

State of West Bengal Vs. Tapas Hazra and Development Concern

State of West Bengal Vs. Tapas Hazra and Development Concern

SooperKanoon Citation : sooperkanoon.com/1060121

Court : Kolkata

Decided On : Jan-04-2013

Judge : Sanjib Banerjee

Appellant : State of West Bengal

Respondent : Tapas Hazra and Development Concern

Judgement :

AP No.323 of 2005 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction STATE OF WEST BENGAL Versus TAPAS HAZRA & DEVELOPMENT CONCERN BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE Date :

4. h January, 2013.

Appearance: Mr.Sakya Sen, Adv.Ms.Sumitra Mukherjee, Adv.The Court : The State makes this case out to be another fraudulent attempt by a contractor to foist a liability on the State without any justification.

The contractor was awarded a work order following a tender process but nothing happened thereafter since, by virtue of orders of this Court passed in proceedings under Article 226 of the Constitution of India, the entire process apparently remained arrested.

The contractor was awarded a work order on February 19, 1996 and rather than the contractor putting in the security deposit along with the earnest money already tendered at the time of making the offer, the contractor withdrew the earnest deposit in July of 1996.

But such matter need not be conclusively dealt with in view of the order proposed to be made.

The contractor claimed that it had suffered damages on account of the contract not being allowed to be performed.

An application under Section 11 of the Arbitration and Conciliation Act, 1996 was carried to the Chief Justice of this Court or his designate at a time when orders under Section 11 of the 1996 Act were regarded as administrative orders in view of the Konkan Railway judgment that ruled the field till the SBP & Co. decision overruled the Konkan Railway view.

It also appears that the State did not use any affidavit-in-opposition to the Section 11 matter.

The State sought special leave to appeal to the Supreme Court from the order appointing the arbitrator passed on the Section 11 request.

The Supreme Court refused to entertain the matter on the ground that it was an administrative order and not a judicial order.

The Supreme Court left the question of arbitrability open for the State to canvass before the arbitrator.

There were several sittings held before the arbitrator with the State not filing either any application under Section 16 of the 1996 Act or its statement of defence to the claim lodged by the contractor.

Ultimately, when the application under Section 16 of the 1996 Act was carried to the arbitrator, it was alleged therein that there exists no arbitration agreement between the parties herein .

The application also claimed that in absence of arbitration agreement in writing no reference to arbitration of the purported dispute could be made.

The arbitrator dealt with the objection in couRs.of the award since the challenge under Section 16 was carried at a belated stage.

The arbitrator recorded that it was only at the 11th sitting in the reference that it was alleged on behalf of the State that there was no arbitration agreement between the parties.

The arbitrator noticed the dual representation on behalf of the State and spoke of directions being issued for the original tender documents containing the offer of the contractor to be produced.

The award recorded that despite several reminders and opportunity, the State did not produce either the original tender documents or any papers in such regard.

The arbitrator held that on the basis of the States acceptance cum work order of February 19, 1996 there was a concluded contract and the fact that the formal contract was not executed was of no relevance.

Apropos the application under Section 16 of the 1996 Act, the arbitrator held that during the long period between June, 1998 and March, 2003 the State had No. denied the existence of the arbitration agreement as not alleged.

The arbitrator went on to hold that such unexplained long silence on the part of the respondent is very very significant and important in establishing that the allegation of non-existence of arbitration agreement is an afterthought.

It must be noticed that the order on the request under Section 11 of the 1996 Act was made in October, 2001 and the special leave petition therefrom was dismissed on May 2, 2003.

The Supreme Court while dismissing the special leave petition specifically recorded that the pleas available to the petitioner- State, including the plea as to non-existence of the arbitration agreement, may be raised before the arbitrator or such other forum before which it may be permissible in law to raise the same.

In the light of the Supreme Court observation in May, 2003 and the specific leave granted to the State to raise an objection as to the alleged nonexistence of the arbitration agreement, the over-emphasis in the award of the hiatus between 1998 and 2003 is of no relevance at all and the conclusion drawn therefrom is perverse.

The Supreme Court permitted an objection as to the existence of the arbitration agreement being carried to the arbitral tribunal and it was so done.

As recorded in the award itself, the objection was carried to the arbitral tribunal at the 11th sitting in the reference on June 19, 2003.

There does not appear to have been any great delay between the Supreme Court order passed in May, 2003 and the objection as to the existence of the arbitration agreement being carried to the arbitral tribunal within a month therefrom.

The State in its application under Section 16 of the 1996 Act stressed on there being no concluded contract and, as a consequence, there being no arbitration agreement between the parties.

It does not appear that the State categorically asserted in its application before the arbitrator that the arbitration agreement was not applicable to the case in view of the value of the work put to tender.

It is alleged on behalf of the State not that the relevant clause in the contract carried a proviso, whether in the contract itself or by virtue of a Government notification several months prior to the tender process in this case being initiated.

According to the State, the arbitration clause was made applicable only to cases where the value of the work put to tender was in excess of Rs.100 lakh.

It is the admitted position that the value of the work put to tender in this case was in the region of Rs.75 lakh.

In the present petition under Section 34 of the 1996 Act, the State has referred to the relevant documents at paragraph 4 thereof and has compendiously appended copies thereof and collectively marked them as a solitary annexure.

Paragraph 4 of the petition has been dealt with in the affidavit-in-opposition filed on behalf of the contractor.

Both paragraphs 4 and 5 of the affidavit deal with paragraph 4 of the petition.

Apart from the assertion in such paragraph that the arbitration clause was incorporated in the tender documents, the veracity of the copy documents appended to the petition has not been questioned.

An attempt is not made to suggest from the Bar on behalf of the contractor, that erroneous documents had been appended to the petition and that the general conditions governing such contracts, at the relevant point of time, did not make a distinction between the contracts on the basis of the values of the works put to tender.

However, in the absence of any assertion in the affidavit-in-opposition, despite the contractor having an opportunity to deal with the petition, such submission from the Bar cannot be accepted.

Upon an arbitration agreement being asserted and it being denied, it is incumbent on the person asserting the agreement to demonstrate its existence.

It does not appear that the arbitrator appreciated that it was for the claimant to satisfy the arbitrator that there was an arbitration agreement between the parties.

It is possible that the particular point that is not taken by the State was not urged before the arbitral tribunal.

However, there was a categorical assertion in the two opening grounds in the application of the State under Section 16 of the Act to the effect that there was no arbitration agreement between the parties.

Such aspect of the matter appears to have been glossed over in the award, with the arbitrator only finding it significant that the State had not questioned the existence of the arbitration agreement for a long period between 1998 and 2003.

The merits of the claim need not be gone into at this stage.

It also appears that the original documents called for by the arbitrator were not produced by the State.

No final pronouncement on the objection as to the existence of the arbitration agreement need also be made since there has not been any satisfactory initial adjudication thereon in courts of the arbitral reference.

In view of the aforesaid and of the arbitral tribunals failure to comprehensively adjudicate upon the challenge to the existence of the arbitration agreement, the award is liable to be set aside.

Accordingly, the award is set aside and the matter remanded, not to the original arbitrator but to any other in accordance with the arbitration agreement cited by the contractor for a fresh decision in accordance with law as expeditiously as the process can accommodate.

A prayer was made at the hearing and upon the petitioners submission having been concluded for the contractor to be permitted a chance to file a supplementary affidavit.

Such extra-ordinary indulgence as sought by the contractor has been declined.

AP No.323 of 2005 is allowed as above with costs reserved at 6000 GM against the contractor in the event it is ultimately discovered that the arbitration agreement cited by the contractor does not apply.

Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.) kc/sg.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com