

THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Extraordinary Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

Arb. P. No. 01 of 2017

Prakash Chand Pradhan
Son of late Manik Chand Pradhan,
Kutchery Rangpo
Rangpo, East Sikkim.

... Petitioner.

versus

1. Union of India,
Through the Secretary,
Ministry of Road Transport and
National Highways,
1, Sansad Marg, New Delhi-110001.
2. The General Manager (Projects),
National Highways and Infrastructure
Development Corporation Limited,
Ministry of Road Transport and Highways,
Opposite Mount Zion School Kidzee,
M.P. Golai, Tadong,
Gangtok, East Sikkim.
3. The State of Sikkim,
Through the District Collector,
East District/ duly authorized Competent
Authority of the Central Government,
Sichey, Gangtok, East Sikkim.

... Respondents.

Appearance:

Mr. T.B. Thapa, Sr. Advocate with Mr. Ranjan Chettri, Mr. Khem Raj Sapkota and Ms. Chandrika M. Karki, Advocates for the Petitioner.

Mr. Karma Thinlay, Senior Central Government Advocate for Respondents No. 1 and 2.

Mr. Santosh Kr. Chettri, Asstt. Government Advocate for Respondent No. 3.

J U D G M E N T
(05.07.2017)

Satish K. Agnihotri, CJ

The petitioner, stated to be the landowner of the land bearing Khesra Plot No. 2384/3685/P ad-measuring 0.46 Hectare land situate at IBM, Central Pendam Block, Rangpo Sub Division, East District, Sikkim, has come up with this petition, purported to be under Section 11 (4), 11 (5) and 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996"), seeking appointment of a Sole Arbitrator to adjudicate and decide the issue of fair compensation in respect of the land acquired therein.

2. The brief facts, as projected by the petitioner, are that the Government of India, Ministry of Road Transport and Highways published a notification dated 13th April 2016 under

sub-section (1) of Section 3A of the National Highways Act, 1956 (hereinafter referred to as "NH Act"), declaring its intention to acquire the land specified in the Schedule annexed thereto for building (widening/ two-laning, etc.) including the bypasses, maintenance, management and operation of National Highway No. 10 (old NH No. 31A) on the stretch of land from Km. 51.870 to Km. 53.900 in East District, in the State of Sikkim, wherein the land-in-question was included. Subsequent thereto, a notification dated 09th July 2016 (Annexure P-3) under Section 3D of the NH Act, was published in the Gazette of India Extraordinary Part II – Section 3 – Sub-section (ii) providing that no objection was received from any person by the competent authority and as such, land specified therein stands acquired and vested absolutely in the Central Government, free from all encumbrances. The compensation in respect of land-in-question owned by the petitioner was determined under the provisions of NH Act to the tune of Rs.10,92,04,010/- (Rupees Ten Crores Ninety Two Lakhs Four Thousand and Ten) only. The petitioner accepted the cheque dated 12th January 2017 for the said amount. Feeling dissatisfied with the determination of the amount, it is stated that the petitioner has made a representation to the competent authority under the provisions of NH Act, namely to the third respondent, requesting for

determination of the amount of compensation, rehabilitation and resettlement and other benefits by an Arbitrator to be appointed by the Central Government, as provided under Section 3G(5) of the NH Act. Finding no response from the third respondent, the instant petition is filed as aforestated.

3. Mr. T.B. Thapa, learned Senior Counsel appearing for the petitioner, referring to the provisions of Section 3G(5) of the NH Act, would contend that the provisions of the Act require reference to appoint an Arbitrator by the Central Government, in the event, the amount determined by the competent authority is not acceptable to either of the parties. It is further contended that the provisions of the Act of 1996 is applicable to the arbitration under sub-section (6) of Section 3G of the NH Act. Thus, the petitioner has made a representation for appointment of the Arbitrator under the provisions of the Act of 1996 on 17.01.2017, which remained un-responded. Thus, this Court, exercising its jurisdiction under Section 11 (6) of the Act of 1996, may appoint an Arbitrator, who is non-partisan, unbiased, possessed with high dignity, well qualified and also not being an employee of the Central or State Government, as Sole Arbitrator to adjudicate the disputes involved herein, in respect of determination of compensation for the land-in-question acquired by the Central Government.

