National Collateral Management Services Limited vs.food Corporation of India & Anr

National Collateral Management Services Limited vs.food Corporation of India & Anr

SooperKanoon Citation : sooperkanoon.com/1208771

Court : Delhi

Decided On : Sep-08-2017

Appellant : National Collateral Management Services Limited

Respondent : Food Corporation of India & Anr

Judgement :

$~OS-4 * IN THE HIGH COURT OF DELHI AT NEW DELHI % + Date of decision:

08. 09.2017 ARB.P. 384/2017 NATIONAL COLLATERAL MANAGEMENT SERVICES LIMITED .....

... Petitioner
Through Mr.Abhinav Vashist, Sr.Adv. with Mr.Mihir Lahoti, Mr.Sudhanshu Sikka, Ms.Priya Singh, Ms.Amrita Grover and Mr.Pramod Kr.Mathur, Advs. Mr.Divakant Mody, versus FOOD CORPORATION OF INDIA & ANR..... Respondent Through Mr.Om Prakash and Mr.Pradeep Kr.Tripathi, Advs.for R-1 Mr.G.Tushar Rao and Mr.Mayank Sharma, Advs. for R-2 CORAM: HON'BLE MR. JUSTICE JAYANT NATH JAYANT NATH, J.

(ORAL) 1. This unfortunate dispute is between two government controlled/ Public Sector Undertakings quarrelling with each other even on the issue as to whether an Arbitrator should be appointed to adjudicate the disputes between the parties.

2. This petition is filed under section 11(5) of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties. On 16.7.2003 respondent No.2 UOI had conveyed the Principles/Policies to be adopted for procurement of food grains through agencies/agents for the Central Pool. The petitioner ARB.P.384/2017 Page 1 further submits that on 6.4.2005 a strategic arrangement for mutual business benefit was arrived at between the petitioner NCDEX and the respondent in the form of a Memorandum of Understanding. On 13.4.2007 and 4.1.2008 the petitioner and respondent have entered into an agreement in respect of State of Orissa for Paddy Procurement and Delivery of resultant Custom Milled Rice for KMS200607 and KMS200708.

3. Disputes having arisen between the parties the petitioner has invoked the arbitration clause on 20.3.2015.

4. Reliance is placed on the arbitration agreement contained in the two agreements.

5. The respondents have entered appearance and have raised objections to invocation of the arbitration clause. According to the respondents the clauses relied upon by the petitioner in the two agreements are not arbitration clauses/arbitration agreement.

6. The arbitration clause relied upon by the petitioner in the Agreement dated 13.4.2007 reads as follows:-

"9. Principal and Agent either party can terminate the Agency Agreement by way of giving 3(three) months notice to the other. This Agency Agreement may be executed in duplicate by the FCI/Principal and agent, and each of the said copy shall be deemed to be an original and retained by the FCI/Principal and the agent, and such counter parts together shall constitute one and the same instrument. Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this Agency Agreement shall be referred to the Chairman and Managing Director of FCI/Principal for settlement and whose decision ARB.P.384/2017 Page 2 7. shall be final and binding on the FCI/Principal

and the agent. The relevant clauses of agreement dated 4.1.2008 read as follows:-

"10. Principal/FCI can apply the set off clause against the Agent if there is/are any claims on them This Agency Agreement may be executed in duplicate by the Principal and Agent, and each of the said copy shall be deemed to be an original and retained by the Principal and Agent, and such counter parts together shall constitute one and the same instrument. Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this Agency Agreement shall be referred to the Chairman and Managing director of FCI/Principal for settlement and whose decision shall be final and binding on the both FCI/Principal and Agent. 8. I have heard learned counsel for the parties. At the outset, learned senior counsel for the petitioner submits that he does not press any reliefs against respondent No.2. Respondent No.2 is accordingly deleted from the array of parties.

