

02 18.12.2023
AN Ct. No. 08

FMAT (ARBAWARD) 52 of 2023

With

IA No. CAN 1 of 2023

Eastern Coalfields Limited

vs.

BGM & M-RPL-JMCT(JV) of Babupara

Mr. Tilak Bose, ld. Sr. Adv.

Mr. Debnath Ghosh

Mr. Syed Nurul Arefin

Mr. Rahul Singh

Ms. Reshmi Binayak

... for the appellants

Mr. Debajyoti Basu

Mr. Diptomoy Talukdar

Mr. Dibyendu Ghosh

Mr. Subhojit Seal

... for the respondent

This appeal is arising out of an order dated 04.10.2023 in an application filed under Section 9 of the Arbitration & Conciliation Act, 1996. The learned Judge, Commercial Court at Asansol on 04.10.2023 passed an ex parte ad interim order restraining the respondent authorities viz. the appellant herein to give further effect to the show cause notice vide reference no. ECL/NK-KB/Agent/NS/2023-24/1165 dated 25.09.2023 without leave of the Court and the respondent was given liberty to seek discharge of variation or this interim order. This interim order was extended on 23.11.2023 till 04.01.2024.

Admittedly, the appellant did not apply for variation and/or discharge of the ad interim order before the returnable date. The appellant appeared on 23rd November, 2023. It appears that the learned Single Judge

has directed the petitioner respondent to take effective steps for appointment of the arbitrator by the next date. We have informed that the application under Section 11 has been filed and it is being opposed on behalf of the appellant.

Learned Single Judge has proceeded on the basis of an arbitration agreement in terms of Clause 13 of the notice inviting tender and passed the impugned order.

Mr. Bose, learned senior counsel appearing on behalf of the appellant has strenuously argued that Clause 13 cannot be considered to be an arbitration agreement within the meaning of Section 7 of the Arbitration & Conciliation Act, 1996 and has relied upon the decisions of the Hon'ble Supreme Court in the cases of *Jagdish Chander vs. Ramesh Chander & Ors.* reported in (2007) 5 SCC 719 and *Mahanadi Coalfields Ltd. & anr. vs. IVRCL AMR Joint Venture* reported in (2022) SCC On Line SC 960.

In view of the fact that the matter is fixed before the learned Commercial Court on 04.01.2024, we direct the said Court to decide whether the enforceability of an arbitration agreement in the face of an allegation by ECL that Clause 13 cannot be construed to be an arbitration agreement within the meaning of Section 7 of the Arbitration & Conciliation Act, 1996. In the event, learned Court is in favour of the ECL, there is no need to go into the merits of the matter. However, in the event, the learned Commercial Court is of the view that it is a contractual arbitration agreement, the learned court may proceed with the matter on merits. The participation of the appellant

before the learned Commercial Court in the pending proceeding without prejudice to the rights and contentions that there is no arbitration agreement between the parties. Even if the Court is of the view that there is an arbitration agreement, the Court has to consider in deciding the show cause notice whether it was without jurisdiction or mala fide and unless these facts are established by the respondent, the Court would not be entitled to pass any order in the said Section 9 application unless the court is satisfied that conditions for challenging a show-cause notice and fulfilled.

We make the observation that the order impugned is not furnished, any adequate reason for an ad interim order staying the show cause notice. The appellant shall be at liberty to file an objection to the application filed under Section 9 of the Arbitration & Conciliation Act, 1996 on or before Friday upon prior service to Mr. Subhojit Seal, learned advocate on record. Reply, if any, shall be filed on or before 03.01.2024. We make it clear that this order shall have no bearing on the application filed by the petitioner. The decision with regard to the arbitration agreement shall be decided on the date fixed.

Learned counsel appearing for the respondent has further submitted that on a meaningful consideration of Clause 13, it is clear that the parties have entered into an arbitration agreement and the application under Section 9 of the Arbitration & Conciliation Act, 1996 is maintainable in law. Reference has been made upon the decision of the

Hon'ble Supreme Court in the case of Babanrao Rajaram Pund vs. Samarth Builders & Developers & anr. reported in (2022) 9 SCC 691.

In view of the above, both the instant appeal and the connected application are **disposed of**.

On consent of the parties present, in respect of the above order and directions passed, FMAT (ARBAWARD) 56 of 2023, published in the supplementary list today, is taken into consideration and hereby **disposed of**.

(Uday Kumar, J.)

(Soumen Sen, J.)