that in the detailed written statement as filed by the appellant they had not raised any counter-claims. But then the very purpose of resorting to arbitration ought to be settlement of disputes between the contractor and the principal and having regard to the ratio emerging from some of the decisions cited before me by the learned senior counsel for the appellants, it will have to be found that the purpose of the arbitration was settlement of all disputes which actually existed between the parties. It is true that when pending disputes are referred to an Arbitral Tribunal which may consist of a single Arbitrator or a team of Arbitrators, then the above Tribunal becomes a substitute for the regular Court and the Tribunal invites pleadings from the parties.



**14.** In the instant case when pleadings were invited, the respondents reiterated their claims which they have raised through the paragraphs 34 and 38 of the original plaint. The appellants who got an opportunity raised certain fresh claims which they had not raised before the Court in the first instance. Naturally controversy arose before the Arbitrator as to whether the proceedings can relate to the claims raised by the appellants. This controversy was raised with all seriousness and specificity. He filed a petition, one of the prayers was that the question as to whether the Arbitrator has the power to adjudicate the claims raised by the appellants, be considered as a preliminary issue. I find that the above petition was decided by the Arbitral Tribunal authoring a reasoned order in favour of the appellant. Though the filing of the application for raising of preliminary issue was without prejudice to the contention of the respondents regarding the jurisdiction of the Tribunal, in my view the subsequent participation by the respondents in the proceedings before the Arbitral Tribunal in which the respondents and the appellants had adduced evidence in support of their raised claims will show that it is idle for the respondents to contend that the Arbitral Tribunal should not have adjudicated in the claims of the appellants. The infirmity noticed by the Court below about the impugned award is that the Arbitral Tribunal adjudicated into the claims of the respondents which



according to the Court was beyond the terms of the reference. According to me, the above infirmity is no infirmity. But I find force in the submission of Mr. Gupta that principles of natural justice were violated by the Arbitrator at least in the matter of referring certain documents placed on record in the case for forensic inspection and relying on the report submitted by the investigator without giving an opportunity to the respondents to challenge the investigator who filed the report which was adverse to the respondents.

**15.** I feel that the entire issue with regard to the merits of the claims raised by the contractor and all the counter-claims raised by the appellants should be re-adjudicated and settled afresh by the Arbitral Tribunal. Sufficient opportunity is to be afforded to both the sides for examining and cross-examining any relevant witness. In particular, opportunity should be afforded to the respondents for citing and cross-examining the author of the investigation report in which findings have been entered that the respondents have forged certain documents.

**16.** The result of the above discussion is that the appeal succeeds. The impugned judgment is set aside and while sustaining the order of remit passed by the Court below in respect of the award dated 29.12.2001 passed by the Arbitrator, it is ordered that a fresh



Arbitrator will be appointed by the appointing authority as per the provisions of the Contract Agreement read with Condition 70 of the IAFW-2249, Military Engineer Services (General Conditions of Contracts) and the Arbitrator so appointed shall adjudicate and settle not only the disputes and claims referred to by the District Court in its order dated 09.11.1995 but also the claims raised by the appellants before the appointing authority and any statement filed by them before the Arbitrator. Opportunity for adduction of evidence, examination and cross-examination of witnesses shall be granted to both the sides as observed herein before. The Arbitrator so appointed shall expedite matters and pass the award without undue delay.

Sd/-

**( Pius C. Kuriakose )**  
**Chief Justice**  
**15.07.2013**