9. Learned senior counsel for the petitioner relies upon judgment of the Supreme Court in Punjab State and Others vs. Dina Nath (2007) 5 SCC28to contend that under similar circumstances the Supreme Court has interpreted a similar clause as an arbitration agreement.

10. Learned counsel for the respondent has submitted as follows:-

"(i) He relies upon judgments of the Supreme Court in Bharat Bhushan Bansal vs. U.P.Small Industries Corporation Ltd., Kanpur- MANU/SC/0023/1999 and Jagdish Chander vs. Ramesh Chander and Ors.,-MANU/SC/7338/2007 to contend that the arbitration clause relied upon by the petitioner is not an arbitration clause. ARB.P.384/2017 Page 3 (ii) He further submits that in any case for the period 2007-08 another agreement was executed between the parties on 29.9.2008 which does not contain an arbitration clause. In view of the said agreement he submits that no arbitration can take place regarding the period 2007-08.

11. The issue centres around interpretation of the clause relied upon by the petitioner i.e. whether it can be termed to be an arbitration agreement.

12. Section 7 of the Act defines an arbitration agreement as follows:-

"7 Arbitration agreement. (1) In this Part, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication through electronic means) which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. (including communication 13. In Punjab State vs. Dinanath (supra) the Supreme Court was dealing with a clause which reads as follows:-

"ARB.P.384/2017 Page 4 1.The crucial question that needs to be decided in these appeals is whether Clause 4 of Work Order No.114 dated 16th of May, 1985 (in short 'Work Order') which says that:

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1 Chandigarh for orders and acceptable/binding on both the parties" constituted an arbitration agreement. and his decision will be final 14. Based on the above clause, the Supreme Court held as follows:-

"5. Having heard the learned Counsel for the parties and after going through the impugned order of the High Court as well as the orders of the appellate court and the trial court and the materials on record and considering the clauses in the Work Order, we are of the view that the High Court was fully justified in setting aside the order of the appellate court and restoring the order of the Additional Subordinate Judge by which the dispute was referred to arbitration for decision. Before proceeding further, we may, however, take note of some of the relevant clauses in the Work Order which read as under: Clause 13 of the work order-If the contractor

does not carry out the work as per the registered specifications, the department will have the option to employ its own labour or any other agency to bring the work to the departmental specification and recover the cost therefrom. ..... Clause 4 "Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Construction Circle No.1, Chandigarh for orders and his decision will be final and acceptable/binding on both parties. ... ... ARB.P.384/2017 Page 5 Jabalpur MANU/SC/0002/1980 8. A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject matter of the contract, such dispute shall be referred to arbitration. In that case such agreement would certainly spell out an arbitration agreement. [See Rupmani Bai Gupta v. Collector of : AIR 1981 SC479]. However, from the definition of the arbitration agreement, it is also clear that the agreement must be in writing and to interpret the agreement as an 'arbitration agreement' one has to ascertain the intention of the parties and also treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties was to have an arbitration agreement: that is to say, an arbitration agreement immediately comes into existence. 9....

10. We have already noted Clause 4 of the Work Order as discussed hereinabove. It is true that in the aforesaid Clause 4 of the Work Order the words "arbitration" and "arbitrator" are not indicated; but in our view, omission to mention the words "arbitration" and "arbitrator" as noted herein earlier cannot be a ground to hold that the said clause was not an arbitration agreement within the meaning of Section 2[a]. of the Act. The essential requirements as pointed out herein earlier are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final. As the conditions to constitute an 'arbitration agreement' have been satisfied, we hold that Clause 4 of the Work Order must be construed to be an arbitration agreement and dispute raised by the parties must be referred to the arbitrator. In the case of K.K. Modi : [1998].1SCR601 , this Court had laid down the test as to v. K.N. Modi MANU/SC/0092/1998 ARB.P.384/2017

Page 6 when a clause can be construed to be an arbitration agreement when it appears from the same that there was an agreement between the parties that any dispute shall be referred to the arbitrator. This would be clear when we read Para 17 of the said judgment and points 5 and 6 of the same which read as under:

5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law: and lastly 6. Agreement must contemplate that the tribunal will make a decision upon a dispute, which is already formulated at the time when reference is made to tribunal. .....