4. Mr. Thapa would further contend that Section 12(5) read with Seventh Schedule and Fifth Schedule of the Act, 1996 requires that the Arbitrator, may not be interested in the dispute and also has any other past or present relationship with the parties, must be unbiased and of unimpeachable integrity. Referring to the counter affidavit filed by the respondents-Central Government, wherein the Central Government has come up with an Order dated 08th July 2016, whereunder Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim, has been notified as Arbitrator for all Districts in the State of Sikkim, learned Senior Counsel would further urge that the Secretary-cum-Relief Commissioner, being an employee of the Central Government and also working with the State Government, may not be unbiased, independent and fearless to adjudicate the dispute fairly and freely. A retired Judge of the High Court or the Supreme Court may be appointed as an Arbitrator. It is further submitted by the learned Senior Counsel that the appointment of an Arbitrator before issuance of notification dated 09th July 2016, declaring the acquisition of land as acquired and also before determination of compensation, is null and void and the same may not be given effect to, in the case on hand. Mr. Thapa would further urge that the Supreme Court in a catena of

decisions viz. ***Datar Switchgears Ltd. Vs. Tata Finance Ltd. and another¹***, ***Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd.²***, ***Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd.³*** and ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Ltd.⁴***, in categorical terms, propounded the principal of law that no appointment made after filing of an application under Section 11 (6) of the Act of 1996 is valid appointment under the provisions of Arbitration and Conciliation Act, 1996. Further, the Secretary-cum-Relief Commissioner is a superior officer to the District Collector in the line, who has been the competent authority under the NH Act and the determination of compensation made by him may not be examined properly.

5. Next, it is contended that even otherwise the order dated 08th July 2016, appointing the Arbitrator, was never communicated to the petitioner, even after the demand was made for appointment of the Arbitrator on 17th January 2017. Thus, this is an internal correspondence, but not an order as laid down by the Supreme Court in ***Bachhittar Singh vs. State of Punjab and another⁵*** and the same is not binding on the parties.

1 (2000) 8 SCC 151
2 (2007) 5 SCC 304
3 (2008) 10 SCC 240
4 (2017) 4 SCC 665
5 AIR 1963 SC 395

6. In response, Mr. Karma Thinlay, learned Central Government Counsel appearing for all the respondents, would submit that the petition deserves to be dismissed as the Central Government had already appointed the Arbitrator i.e. Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, vide order dated 08th July 2016 for all the disputes in respect of determination of compensation for acquisition of land in the State of Sikkim, in exercise of powers under sub-section (5) of Section 3G of the NH Act. And as such, it is not necessary to appoint any Arbitrator as sought for by the petitioner. It is further contended that the Secretary-cum-Relief Commissioner is a competent person dealing with the land acquisition cases and is fully expert on determining the valuation and compensation for the land. Learned Counsel would next contend that the allegation is vague, unsubstantiated and general in nature, which deserves to be rejected.

7. A thoughtful consideration is given to the submissions put forth by the learned Senior Counsel appearing for the parties and the documents annexed to the petition and relevant statutory provisions are carefully examined.

8. Indisputably, the land-in-question was acquired by the respondents under provision of NH Act for the purpose, as

aforestated, and the compensation was determined by the competent authority to the tune of Rs.10,92,04,010/- (Rupees Ten Crores Ninety Two Lakhs Four Thousand and Ten) only for the land-in-question. The petitioner, feeling dissatisfied, invoking his right under Section 3G(5) of the NH Act, made a representation to the prescribed competent authority i.e. the third respondent on 17th January 2017. The said representation remained un-responded, as according to the learned Senior Counsel appearing for the petitioner, the representation/demand was made to the competent authority i.e. Central Government, for appointment of an Arbitrator, as required under Section 3G(5) of the NH Act. Failing which, the petitioner was constrained to file this petition, seeking a direction of this Court to appoint the Arbitrator in exercise of powers under Section 11(6) of the Act of 1996.

9. Before advertng to the factual matrix involved in the case on hand, it is apposite to refer to the relevant provisions. Sub-section (6) of Section 11 of the Act of 1996 obligates the Supreme Court or the High Court, as the case may be, to secure the appointment of the Arbitrator. Sub-section (5) of Section 11 of the Act of 1996 prescribes that if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be

made, upon request of a party, by the Supreme Court or, as the case may be, the High Court. Sub-section (2) of Section 11 prescribes that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Relevant provisions read as under: -

“11. Appointment of arbitrators. — (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment

procedure provides other means for securing the appointment.”

