IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

IA NO. GA/1/2022
In RVWO/2/2022
EASTERN COALFIELDS LIMITED
Vs.
RREPL-KIPL (JV)

With

IA NO. GA/2/2022
In RVWO/2/2022
EASTERN COALFIELDS LIMITED
Vs.
RREPL-KIPL (JV)

IN

A.P. NO. 371 OF 2020

For the Applicant : Mr. Manik Das, Adv.
Ms. Tanushree Dasgupta, Adv.

For the Respondent : Mr. Sudip Deb, Adv.
Mr. Riju Ghosh, Adv.

Hearing concluded on : August 12, 2022

Judgment on : August 18, 2022

DEBANGSU BASAK, J. :-

1. The applicant has applied for review of the judgement and order dated April 9, 2021 passed in AP No. 371 of 2020. The applicant has also applied for stay of the operation of such order by way of an interim application filed in the review petition. Both the applications for stay as well as the review petition have been heard analogously.

2. The respondent herein had applied under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in respect of disputes arising out of a contract entered into between the respondent and the applicant which the respondent claimed to contain an arbitration agreement. Such application under Section 11 of the Arbitration and Conciliation Act, 1996 had been disposed of by an order dated April 9, 2021 review of which has been sought in the present review petition.

3. Learned advocate appearing for the applicant has submitted that, the applicant had preferred a special leave petition before the Hon'ble Supreme Court against the order dated April 9, 2021 passed in AP No. 371 of 2020. The special leave petition had been disposed of by the order dated November 26, 2021. By the order dated November 26, 2021, the Hon'ble Supreme Court had permitted the applicant to file a review application before the High Court. Pursuant to such liberty being granted, the applicant had filed a review petition which was dismissed as withdrawn with liberty to file a fresh on February 10, 2022. Subsequent thereto, the applicant had filed the present review application.

4. Learned advocate appearing for the applicant has referred to the clause alleged to be containing the arbitration agreement. He has submitted that, similar clauses in contracts have been considered by a single judge of this Hon'ble Court, the division bench of this Hon'ble Court, and the Hon'ble Supreme Court. In all such occasions, the Courts had held that, such clause does not contain any arbitration agreement. He has relied upon the order dated ***December 22, 2021*** passed in ***AP No. 817 of 2021 (R N Samanta Versus Coal India Ltd)***, judgement and order dated ***June 27, 2018*** passed in ***FMA 1497 of 2018 (South-Eastern Coalfields Ltd versus Cart Road Wings JV)***, and the judgement and order dated ***July 25, 2022*** passed in ***Civil Appeal No. 4914 of 2022 (Mahanadi Coalfields Ltd versus M/s IVCL AMR Joint Venture)*** in support of his contentions.

5. Learned advocate appearing for the respondent has submitted that, the order dated April 9, 2021 was passed largely on consent of the parties. He has referred to the body of the order dated April 9, 2021. He has submitted that, immediately after the arbitration clause contained in the agreement having been set out in the order dated April 9, 2021, the Court had recorded that, the existence of

arbitration agreement is not disputed. He has contended that, such recording in the order tantamount to the parties to the litigation, agreeing to the existence of an arbitration agreement governing the disputes between the parties. He has drawn the attention of the Court to the fact that, the applicant subsequently raised counterclaim as against the respondent.

6. Learned advocate appearing for the respondent has drawn the attention of the Court to the conduct of the applicant subsequent to the order dated April 9, 2021. He has contended that, the applicant had waived its alleged right of review of the order dated April 9, 2021 by conduct of the applicant subsequent to the order dated April 9, 2021. The applicant had participated in the arbitration proceedings unconditionally. The applicant had applied under Section 16 of the Arbitration and Conciliation Act, 1996. He has referred to the minutes of the meeting of the arbitral tribunal dated July 31, 2022. He has contended that, the applicant has not taken any steps thereafter with regard to the finding of the arbitral tribunal as recorded in the minutes of the meeting July 31, 2022.

