

OCD-17

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AP-COM/416/2024

BHAGWANDAS VEHICLE TEST SERVICES PVT LTD
VS
WEST BENGAL TRANSPORT INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 24th September, 2024

Appearance:
Mr. Swatarup Banerjee, Adv.
Mr. Sariful Haque, Adv.
Mr. Rajib Mollick, Adv.
Mr. Biswaroop Ghosh, Adv.
...for the petitioner

Mr. Pradip Kumar Roy, Adv.
Mr. T. Roy Chowdhury, Adv.
Ms. Susmita Pal, Adv.
...for the respondent

The Court:- Learned counsel for the respondent seeks an adjournment. It is seen from the order dated September 18, 2024 that the respondent had sought an adjournment on the said date as well, upon which the matter was adjourned till yesterday.

Even today an adjournment is sought. When refused, learned counsel for the respondent seeks liberty to file affidavit in opposition.

However, since all the relevant documents are annexed to the application and connected supplementary affidavit, such prayer is evidently intended to delay the matter further. In any event, the Court sitting in Section 11 jurisdiction cannot and does not go into the merits of the dispute between the

parties to require filing of an affidavit-on-opposition on the substance of the dispute.

In any event, it is noticed that a co-ordinate Bench of this Court, in an order dated February 29, 2024, had recorded the three plinths of objections of the respondent. The first was that the matter pertains to a special statute and as such is not inherently arbitrable. The second was that the words used in the arbitration agreement do not afford reference to arbitration. Thirdly, the arbitration agreement is a two-tier proceeding, without exhausting which no Arbitrator cannot be appointed.

Learned counsel appearing for the petitioner submits that the dispute arises out of a Concession Agreement between the parties and does not touch the proceeding initiated by the respondent under the Public Land (Eviction of Unauthorized Documents) Act, 1962. In any event, the said proceeding was initiated after the petitioner approached the Court for an order under Section 9 of the Arbitration and Conciliation Act, 1996 and obtained the said order.

Learned counsel cites a judgment of a co-ordinate Bench in the matter of *Rolta Infrastructure and Technology Services Private Limited Vs. Department of Information Technology and Electronics, Government of West Bengal* reported at 2024 SCC Online Cal 105 where, under similar circumstances as per the petitioner, the Court granted an order under Section 9 of the 1996 Act, despite a proceeding under the 1962 Act having already been initiated. Learned counsel for the petitioner submits that the present petitioner is on a better footing inasmuch as in the instant case the proceeding under the 1962 Act was initiated

only after the petitioner approached the Court having jurisdiction over arbitral matters under Section 9 of the 1996 Act and obtained an order therefrom.

Upon hearing learned counsel for the parties, it transpires that there is distinction in the ratio laid down in the co-ordinate Bench judgment in *Rolta Infrastructure (supra)* and the present case.

In several places of the said judgment, the learned Single Judge had observed that the argument of eviction from public land being a matter which is non-arbitrable is not germane to the applications of the nature as came up for consideration before the said Bench, the said application being one under Section 9 of the 1996 Act. The Court further held that the issue of non-arbitrability is a relevant consideration in applications filed under Section 11 of the 1996 Act. Again, the learned Single Judge reiterated that in *Vidya Drolia* and *A. Ayyasamy's* cases, referred to in the said judgment, the proceedings were under Sections 11 and 8 of the 1996 Act respectively where the entire question was whether the parties (and the dispute) should be referred to arbitration. The learned Single Judge distinguished from the said cases by observing that in the case before the learned Single Judge, the application was under Section 9 of the 1996 Act from the arbitration agreement between the parties and the referral Court had been conferred with preliminary powers to grant interim measure of protection for preservation of the subject matter of arbitration. As such, it is clear from the cited judgment itself that the learned Single Judge was conscious of the distinction between a proceeding under Section 11 and one under Section

9 of the 1996 Act and laid down the proposition therein in respect of Section 9, as opposed to Section 11, of the 1996 Act.

In paragraph 14 of the said judgment, the learned Single Judge observed that apart from the power conferred on a Court in a proceeding under Section 9, there is no conflict between the 1996 Act and the 1962 Act and that both statutes operates in independent fields and the 1996 Act certainly does not contemplate obliteration of the provisions of the 1962 Act. Indeed, it was held, a non-obstante clause of the State Act cannot override a later Central Act operating in a different field altogether.

Looking into the facts of the present case, however, it is clear that the dispute raised by the petitioner in its notice under Section 21 of the 1996 Act revolves entirely around the allegedly unlawful termination of the Concession Agreement between the parties and the rights and liabilities flowing from the said Concession Agreement itself. The dispute resolution clause under Article 16 of the said agreement clearly covers all disputes of the present nature.