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10. In this case, there is no mechanism provided for appointment of the Arbitrator under the provisions of the NH Act, except sub-section (6) of Section 3G, which contemplates applicability of provisions of the Act of 1996 to every arbitration under the Act and as such, it is evident that the Central Government is competent to appoint an Arbitrator, being a party to the dispute, on receipt of a representation/ demand made by other party, being aggrieved by the determination of the compensation amount. In the case on hand, as submitted by the petitioner, the representation was made to the prescribed competent authority under the provisions of NH Act, i.e. to the third respondent, the District Collector, East Sikkim. It is the case of the petitioner that the District Collector is the requisite authority for making demand to refer the dispute to the arbitrator to be appointed by the Central Government under sub-section (5) of Section 3G of the NH Act.

11. It is categorically stated by the learned Senior Counsel appearing for the respondents that for want of appropriate request to the proper competent authority, no decision on appointment of the Arbitrator vide order dated 08th July 2016 could be communicated to the petitioner. It is also contended

that the present petition is not maintainable for want of compliance of Section 11(5) of the Act 1996 read with Section 3G(5) of the NH Act before approaching this Court for appointment of an Arbitrator.

12. On bare perusal of Section 3, which provides for appointment of the competent authority, read with Section 3A of the NH Act, it is manifest that the competent authority, so appointed under the Act, shall act on behalf of the Central Government. Section 3A of the NH Act clearly contemplates that the intention to acquire such land be notified in the Official Gazette, which shall be done by the competent authority. Thus, the competent authority, so notified, is a competent person to receive application by either party for appointment of the Arbitrator, in the event, the amount so determined is not acceptable, under provisions of sub-section (5) of Section 3G of the NH Act.

13. The contention of learned Senior Counsel appearing for the respondents is that the competent authority, being the authority to determine the compensation, may not be the Central Government, is noted to be rejected. Drawing simile from the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, wherein

the Collector is competent to pass the award and determine the market value, but under Section 64, an application is made to the Collector by a person, who has not accepted the award. On receipt of application, the Collector is obliged to make a reference to the appropriate authority. Likewise, in the case on hand, the competent authority alone is empowered to receive the request by a party to refer the dispute to the Arbitrator, to be appointed by the Central Government. In such an event, the request was properly made by the petitioner on 17th January 2017 for appointment of the Arbitrator. Section 11 of the Act of 1996 contemplates appointment of an Arbitrator within thirty days from the receipt of a request to do so from the other party. In the event the appointment is not made within such time, the parties are at liberty to take recourse to provision of Section 11 of the Act of 1996. Thus, this petition is maintainable.

14. Indisputably, the District Collectors of all the Districts are appointed as competent authority for their respective Districts under Section 3A of the NH Act, as evident from the order dated 31st December 2015.

15. The respondents, according to Mr. Thapa, learned Senior Counsel appearing for the petitioner, has come up first time with an order of appointment of an Arbitrator with the

counter affidavit filed on 23rd May 2017 herein. Thus, the said order is no order in the eyes of law, as the same was not communicated to the concerned person. Referring to the proposition of law laid down by the Supreme Court in ***Bachhittar Singh*** (supra), Mr. Thapa would further contend that the order be treated as invalid. Learned Senior Counsel next submits that since such an order became effective on communication to the petitioner after filing of the petition, this was without authority of law.

16. On examination, it is found that the order dated 08th July 2016 (Annexure A-1) was issued by the respondent department under signature of Deputy Secretary to the Government of India. Seemingly, the said order was neither notified nor communicated to any concerned persons, who are likely to be impacted by the said order. The notification dated 09th July 2016, whereunder the land-in-question along with other lands were declared to have been acquired and vested absolutely in the Central Government, free from all encumbrances, also does not indicate the appointment of the Arbitrator before publication of the notice and as such, there was no reason for the petitioner and other parties to be informed of the appointment of the Arbitrator. In such view of the matter, even if the Arbitrator is appointed, the same shall come into effect so far as the

petitioner is concerned from the date of filing of the counter affidavit i.e. the date when the petitioner came to know about the order.

17. In ***Bachhittar Singh*** (supra), a constitution bench of the Supreme Court, examining the nature and ambit of an order of the State Government, held as under:

“(10) Therefore to make the opinion amount to a decision of the Government it must be communicated to the person concerned. In this connection we may quote the following from the judgment of this Court in the *State of Punjab v. Sodhi Sukhdev Singh* : AIR 1961 SC 493 at p. 512:

"Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent."

Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over against and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

18. The aforesaid principle of law was referred with the approval in ***MCD vs. Qimat Rai Gupta***⁶, holding that the communication of an order is a necessary ingredient for bringing

6 (2007) 7 SCC 309

an end result to a status or to provide a person an opportunity to take recourse to law if he is aggrieved thereby, the order is required to be communicated.

