

**THE HIGH COURT OF TRIPURA
A G A R T A L A**

CRP 51 OF 2008

Tripura State Electricity Corporation Ltd.,
Represented by the Chairman-cum-Managing Director,
Tripura State Electricity Corporation Ltd.,
Corporate Office, Bidyut Bhavan,
Banamalipur, P.O. Agartala,
P.S. East Agartala, District- West Tripura.

..... **Petitioner.**

- V e r s u s -

Sri Jiban Kr. Saha,
Son of Late Jatindra Ch. Saha,
Sanjit Villa, Jagannathbari Road,
Palace Compound, P.O. Agartala,
P.S. West Agartala, District- West Tripura.

..... **Respondent.**

**BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA**

For the petitioner : Mr. N. Majumder, Advocate.

For the respondent : Mr. S. Deb, Sr. Advocate,
Mr. P. Dutta, Advocate.

Date of hearing and
delivery of judgment
and order. : 31.07.2014.

Whether fit for reporting : **YES.**

JUDGMENT & ORDER (ORAL)

This revision petition filed under Article 227 of the Constitution of India is directed against the order dated 07-05-2008 passed by the learned Civil Judge (Senior Division), Court No.1, West Tripura, Agartala in case No. T.S.(Arbitration) 11 of 2004 whereby the award of the Arbitrator has been made rule of

the Court in terms of the Arbitration Act, 1940 (hereinafter referred to as the Act of 1940).

2. The main grievance of the petitioner is that the entire proceedings under the Act of 1940 are wholly without jurisdiction because in the mean time, the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) had come into force and, therefore, the award of the Arbitrator as well as the impugned order making the award a rule of the Court be set aside.

3. The petitioner is the Tripura State Electricity Corporation Ltd. (TSECL). It is an undertaking of the Government of Tripura. This Government undertaking is expected not to behave like a cantankerous litigant. A Government organization must act fairly and responsibly and should not raise objections only for the sake of raising objections.

4. As far as the facts of this case are concerned, it is not disputed that an agreement was entered into between the petitioner Corporation and the contractor Sri Jiban Kr. Saha. As per the terms of the contract, any disputes arising between the parties were to be referred to Arbitrator. The contract was entered into between the parties on 02-11-1993. Disputes arose between the parties and the respondent Contractor raised claims before the Corporation. When his claims were not accepted, he filed an application on 22-07-1996 under sections 8 and 20 of the Act of 1940 praying that an Arbitrator be appointed to decide the disputes between the parties. In the mean time, on 16-08-1996 the Act of

1996 came into force. Section 85 of the Act of 1996 which contains the repealing and savings provisions reads as follows:-

“85. Repeal and savings.—(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,—

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”

5. It is the contention of Mr. Nepal Majumder, learned counsel for the petitioner, that in terms of section 85 of the Act of 1996, the Act of 1940 was repealed w.e.f. 16-08-1996 and, therefore, from that day onwards the Act of 1940 was no longer in force and an Arbitrator could have been appointed only by Chief Justice in terms of section 11 of the Act of 1996.

6. At this stage, it would be pertinent to mention that before the Civil Judge (Senior Division), Court No.1, West Tripura, Agartala, the petitioner TSECL raised no such objection with regard to jurisdiction. It did not raise any objection that an Arbitrator

could be appointed only under section 11 of the Act of 1996 and not under the old Act. Not only that after the Arbitrator was appointed, I find from the record that on a large number of occasions applications were filed for appointment of new Arbitrator because the Arbitrator initially appointed had for one reason or the other not completed the arbitration proceedings and withdrawn from the same. In none of these proceedings was any objection raised by the Electricity Corporation that the Court had no jurisdiction to appoint a new Arbitrator in place of the old one.

7. Finally, Sri M.K. Sen was appointed as Arbitrator and he delivered his award on 02-02-2007. Thereafter, the award was filed in Court with notice to the TSECL and the award was made rule of the Court vide order dated 07-05-2008. In this order, it is stated that though the TSECL was served and even the Arbitrator had sent copy of the award to the TSECL, the Corporation did not choose to file any objections to the award of the Arbitrator. Thereafter, the award was made rule of the Court on 07-05-2008. It is only thereafter that this petition under Article 227 has been filed. Even in this petition, there is no objection with regard to the jurisdiction but this has only been orally urged by Sri Nepal Majumder at the time of arguments of the case. The question is can a public sector undertaking be permitted to raise such an objection at this belated stage.

8. It would also not be out of place to mention that the savings clause of section 85 of the Act of 1996 clearly states that

the provisions of the old Act would continue to apply in case of arbitral proceedings which had commenced before the coming into force of the Act of 1996. In the present case, the application under section 8 read with section 20 was filed prior to 16-08-1996, i.e. before the new Act had come into force and, therefore, the arbitral proceedings had commenced prior to that stage. Even assuming for the sake of argument that the arbitral proceedings commenced only after the Arbitrator took cognizance of the matter, then also it is not a case of total lack of jurisdiction.

9. Under section 11 of the new Act, the Chief Justice is to appoint an Arbitrator only when there is disagreement between the parties. Nothing in the new Act prohibits the Arbitrators from appointing an Arbitrator by consent. Even under the new Act if a civil suit is filed, then in terms of section 8 of the Act of 1996 if there is an arbitration clause, the Court can refer the case to arbitration in terms of the arbitration clause. Therefore, this is not a case of total lack of jurisdiction because in any event the dispute had to be decided by an Arbitrator.

10. It is well settled law that when there is no inherent lack of jurisdiction, then the objection as to jurisdiction can be waived in terms of section 21 of the Code of Civil Procedure. An objection as to jurisdiction must be taken at the first opportunity. A party cannot be allowed to approbate and reprobate. In the present case, not only was the objection never taken but in fact, the present petitioner submitted to the jurisdiction of the Arbitrator and

acquiesced to his jurisdiction by filing a counter claim and claiming more than Rs.8,00,000/- as in the counter claim. Having invoked the jurisdiction of the Arbitrator by making a counter claim, it is indeed shocking that the Corporation can now turn around and have the temerity to argue that the award is without jurisdiction.

11. Therefore, I find no merit in this petition which is accordingly dismissed with costs assessed at Rs.10,000/-. The order of the learned Court below dated 07-05-2008 upholding the award of the Arbitrator and awarding interest @ 9% per annum from the date of award till payment thereof is upheld.

12. The petition is disposed of in the aforesaid terms.

13. Send down the lower court records forthwith.

CHIEF JUSTICE