

# THE HIGH COURT OF MEGHALAYA

## **ARB.P No. 4 of 2013** **(Old No. Arb.P. 12 of 2012)**

Shri Rubu Hangu, Proprietor of M/S Noomply & Construction, Naharlagun (Near Police Garage), P.O. Naharlagan, Dist – Papumpare, Arunachal Pradesh, Pin – 791110

**...Petitioner**

### **-VERSUS-**

1. North Eastern Electrical Power Corporation Ltd, (A Govt. of India Enterprise) represented by its Chairman – cum – Managing Director, NEEPCO Ltd, Brookland Compound, Lower New Colony, Shillong -3.
2. The Executive Director – Projects (Hydro), NEEPCO Bhawan, NEEPCO Ltd., R.G.Boruah Road, Sundarpur, Guwahati - 781005.
3. The Head of Project, KPC, Kameng H.E.Project, Kimi, Arunachal Pradesh.
4. The Engineer-in-Charge, NEEPCO Ltd., Kameng H.E. Project, West Kaming, Khupi.

**....Respondents**

Mr. S.Sen, Advocate, present for the petitioner.

Mr.KP Sarma, Senior Advocate, assisted by Mr. H.Das, Advocate, present for the respondents.

Date of hearing 25<sup>th</sup> February, 2014

Date of Judgment and Order 25<sup>th</sup> February, 2014.

## **JUDGMENT AND ORDER**

**HON'BLE PRAFULLA. C.PANT, CHIEF JUSTICE**

This arbitration petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 has been received from the Gauhati High Court

under Section 28 I (2) of the North Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012.

2. It is relevant to mention here that in the agreement executed between the parties, contains Clause 54 which reads as under:

**“Clause No.54: JURISDICTION**

*The court situated at the place where the headquarter of the Corporation is situated viz. Shillong will have jurisdiction to entertain civil suits pertaining to the contract”.*

3. Probably for the above reason, this petition appears to have been transferred by Hon’ble Chief Justice, Gauhati High Court, to this court.
4. Heard learned counsel for the parties and perused the papers in record.
5. Briefly stated, the petitioner entered into an agreement with the respondent No.1 i.e. North Eastern Electrical Power Corporation Ltd (for short NEEPCO), Shillong, regarding construction of work of “Formation and Cutting of Approach Road from Buragaon towards Tenga Dam site from Ch. 00.00 km to Ch. 6.00 starting from Buragaon (including Jungle clearance, uprooting of trees and preparation of Sub-Grade, consolidation etc) in Arunachal Pradesh. The work was to be completed within six months w.e.f. 29-6-2004 i.e. date of agreement, but completed on 10-01-2009. The dispute relates to certain claims made by the petitioner after completion of work, and final payment after 3<sup>rd</sup> revision, which were rejected by the Officers of NEEPCO.
6. Learned counsel for the petitioner submitted that due to the increase in the volume of work under contract and delayed payment, the petitioner has

sought appointment of arbitrator in terms of Clause 66 of the agreement.

Clause 66 of the agreement reads as under:

**“Clause No.66 : ARBITRATION:**

- 66.1 a) *The agreement authority for this contract is the North Eastern Electric Power Corporation Limited and is represented by Engineer-in-Charge, as far as this contract is concerned. The Engineer-in-Charge, is represented at site of work by the Managers, Deputy Managers, Assistant Managers, Assistant Engineers, Junior Engineers and other subordinate staff. These officers at site are delegated with certain powers regarding execution, measurement and payment of works. The commitments made by these officers at site and the Engineer-in-Charge are based on interpretation of agreement made by them. It may sometimes happen that the Corporation/Engineer-in-Charge does not agree with the views of its/his subordinate officers and may have an entirely different view as far as the interpretation of a clause in this agreement is concerned. In such cases, the Corporation/Engineer-in-Charge, shall have the full right to revoke the decisions made by each/his subordinate officers and direct adjustments in payments based on the final decisions of Corporation/Engineer-in-Charge, such decisions of the Corporation/Engineer-in-Charge, shall be communicated to the contractor under the title “Decision revoked by Engineer-in-Charge/Corporation” and shall be binding on the contractor.*
- b) *Subject to the above stipulations, if the contractor considers any record or ruling of the Corporation/Engineer-in-Charge, or its/his subordinates so authorized in respect of any of the provisions of this contract to be not in accordance with provisions of this agreement or considers any work demanded of him by the Engineer-in-Charge, to be outside the requirements of the contract, he shall immediately upon such ruling being made or such work being demanded, ask in writing for written instructions or decisions on receipt, whereof he shall proceed without delay to confirm to the record or to perform the work demanded, and within 15 days after the date of receipt of written instructions or decisions he may file a written protest with the Engineer-in-Charge, stating clearly and in detail the basis of his objection. Except for such protests or objections; as are made on record in the*

*manner herein specified, and within the time limit stated, the records rulings, instructions or decisions of the Corporation or Engineer-in-Charge, shall be final and conclusive. Instructions and/or decisions of the Engineer-in-Charge, contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions, subject to protest or objections as herein provided.*

