

OCD-8

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

AP-COM/697/2024

SHAILESH MISHRA AND ANR
VS
SIMPLEX INFRASTRUCTURE LTD

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 18th September, 2024

Appearance:
Mr. Prithwish Ray Chowdhury, Adv.
...for the petitioners

Mr. Abhishek Banerjee, Adv.
..for the respondent

The Court:- The learned counsel for the petitioners argued that the petitioners worked in the capacity of sub-contractor in a contract between the RVNL and the respondent. The work contract issued by the respondent in favour of the petitioners contains two similar arbitration clauses. The only difference between the clauses is that Clause 21 says that the sole Arbitrator is to be appointed by the Managing Director of the respondent, whereas Clause 37 fixes such responsibility on the Company Secretary of the respondent.

However, both being ineligible under section 12 of the Arbitration and Conciliation Act 1996, the petitioners invoked the arbitration clause and thereafter has moved this application.

Learned counsel for the petitioners also places reliance on certain communications between the RVNL and the petitioners along with other sub-

contractors, where it was disclosed that the RVNL reduced the quantum of claim of the petitioners, which is to the tune of Rs.50,51,742/- to a meagre Rs.2,84,286/-. As such, it transpires from the RVNL's communication that the respondent under-certified the dues of the petitioners, which also adds to the dispute.

Learned counsel for the respondent contends that subsequent to the invocation of the arbitration clause in the work order, there was a tripartite agreement between the principal employer RVNL, the petitioner and the present respondent, along with other sub-contractors, whereby the RVNL, that is the principal, was to make the payments directly to the petitioners with regard to the petitioners' dues. Importantly, the said subsequent tripartite agreement does not contain any arbitration clause.

Learned counsel for the respondent argues that in view of the subsequent tripartite agreement pertaining to settlement of the dues of the petitioners, which is also the premise of the present invocation, the later agreement subsumed the present dispute and as such, there cannot be any reference to arbitration under the earlier agreement/work order.

It is further contended by the respondent that in view of the petitioners having written to the RVNL directly and the RVNL having conceded to an extent to make certain payments to the petitioner, there is no scope of reference in terms of the previous work order between the petitioners and the respondent.

A perusal of the two arbitration clauses in the concerned agreement between the parties comprising of the work order, that is, Clauses 21 and 37

thereof, shows that the parties undoubtedly agreed to refer the disputes arising out of or in connection with the work order to arbitration. The petitioners are justified in arguing that both the Company Secretary and the Managing Director of the respondent, being functionaries of the respondent, are ineligible within the contemplation of section 12 of the Arbitration and Conciliation Act 1996, read with the *Perkins Eastman Case*, reported at (2020) 20 SCC 760.

With regard to the argument of the respondent regarding the parties having entered into a tripartite agreement with RVNL, the principal, subsequently, the same cannot be adjudicated within the limited conspectus of an application under Section 11 of the 1996 Act. What the Section 11 Court has to ascertain primarily is whether there is an arbitration clause in an agreement between the parties.

In the present case, there are not one but two arbitration clauses of similar purport in the agreement between the parties, comprised of the work order in question.

Although the respondent's contention regarding there being a subsequent agreement, which subsumes the work order, might or might not be a valid defence in the arbitral proceeding itself, it would be premature at this juncture for this Court to enter into the merits of such contention. Moreover, the petitioners dispute the existence of such subsequent settlement agreement between the parties, which disputed question of fact is best left to be decided by the arbitrator.

As such, there is no fetter in the dispute now raised by the petitioners, which is otherwise arbitrable, being in the nature of a money claim, being referred to arbitration.

Accordingly, AP-Com/697/2024 is allowed on contest, thereby appointing Mr. Anubhav Sinha, a member of the Bar Library Club, 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 his own remuneration in consultation with the parties and within the framework of the 1996 Act, in particular the Fourth Schedule thereof.

It is made clear that all issues raised by the parties are kept open for being adjudicated on merits by the Arbitrator.

(SABYASACHI BHATTACHARYYA, J.)