

(2016) 01 RAJ CK 0055
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 1080/2013

Devron Ascenda (P) Ltd.

APPELLANT

Vs

Jodhpur Vidhyut Vitran Nigam Limited and Others

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 34, Section 7
Constitution of India, 1950 — Article 226

Citation : (2016) 01 RAJ CK 0055

Hon'ble Judges : Vineet Kothari, J.

Bench : Single Bench

Advocate : Dinesh Mehta, for the Appellant; Sunil Joshi and M.S. Deora, for the Respondent

Final Decision : Disposed off

Judgement

Vineet Kothari, J.—1. The present appeal is directed against the order dated 26.02.2013 passed by the learned Additional District Judge No. 1, Jodhpur Metropolitan in Civil Misc. "A" Case No. 3/2009 ? Devron Ascenda (P) Ltd. Vs. Jodhpur Vidhyut Vitran Nigam Ltd., rejecting the application under Section 34 of the Arbitration and Conciliation Act, 1996 of the claimant-appellant on the ground that Clause 23 of the Contract between the parties for executing certain works contract by the applicant for respondent-Jodhpur Vidhyut Vitran Nigam Limited for referring the dispute to the Standing Committee was not the Arbitration Clause, and therefore, the application under Section 34 of the Act of 1996, was not maintainable.

2. The relevant portion of the impugned order dated 26.02.2013 of the learned court below is quoted below for ready reference:--

3. Learned counsel for the appellant-claimant, Mr. Dinesh Mehta fairly submitted that in view of the recent judgments of this Court, similar clauses in the contracts have been held to be not amounting to any arbitration agreement between the parties, and therefore, the impugned order of the learned Additional

District Judge No. 1, Jodhpur cannot be successfully challenged. However, he urged that in view of the earlier judgments of this Court, while similar clauses were held to be arbitration agreement between the parties, the appellant was pursuing this remedy under Section 34 of the Act against rejection of his claim petition rightly, and therefore, the claimant could not assail the rejection of his claim by the Standing Committee by either filing civil suit or by invoking the writ jurisdiction.

4. The earlier set of judgments relied upon by Mr. Dinesh Mehta, learned counsel for the appellant-claimant are in the case of M/s. Suri Construction Vs. State of Rajasthan & Ors., , 2005 (3) WLC (Raj.) 589 and M/s. Surya Construction Company Vs. The State of Rajasthan & Anr., , 2014 (1) WLN (Raj.) 88, whereas the later set of judgments were rendered by Division Bench of this Court headed by the Hon''ble Acting Chief Justice in the cases of State of Rajasthan & Ors. Vs. SPML Infra Ltd. & Ors., , 2015 (5) ARBLR (Raj.) 166, Mohammed Arif Contractor Vs. State of Rajasthan & Ors., , 2015 (3) ARBLR (Raj.) 43 and Parmanand Vs. State of Rajasthan & Ors., .

5. The relevant extract of the Division Bench judgment in the case of State of Rajasthan & Ors. Vs. SPML Infra Ltd. & Ors. (supra) is quoted below for ready reference:--

"17. In the present case, the language of Clause 23 of the agreement/contract is almost the same as it was in Clause 10 of the conditions of agreement contract referred to in State of Orissa & Ors. Vs. Bhagyadhar Dash (supra), in which it was found by Hon''ble Supreme Court that the clause does not refer to arbitration as a mode of settlement of assessment. In the present case also, Clause 23 does not provide for reference, to settle the dispute between the parties, as an arbitration. The decision of the Administrative Committee is not a mode, which may show that the clause on either of the parties. It does not provide for such procedure, which may show that the Superintending Engineer is to act judicially, which is attribute of the arbitration, after considering the submissions of the parties. The clause does not disclose any intention to make Standing Committee as an arbitrator in respect of dispute, which may arise. The decision of the Standing Committee is not a judicial determination, but a decision of one party. It is open to challenge by either party in the court of law under Clause 51 for the agreement/contract. Clause 23 for the agreement/contract, therefore, cannot be considered as an arbitration clause under the agreement. We further find that the direction given by learned Single Judge, firstly to the Standing Committee to adjudicate the dispute, was beyond the provisions of Clause 23 for the agreement/contract, and further the direction that if the Administrative Secretary and the Finance Secretary are the members, then the matter will be referred to the retired Judge, is also wholly without jurisdiction. A writ court under Article 226 of the Constitution of India cannot take away the jurisdiction vested under Section 11 of the Act of 1996 on the Chief Justice or the Judge designated by him. Such powers are to be exercised only by the Chief

Justice or the Judge designated by him and cannot be exercised indirectly or by reference in exercising jurisdiction under Article 226 of the Constitution of India. Ordinarily, the High Courts under Article 226 of the Constitution of India do not exercise powers which are vested under the special Act on either the Chief Justice or any Judge nominated or designated under the Act. It is well settled that when something is required to be done under the statutory Act in a particular manner, it should be done in the same manner and not otherwise. Learned Single Judge could not have, even in the alternative, directed the matter to be decided by a retired Judge of the Court by nominating the Judge. The directions issued by the learned Single Judge are clearly contrary to the scheme of the Act of 1996 for nominating an arbitrator, in case parties fail or neglect to appoint an arbitrator in accordance with the arbitration clause contained in the agreement. For the aforesaid reasons, the special appeal is allowed. The judgment and order of learned Single Judge dated 03.04.2014 is set aside."

Following the same, a learned Single Judge of this Court also held in Mohammed Arif Contractor Vs. State of Rajasthan & Ors. (supra) as under:--

"18. In order to construe a clause to be an arbitration clause, it should have the attributes of an arbitration agreement, i.e. the parties should agree to refer the disputes, present or future, to the private tribunal; the private tribunal should be able to adjudicate upon the disputes in an impartial manner giving due and equal opportunity to the parties to put forth their case before it; and the parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them. Thus, the very trappings or essentials of the arbitration agreement being missing in the Clause 23 in question, the same cannot be treated as the arbitration clause. In that view of the matter, it is held that the Clause 23 read with Clause 51 of the agreement in question, being not an arbitration clause or an arbitration agreement as contemplated in Section 7 of the said Act, the provisions of the said Act could not be made applicable to the facts of the present case, and the application under Section 11 of the said Act seeking appointment of the arbitrator could not be said to be maintainable. The application, therefore, deserves to be dismissed and is accordingly dismissed."

6. In view of the settled legal position, respectfully following the same, the contention of the learned counsel for the appellant-claimant appears to be correct, and therefore, the rejection of the application under Section 34 of the Act of 1996 by the learned court below, on this ground, appears to be justified and does not call for any interference by this Court. However, in view of the aforesaid legal position obtaining earlier, which was changed later on by the judgments of this Court and the fact that the Standing Committee under Clause 23 of the Contract between the parties had rejected the claim of the appellant-Contractor, the appellant-Contractor cannot be rendered remediless, and therefore, if the appellant-Contractor chooses to challenge the said decision of the Standing Committee by taking appropriate proceedings in the court of law, the same is expected to be disposed of on merits in accordance with law.

7. With these observations, the present appeal is disposed of. No costs. Copy of this order may be sent to the concerned parties as well as the learned court below forthwith.