- c) *If the contractor is dissatisfied with the final decision of the Engineer-in-Charge, or Corporation on the protest or objection made by the contractor in accordance with the procedure prescribed in paragraph 66.1(b), the contractor may within 15 days after receiving notice of such decision, give notice in writing to the Engineer-in-Charge, requiring that the matter be submitted to arbitration and furnishing detailed particulars of this dispute or difference specifying clearly the point of issue. If the contractor fails to give such notice to the Engineer-in-Charge within the period of 15 days as stipulated above, the decision of the Engineer-in-Charge, shall be final and conclusive and binding on the contractor. Thereafter such issues shall not be subjected to arbitration.*
- d) *Arbitration shall be effected by an Arbitration Board consisting of two members. One selected by the Corporation and the other by the contractor. The provisions of the India Arbitration Act, 1940 and the rules thereunder shall apply for appointment of umpire and all matters relating to the arbitration proceedings.*
- e) *No arbitration proceedings shall be commenced without settling the specific terms of reference.*
- f) *The cost of such arbitration shall be borne by the parties or party as decided by the Arbitration Board.*
- g) *If work under the contract has not been completed when a dispute is referred to arbitration, the work shall continue during the arbitration proceedings, if this reasonably possible, and no payment due to the contractor shall be withheld on account of arbitration proceedings unless authorized or required by the Arbitration Board”.*

7. On the other hand, on behalf of the respondents, attention of this court is drawn to Clause 30, Clause 50 of the agreement and condition No. 8 of the work contract. Clause 30 of the agreement reads as under:

**“Clause No.30: QUANTITIES & UNIT PRICES:**

- a) *The quantities noted in Bill of Quantities shall be treated as approximate only for comparing tenders and no claims shall be made against the Corporation for excess or deficiency therein whether actual or relative. The contractor shall do the entire quantity of work required for completing the job as per the specifications at the agreed rates.*
- b) *The rates to be quoted in Bill of Quantities will be inclusive of all taxes, duties, royalties, monopolies etc. that may be levied by the Government or any other body unless otherwise specifically mentioned herein.*
- c) *He shall be entitled to payment for the work done by him and only at the unit rate quoted by him. No claims by him for any work included in the contract, but not done by him either in part or in full will be entertained”.*

Clause 50 of the agreement is reproduced below:

**“Clause No. 50 : NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC:**

*No claims for interest or damages will be entertained by the Corporation with respect to any money or balance which may be lying with the Corporation owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other or with respect to any delay on the part of the Engineer-in-Charge making periodical or final payments or in any other respect whatsoever”.*

Condition No. 8 of the work contract is reproduced from Annexure 3 of the counter affidavit filed on behalf of the respondents –

“(A) Price Adjustment/Escalation – No escalation shall be payable against this work and no claim in this respect shall be entertained”.

8. Also, attention is drawn on behalf of the respondents to Clause 59 of the agreement which provides that – “Any claim raised by the contractor should have been raised before the Engineer-in-Charge and not before any subordinate authority within 90 days from the earliest date he should have raised the claim. He is precluded from raising any such claim after the expiry of the above period”.
9. Perusal of the papers on record shows that initially an amount for which the work was to be completed by the petitioner/contractor was ₹ 1,20,35,602.26/-. It further reveals from the papers on record that due to the increase in the volume of work and escalation etc, the petitioner has so far received an amount of ₹ 10,31,14,473/- .
10. Admittedly, the agreement was executed on 29-6-2004 and the work was completed by the contractor (petitioner) on 10-1-2009. The final instalment of payment appears to have been received by the petitioner of an amount of ₹ 2,79,36,330/- on 9-4-2010.
11. Learned counsel for the respondents contended that since the full and final payment was accepted by the petitioner without protest, as such no dispute subsist between the parties. As such, the petitioner cannot be allowed to raise the dispute now.
12. In reply to this, learned counsel for the petitioner submitted that the petitioner has not given any certificate waiving to raise any dispute in respect of the claim now sought to be settled, as such, he cannot be barred from seeking appointment of arbitrator.

13. Having considered submissions of learned counsel for the parties and further considering the principle of law laid down in ***M/s P.K.Ramaiah and Company vrs Chairman & Managing Director, National Thermal Power Corpn (1994) Supp (3) SCC page 126, Union of India and Ors vrs Master Construction Company (2011) 12 SCC page 349, National Insurance Co Ltd vrs Boghara Polyfab Pvt Ltd (2009) 1SCC page 267,*** this court is of the view that in the present case, the claim appears to have been finally settled between the parties for which the petitioner has already received the final payment without protest. As such, no dispute appears to be subsisting for which an arbitrator is required to be appointed. From the affidavit, counter affidavit and rejoinder affidavit, it is evident that thrice the revision of estimates was made and against the initial sum of ₹ 1,20,35,602/-, the payment of ₹ 10,31,14,473/- has been made by the respondents to the petitioner.
13. Therefore, keeping in mind the relevant Clauses of the agreement quoted above and in the above circumstances, this court is of the view that since no disputes subsists between the parties, the petition moved by the petitioner (contractor) is liable to be dismissed.
14. Accordingly, the arbitration petition moved under Section 11(6) of the Arbitration & Conciliation Act, 1996 is hereby dismissed.

(Prafulla C.Pant)  
CHIEF JUSTICE  
25<sup>th</sup> February, 2014

S.Rynjah