

Sarkar and Sarkar Vs. State of West Bengal and anr.

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SooperKanoon Citation : sooperkanoon.com/883940

Court : Kolkata

Decided On : May-16-2006

Reported in : 2007(2)ARBLR396(Cal),(2007)1CALLT157(HC)

Judge : Kalyan Jyoti Sengupta and ;Aniruddha Bose, JJ.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(3), 11(6), 16, 16(3), 34 and 37

Appeal No. : A.P.O.T. No. 152 of 2004, A.P. No. 522 of 1998 and A.P.O. No. 108 of 2004

Appellant : Sarkar and Sarkar

Respondent : State of West Bengal and anr.

Judgement :

1. By this appeal the appellant being unsuccessful before the learned Arbitrator has impugned the decision of the learned Arbitrator rendered under Section 16 of the [Arbitration and Conciliation Act, 1996](#) and ruled that the learned Arbitrator has no jurisdiction to adjudicate the dispute and held that there exists no arbitration agreement between the parties to decide the claim and contention of the appellant. The decision of the learned Arbitrator is quite compact and full of reasons backed by the various judicial pronouncements of the Supreme Court and this Court. Now the task of this Court is to examine whether such ruling of the learned Arbitrator under Section 16 regarding the existence of the arbitration

agreement factually and legally and further arbitrability of the subject matter is right or wrong in this appellate jurisdiction. We are not unmindful of our power under Section 37 of the Act. Unlike under Section 34 read with Section 37 our jurisdiction as a first Appellate Court is not a restricted one. Therefore, it is open for us to consider all aspects of the matter meaning thereby we can examine as to whether interpretation given by the learned Arbitrator of a clause is correct or not.

2. Precisely factual and legal dispute before Appellate Court can be the subject matter of the scrutiny unlike the Appellate Court under Section 34 of the aforesaid Act.

3. Before we address to the respective contention of the learned Counsels we think it fit to record the factual aspect of this matter. The claimant entered into an agreement with the State Government for construction of certain civil works which are governed by the written agreement containing various terms and conditions constituting rights and obligations. It is an admitted position that an arbitration clause being Clause 25 has been deleted from the agreement. What was there need not be examined nor it has been examined by the learned Arbitrator in details.

4. The claimant once approached this Court under Section 11 of the said Act for referring the dispute between the parties to arbitration relying on Clause 12 of the said agreement. At the first instance the learned single Judge of this Court dismissed the application as having no jurisdiction. The order of the learned single Judge was taken to appeal and on remand the matter was reheard by the learned single Judge of this Court. This application was obviously contested but what stand was taken is not made known to us but the result of the application was positive and the learned single Judge held that the appointment of the Arbitrator should be made by the learned Chief Justice under Section 11 Sub-section 6 of the said Act. The order of the learned single Judge on the second round does not contain any reasons for which he was prompted to pass such order. It is immaterial to find out the mental process of the learned Judge. It would suffice that an order was passed for appointment of an Arbitrator.

5. The then learned Chief Justice on receipt of this reference did not hesitate to appoint a retired Judge of this Court being the learned Arbitrator for adjudicating the matter.

6. On this factual backdrop the matter was sent to the learned Arbitrator and statement of claim was filed. At the preliminary hearing of this matter the State of West Bengal filed an application saying that there exists no arbitration agreement and the subject matter of the dispute is an excepted one and it is not arbitrable under any circumstances whatsoever. Clause 12 of the agreement cannot be construed under any stretch of imagination an arbitration agreement, particularly when the express arbitration clause being Clause 25 has been deleted by consent of the parties. The parties therefore cannot think of making provision of second arbitration. The learned Arbitrator was persuaded to accept the argument of the State and the rule as observed by us above.

7. The learned senior counsel Mr. Hiranmoy Dutt while assailing the decision of the learned Arbitrator contends that the learned Arbitrator has given an absurd interpretation of Clause 12. He says if it is read as a whole it will appear that latter portion of Clause 12 by necessary implication is an arbitration agreement. He submits further that it is not necessary that one arbitration or one reference must be contained therein nor be construed it was an arbitration clause.

8. He urges that the aforesaid clause is not an excepted clause whereby and whereunder the decision of the departmental officer shall be final and binding and for which rule of Court is not required to be made nor can be enforced under the Arbitration Act. In support of his contention he has relied on the following decisions of the Supreme Court reported in (1980)2 SCC 341, (1998)3 SCC 573 (paragraphs 23 and 25) and a Division Bench Judgment of this Court reported in AIR 1990 Calcutta 83.

9. He further submits that whether subject matter of the claim is arbitrable or not could not have been decided by the learned Arbitrator after holding that there exists no arbitration agreement. Such a decision is premature as it will be evident from Section 11 sub-section 3 of the said Act. He has taken us through the various relevant paragraphs of the statement of claim filed before the learned Arbitrator.

He contends that subject matter of the claim does not fall beyond the scope of the arbitration clause contained in Clause 12 of the said agreement.

