

Cimmco Ltd. Vs. Texmaco Rail and Engineering Ltd.

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Court : Kolkata

Decided On : Mar-03-2014

Judge : Sanjib Banerjee

Appellant : Cimmco Ltd.

Respondent : Texmaco Rail and Engineering Ltd.

Judgement :

AP No.673 of 2012 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction Original Side CIMMCO LTD.Versus TEXMACO RAIL & ENGINEERING LTD.Appearance Mr.Ratnanko Banerjee, Adv.Mr.S.K.Mal, Adv.Mr.Jayanta Mitra, Sr.Adv.Mr.Srenik Singvi, Adv.BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE Date : March 3, 2014.

The Court : In this petition under Section 11 of the Arbitration and Conciliation Act, 1996, the petitioner relies on its letter of invocation of April 13, 2012, where it asserted the arbitration agreement and the existence of disputes covered thereby, and the denial of such contention in the respondents reply of May 1, 2012.

The petitioner claims that it is the owner of an industrial design which it had partially assigned to the respondent for a period of five years and which the respondent has apparently exploited beyond the tenure and without payment of any royalty.

A previous petition was carried to this Court under Section 9 of the Arbitration and Conciliation Act, 1996.

Such petition was dismissed upon an application being filed by the petitioner which, inter alia, claimed as follows at paragraph 3 thereof: 3.

This settlement resolves all the disputes between the parties in this matter and disputes raised by the Appellant in the instant proceeding.

It is further agreed that either party and/or their assigns will not raise any of the issues involved in the subject legal proceedings in any forum hereafter . The respondent says that in view of the amicable resolution of all the disputes between the parties, nothing remains to be taken to a reference.

The respondent had asserted as such in the letter of May 1, 2012 in response to the petitioners invocation of the arbitration agreement.

The respondent maintains that for an arbitral reference to be conducted, it is essential that there must be some dispute which is capable of adjudication.

The respondent suggests that in view of the dismissal of the previous Section 9 petition and the wide words of paragraph 3 of the application for dismissal of such petition, there is no live issue to be carried to an arbitral reference.

The respondent refers to the seven-judge Constitution Bench judgment in SBP & Co.versus Patel Engineering Limited reported at (2005) 8 SCC618 Paragraphs 14, 15, 19 and 20 of the report have been placed in the recognition of the extent of the authority of the Chief Justice or his designate under Section 11 of the 1996 Act as enunciated therein.

The respondent asserts that since the application for dismissal of the previous Section 9 petition expressly prohibited the parties from raising such disputes as had already arisen between them, there is no issue that remains to be adjudicated.

One of the assessments required to be made on a request under Section 11 of the 1996 Act, the respondent suggests on the basis of the Constitution Bench dictum, is as to whether there is a live claim; and such adjudication has to be made by the

Chief Justice or his designate and answered in favour of the party making a request for a reference before an arbitral tribunal is constituted in accordance with such request.

In *SBP & Co.*, the Constitution Bench overruled the five-judge decision in *Rani Construction* reported at (2002) 2 SCC 388 which regarded the exercise undertaken by the Chief Justice or his designate under Section 11 of the 1996 Act to be purely administrative in character.

In considering the question, the Supreme Court discussed the nature and extent of the authority available to a Chief Justice or his designate under Section 11 of the Act, the nature and extent of the authority available to a judicial authority in receipt of a petition under Section 8 of the Act and to the arbitration judge considering an application under Section 9 of the Act.

It was held that at every stage, the existence and the validity of the arbitration agreement, if in issue, had to be decided for that was a jurisdictional fact.

In the present case, the existence of the arbitration agreement is not in dispute.

Equally, it is not the respondents case that such clause is invalid.

What the respondent suggests is that by virtue of the application for withdrawal of the previous petition under Section 9 of the 1996 Act and the order dated February 4, 2010 passed thereon, the claim sought to be made by the petitioner herein can no longer be canvassed.

Such question as raised by the respondent does not touch upon the existence or validity of the arbitration agreement; but on the efficacy thereof in the context of the parties conduct.

In character, content and approach, the 1996 Act makes a substantial departure from arbitration law as governed by the Arbitration Act, 1940.

Section 13 of the 1996 Act leaves the parties free to agree on a procedure for challenging the appointment of an arbitrator.

The provision also stipulates the procedure to be adopted in the absence of an agreement between the parties on such score.

Section 16 of the 1996 Act gives authority to an arbitral tribunal to adjudicate upon its own jurisdiction.

It is a departure from the law on arbitration as it stood prior to the 1996 Act and has been recognised as such at paragraph 20 of the report of SBP & Co. In view of Section 5 of the 1996 Act that limits the scope of judicial interference or intervention in matters pertaining to arbitration, upon an objection of the kind now raised by the respondent herein being urged, the Chief Justice or his designate will not conclusively answer the issue and leave it to the arbitral tribunal, if the existence and validity of the arbitration agreement is not in question.

It must be kept in mind that an arbitration agreement is not necessarily exhausted upon the culmination of an arbitral reference or upon an arbitral award attaining finality.

An arbitration agreement is capable of several references being made thereunder, depending on the nature of the matrix contract governed by the arbitration agreement.

The argument on behalf of the respondent amounts to the virtual extinguishment of the arbitration agreement between the parties herein upon the previous Section 9 petition under the 1996 Act being dismissed.

It is possible that no further disputes in respect of the matrix contract can be raised by virtue of the terms on which the petition under Section 9 of the 1996 Act was invited to be dismissed; it is equally possible that the claim which has been raised now by the petitioner may not have arisen at the earlier stage and such claim would survive notwithstanding the terms on which the previous petition was dismissed.

An adjudication of such issue would be more an adjudication on merits than an adjudication on the existence or the validity of the arbitration agreement itself.

In the light of the authority conferred by the 1996 Act on the arbitral tribunal to adjudicate upon its jurisdiction, the Chief Justice or his designate has to yield to such authority once it is found that the resistance to the reference is not founded on the existence or the validity of the arbitration agreement but merely on its applicability in a particular situation.

AP No.673 of 2012 is allowed by appointing Mr.P.K.Das, Sr.Advocate, as the sole arbitrator to adjudicate upon the disputes between the parties covered by the arbitration agreement.

Given the nature of the disputes, it does not appear that the reference should last any more than three months from the completion of pleadings.

Accordingly, the consolidated remuneration of the arbitrator will be Rs.4 lakh to be shared by the parties in equal measure.

There will be no order as to costs.

Certified website copies of this order, if applied for, be urgently supplied to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.) sg.

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