

OD-9

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/27/2023

M/S. CEMENTONE ENGINEERING
VS
THE GENERAL MANAGER,
EASTERN RAILWAY AND ANR.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 25th April, 2023

Appearance:

Mr. Sankarsan Sarkar, Adv.

Mr. Arindam Chandra, Adv.

Mr. Atish ghosh, Adv.

Mr. Tanmoy Sett, Adv.

Ms. Antara Dey, Adv.

...for the petitioner

Mr. Kalyan Kumar Chakraborty, Adv.

Mr. Vivek Kumar Pandey, Adv.

...for the respondents

The Court:- The present section 11 application has been filed by a contractor of the eastern railway on an alleged dispute pertaining to the claim of the petitioner for damages and certain alleged unpaid amounts for the work done by the petitioner.

Learned counsel for the petitioner places reliance on an arbitration clause contained in the General Conditions of Contract of the Indian Railways, which pertains to appointment of arbitrator. It submitted that the present dispute falls

within the purview of such arbitration clause and, as such, is required to be referred to arbitration.

However, since there was no agreement between the parties regarding the arbitrator to be appointed, the present application has been filed.

Learned counsel appearing for the respondents objects to the reference to arbitration under Section 11 primarily on two grounds. The first ground on which such reference is opposed is admittedly of a technical nature. It is argued that Clause 63.1 of the General Conditions of Contract (GCC, 2019), clearly stipulates that all disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of work or after its completion, shall be referred by the contractor to the “GM” (General Manager).

In the present case, however, the invocation was not sent to the General Manager, it is argued. The notice of demand itself, for pre-arbitration, was referred to the Divisional Railway Manager, as evident from Annexure “B” at page 26 of the present application. Hence, such dispute cannot be termed as a dispute within the contemplation of Section 21 of the Arbitration and Conciliation Act, 1996. Secondly, learned counsel submits that Clause 64.(1)(ii)(b) provides that the parties may waive off the applicability of sub-Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 if they agree for such waiver in writing, after the dispute having arisen between them, in the format given therein.

It is argued that Section 64.(3)(a) of the GCC further provides the modality for appointment of arbitrator where applicability of Section 12(5) has been waived off.

Learned counsel for the respondents seeks to place reliance on two judgments of the Supreme Court, respectively reported at (2004) 10 SCC 504 and (2006) 13 SCC 240.

It is contended that the said judgments clearly refer to the very clauses cited by the respondents and clinch the issue against the petitioner as regards the provisions of the GCC that the arbitrator, if appointed, has to be the arbitrator as envisaged within the GCC. Hence, the present reference sought under Section 11 is not maintainable, it is argued.

Learned counsel appearing for the petitioner controverts such contentions and submits that there was a 'pre-arbitration' proceeding between the parties, which was in effect a conciliation proceeding it was an admitted position that disputes had arisen between the parties.

Hence, it cannot be said that the reference to dispute itself was bad.

It is further argued that both the judgments cited by the respondents were past prior to the amendment of 2015 and, as such, are not garment the adjudication the present lis.

It is further argued that Section 64.(1)(ii)(b) clearly envisages that the parties "*may*" waive all the applications of applicability of Sub-Section 12(5) if they agree for such waiver in writing *after dispute having arisen between them*.

In the present case, however, there was no such agreed waiver in writing for which the subsequent clauses would not apply in the present case.

A perusal of the relevant clauses of the GCC along with the memorandum of agreement dated March 10, 2015 executed between the parties clearly indicates that the dispute arisen between the parties falls within the domain of the arbitration clause.

However, neither of the objections raised by the respondents can be entertained for the reasons as noted below.

Inasmuch as clause 63.1 of the GCC is concerned, the same merely refers to the reference of the dispute itself, at the inception, by the contractor to the General Manager of the railway.

However, the said clause does not having material bearing on the language of Section 21 of the 1996 Act, which is not merely a reference of the dispute but a reference to arbitration of the dispute. Secondly, 21 contemplates that, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date of which a request for that dispute to be referred to arbitration is received by the respondents.

Hence, an invocation under Section 21 cannot be circumscribed by the relevant clause, that is, Clause 63.1 of the GCC, which is cited by the respondents. That apart, since pre-arbitration/conciliation proceedings have already been going on between the parties, the dispute having arisen between the parties or the veracity of the raising of such dispute stands itself undisputed. Insofar as the judgment cited by the respondents are concerned, on such score as well, learned counsel for the petitioner is absolutely justified in submitting that both the said judgments are of the era prior to the 2015 amendment to the 1996 Act.

That apart, the petitioner is also justified in contending that Clause 64.(1)(ii)(b) clearly contemplates that if there is an agreement for waiver in writing after the dispute having arisen between the parties, the said clause is applicable. However, in the present case, there is nothing to indicate that there was ever any such waiver in writing after the dispute having arisen.

In such view of the matter, it cannot be said that the reference sought by the petitioner is not maintainable in law in any manner whatsoever.

Accordingly, AP/27/2023 is allowed of by appointing Mr. Sakya Sen (Mob: 9830090750), an Advocate practising in this Court and a member of the Bar Library Club, as the sole arbitrator to resolve the disputes between the parties, subject to obtaining his declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(SABYASACHI BHATTACHARYYA, J.)