10. Mr. Indrajit Sarkar, learned Counsel for the State on the other hand contends that the ruling of the learned Arbitrator under Section 16 does not call for any interference. The learned Arbitrator has applied the correct law and followed the decision of the Apex Court on this point. According to him Clause 12 cannot be understood and/or meant either by expressly or by necessary implication to be an arbitration clause. There is no whisper of any arbitration or reference much less of providing the adjudicating machinery. He also agreed with the submission of Mr. Dutt that the entire clause has to be read as a whole to understand the scope and purport of the same. Under any circumstances by this clause adjudicating machinery has not been thought of by the parties to term the same as arbitration because of the deletion of the express arbitration agreement being Clause 25. The factum of conscious deletion by the parties suggests that the parties did not envisage by mutual agreement to provide further arbitration agreement. He has drawn our attention to three Supreme Court decisions in this regard, namely, AIR 1996 SC 942, (1999)4 SCC 491 and AIR 1980 SC 1522.

11. Clause 12 is an excepted clause for decision making process and for taking decision power has been given to the departmental officer whose decision is final and such decision making process cannot be termed to be an arbitration proceeding. This is an excepted clause and there is no need for making such a decision as rule of the Court for it cannot be enforced under the Arbitration Act as treating to be an award.

12. We have considered the respective contentions of the learned Counsels. Keeping in view of our power as given under Section 37 read with Section 16 we think before we examine the correctness of the decision of the learned Arbitrator we shall quote the Clause 12 of the agreement.

Clause 12: The Engineer-in-Charge shall have power make any alteration in omissions from, additions to or substitution for the original specifications, drawing, designs and instructions, that may appear, to him to be necessary or advisable during the progress of work and the contractor shall be bound to carry out the work

in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, addition or substitutions, shall not invalidate the contract but shall be deemed to have formed as work included in the original tender and any altered additional or substituted work which the contractor may directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates if any, may be specified in the tender form for the main work. The time for the completion of the work shall be extended in the proportion that the altered, additional or substituted work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. And if the altered, additional or substituted work includes any class of work, for which no rate is specified in this contract, then such class of work shall be carried out at the rate entered in the Schedule of rates in the District which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered and if the altered, additional or substituted work is not entered in the said schedule of rate payment thereof shall be made by the Engineer-in- charge by determining the rates on analysis worked out from (a) the basic rates of materials and labour provided in the current schedule of rates or (b) the current market rates of materials and labour when even basic rates for the work are not available in the schedule. In cases when such rates are determined on analysis by the Engineer-in-Charge under (a) above, the stipulated percentage above or below schedule of rates as provided in the contract shall also apply arid in case of rates worked out on analysis under (b) above payment shall be made at the rates so determined without application of the said stipulated percentage. In the event of any dispute regarding rates determined on analysis for any altered, additional or substituted work under this clause, the decision of Superintending Engineer of the Circle, shall be final and binding.

13. We are constrained to record that the learned Arbitrator did not consider the entire clause nor he set out the same in his ruling. Upon careful reading according to us this clause is a special clause and in this clause the Engineer-in-Charge, namely, Executive Engineer was entrusted by the department to take a decision with regard to alteration, addition and excess works or otherwise they agreed upon

and he has been given power to determine the rate of works which was required to be done by way of arbitration or otherwise as provided under Clause 12. The nature of work mentioned in Clause 12 does not envisage in the contract. It has been mentioned how the determination of rate is to be done by the Engineer-in-Charge.

14. It appears to us further that his determination upon analysis of rate is not the final or binding and it is subject to scrutiny by the Superintending Engineer which is very clear from the latter portion of the Clause 12 as above.

15. We have gone through the decisions of the Supreme Court cited particularly with regard to the excepted clause. In all those decisions we find the departmental officer has been given absolute power to take a decision in a particular and classified subject matter of the contract of technical work or otherwise. In those cases it has been specifically mentioned that the decision of the departmental officer is final and binding. There is no provision in that clause for further scrutiny by any other machinery unlike the clause mentioned herein.

16. The contention of Mr. Sarkar is that there must be an arbitration clause and to consider a clause being an arbitration one, the word arbitration or the word reference must be there. We are unable to accept this contention that unless such words are employed in the clause a particular clause cannot be termed to be an arbitration agreement. According to us and so also it has been ruled by the Apex Court in several pronouncement consistently that the arbitration agreement can be said to be existing either expressly or by necessary implication. We are in total agreement with Mr. Sarkar that the clause cannot be termed expressly to be an arbitration agreement and to this Mr. Dutt does not dispute in principle. Whether by necessary implication latter portion of the clause can be termed to be an arbitration clause or not.