19. At the risk of repetition we may also say before parting with this judgment that Clause 4 of the Work Order speaks for a dispute between the parties. It also speaks of a dispute and all such disputes between the parties to the Work Order shall be decided by the Superintending Engineer, Anandpur Sahib Hydel Circle No.1. Obviously, such decision can be reached by the Superintending Engineer, Anandpur Sahib Hydel Circle No.1 only when it is referred to him by either party for decision. The reference is also implied. As the Superintending Engineer will decide the matter on reference, there cannot be any doubt that he has to act judicially and decide the dispute after hearing both the parties and permitting them to state their claim by adducing materials in support. In Clause 4 of the Work Order it is also provided as noted herein earlier that the decision of the Superintending Engineer shall be final and such agreement was binding between the parties and decision shall also bind both the parties. Therefore, the result would be that the decision of the Superintending Engineer would be finally binding on the parties. Accordingly, in our view, as discussed herein above that although the expression "award" or "arbitration" does not ARB.P.384/2017 Page 7 appear in Clause 4 of the Work Order even then such expression as it stands in Clause 4 of the Work Order embodies an arbitration clause which can be enforced.

20. For the reasons aforesaid, we are of the view that Clause 4 of the Work Order can safely be interpreted to be an arbitration agreement even though the term 'arbitration' is not expressly mentioned in the agreement. In view of our discussions made herein earlier, we therefore conclude that Clause 4 of the Work Order constitutes an arbitration agreement and if any dispute arises, such dispute

shall be referred to Superintendent Engineer for decision which shall be binding on the parties. 15. Hence, the Supreme Court has noted that the above clause in question seeks to use the phrase Any dispute shall be referred to Superintendent Engineer to decide the matter whose decision shall be final and that there can be no doubt that the Superintendent Engineer has to act judicially to decide the dispute after hearing both the parties. As a result thereafter the decision of the Superintendent Engineer shall be final and binding on the parties. Though the expression Award or arbitration is not used, the above clause was interpreted to be an arbitration clause/arbitration agreement.

16. I may also have a look at the judgment relied upon by the learned counsel for the respondent in Bharat Bhushan Bansal vs. U.P.Small Industries Corporation Ltd. (supra). The relevant clause which was involved in the said case reads as follows:-

"Decision of the Executive Engineer of the UPSIC to be final on certain matters: Clause 23: Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the ARB.P.384/2017 Page 8 specification, design, drawings and instructions herein before mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor. Decision of the M.D. of the U.P.S.I.C. on all other matters shall be final: Clause-24: Except as provided in Clause 23 hereof the decision of the Managing Director of the U.P.S.I.C. shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matter arising out of this contract and not specifically mentioned herein. 17. The above noted clause was interpreted by the Supreme Court to be a reference to the Managing Director in

the capacity of an expert and not to decide disputes in a quasi judicial manner. It was held that the said clause does not contemplate any arbitration and the application of section 8 of the Arbitration Act, 1940 would not arise.

18. Similarly, in Jagdish Chander vs. Ramesh Chander and Ors. (supra) i.e. the second judgment relied upon by the petitioner the Court was interpreting the following clause:-

"ARB.P.384/2017 Page 9 2..... Clause 16 of the said Deed relates to settlement of disputes. The said clause is extracted below: time afterwards any dispute

16) If during the continuance of the partnership or at any the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine. touching 19. The Supreme Court held as follows:-

"(Emphasis supplied) (i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, a determination and obligation to go to arbitration and not merely contemplate for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement. the possibility of going the words used should disclose (iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which ARB.P.384/2017 Page 10 specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to

decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement. (iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future. ARB.P.384/2017 Page 11 20. It follows from the above judgment of the Supreme Court that where a clause relating to settlement of disputes, contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. It is not necessary that the clause sets out the attributes of an Arbitration Agreement.