7. Learned advocate appearing for the respondent has referred to the clause in the contract containing the

arbitration agreement between the parties. He has submitted that, the second last paragraph contains the word 'shall' whereas the last paragraph of such clause contains the word 'may'. He has contended that, in respect of parties other than government agencies, the redressal of the disputes was left to the discretion of the party who is not a government agency. According to him, the options available to a party other than government agencies, are to approach a Court of law or to invoke the provisions of the Arbitration and Conciliation Act, 1996. In the facts of the present case, the respondent had invoked the provisions of the Arbitration and Conciliation Act, 1996. The applicant had participated in the arbitration proceedings. The respondent had accepted that such clause means that there was an arbitration agreement between the contracting parties as will appear from the body of the order dated April 9, 2021.

8. Learned advocate appearing for the respondent has relied upon ***2021 Volume 5 Supreme Court Cases 671 (Pravin Electricals Private Limited versus Galaxy Infra And Engineering Private Limited)*** and contended that, when the issue of the existence of an arbitration agreement requires a deeper consideration than a prima facie

examination, then, the matter should be left for final determination by the arbitral tribunal. In the facts of the present case, he has submitted that, since a deeper consideration of the clause is required so as to return a conclusive finding as to the existence of the arbitration agreement, the same may be referred to the arbitral tribunal already appointed. He has therefore contended that, the application for review should be dismissed.

9. The applicant had issued an electronic tender dated December 18, 2017 for hiring of HEMM for re handling 39.20L cum OB from existing dump near Bhadotola for safe extraction of coal near west side of Bhadotola of RCML patch at Rajmahal Area. The respondent had been formed on December 20, 2017 pursuant to a joint-venture agreement between diverse private companies.

10. The respondent had participated in the electronic tender of the applicant and was successful therein. The applicant had awarded the work contained in the electronic tender dated December 18, 2017 to the respondent. The applicant had issued a letter of acceptance dated February 14, 2018 and a work order dated April 18, 2018 in favour of the respondent. The work order dated April 18, 2018 and the electronic tender dated December 17, 2017 have the

same settlement of disputes clause. The settlement of disputes clause appearing in both the electronic tender dated December 17, 2018 and the work order dated April 18, 2018 to which, the parties have referred to in course of the hearing, is as follows: –

> *"13. Settlement of Disputes*
>
> *It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level.*
>
> *The contractor should make request in writing to the Engineer-in-charge for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of dispute/claim failing which no disputes/claims of the contractor shall be entertained by the company.*
>
> *Effort shall be made to resolve the dispute in two stages.*
>
> *In first stage dispute shall be referred to Area CGM, GM. If difference still persists the dispute shall be referred to a committee constituted by the owner. The committee shall have one member of the rank of Director of the company who shall be chairman of the company.*
>
> *If differences still persist, the settlement of the dispute shall be resolve in the following manner:*
>
> *Sector Enterprises/Govt. Departments (except Railways, Income Tax, Customs & excise duites)/ State Public Sector Enterprises shall be referred by either party for Arbitration to the PMA (Permanent*

Machinery of Arbitration) in the department of Public Enterprises.

In case of parties other than Govt. Agencies, the redressal of the dispute may be sought in the Court of law."

11. Disputes and differences had arisen between the parties with regard to the working of the contract in relation to the electronic tender dated December 17, 2017. The respondent had applied under Section 11 (6) of the Arbitration and Conciliation Act, 1996 which was disposed of by the order dated April 9, 2021. The special leave petition directed against such order was disposed of by the order dated November 26, 2021 permitting the applicant herein to apply for review of the order dated April 9, 2021. The applicant had applied for review of the order dated April 9, 2021. Such review petition had been withdrawn with liberty to file a fresh by an order dated February 10, 2022. The applicant had thereafter filed the present review application along with the application for stay.

12. The order dated November 26, 2021 passed by the Hon'ble Supreme Court granting liberty to the applicant herein to file a review application with regard to the order dated April 9, 2021 has noted that, ***R N Samanta (supra)***

and ***South-Eastern Coalfields Ltd (supra)*** were not placed before the Court on April 9, 2021.