19. Subsequently, in ***Bipromasz Bipron Trading SA vs. Bharat Electronics Limited (BEL)***⁷, the Supreme Court recapitulated the said proposition of law as under: -

“38.The order made by a statutory authority or an officer exercising the powers of that authority comes into force so far as the authority/officer is concerned, from the date it is made by the authority/officer concerned. But so far as the affected party is concerned, the order made by the appropriate authority would be the date on which it is communicated.....”

20. In ***Vivek Batra vs. Union of India***⁸, the Supreme Court has further reaffirmed the proposition of law laid down by the Supreme Court in *Sethi Auto Services Station vs. DDA : (2009) 1 SCC 180* that notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.

21. In view of the aforesaid well-settled principles of law, the order dated 08th July 2016 appointing the Secretary-cum-Relief Commissioner, Land Revenue and Disaster

7 (2012) 6 SCC 384

8 (2017) 1 SCC 69

Management Department, Government of Sikkim as Arbitrator for all the Districts of the Sikkim cannot be held as an order of appointment of the Arbitrator in the disputes involved herein. Moreover, other mode of communication for extending authenticity to the order or circular of the Central Government or State Government, is publication by way of notification either in the Gazette or in any other mode, presumably to bring into notice of the concerned persons or else the Central Government ought to have communicated in the notification dated 9th July 2016 of acquisition of land for the appointment of the Arbitrator to enable the aggrieved parties to take recourse to the appropriate forum, if necessary. It is clearly stated by the learned counsel appearing for the respondents that it was neither published by way of notification nor informed through the notification of acquisition of land dated 09th July 2017 to any party. Thus, unhesitatingly it is held that the Arbitrator was not appointed in the instant dispute.

22. At this stage, it is pertinent to examine the relevant provisions of the Act of 1996, which is made applicable to the dispute herein. Section 3G (5) and (6) of the NH Act read as under: -

“3G. Determination of amount payable as compensation.-

(1) to (4)

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act."

23. On plain reading of the relevant provisions, which is clear and unambiguous, it is revealed that on refusal to appoint the Arbitrator, as contemplated under sub-section (5) of Section 3G of the NH Act, the appointment of the Arbitrator and also the adjudication by the Arbitrator shall be in accordance with the provision of the Act of 1996.

24. Mr. Thapa would contend that once the petition has been moved for appointment of the Arbitrator, the other party is divested of the power to appoint the Arbitrator.

25. In ***Datar Switchgears Ltd.*** (supra), the Supreme Court observed as under: -

"19. if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an

arbitrator. Only then the right of the opposite party ceases.”

26. In ***Northern Railway Administration*** (supra), the similar issue came up for consideration before the Supreme Court, wherein it was held as under: -

“12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.”

27. In ***Ace Pipeline Contracts (P) Ltd.*** (supra), the observations made in the ***Datar Switchgears Ltd.*** (supra) was referred with affirmation as under: -

“Therefore, mandamus can be issued by the courts in exercise of powers under Section 11(6) of the Act but the demand should be in the event of failure by the authorities to appoint arbitrators within the reasonable time.”

28. In view of the aforesaid well-settled proposition of law, the Central Government has failed to appoint the Arbitrator within the prescribed time, as required, and as such, this Court may proceed to appoint the Arbitrator, in accordance with law.

29. The question in respect of neutrality, impartiality and independence of the Arbitrator, as pleaded by the learned Senior Counsel, appearing for the petitioner, is not relevant to the issue

under consideration in case on hand. The appointment of the Arbitrator made by the Central Government before 08th July 2016 is found as invalid. In such view, the Court is not inclined to examine this issue at this stage as it is premature. It is beneficial to refer to the observation made by the Supreme Court in **Voestalpine Schienen GMBH** (supra), in respect of the requisites of an Arbitrator, wherein the Supreme Court has observed as under: -

“24. Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of Subsection (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the Respondent are not covered by any of the items in the said list.”

30. The petitioner has given a list of Arbitrators, who are not acceptable to the other party. In such view of the matter, it is deemed proper to appoint Mr. Justice A.P. Subba, former

Judge of this High Court as an Arbitrator to the disputes. Mr. Justice Subba is requested to enter upon the reference in issue, after notice to the parties, at the earliest. The professional fee and expenses is determinable with the agreement by the Arbitrator himself.

31. The petition is ordered, accordingly.

Chief Justice
05.07.2017

jk/ Approved for Reporting : Yes/~~No~~.
Internet : Yes/~~No~~.