The objection in the present case as to non-arbitrability on the ground of applicability of the 1962 Act is, although attractive at the first blush, otherwise specious.

The present dispute does not relate in any manner to an eviction proceeding under the 1962 Act. Although, collaterally, the outcome of the present dispute might affect the fate of the 1962 Act proceeding, the conspectus of applicability of the 1962 Act is in no manner germane in the present dispute. In the proceeding under the 1996 Act, the reference is based entirely on the

perception of the claimant as regards of the nature of the dispute, which can subsequently be supplemented by statement of defence / counter-claim. At the stage of deciding an application under Section 11 of the 1996 Act, it is the perception of the claimant as regards the dispute which is of paramount importance to the Court. The Court, under Section 11, does not decide even prima facie on the merits of the disputes between the parties but only has to see whether the dispute raised by the proposed claimant comes within the ambit of the arbitration clause in the agreement between the parties.

Thus, the question of applicability of the bar under the 1962 Act does not arise at all, since the said Act pertains entirely to eviction proceedings against unauthorized occupants and removal of unauthorized constructions in respect of public or government land. The dispute raised by the petitioner, however, has no nexus with such an eviction proceeding. The petitioner seeks to remedy the perceived wrong in termination of the contract between the parties. That apart, the rights and liabilities claimed by the present petitioner all flow from the Concession Agreement and do not in any manner relate to the 1962 Act proceeding which might have been initiated by the respondent. The proceeding under the 1962 Act and the present reference operate in distinct and different fields and have no overlap or conflict with each other. At best, the petitioner can set up a defence on the basis of the Concession Agreement in the 1962 Act proceeding, in which case the said issue would only be incidental.

Undoubtedly, the 1962 Act deals with matters under the State List of the Seventh Schedule of the Constitution whereas the 1996 Act covers matters

within the Union list. Thus, there cannot be any comparison or conflict between the two, vis-à-vis the present dispute, since the present dispute has no nexus with the 1962 Act, which is a special State Act having no operation in the context of the present dispute. Thus, even without going into the question as to the scope of applicability of the 1962 Act, which shall be decided by an appropriate authority, the present dispute, at least prima facie, pertains to the Concession Agreement and rights emanating therefrom and, as such, is squarely arbitrable and comes within the ambit of the arbitration clause between the parties.

As to the second objection taken by the respondent, there is nothing in the arbitration clause of the Concession Agreement between the parties which can impede a reference to arbitration. The words of the arbitration clause, that is, Article 16 are unambiguous as to any dispute of whatever nature, howsoever arising under or in relation to the agreement being referable to arbitration. The said words are of widest amplitude and cover all disputes coming within the wider connotation of the agreement between the parties.

As regards the third objection raised by the respondent, as to a pre-arbitral two-tier system of dispute resolution being contemplated in the agreement, this Court is unable to concur with the arguments of the respondent on such count as well. The arbitration clause provides that either party, in case of a dispute, may call upon the Authorized Engineer to assist the parties in arriving at an amicable settlement thereof. On the second rung of the dispute resolution hierarchy contemplated therein, failing mediation by the Authorized

Engineer, the parties have to refer the dispute to the Chairman of the WBTIDC or the Chairman of the Board of Directors of the Concessionaire.

However, the first rung of the two-tier system has failed in the present case in view of the several correspondence between the parties and the pending litigation between them. The very institution of a proceeding under the 1962 Act by the respondent and the pending writ petition of the present petitioner as well as the failed correspondence between them goes on to indicate that a further relegation of the parties to a pre-arbitration amicable settlement would be a futile exercise.

As to the second tier of the dispute resolution eco-system contemplated in the Concession Agreement, the same is squarely violative of Section 12 of the 1996 Act. The Chairman of the WBTIDC, being one of the functionaries of the respondent, would evidently have a conflict of interest in the matter.

Accordingly, none of the objections raised by the respondent are tenable in the eye of law.

Hence, AP-Com/416/2024 is allowed, thereby appointing Justice Samapti Chatterjee, a retired judge of this Court, as the sole Arbitrator to resolve the disputes between the parties, subject to a declaration under Section 12 of the Arbitration and Conciliation Act, 1996 Act being obtained from the said learned Arbitrator. The learned Arbitrator shall fix her own remuneration in consultation with the parties and within the framework of 1996 Act, in particular the Fourth Schedule thereof.

It is made clear, however, that the observations made above were only tentative insofar as the merits are concerned and were arrived at only for the purpose of deciding whether the matter is to be referred to arbitration.

All questions are kept open on merits to be decided by the learned Arbitrator.

(SABYASACHI BHATTACHARYYA, J.)