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THE STATE OF BIHAR & ORS.

v.

M/S BRAHMAPUTRA INFRASTRUCTURE LIMITED

(Civil Appeal No. 3344 of 2018)

B

MARCH 22, 2018

**[ADARSH KUMAR GOEL, R. F. NARIMAN AND
UDAY UMESH LALIT, JJ.]**

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Arbitration and Conciliation Act, 1996 – s.11(6) – Bihar Public Works Contracts Arbitration Tribunal Act, 2008 – ss.8, 9 and 22 – Works Contract – Arbitration – State aggrieved by the appointment of arbitrator u/s.11(6) of the Arbitration and Conciliation Act (the Central Act) on the ground that the said Act is excluded by the Bihar Public Works Contracts Arbitration Tribunal Act (the State Act) – Held: The scheme of ss.8, 9 and 22 of the State Act shows that in the absence of an agreement stipulating the applicability of the Central Act, the State Act applies to works contracts – Since, in the instant case, an arbitration agreement exists and stipulates applicability of the Central Act, the State Act will not apply – However, it will be open to the appellant-State to move to the High Court for change of Arbitrator, if a case to this effect is made out on an objection of neutrality.

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Bihar Public Works Contracts Arbitration Tribunal Act, 2008 – s.4(3)(b) – Constitutionality of – Held: s.4(3)(b), which provides that the tenure of the Chairman and other members of the Arbitration Tribunal shall be at the pleasure of the Government, is inconsistent with the constitutional scheme, particularly Art.14 of the Constitution – s.4(1) of the Act provides for a three year tenure or till the age of 70 years whichever is earlier – Termination of the said tenure cannot be at pleasure within the term stipulated as the arbitration tribunal has quasi judicial functions to perform – Any termination of the service of such member by a party to the dispute would interfere directly with the impartiality and independence expected from such member – The said provision is, thus, manifestly arbitrary and contrary to the Rule of Law – Accordingly, the said provision declared unconstitutional – Constitution of India – Art.14 – Works Contract.

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STATE OF BIHAR v. M/S BRAHMAPUTRA
INFRASTRUCTURE LIMITED

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3344 of 2018. A

From the Judgment and Order dated 29.03.2017 of the High Court of Patna at Patna in Request Case No. 45 of 2016.

WITH

C. A. No. 3345 of 2018. B

Naman Nagrath, Rajeev Dhawan, Ms. Meenakshi Arora, Parag P. Tripathi, Ms. Vibha Datta Makhija, Sanjay R. Hegde, Sr. Advs., Purushaindra Kaurav, A.G., Harsh Parashar, Zubin Prasad, Aman Pandey, Prateek Khandelwal, Shadan Farasat, Arjun Garg, Prashant Kumar, Saurabh Suman Sinha, Aditya Dev T., M/s. AP & J Chambers, Rahul Narayan, Shashwat G., Ms. Renuka Sahu, Jasdeep Singh Dhillon, Jay Savla, Sridhar Potaraju, Sudhir Mishra, Prabhat Kumar, Petal Chandhok, Udai Khanna, Rishabh Kapur, Priyash Sharma, Ms. Abha R. Sharma, Ms. Disha Vaish, D.S. Parmar, Ms. Sujeeta Srivastava, Harsh Parashar, Varun Amar, Shantanu Krishna, Azim H. Laskar, Sachin Das, Chandra Bhushan Prasad, Shivam Singh, Apoorva Srivastava, Ms. Sugandha Batra, Ranjan Kumar Pandey, Chandan Kumar, Arjun Garg, Jay Savla, Ms. Renuka Sahu, Jasdeep Singh Dhillon, Prabhat Chaurasia, Ms. Hemantika Wahi, Preetesh Kapoor, Ms. Vishakha, K. Krishna Kumar, Mishra Saurabh, Ms. Swarupama Chaturvedi, Ms. Anuradha Mishra, Ankit Lal, Varun Mohan, Ankit Kr. Lal, Ravin Dubey, Sudhansu Pal, Nilava Bandhopadhaya, Prateek Khanna, Advs. for the appearing parties. C D E

The following Order of the Court was passed:

ORDER

1. Leave granted. We have heard learned counsel for the parties. F
2. The State is aggrieved by the appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Central Act) on the ground that the said Act is excluded by the Bihar Public Works Contracts Arbitration Tribunal Act, 2008 (Bihar Act 21 of 2008) (the State Act). G
3. To appreciate the plea raised, it is necessary to refer to the scheme of the State Act as reflected in some of the key provisions. Sections 8, 9 and 22 of the State Act are as follows: H

