07-03-2024
Item no.2 CD
Subrata Bhattacharyya
AR(C)

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Commercial Division)

CAN No.3 of 2023
in
CAN No.2 of 2023
in
FMAT(ARBAWARD) No.40 of 2023
M/s. Mainak Engineering Private Limited
-vs-
Bihar Rural Livelihoods Promotion Society

Ms. Amrita Pandey
Ms. Vaishnari Sonkar …for CANs/respondent

Mr. Debnath Ghosh
Mr. Sarosij Dasgupta
Mr. Pourush Bandyopadhyay
Mr. Samrat Mukherji
Mr. Dakshayani Basu
Mr. Rik Mukherji …for the respondent/appellant

CAN No.3 of 2023

Sufficient cause is shown. The delay in preferring this application is condoned.

This application under section 5 of the Limitation Act, 1963 is allowed.

CAN No.2 of 2023

This is an application by Bihar Rural Livelihoods Promotion Society, the respondent in the appeal, to set aside the ex parte orders dated 18th August 2023, 6th September 2023 and 12th September 2023.

While the said application was being placed before this court by Ms Pandey, learned advocate appearing for the applicant-respondent, argued that the matter could

not be referred to the learned court below, because there was no valid arbitration agreement between the parties.

The relevant clause is clause 8 of the agreement, and is inserted below:–

> "8. Arbitration and Applicable laws –
>
> 8.1. The parties hereby agree that any dispute arising in connection with this MoU shall first be addressed mutually by the Parties. If the said Parties are unable to resolve the dispute mutually, the dispute shall be referred to the Secretary, Rural Development Department, Government of Bihar, whose decision shall be final and binding on all parties.
>
> 8.2. In case an aggrieved party seeks judicial remedy, the petition shall be filed in the jurisdiction of (Bihar) High Court."

Ms. Pandey cited a single bench judgement of the High Court of Chhatisgarh in **Shri Om Prakash Bansal Educational and Social Welfare Trust vs. Union of India and Ors.** decided on **19th December 2023**. Interpreting an identical clause in the agreement between the parties in that case, the court came to the conclusion that it could not be considered as an arbitration clause.

We regret to say that this view cannot be accepted by us, because of at least three judgements of the Supreme Court, which are absolutely contrary to it, cited by Mr Debnath Ghosh, learned advocate appearing for the appellant.

The first case was **Mallikarjun** vs. **Gulbarga University** reported in **(2004) 1 SCC 372**. The clause involved (clause 30) was thus:–

> "The decision of the Superintending Engineer of Gulbarga Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or

> the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of dispute arising between the contractor and Gulbarga University.""

The court interpreted this clause to be an arbitration clause.

The second case is **Punjab State and Others vs. Dina Nath** with connected matters reported in **(2007) 5 SCC 28** where the clause was as follows:–

> "Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties."

In this case also the clause was held to be an arbitration clause.

The judgement in **Punjab State and Others vs. Dina Nath** with connected matters reported in **(2007) 5 SCC 28** was approved and affirmed in paragraph 33 of the judgement in **Vishnu (dead) by LRs. vs. State of Maharashtra and Others** reported in **(2014) 1 SCC 516.**

In reply, Ms Pandey brought to our notice a judgement in the case of **Food Corporation of India vs. National Collateral Management Services Limited (NCMSL)** reported in (**2020) 19 SCC 464** where the relevant clause was as follows:–

> "Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject-matter of this agency agreement shall be referred to the Chairman and Managing Director of FCI/principal for settlement and whose decision shall be final and binding on the both FCI/principal and agent."

In that case the Supreme Court held that it did not constitute an arbitration clause.

The clause in the last decision, in our opinion, is quite different from the other clauses. It refers to a settlement process being undertaken by the Chairman and Managing Director. A settlement effort does not involve any adjudication. The termination of a settlement attempt does not always result in a "final and binding" decision. Suppose, the settlement endeavour fails. If this is taken as a "final and binding decision", it would have the effect of depriving a party of his legal remedy which is clearly violative of section 28 of the Indian Contract Act, 1872 and also the rights of individuals under our Constitution.

In those circumstances, the highest court interpreted this clause as not to be treated as an arbitration clause.

Following the above Supreme Court judgements, we hold at least prima facie that there is a valid and binding arbitration clause between the parties.

Additionally, for the same reasons, in our case, the decision of the Secretary, Rural Development Department can be taken to be final and binding only to the extent an arbitral award is such, subject to challenge judicially, which is provided in clause 8.2. Otherwise, the clause would be illegal.

We dispose of this application (**CAN No.2 of 2023**) accordingly, without in any way interfering with our orders dated 18th August 2023, 6th September 2023 and 12th September 2023.

At this stage, it is submitted by both learned counsel for the parties that the section 9 application could be disposed of by directing that our orders dated 18th August 2023, 6th September 2023 and 12th

September 2023 be confirmed and to continue till an order is made by the arbitral tribunal to be constituted or by a competent court.

We accept the submission and order accordingly.

It is also stated before us that the application under section 11 of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator would be made at the High Court of Patna.

The subject bank guarantee would also be kept renewed by the appellant till the award is made by the arbitral tribunal to be constituted or by a competent court.

The parties will take appropriate steps before the learned court below to record an order in the section 9 application that it has been disposed of by us.

[I.P. Mukerji, J]

[Biswaroop Chowdhury, J]