

(2013) 07 CAL CK 0075
In the Calcutta High Court
Case No : A.P. No. 559 of 2013

Shyam Sel and Power Ltd.

APPELLANT

Vs

W.B. Minerals Development and Rading Corporation Ltd. and
Another

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Citation : (2014) 1 CHN 740 : (2013) 4 WBLR 186

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Abhrajit Mitra, S. Mukherjee and S. Ghosh, for the Appellant; Ashok Banerjee and Shyamal Sanyal for the Respondent No. 1, Rudrasankar De and Sailesh Kr. Gupta for the Respondent No. 2, for the Respondent

Judgement

Sanjib Banerjee, J.—The respondents do not question the existence of the arbitration clause in the agreement of February 4, 2008 that the petitioner has invoked. The respondents say that there are no live claims to be carried to an arbitral reference under such agreement and that the petitioner seeks to carry matters not covered by the arbitration clause to the reference. The parties entered into an agreement on February 4, 2008 under which the petitioner herein proposed to set up an integrated steel plant in the State. The two other parties to the agreement were Government concerns, West Bengal Industrial Development Corporation Limited and the West Bengal Minerals Development and Trading Corporation Limited. Clause 18.2 of the agreement constitutes the arbitration clause -

18.2. In the event of any dispute arising between the Parties in relation to or under this agreement, the same shall be settled by arbitration conducted in accordance with the Arbitration and Conciliation Act, 1996 (or any other enactment which replaces the said Act) by an arbitral tribunal consisting of three arbitrators, one to be appointed jointly by WBIDC/WBMDTC and one by SSL and the third arbitrator being appointed by the two arbitrators so appointed. The

decision of the arbitration tribunal shall be final and binding. The venue for the arbitration shall be Kolkata. The costs of the arbitral tribunal shall be equally borne by both the Parties. Each party shall bear its own cost of the arbitration provided however, the parties can claim costs as part of the relief sought from the arbitration tribunal.

2. The respondents insist that the agreement of February 4, 2008 was given a go-by in the matter relating to allocation of a coal block or supply of coal or like matters and the parties entered into subsequent memoranda of understanding on January 11, 2011 and on March 1, 2011. The respondents refer to the identical clauses in the two memoranda of understanding that provide for the reference of any dispute thereunder to any Additional Chief Secretary or the Principal Secretary or a Secretary to the Government in the Commerce and Industries Department.

3. By a letter dated August 28, 2012, issued to both the respondents, the petitioner invoked the arbitration clause contained in the agreement of February 4, 2008 and named the petitioner's nominee on the three-member tribunal. The petitioner called upon the respondents to either concur in the appointment of the petitioner's nominee as the sole arbitrator or appoint the respondents' nominee within seven days from the date of receipt of the letter. The first respondent replied within three days of the petitioner's letter, referring to the letter of August 28, 2012 upon recognising it to be an invocation of the arbitration clause but not indicating any clear response to the invocation of the arbitration agreement. The second respondent does not appear to have issued any reply at all.

4. The arbitration agreement as quoted above contemplates the setting up of an arbitral tribunal consisting of three arbitrators, one to be appointed jointly by the respondents herein and another to be appointed by the petitioner. The third arbitrator is to be appointed by the two nominees of the parties.

5. Implicit in the first respondent's reply of August 31, 2012 and the second respondent's failure to respond to the petitioner's letter of invocation of August 28, 2012 is the respondents' joint refusal to act in accordance with the arbitration agreement for constituting the arbitral tribunal as contemplated therein.

6. The respondents say that there is no live claim to be carried to an arbitral reference. The respondents rely on the judgment reported at S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and place clause (iv) of the summary of the majority opinion as recorded at paragraph 47 of the report. The further ground urged by the respondents is that the petitioner is effectively seeking to refer the matters covered by the subsequent memoranda of understanding to an arbitral reference under the arbitration clause contained in the agreement of February 4, 2008 by ignoring the procedure for dispute resolution as contemplated in the two memoranda of understanding. In short, the second argument of the respondents

is that the petitioner is seeking to carry disputes not covered by the arbitration clause contained in the agreement of February 4, 2008 to the reference.