13. ***R N Samanta (supra)*** has been rendered in an application under Section 11 of the Arbitration and Conciliation Act, 1996. A similar settlement of disputes clause had been considered. The last clause in that case which is same as that of the one obtaining in the present case, has been understood not to amount to an arbitration agreement between the parties. Consequently, the application under Section 11 of the Arbitration and Conciliation Act, 1996 had been dismissed as not maintainable.

14. ***South-Eastern Coalfields Ltd (supra)*** has considered an appeal against an order passed under Section 9 of the Arbitration and Conciliation Act, 1996. It has considered a similar clause of settlement of disputes as obtaining in the present case. In fact, the last paragraph of the settlement of disputes clause in that case is the same as the one obtaining in the present case. It has held that, such a clause cannot be construed to mean that there was an arbitration agreement between the parties.

15. In ***Mahanadi Coalfields Ltd (supra)*** the Supreme Court has considered the same last paragraph as obtaining

in the clause relating to settlement of disputes in the present case. It has observed as follows: –

> *"10. In the present case, clause 15 of the Contract Agreement is titled "Settlement of Disputes/Arbitration". However, the substantive part of the provision makes it abundantly clear that there is no arbitration agreement between the parties agreeing to refer either present or future disputes to arbitration.*
>
> *11. Clause 15.1 contains a reference to the steps to be taken for settlement of disputes between the parties. Clause 15.2 stipulates that if differences still persist, the settlement of the disputes with government agencies shall be dealt with in accordance with the guidelines of the Ministry of Finance. In the case of parties other than government agencies, the redressal of disputes has to be sought in a court of law.*
>
> *13. The above extract makes it abundantly clear that clause 15 of the Contract Agreement is a dispute resolution mechanism at the company level, rather than an arbitration agreement. Consequently, in case of a dispute, the respondent was supposed to write to the Engineer-in-charge for resolving the dispute. Clause 15 does not comport with the essential attributes of an arbitration agreement in terms of section 7 of the 1996 Act as well as the principles laid down under Jagdish Chander (supra). A plain reading of the above clause leaves no manner of doubt about its import. There is no written agreement to refer either present or future disputes to arbitration. Neither does the substantive part of the clause refer to arbitration as the mode of settlement, nor does it provide for a reference of disputes*

between the parties to arbitration. It does not disclose any intention of either party to make the Engineer-in-Charge, or any other person for that matter, an arbitrator in respect of disputes that may arise between the parties. Further, the said clause does not make the decision of the Engineer-in-Charge, or any other arbitrator, final or binding on the parties. Therefore, it was wrong on the part of the High Court to construe clause 15 of the Contract Agreement as an arbitration agreement."

16. The last paragraph of the settlement dispute clause as obtaining in the present case and ***R N Samanta (supra)***, ***South-Eastern Coalfields Ltd (supra)*** and ***Mahanadi Coalfields Ltd (supra)*** and which has been considered in the three authorities is as follows: –

"In case of parties other than Govt. Agencies, the redress of the dispute may be sought in the Court of Law."

17. Such paragraph in the settlement dispute clause of the contract has been construed not to be an arbitration agreement between the parties by the Hon'ble Supreme Court in ***Mahanadi Coalfields Ltd (supra)*** and by our High Court in ***R N Samanta (supra)*** and ***South Eastern Coalfields Ltd (supra)***.

18. Learned advocate appearing for the respondent has submitted that, the conduct of the applicant prior to the application under Section 11 of the Arbitration and

Conciliation Act, 1996, during the pendency of such applications, during the hearing on April 9, 2021 and its conduct subsequent to such order, should be taken into consideration by the Court in order to arrive at the finding that, there was an arbitration agreement between the parties.

19. Section 2 (b) read with Section 7 of the Arbitration and Conciliation Act, 1996 enjoins the existence of a writing of the parties agreeing to refer present or future disputes to arbitration. There has to be an agreement in writing between the parties to refer the disputes to arbitration conduct will not substitute the statutory requirement of an agreement in writing. The Court while considering an application under Section 11 of the Arbitration and Conciliation Act, 1996 has to arrive at a finding, even on a prima facie basis, if the fact situation so warrants, that, there exists an arbitration agreement between the parties in writing.

