

(2020) 11 JH CK 0138

In the Jharkhand High Court

Case No : Commercial Appeal No. 02 Of 2019

Eastern Central Railway (ECR)

APPELLANT

Vs

Damodar Valley Corporation

RESPONDENT

Date of Decision : 03-11-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2020) 11 JH CK 0138

Hon'ble Judges : Aparesh Kumar Singh, J;Anubha Rawat Choudhary, J

Bench : Division Bench

Advocate : Mahesh Tewari, Abhishek Kumar Dubey, Srijit Choudhary, Srijia Choudhary

Final Decision : Allowed

Judgement

1. Heard learned counsel for the appellant, Mr. Mahesh Tewari, assisted by Mr. Abhishek Kumar Dubey and learned counsel for the Respondent-

D.V.C, Mr. Srijit Choudhary, assisted by Ms. Srijia Choudhary.

2. Appellant-Railways is aggrieved by the order dated 6th January, 2018 passed by learned Commercial Court, Ranchi in Com. (Revoc) Case No.

02/2014, whereunder their application under Section 34 of Arbitration and Conciliation Act for setting aside the Award delivered by the Arbitral

Tribunal has been rejected on the ground of maintainability. Learned Commercial Court relying upon the decision rendered in the case of Northern

Coalfields Limited Vs. Heavy Engineering Corporation Ltd. & Another reported in (2016) 8 SCC 68,5 came to an opinion that application under

Section 34 of the Act of 1996 preferred by the petitioner was outside the purview of Arbitration and Conciliation Act and could not be entertained by

that Court. It gave liberty to the parties to pursue whatever remedies are

available to them in respect of the grievances relating to the Award dated 12th August, 2013 in accordance with law.

3. We have heard learned counsel for the parties and gone through the pleadings on record, including the Lower Court Records. For the reasons recorded hereinafter, we are unable to uphold the impugned order.

4. Learned counsel for the Respondent submits that since both the parties were public sector undertaking and the Railway Ministry, Government of

India, the dispute was placed before the Cabinet Secretary in order to invoke the Permanent Machinery of Arbitration. However, the Cabinet

Secretary after going through the dispute and the rival arguments of the parties advised the parties to settle the dispute through Court or Tribunal.

Thereafter, both the parties appointed their own Arbitrators and both the arbitrators appointed an Umpire. Arbitral tribunal was thus constituted.

Proceedings were held before the Tribunal leading to delivery of the Award dated 12th August, 2013 (Annexure-4 to the supplementary affidavit).

The Award was delivered by majority of 2:1 in favour of DVC.

5. Briefly stated, dispute arose between the parties under an agreement dated 25th October, 1996 relating to supply of energy to the consumer/East

Central Railway, the second party. Clause- 24 of the agreement contains the arbitration clause and is quoted hereinbelow:

If at any time question, dispute or difference between the Corporation and the consumer in regard to any matter relating to or in connection with this

Agreement, barring any such which may arise in the Corporation's exercising power or doing acts under the provisions of Damodar Valley

Corporation Act, 1948 (Act XIV of 1948) or under any other Act for the time being in force or under the terms of this Agreement, either party may

forthwith give to the other in writing to the existence of such question, dispute or differences and the same shall be referred to the adjudication of two

Arbitrators, one to be nominated by the Corporation and the other to be nominated by the consumer and to the adjudication at an Umpire to be

appointed by the Arbitrators, if necessary, in writing, before proceeding with the reference and Award of the Arbitrators or the Umpire appointed by

them as the case may be, shall be final and binding on the parties hereto and the provision of the Arbitration Act, 1940 and all the Rules therein and

any other statutory modification thereof for the time being in force shall be

deemed to apply and be incorporated in this Agreement.

Upon every or any such Agreement, the costs of and incidental to the reference and Award respectively shall be in the discretion of Arbitrator or the

Umpire as the case may be, who may determine the amount thereof and shall direct by whom and to whom and in what manner and what proportion

the same shall be borne and paid.

Provided that in case of any such reference it will be obligatory on the consumer to make full payment of all arrear dues along with surcharge, if any

and current dues and any other dues to the Corporation beforehand and continue paying such dues which may accrue from time to time within the

period as mentioned in the foregoing clauses so long the Arbitration is pending. Should the consumer be held entitled to any return it will be credited by

the Corporation afterwards on receiving the Award of the Arbitration and after having accepted by the Corporation such award and will be through

subsequent bills in the form of adjustments in a manner to be decided by the Corporation.

6. The Railways being aggrieved by the Award preferred an application under Section 34 of Arbitration and Conciliation Act, 1996 before the Court of

learned Sub-Judge, Ranchi. The application was referred to the Commercial Court by learned Sub-Judge since the subject matter had fallen within the

jurisdiction of Commercial Court by then in view of the Commercial Courts Act, 2015. It is not in dispute that in the written statement filed by DVC in

the Com. (Revoc.) Case No. 02/2014, no objection was taken on the issue of maintainability on the ground of availability of appellate forum under

Permanent Machinery of Arbitration. Respondent-DVC placed reliance upon the judgment of Apex Court in the case of Northern Coalfields Limited.