21. I may note that in the present case the arbitration clause does not in any way convey anything which excludes the arbitration clause. In fact reference may be had to the third agreement relied upon by the respondent said to be executed by the parties on 29.9.2008. In this case clause 37 of the Agreement specifically provides that in case of disputes the same shall be referred to the decision of the Chairman and Managing director of FCI for settlement and the decision shall be final and binding. The clause further clarifies that it is clearly understood by the

parties that the present clause is not an arbitration clause.

22. The said clause 37 of the said Agreement reads as follows:-

""37. Any dispute between the parties arising out of this agreement or pertaining to any matter which is the subject matter of this Agreement other than an issue to which finality has been ascribed in the present agreement shall be referred for decision to the Chairman & it Managing Director of FCI for settlement whose decision shall be final and binding on the FCI and the Agent. It is clearly understood by the parties that the present clause is not an arbitration clause. In case, the dispute still subsists then Civil Court shall have jurisdiction to adjudicate the same. 23. Clearly, the terms of the said clause as contained in the agreement dated 29.9.2008 are materially different from the clauses which are said to be an arbitration agreement by the petitioner as contained in the agreements dated 13.4.2007 and 4.1.2008. It is manifest from this distinction that it was ARB.P.384/2017 Page 12 within the knowledge and notice of the respondent that the clauses noted above in the agreements dated 13.4.2007 and 4.1.2008 tantamount to arbitration clauses. Hence, the clarification has been inserted in clause 37 of the last Agreement dated 29.9.2008. Further, the clause relied upon by the petitioner in the two Agreements dated 13.4.2007 and 4.1.2008 are identical to the clause that was subject matter of the judgment of the Supreme Court in the case of Punjab State vs. Dina Nath (supra). The Supreme Court in that judgment had clearly interpreted the said clause as an Arbitration Agreement. Accordingly, I hold that the said clauses as contained in Agreement dated 13.4.2007 and 4.1.2008 are an arbitration agreement and that the disputes are liable to be referred to arbitration.

24. One more issue survives, namely, the third agreement between the parties dated 29.9.2008. It is a matter of fact that the two agreements, namely, 4.1.2008 and 29.9.2008 are for the same period i.e. KMS2007 08and relate to the procurement of Kharif Marketing Season and also prescribe similar terms and conditions. The second agreement dated 29.9.2008 does not specifically state that it overrides the earlier agreement of 4.1.2008. The effect of the Agreement dated 29.9.2008 on the period 2007-08 has to be gone into. I keep this issue open for

adjudication by the learned Arbitrator. I refer the disputes which are subject matter of the Agreement dated 13.4.2007 and 4.1.2008 for arbitration.

25. I may also note that in the present petition disputes other than the subject matter of these two agreements have also been sought to be referred for arbitration. Learned senior counsel for the petitioner states that he does not press for reference of the said disputes to arbitration and seeks liberty to take steps regarding the said disputes as per law. Accordingly, granting ARB.P.384/2017 Page 13 leave and liberty to the petitioner to take steps as per law the present petition is confined to disputes which are subject matter of the Agreements dated 13.4.2007 and 4.1.2008. Only the said disputes are referred to Arbitration.

26. I may note that the two Arbitration clauses in question state that in case of disputes arising between the parties, the same shall be referred to the Chairman and Managing Director of the FCI for settlement.

27. In view of Section 12(5) read with Seventh Schedule of the Act, the said Chairman and Managing Director being an employee of the respondent cannot act as an Arbitrator.

28. Mr. Justice K.K.Lahoti (Retired) (Mobile No.09425152000) is appointed as the Sole Arbitrator to adjudicate the dispute between the parties. He will decide his fees in consultation with the parties.

29. Petition is accordingly allowed, as above. All pending applications, if any, also stand disposed of. JAYANT NATH, J SEPTEMBER08 2017 n ARB.P.384/2017 Page 14