

PUNATSANGCHHU – 1 HYDROELECTRIC PROJECT  
AUTHORITY, BHUTAN

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v.

LARSEN & TOUBRO LTD.

(Civil Appeal No. 693 of 2021)

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FEBRUARY 22, 2021

**[INDU MALHOTRA AND AJAY RASTOGI, JJ.]**

*Arbitration and Conciliation Act, 1996 – s.11 – Contract between appellant-authority and respondent-contractor in relation to a Hydro-electric Project in Bhutan – Disputes between the parties – Respondent sent notice of arbitration to appellant under Clause 67 (ii) of the contract, and nominated its own nominee arbitrator – Appellant stated it was agreeable for arbitration; however, arbitration would be governed by Alternative Dispute Resolution Act, 2013 of Bhutan and the place of arbitration shall be at Thimphu, Bhutan – Thereafter, respondent filed application u/s.11(6) of the Act, 1996 before High Court for appointment of arbitrator on behalf of appellant – High Court held that Clause 67 (ii) of the contract did not indicate that applicability of the 1996 Act would cease on enactment of the Bhutan Act of 2013 – Since appellant had failed to appoint its arbitrator, High Court exercised its jurisdiction u/s.11, and made the appointment and further directed that the two arbitrators would proceed to appoint the presiding arbitrator, and the arbitral proceedings would be governed by the provisions of the 1996 Act – Hence the instant appeal – Meanwhile, the arbitral tribunal was constituted, as the two arbitrators had appointed a presiding arbitrator – However, thereafter, consensus arrived at between appellant and respondent with respect to the applicable statute and the seat of arbitration – Accordingly, order of High Court modified to the extent that all disputes arising out of the contract in question shall be conducted in accordance with the Bhutan Act of 2013 with the seat of arbitration at Thimphu – The tribunal will, however, be at liberty to conduct some of the hearings, in consultation with the parties, at such venues as may be convenient – Alternative Dispute Resolution Act, 2013 (enacted by Kingdom of Bhutan).*

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- A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 693 of 2021.

From the Judgment and Order dated 11.12.2020 of the High Court of Delhi at New Delhi in Arbitration Petition No. 461 of 2020.

- B Tushar Mehta, SGI Ranjeet Kumar, Gourab Banerjee, Sr. Advs. Bharat Singh, Dhruv Gupta, Amit Pawan, Ananya Kumar, Rajat Joneja, Ms. Neeharika Aggarwal, Divyam Agarwal, Advs. for the appearing parties.

The following Order of the Court was passed:

C **ORDER**

Leave granted.

1. On 14.04.2009, a Contract Agreement was executed between the Appellant and the Respondent-Contractor for the Construction of Diversion Tunnel, Dam, Intake and Desilting Arrangement including D Hydro-mechanical Works of the Punatsangchhu-I Hydro-electric Project located in Wangdue Phodrang District in Bhutan. The contract provided for resolution of disputes through arbitration. The relevant terms of the Contract are as under :

**Clause 5 (i) (b)**

- E The law to which the Contract is to be subject and according to which the Contract is to be construed shall be the law for the time being in force in Bhutan and within the jurisdiction of Thimphu courts.

**Clause 67**

- F (ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or differences shall be referred for arbitration through to an Arbitral Tribunal of three arbitrators appointed jointly by the PHPA and the Contractor. Where the mandate of an arbitrator terminates a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

In the absence of an Arbitration Act in Bhutan, the Arbitral Tribunal shall follow / be guided by the basic principles and procedures as contained in the Indian Arbitration and Conciliation Act 1996. The

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parties shall be free to agree on a procedure for appointing the Arbitrators. Failing any agreement for appointment of Arbitrators, each party shall appoint one Arbitrator and the two appointed Arbitrators shall appoint the third Arbitrator, who shall act as the presiding Arbitrator. A