(Supra) in support of its objection on maintainability at the time of arguments. Learned Court has quoted the relevant guidelines framed by the Central

Government regarding Permanent Machinery of Arbitration in the impugned order, which is extracted hereunder:

In the event of any dispute or difference relating to the interpretation an application of the provisions of the contracts, such dispute or difference shall

be referred by either party for arbitration to the sole arbitrator in the department of public enterprises to be nominated by the Secretary to the

Government of India in-charge of the Department of Public Enterprises. The

Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of legal affairs, Ministry of law and Justice, Government of India. Upon such reference, the dispute shall be decided by the law Secretary or the Special Secretary/Divisional Secretary, when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator. (Emphasis supplied).

7. It is not in dispute that the arbitrators were not nominated by the Secretary to the Government of India, in-charge of the department of public enterprises. As a matter of fact, the arbitrators were chosen by the parties and not nominated by the authorities mentioned in the guidelines for setting up Permanent Machinery of Arbitration. It is also not disputed by the Respondent-DVC that there was no Permanent Machinery of Arbitration in existence at the time when the Comp. (Revoc) Case No. 02/2014 was preferred by the aggrieved Railways for setting aside the Award under Section 34 of the Act of 1996. Learned Commercial Court, however, being erroneously guided by an oral objection taken on behalf of DVC on the plea of maintainability and relying upon the guidelines quoted above and the decision of the Apex Court in the case of Northern Coalfields Ltd.(Supra) proceeded to hold that the application is not maintainable under Section 34 of the Act of 1996.

8. Learned counsel for the DVC has also made reference to an order passed in Civil Appeal No. 11122 of 2017 dated 28th August, 2017 in the case of NTPC Khalgaon Super Thermal Power Station Vs. Hindustan Steel Works Construction Ltd. By the said order, reference has been made to the Larger Bench on the following question :

8. That Permanent Machinery of Arbitration (PMA) had been set in place earlier than the judgment in the ONGC case, as noticed in Northern Coalfields (supra) in March, 1989. Yet, in the summary contained in para 23, this Court, instead of appreciating that the Committee on Disputes was set up judicially, and ran parallel to the Permanent Machinery of Arbitration,

appears to have combined the two in requiring permission from the CoD

to refer disputes already finally decided by the PMA to a litigative process while the CoD was in place, as was held in para 24 of the said judgment.

9) This being the case, it is clear that it requires to be determined by a Larger Bench as to whether a litigative process can yet be availed in situations

like the present where, under the PMA, the Appellate order of the Secretary is final and binding on both parties.

9. In the facts of the present case, neither is the arbitrator nominated by the Secretary of the concerned department relating to the public sector

enterprise nor there is any appellate decision by the forum created under the permanent machinery of arbitration. Therefore, the contention of the

learned counsel for the DVC based upon this order of reference does not help their case.

10. As an upshot of the narration of facts and discussions made hereinabove, it is clear that the instant arbitration proceeding was not conducted under

the permanent machinery of arbitration. No objection was taken before learned Commercial Court in the written statement by the DVC that the

application under Section 34 is not maintainable. However, learned Commercial Court being guided by the relevant guidelines relating to the permanent

machinery of arbitration and the decision rendered in the case of Northern Coalfields Ltd. (Supra) chose to hold the commercial case as not

maintainable leaving it to pursue its remedy before any other forum. As noticed hereinabove, the matter despite being placed before the Cabinet

Secretary for referring it to the permanent machinery of arbitration, did not go through the adjudicative process or resolution process of permanent

machinery of arbitration since the Cabinet Secretary opined that the parties should resolve their disputes through Court or through Tribunal. In those

circumstances, when the arbitration proceeding has been initiated in pursuance of Clause-24 of the agreement, which itself provided for resort to

arbitration in case of dispute or differences under the Arbitration Act, 1940 and statutory modification thereof, it cannot be said that at the stage of

appeal, the parties should have been relegated to permanent machinery of arbitration. Learned Commercial Court, therefore, clearly fell in error in

holding that the Com. (Revoc.) Case No. 02 of 2014 is not maintainable under Section 34 of Arbitration and Conciliation Act, 1996. Therefore, the

order impugned, cannot be sustained in the eyes of law and it is accordingly set aside. The matter is remanded to the Commercial Court to decide the case in accordance with law and the provisions under Section 34 of the Arbitration and Conciliation Act, 1996. The Appeal is allowed. However, no order as to costs. Let the lower Court records be sent back to the Court concerned forthwith.