

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 877 of 2022
With
CAN 1 of 2022

Reserved on: 04.08.2022
Pronounced on: 14.09.2022

M/s. Kalimata Vyapaar Pvt. Ltd. and Another

...Appellants

-Vs-

The General Manager Northern Railways and Others

...Respondents

Present:-

Mr. Suman Dutta,
Mr. Asif Hussain,
Mr. Kallol Saha, Advocates

... for the appellants

Mr. Avinash Kankani, Advocate

... for the respondents

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE SUGATO MAJUMDAR,
JUDGE

Prakash Shrivastava, CJ:

1. By this intra-court appeal, writ petitioners have challenged the order of the learned Single Judge dated 10th of May, 2022 whereby WPA 9866 of 2020 has been disposed of with liberty to the appellants to seek remedy of arbitration in terms of the arbitration clause contained in the contract and by extending the interim order for a limited period.

2. The appellants had filed the writ petition with the plea that it is engaged in the manufacture and supply of diverse track items and had submitted the bid in response to the NIT published by the respondent on or about 14th of February, 2019. While submitting the

bid, appellant had indicated and included therein the deviation under the Techno Commercial Part by mentioning it boldly in annexure 'A'. The technical bid of the appellants was responsive and price offer of the appellants was opened and tabulated by the respondent and in the reverse auction, appellants had revised their financial bid and were declared L-1 bidder. According to the appellants, they were under the belief that the respondent no. 1 will issue the advance acceptance in tune with the offered document of the appellants recording therein the deviation but on 5th of September, 2019, appellants had received two separate letters issued by the respondent no. 2 mentioning that the bid submitted by the appellants was accepted subject to the terms and conditions set forth in the letter. According to the appellants, the two letters were not as per the terms set forth in the appellant's bid. The appellant had sent the communication dated 6th of September, 2019 to the respondents. The plea of the appellants is that they had proceeded under the bona fide belief that there was no concluded contract. The respondents had issued communication dated 5th of September, 2019 stating that the appellant's bid was accepted and mentioning that the said advance acceptance letter shall constitute a binding and concluded contract. Thereafter, the communication dated 24th of August, 2020 was issued by the respondents mentioning that the appellants had not deposited the security amount as requested by the letter dated 5th of September, 2019 against the contract, therefore, the contract was cancelled and the security money amounting to Rs. 59,59,348/- was forfeited. Thereafter, the respondents had issued the communication dated 12th of November, 2020 stating that non-acceptance of counter offer by the appellants was not permissible in

the light of appellants having undertaken while submitting the bid that the bid did not contain any deviation. Hence, in the writ petition, the appellant had questioned the notices dated 24th of August, 2020 and 12th of November, 2020.

3. Learned Single Judge vide impugned order dated 10th of May, 2020 has reached to the conclusion that the appellant has the remedy of arbitration, therefore, permitted the appellant to seek arbitration of the dispute in terms of the arbitration clause.

4. Submission of learned counsel for the appellant is that no concluded contract exists between the parties as the offer of the appellant was a conditional order. His further submission is that after exchange of affidavit before the learned Single Judge, the appellant cannot be relegated to the remedy of arbitration and alternate remedy is not a bar in entertaining the writ petition.

5. As against this, learned counsel for the respondent has submitted that the appellant himself had made a request for invoking the arbitration clause and that the respondents were not bound to accept the deviation and concluded contract exists and even otherwise in terms of Section 16 of the Arbitration and Conciliation Act, 1996, the issue relating to concluded contract can be decided by the Arbitrator.

6. We have heard the learned counsel for the parties and perused the record.

7. It is undisputed before this Court that Clause 2903 of the Indian Railways Standard Conditions of Contract (Supply Contract) 1997 contains the arbitration clause to the following effect:

“2903(i): In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or if the Railway fails to make a decision within 120 days (as referred in 2902), then and in any such case, but except in any of the “excepted matters” referred to in Clause 2902 of these Conditions, parties to the contract, after 120 days but within 180 days of their presenting their final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. Provided that where the claim is raised by Railways para 2903(i) shall not apply.

2903(ii)(a): The demand for arbitration shall specify the matters which are in question, or subject to the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made together with counter claims or set off, shall be referred to arbitration and other matters shall not be included in the reference.

2903(ii)(b): The parties may waive off the applicability of Sub-Section 12(5) of Arbitration and Conciliation Act 1996 (as amended), if they agree for such waiver in writing, after dispute having arisen between them.

2903(iii)(a): The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.”

8. The record further reflects that though the appellant in annexure ‘A’ to the bid document had mentioned the commercial deviation but the offer of the bidder contains the following declaration:

“3. I agree that the purchaser may, at his discretion ignore any deviation quoted by me in any uploaded document or else where in any tab other than the deviation

tab while accepting my offer, and I shall be legally bound to accept any contract placed on me by the purchaser by ignoring any such deviation(s).”

9. It is also found that the appellant vide communication dated 10th of November, 2020 sent to the respondent no. 1 had made a request for appointment of arbitrator for settling the matter with the prayer to refer the matter to the arbitrator. Section 16(1) of the Arbitration and Conciliation Act, 1996 in clear term provides that the Arbitration Tribunal may rule at its own jurisdiction including ruling of any objection with respect to the existence or validity of the arbitration agreement.

10. In view of the aforesaid, learned Single Judge has rightly observed that the issue as to whether there was a concluded contract at all between the parties should be subject matter of the arbitration invoked by the appellant.

11. So far as the submission of the learned counsel for the appellant in respect of maintainability of the writ petition in a contractual dispute in spite of existence of arbitration clause, and reliance upon the judgment of the Hon’ble Supreme Court in the matter of **Unitech Limited vs. Telangana State Industrial Infrastructure Corporation (TSIIC)** reported in **AIR 2021 SC (SUPP) 756** is concerned, there is no dispute to the proposition that High Court’s jurisdiction under Article 226 of the Constitution is not ousted in respect of the dispute pertaining to contractual matters or existence of arbitration clause but each case requires consideration on its own facts and in the facts of the present case, learned Single Judge has not committed any error in directing the appellant to avail the

remedy of arbitration. Mere exchange of affidavits before the learned Single Judge does not come in the way of issuing such direction.

12. Hence, we find that the order of the learned Single Judge does not suffer from any error and no case for interference is made out.

13. The appeal is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(SUGATO MAJUMDAR)
JUDGE

Kolkata
14.09.2022

PA(RB)

(A.F.R./N.A.F.R.)