- A “8. Act to be in addition to Arbitration & Conciliation Act, 1996. -
Notwithstanding anything contained in this Act, and of the
provisions shall be in addition to and supplemental to Arbitration
& Conciliation Act, 1996 and in case any of the provision contained
herein is construed to be in conflict with Arbitration Act, then the
latter Act shall prevail to the extent of conflict.
- B 9. Reference to Tribunal and making of award.— (1) Where any
dispute arises between the parties to the contract, either party
shall, irrespective of whether such contract contains an arbitration
clause or not refer, within one year from the date on which the
dispute has arisen, such dispute in writing to the Tribunal for
arbitration in such form and accompanied by such documents or
other evidence and by such fees, as may be prescribed.
- C (2) On receipt of a reference under sub-section (1), the Tribunal
may, if satisfied after such inquiry as it may deem fit to make, that
the requirements under this Act in relation to the reference are
complied with, admit such reference and where the Tribunal is
not so satisfied, it may reject the reference summarily.
- D (3) Where the Tribunal admits the reference under sub-section
(2), it shall, after recording evidence if necessary, and after perusal
of the material on record and on affording an opportunity to the
parties to submit their argument, make an award or an interim
award, giving its reasons therefor.
- E (4) The Tribunal shall use all reasonable dispatch in entering on
and proceeding with the reference admitted by it and making the
award, and an endeavour shall be made to make an award within
four months from the date on which the Tribunal had admitted the
reference.
- F (5) The award including the interim award made by the Tribunal
shall, subject to an order, if any made under Section – 12 or 13,
be final and binding on the parties to the dispute.
- G (6) An award including an interim award as confirmed or varied
by an order, if any, made under Section- 12 or 13 shall be deemed
to be a decree within the meaning of section-2 of the Code of
Civil Procedure, 1908 of the principal Court of original jurisdiction
within the local limits whereof the award or the interim award has
been made and shall be executed accordingly.
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22. Overriding effect of this Act.- Notwithstanding any thing contained in any other Law, Rule, Order, Scheme, or Contract Agreement entered into before or after commencement of this Act, any dispute as defined in Section 2(e) of this Act shall be regulated under the provisions of this Act, Rules and Regulations framed thereunder, and absence of arbitration clause in any contract agreement shall not have effect excluding any dispute from the purview of this Act.”

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4. It is not in dispute that the parties have executed agreement dated 22nd June, 2012, providing for appointment of an arbitrator as per provisions of the Central Act. Relevant portion of Clause 25 of the said Agreement is as follows:

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“The arbitration shall be conducted in accordance with provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under the clause.”

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5. The scheme of Sections 8, 9 and 22 of the State Act shows that in the absence of an agreement stipulating the applicability of the Central Act, the State Act applies to works contracts. Since in the present cases, an arbitration agreement exists and stipulates applicability of the Central Act, the State Act will not apply. We, thus, do not find any ground to interfere with the impugned order.

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6. The appeals are dismissed. It will, however, be open to the appellant-State to move the High Court for change of Arbitrator, if a case to this effect is made out on an objection of neutrality, as submitted by learned counsel for the State.

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7. Before parting with this order, we consider it appropriate to deal with the submission raised by learned counsel for the respondent(s) that Section 4(3)(b) of the State Act is patently unconstitutional. The said section is as follows:

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“Section 4. Terms and conditions of service of the Chairman and other members of Tribunal :-

(3) (b) The Chairman and any other member shall hold the office at the pleasure of the Government, provided that; in case of

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A premature termination; they shall be entitled to three months pay & allowances in lieu of compensation.”

8. We are of the view that a provision that the tenure of the Chairman and other members of the Arbitration Tribunal at the pleasure of the Government is inconsistent with the constitutional scheme, particularly Article 14 of the Constitution of India. Section 4(1) of the State Act provides for a three year tenure or till the age of 70 years whichever is earlier. Termination of the said tenure cannot be at pleasure within the term stipulated as the arbitration tribunal has quasi judicial functions to perform. Any termination of the service of such member by a party to the dispute would interfere directly with the impartiality and independence expected from such member. The said provision is, thus, manifestly arbitrary and contrary to the Rule of Law. Accordingly, we declare the said provision to be unconstitutional.

Ankit Gyan

Appeals dismissed.