09.07.2025
Item No.1
Court No.01
SK(AR(CR)

In the High Court at Calcutta
Circuit Bench at Jalpaiguri

CO/76/2024

THE EXECUTIVE ENGINEER, NATIONAL HIGHWAY DIVISION NO. IX AND ANR
VS
M/s. DILIP KUMAR DAS AND SONS

Mr. Joyjit Choudhury,
Mr. Nabankur Paul,
....for the petitioner.

Ms. Suman Sehanabis(Mandal),
....for the respondent.

The challenge in this revisional application is directed against an order dated 22 March, 2023 passed by the District Judge at Jalpaiguri in OC Execution no. 70/2017 "Arb".

By the impugned order the District Judge has on an issue of maintainability, *inter alia,* directed that the decision of the Dispute Review Expert (Board) is to be treated as an arbitral award and has proceeded to execute the same. In this background, the applicant assails the impugned order dated 6 May, 2024 and raises a jurisdictional issue which goes to the root of maintainability of the Main Execution Case i.e EC No. 70/2017.

Briefly, the petitioner published a notice inviting offers for construction works in respect of National Highway-31. The respondent being the successful bidder was awarded the contract.

The mechanism for dispute resolution as contemplated under the contract is stipulated hereinunder:

> *"24. Disputes*
> *"24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer's decision."*

The general conditions of the tender also provide as follows:

"ARBITRATION

The procedure for arbitration will be as follows:

25.3 (a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed and the Arbitral Tribunal consisting of 3 arbitrators one each to be appointed by the Employer and the Contractor and the third Arbitrator to be chosen by the two Arbitrators so appointed by the Parties to act as Presiding Arbitrator shall be considered. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Council, Indian Roads Congress.

(b) The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so

appointed by the Parties, and shall act a presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Council, Indian Roads Congress.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Council, Indian Roads Congress shall appoint the arbitrator. A certified copy of the order of the Council, Indian Roads Congress, making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings."

In the execution case, the respondent has sought to enforce the decision of the review expert dated 19 February, 2017. By the said decision, the dispute review expert had, inter alia, directed payment of an aggregate amount of Rs.113.64 lakhs + 12% simple interest payable beyond 19 February, 2017 till the date of payment to the respondent.

Thereafter, by a letter dated 22 December, 2017 the petitioner had invoked the above clause 25.3A of the General Conditions of Contract and sought to appoint an Arbitrator in terms of the above clause. In response, by a communication dated 9 January, 2018, the respondent contended that they were entitled to enforce the decision of the Dispute Review Expert and there was no question for proceeding by way of arbitration. In this background, the respondent had initiated the above execution case being OC Execution No. 70/2017 for enforcement of the decision of the review expert wherein the impugned order has been passed.

On behalf of the petitioner, it is contended that the impugned order is wholly without jurisdiction *non est* and void. Moreover, any attempt to seek enforcement of the decision of the Decision Review Expert is wholly without jurisdiction.

There is a basic fallacy is in treating the decision of the DRE as an award under the Act. The decision of the DRE is not an award or a deemed decree within the meaning of The Arbitration and Conciliation Act, 1996. The decision to refer the matter to the DRE also does not constitute an arbitral reference. There are no trappings of an arbitration in the decision of the

DRE and consequently the entire execution proceeding is not maintainable.

On behalf of the respondent, it is contended that the matter should be referred to the Appropriate Commercial Court having jurisdiction under section 15 of the Commercial Courts Act, 2016 (as amended).

In passing the impugned order there is no decision on whether the decision of the Dispute Review Expert is to be treated as an award as defined under the Act. A perusal of the above dispute resolution clause would *ex facie* demonstrate that the procedure for referral of disputes to the Dispute Review Board cannot be treated as an arbitration agreement and the decision of DRE is not an "arbitral award" as defined under section 31 of the Act.

The legal sanctity and enforceability which is attached to an arbitral award stems from the statutory recognition under the Act which cannot be indiscriminately extended to quasi-judicial or administrative decisions rendered by other authorities. There is no question of treating any or every such determination as an award or a deemed decree under the Act and thereby undermining the statutory scheme and the procedural safeguards which govern the adjudicatory process under the Act. This conflation raises serious issues of maintainability, as it blurs the essential distinction between a duly constituted arbitral tribunal contemplated under a valid arbitration agreement.

In light of the above express arbitration clause, any attempt to execute the decision of the DRE as a decree bypassing the agreed arbitral mechanism is not only impermissible but also patently illegal. Such a mechanism circumvents the binding dispute resolution framework and undermines party autonomy enshrined under the contract. Consequently, the enforcement of such decisions as if they are a decree, despite the existence of an independent, valid and binding arbitration clause, is legally untenable. In view of the above, the DRE's decision has been rendered outside the scope of the arbitral jurisdiction and is unenforceable as a decree. And any such attempt to execute the same is not only unsustainable but tantamount to being perverse.

Such a decision of the Dispute Review Expert (DRE) cannot fall within the definition of "arbitration" as provided under S. 2(1)(a) of the 1996 Act, as it neither involves adjudication by an arbitral tribunal constituted with the consent of parties in accordance with law, nor does it possess the essential attributes of a quasi-judicial determination. Furthermore, the clause in the contract conferring the DRE cannot be interpreted as an "arbitration agreement" under Section 7 of the Act. Consequently, such a decision rendered by the DRE is incapable of enforcement under section 36 of the 1996 Act.

There has been no consideration of this aspect of the matter in passing the impugned order. There is an inherent lack of jurisdiction in the initiation of OC Execution no. 70/2017. The decision of the DRE is unenforceable and outside the scope of the Act.

In view of the above, the impugned order dated 22 March, 2023 is set aside. OC Execution case no. 70/2017 stands dismissed for lack of jurisdiction.

Liberty is granted to the parties to take necessary steps, if so advised. The petitioner is at liberty to take all steps under the arbitration clause, if so advised, in accordance with law.

With the above directions, CO/76/2024 stands allowed.

(RAVI KRISHAN KAPUR, J.)