7. Since the existence of the arbitration agreement has not been questioned, a reference has to be made. The reference could have been resisted by the respondents if either the petitioner had not invoked the arbitration agreement in accordance with law or grounds were cited by the respondents for the Chief Justice or his designate to decline the constitution of the arbitral tribunal. It is of significance that the first respondent's letter of August 31, 2012 does not indicate that the disputes sought to be raised in the petitioner's letter of August 28, 2012 were incapable of adjudication under the arbitration agreement contained in the matrix contract of February 4, 2008. No particulars are cited by the respondents as to why the claims made by the petitioner are dead claims. It does not appear to be clear from the respondents' submission as to whether the respondents seek to rely on the relevant clause in the SBP and Co. (supra) judgment to suggest that the claims sought to be raised by the petitioner cannot be pursued as being barred by the laws of limitation.

8. Clause (iv) of paragraph 47 of the SBP and Co. (supra) judgment is a summary of what has been held earlier in the majority opinion. It would be profitable to refer to paragraph 39 of the report to ascertain the extent of the judicial authority to be exercised by a Chief Justice or his designate u/s 11 of the 1996 Act.

9. The judgment says that a Chief Justice or his designate, upon receipt of a request u/s 11 of the Act, has to decide on his own jurisdiction. He has then to decide whether there is an arbitration agreement within the meaning of the said Act and whether the person carrying the request is a party thereto. The following passage next appearing at paragraph 39 of the report is of immense relevance in the present context:

39....It is necessary to indicate that he (the Chief Justice or his designate) can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration....

10. It is evident on a meaningful reading of the above passage that if it is possible for a Chief Justice or his designate to assess, on the basis of the material before him, as to whether there are live disputes to be carried to an arbitral reference or not, such assessment would be made. However, just as in most cases of limitation when disputed question of fact and law arise, the question of limitation may not be possible to be decided except by taking

evidence, the authority of the arbitrator as recognised in Section 16 of the said Act, read with the provision for limited interference by Court as mandated by Section 5 thereof, would prompt the Chief Justice or his designate to yield to the arbitral tribunal's authority under the said Act of 1996 and not adjudicate on disputed questions in a request u/s 11 of the said Act.

11. The task at hand is simpler since nothing has been cited to suggest why the claims raised by the petitioner are barred by limitation. The order that can be made herein, since the petitioner pursues the arbitration agreement contained in the matrix contract of February 4, 2008, is only for a reference to be conducted in accordance therewith. As a corollary, only disputes that are covered by such arbitration clause can be carried to the arbitral reference. The disputes which pertain exclusively to the subsequent memoranda of understanding and are not covered by the arbitration clause in the initial agreement of February 4, 2008, may not be carried to the arbitral reference in pursuance of any order that may be made herein. But again, it will be for the arbitral tribunal to decide on the issue.

12. Since the existence of the arbitration agreement is not disputed and no cogent ground has been indicated by the respondents for declining the request made by the petitioner upon the failure of the respondents to adhere to the contractual scheme for securing the composition of the arbitral tribunal, Justice Prabir Kumar Samanta (retd.) is nominated as the respondents' nominee on the arbitral tribunal. Since the petitioner's nominee has already been indicated, the two nominees are left free to decide on the third arbitrator to complete the constitution of the arbitral tribunal.

13. It is made clear that the merits of the disputes between the parties have not been gone into and all points available in accordance with law are left open to be carried to the arbitral reference uninfluenced by any observation in this order.

14. The two nominees will be entitled to a consolidated remuneration each of Rs. 5 lakh as will the third arbitrator to be decided upon by the two nominees, since the parties indicate that the reference should take no more than six months from the date of completion of the pleadings.

15. AP No. 559 of 2013 is disposed of without any order as to costs. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.