20. In the facts of the present case, the settlement of disputes clause has seven paragraphs. The first paragraph requires the contractor to avoid litigation and disputes during the course of execution of the work. It provides that should disputes take place, then effort should be made first

to settle the disputes at the company level. The second paragraph requires the contractor to make a request in writing to the Engineer in Charge for settlement of disputes. The third paragraph envisages resolution of the disputes in two stages. The fourth paragraph recognises the first stage. It requires the dispute to be referred to the area chief general manager, general manager at the first stage. If difference still persists then the dispute is to be referred to a committee constituted by the owner. The fifth paragraph speaks of the second stage. The second stage provided in the fifth paragraph is broken into two parts. In the first part, disputes relating to commercial contracts with Central Public Sector Enterprises/Government Departments (except Railways, Income Tax, Customs and Excise Duties)/State Public Sector Enterprises are to be referred by either party for Arbitration to the PMA (Permanent Machinery of Arbitration) in the Department of Public Enterprises. The second part specifies that, in case of parties other than government agencies, the redress of the dispute may be sought in the Court of law.

21. It has to be held that, the parties herein are guided by the second part of the relevant settlement of disputes clause as, the respondent is not a central public sector enterprise

or a state public sector enterprise or a government department.

22. Learned advocate appearing for the respondent has juxtaposed the word "shall" used in the fifth paragraph 1st portion with the word "may" appearing in the second portion of such paragraph. He has contended that, the word "may" used in the clause permits the respondent to approach for arbitration in addition to approaching the Court of law. Such contention cannot be accepted in view of the authoritative pronouncements in ***R N Samanta (supra)***, ***South-Eastern Coalfields Ltd (supra)*** and ***Mahanadi Coalfields Ltd (supra)***. In absence of a written agreement to refer the present and future disputes to the contract to arbitration, the conduct between the parties cannot be construed to mean that, the parties had agreed to arbitration.

23. In the facts of the present case, there is no positive assertion on the part of the applicant herein that it had agreed to arbitration. The applicant herein had been silent with regard to the existence of the arbitration agreement between the parties in the affidavit in opposition which it had filed in AP No. 371 of 2020. It had allowed the Court to record that, the existence of arbitration agreement is not

disputed, on April 9, 2021, when the Court was considering the application under Section 11 (6) of the Arbitration and Conciliation Act, 1996. However, the fundamental basis for referring the parties to arbitration being an arbitration agreement in writing between them, never existed between the parties for the applicant herein to waive or acquiesce any of its rights.

24. There had been disputes between the parties with regard to the existence of the arbitration agreement itself in ***Pravin Electricals Private Limited (supra)***. The arbitration agreement was claimed to be in the consultancy agreement dated July 7, 2014 which one of the parties thereto had contended that it had never entered into it. In such context, the Supreme Court has held that, where it is not possible for a Court exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, to weed out manifestly and ex-facie non-existent and invalid arbitration agreements and non arbitrable disputes, then, in such cases, the issue of the existence of arbitration agreement can be referred to the arbitrator for determination as a preliminary issue. Such fact scenario is not obtaining in the present case inasmuch as, three authorities had construed the clause in question and held

that, it did not amount to an arbitration agreement. Therefore, in view of such authoritative pronouncements, it cannot be said that, there is any issue with regard to the existence of the arbitration agreement requiring reference to the arbitrator for determination as a preliminary issue.

25. In view of the discussions above, RVWO No. 2 of 2022 is allowed. The order dated April 9, 2021 is reviewed and held that, there is no arbitration agreement between the parties. AP No. 371 of 2020 is therefore dismissed as not maintainable in view of nonexistence of arbitration agreement between the parties. No order as to costs.

26. In view of this judgement and order, no further order need be passed in the pending interim application. The same may also be treated as disposed of by the Department.

[DEBANGSU BASAK, J.]