

(2015) 02 MP CK 0043
In the Madhya Pradesh High Court
Case No : Arb. C. No. 66/2010

Pandey Coal Briquettes

APPELLANT

Vs

National Thermal Power Corporation

RESPONDENT

Date of Decision : 16-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(5), 7

Citation : (2015) 02 MP CK 0043

Hon'ble Judges : Sanjay Yadav, J.

Bench : Single Bench

Advocate : Rajesh Dubey, Learned Counsel, for the Appellant; R.C. Shrivastava, Learned Counsel, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Yadav, J.—Heard.

2. Vide present application under Section 11(5) of the Arbitration and Conciliation Act, 1996, petitioner seeks appointment of Arbitrator for resolution of dispute said to have arisen out of lease Agreement dated 26.7.1996 The reference is being sought on the strength of clause 2 of the Lease, which is in the following terms:

2. That, in case of any dispute regarding violation of any terms and conditions by the lessee as mentioned therein above, the same shall be referred to General Manager (Chief Executive) of NTPC/VSTPF and whose decision shall be final and binding on the parties. 3. The respondents, however, have refuted the claim contending, inter alia, that there being no arbitration agreement as postulated under Section 7 of 1996 Act, the alleged dispute cannot be referred to by appointing an Arbitrator.

4. Whereas the petitioner placing reliance in the case of Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, has to submit that to decipher any arbitration agreement what is required to be ascertained is whether the parties

have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. It is urged that clause 2 of lease if is read in the context, what has been held in *Rukmanibai Gupta* (supra), the respondents are not justified in raising an objection of non-availability of arbitration agreement.

5. Decision in *Smt. Rukmanibai Gupta* (supra) came up for consideration before Three Judges Bench of Supreme Court in *State of Orissa and another etc. Vs. Sri Damodar Das*, ; wherein dwelling upon the clause 25 of the agreement in the said case, which was in the following terms:

9. "25. Decision of Public Health Engineer to be final - Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to the contract, drawings specifications estimates, instructions, orders or these conditions, 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 or the sooner determination thereof of the contract."

10. A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for Clause 25, there is no other contract to refer any dispute or difference to an arbitrator named or otherwise.

It was further held:

11. This Court was called upon to consider similar clause in *State of U.P. Vs. Tipper Chand*, . The clause was extracted therein. After consideration thereof, this Court held that after perusing the contents of the said clause and hearing learned counsel for the parties "we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time". It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for the arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio.

It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration. The Full Bench judgment of the Punjab and Haryana High Court relied on by the counsel was expressly overruled by this Court in Tipper Owners case (supra). Therefore, it is no longer good law. Moreover, notice Was not given to the Public Health Engineer to enter upon the reference but was issued to Chief Engineer to refer the dispute to an arbitrator. The contention in the rejoinder of the appellants that the respondent received the amount with protest to conclude that the amount was received in full and final settlement of the Act, cannot be accepted unless there is proof or admission in that behalf. The ratio in P.K. Ramaiah and Co. v. NTPC, [1904] Supp. 3 SCC 126 has no application to the facts of the case.

12. We, therefore, hold that clause 25 of the agreement does not contain an arbitration agreement nor it envisages any difference or dispute that may arise or had arisen between the parties in execution of the works for reference to an arbitrator. The High Court following its earlier decision in M/s. Praharaj Partners v. State of Orissa and Ors., in Miscellaneous appeal No. 153/79 and Civil Revision No. 478/79 dated February 26, 1981. The learned Judge in that judgment relied on the Full Bench Judgment of the Punjab and Haryana High Court and on Rukmanibai Gupta's case (supra). The High Court's decision has already been overruled and Rukmanibai Gupta's case (supra) has no application.

The decision of the High Court, therefore, is clearly unsustainable in law.

6. In the case at hand the clause 2 relied upon by the petitioner stipulates "That, in case of any dispute regarding violation of any terms and conditions by the lessee as mentioned therein above, the same shall be referred to General Manager (Chief Executive) of NTPC/VSTPF and whose decision shall be final and binding on the parties.

7. Section 7 of 1996 Act provides for

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 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.

8. Learned counsel for the petitioner is unable to commend to any such clause of agreement indicating that the same is in terms of Section 7 of 1996 Act provides for settlement of dispute for arbitration.

9. In this context reference can be had of the decision in Jagdish Chander Vs. Ramesh Chander and Others, ; wherein their Lordships were pleased to lay down well settled principles in regard to what constitutes an arbitration agreement holding:

(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, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going 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.

(ii) Even if the words "arbitration" and "arbitral tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(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 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.

10. In the case at hand since the clear intention is borne out from clause 2 that the parties could settle their disputes amongst themselves and the decision of General Manager (Chief Executive) of NTPC/VSTF is final and binding, no arbitration agreement exists as would enable the petitioner to carry the application any further.

11. Consequently the petition fails and is dismissed.