17. Wording of the Clause 12 it appears to us that the decision with regard to rate has to be determined by the Executive Engineer and such determined rate may not satisfy either of the parties. The Executive Engineer may overrate or underrate regarding excess or additional work. Any of the parties may have or may not have grievances. If the determination with regard to the rate is accepted by the parties

the matter ends there. Here we find the claimant submitted bills quoting rate in terms of the agreement. The rate, however, has not been determined expressly by them. The Engineer-in-Charge, namely, the Executive Engineer made ad hoc payment, thereby by necessary implication he has not accepted the rate of claimant quoted in their bills. So it called for the intervention of the Superintending Engineer who is the authority to decide it finally. According to us in order to construe an arbitration agreement there must be a power for taking a decision and the decision can only be rendered when there exists a dispute. To put negatively if there exists no dispute, no question of adjudication does arise. A dispute according to us as also recognised by the judicial pronouncement and the legal jurisprudence, is that assertion of fact and law by one party and non-acceptance or denial by another party, if this state of fact exists and it can be termed the dispute having arisen. Thereafter adjudicating exercise is required if called upon to do so. If all these trapping and mechanism exist in a particular clause then it can safely be said as being an arbitration agreement by necessary implication.

18. We do not think that mere non-mentioning of the word arbitration or reference changes the character of arbitration mechanism. In support of our observation, We find a Judgment of Division Bench of this Court reported in AIR 1990 Calcutta 83 while deciding whether there exists any arbitration agreement, has ruled as follows:

Let us now examine in the aforesaid background of law as interpreted by the Supreme Court and other High Courts referred to above whether Clause 13 constitute an arbitration agreement. We have already quoted the said clause, it speaks of a dispute between the parties. It also speaks of a decision by the Superintending Engineer of the Circle on such dispute. It is, therefore, very clear that all the disputes between the parties to the contract shall be decided by the Superintending Engineer. Obviously such decision can be arrived at by the Superintending Engineer 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 he has to act judicially and decide the dispute after hearing both the parties and permitting them to substantiate their claim by adducing materials in support. In deciding the dispute he must act judicially. In the

said clause it is also provided that his decision shall be final and as the agreement is binding between the parties the decision shall also bind both of them. The result would be the decision would be finally binding on the parties. Though the expression 'award' or 'arbitration' is not appearing in the aforesaid clause, even then the expression as it stands embodies an arbitration clause which can be enforced. In this view of the matter, we are unable to find merit in this application and the same stands dismissed without any order as to costs.

19. This decision of the Division Bench came to be considered by the Supreme Court in the case of K.K. Modi v. K.N. Modi and Ors. reported in (1983)3 SCC 573 and while considering this decision and other decisions it was held that whether a particular clause is arbitration clause by expressly or by necessary implication that depends upon the nature and language of that particular clause.

20. In this decision while considering almost similar clause such a clause was held being an arbitration clause.

21. The decisions cited by Mr. Sarkar as quoted above are not factually applicable in this decision. The excepted clause mentioned therein is completely different and distinct from the clause mentioned here. In those decisions there was no provision for further scrutiny after decision is taken by the departmental officer and further decision of the departmental officer was agreed to be final and binding. Accordingly we are unable to apply the principle laid down in those decisions. The learned Arbitrator, we are of the view, has erroneously applied those decisions in this case without reading the clause in the proper perspective. So we cannot uphold the ruling of the learned Arbitrator that there does not exist any arbitration clause.

22. Before we part with this matter in this issue we are of the view also that when the matter was referred to arbitration through intervention of the Court of course at that point of time the decision for appointment of Arbitrator by the Chief Justice was not a judicial decision. Even then taking it the same to be an administrative one, such decision cannot be upset by the learned Arbitrator. State of West Bengal is simply estopped from raising such dispute as regards existence of the arbitration agreement but it is always open for the parties to contend before the

learned Arbitrator that the subject matter of the dispute is not arbitrable and ruling in this regard can very well be rendered by the learned Arbitrator under Section 16 sub-section 3 of the said Act. This shall be done at an appropriate stage as mentioned in the said sub-section.

23. Accordingly we hold that there exists an arbitration agreement and such an agreement we feel will restrict to the clause, namely, the rate. However, whether the statement of claim is covered by the arbitration clause or not is not decided by us. It shall be decided by the learned Arbitrator afresh without being swayed or influenced by his earlier observation and determination.

24. After examining the statement of claim we feel that the claim and contention of the claim can be truncated from the subject matter which is not covered by the arbitration agreement and the learned Arbitrator shall proceed with the matter. Therefore, the order of the learned Arbitrator is accordingly set aside. The learned Arbitrator shall proceed de novo and we think this should be done as expeditiously as possible preferably within a period of four months from the date of communication of this order.

25. Having regard to the facts and circumstances of this case we feel this matter should be remanded to the same learned Arbitrator who has already ruled in this matter. For any reason if the learned Arbitrator does not proceed with the matter it would be open for Mr, Dutt's client to take step in accordance with law approaching once again the learned Chief Justice.

Mr. Sarkar prays for stay of operation of this Judgment and order.

We feel there are some points involved in this matter. Accordingly we grant stay of operation of this Judgment and order till two weeks after the Summer Vacation.

Xerox certified copy of this dictated order be made available to the parties, if applied for.