**Clause 67 (iv) B**

If either of the parties fail to appoint its arbitrators in pursuance of sub-clause (ii) above, within 30 days after the receipt of the notice of the appointment of its arbitrators or the two appointed Arbitrators fail to agree on third Arbitrator within thirty days from the date of their appointment then the appointment shall be made, upon request of a party, by the Chief Justice, Delhi High Court, India/Thimphu High Court, Bhutan or any person or institutions designated by him. C

**Clause 67 (vii)(a)**

All arbitration shall be held at New Delhi, India/ Thimphu, Bhutan. D

2. On 25.02.2013, the Kingdom of Bhutan enacted the Alternative Dispute Resolution Act, 2013 (“*the Bhutan Act*”) to provide for settlement of disputes through arbitration. The Act came into force w.e.f. 14.03.2013.

3. Disputes arose between the parties with respect to certain claims made by the Respondent-Contractor. E

On 28.07.2020, the Respondent-Contractor sent a notice of arbitration to the Appellant-Authority under Clause 67 (ii) of the Contract, and nominated a retired Judge of this Court as its nominee arbitrator.

4. In response to the Notice dated 28.07.2020, the Appellant replied *vide* Letter dated 04.08.2020, stating that it was agreeable for settlement of disputes through arbitration. However, as per Clause 67 (ii) of the Contract, the arbitration would be governed by the Bhutan Act, 2013 and the place of arbitration shall be at Thimphu, Bhutan as provided by Clause 67 (vii) (a). F

5. In October, 2020, the Respondent-Contractor filed an application u/S. 11 (6) of the Arbitration & Conciliation Act, 1996 before the Delhi High Court for appointment of an arbitrator on behalf of the Appellant-Authority. G

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- A 6. The Delhi High Court *vide* Order dated 11.12.2020 held that Clause 67 (ii) of the Agreement did not indicate that the applicability of the 1996 Act would cease on the enactment of the Bhutan Act. The enactment of the Bhutan Act, 2013 would not result in the 1996 Act becoming inapplicable. The arbitration would be governed by the 1996 Act. Since the Hydro-electric Authority had failed to appoint its arbitrator, the Court exercised its jurisdiction u/S.11, and made the appointment. It was further directed that the two arbitrators would proceed to appoint the presiding arbitrator, and the arbitral proceedings would be governed by the provisions of the 1996 Act.

- C 7. Aggrieved by the Order dated 11.12.2020, the Hydro-electric Authority filed the present special leave petition.

We have heard Mr. Tushar Mehta, learned Solicitor General of India and Mr. Ranjeet Kumar, Senior Advocate on behalf of the Appellant-Authority, and Mr. Gourab Banerji, Senior Advocate on behalf of the Respondent-Contractor.

- D On 16.02.2021, the matter was taken up for admission hearing. We were informed by the Senior Counsel for the parties that in the meanwhile, the arbitral tribunal had been constituted, as the two arbitrators had appointed Justice (Retd.) R.C. Lahoti, former Chief Justice of India, as the presiding arbitrator.

- E The learned Solicitor General appearing on behalf of the Authority fairly submitted that the Appellant herein did not have an issue with respect to the panel of arbitrators appointed for adjudication of the disputes. Their grievance was limited to the applicability of the Indian Arbitration & Conciliation Act, 1996 and the seat of arbitration at New
- F Delhi.

- G 8. The matter was then taken up on 22.02.2021 for further hearing. Mr. Gourab Banerji, learned Senior Advocate for the Respondent-Contractor submitted that his clients were agreeable to the arbitration being conducted in accordance with the Alternative Dispute Resolution Act, 2013 of Bhutan, with the seat of arbitration at Thimphu.

- H 9. In view of the consensus arrived between the parties, the Order of the High Court stands modified to the extent that all disputes arising out of the Agreement dated 14.04.2009 shall be conducted in accordance with the Alternative Dispute Resolution Act of Bhutan, 2013 with the

seat of arbitration at Thimphu. The tribunal will, however, be at liberty to conduct some of the hearings, in consultation with the parties, at such venues as may be convenient. A

The Civil Appeal is disposed of, with no order as to costs.

Pending applications, if any, shall stand disposed of.

Devika Gujral

Appeal disposed of.