

(2022) 09 CAL CK 0144
In the Calcutta High Court
Case No : A.P. No. 555 Of 2022

West Bengal Power Development Corporation Limited APPELLANT
Vs
Sical Mining Limited RESPONDENT

Date of Decision : 30-09-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 11(6), 12(5), 14, 14(2), 21

Citation : (2022) 09 CAL CK 0144

Hon'ble Judges : Prakash Shrivastava, CJ

Bench : Single Bench

Advocate : C. Gupta, S. Dasgupta, A. Mitra, R. Das, K. Rahaman, P. Biswas, S. Chatterjee

Final Decision : Dismissed

Judgement

Prakash Shrivastava, CJ

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') has been filed to appoint the sole arbitrator to decide the dispute between the parties.

2. It is undisputed that the Coal Mining agreement dated 27th of October, 2016 was entered into between the parties which contained following arbitration clause.

"42.3 Arbitration

42.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 42.2, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 42.3.2. Such arbitraiton shall be held in accordance with the Arbitration and Conciliation Act, 1996. The place of such arbitration shall be Kolkata, and the language of arbitration proceedings shall be English.

42.3.2 The arbitrator shall be appointed by the Additional Chief Secretary/ Principal Secretary to the Government of West Bengal, Department of Power and

Non-Conventional Energy Sources.

42.3.3 The arbitral tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 42 shall be final and binding on the Parties as from the date it is made, and the Mine Developer and Operator and WBPDCCL agree and undertake to carry out such Award without delay.

42.3.4 The Mine Developer and Operator and WBPDCCL agree that an Award may be enforced against the Mine Developer and Operator and/or WBPDCCL, as the case may be, and their respective assets wherever situated.

42.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder."

3. Since the dispute had arisen, therefore, invoking clause 42.3.2, the Additional Chief Secretary, Power Department vide order dated 10 th of February, 2022 had appointed Sri Debidas Datta, Advisor to the Department as sole arbitrator for redressal of dispute. The said appointment came to be challenged at the instance of the applicant under Section 14 of the Act.

4. Learned Single Judge, Commercial Court vide order dated 18th of May, 2022 had allowed the application under Section 14 of the Act and after taking note of the judgments of the Hon'ble Supreme Court in the matter of TRF Limited vs. Energo Engineering Projects Limited reported in AIR 2017 SC 3889, in the matter of Bharat Broadband Network Limited vs. United Telecoms Limited reported in AIR 2019 SC 2434 and in the matter of Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd. reported in 2019 SCC OnLine SC 1517 had held that:-

"Therefore, in the light of the above discussion and series of the Hon'ble Apex Court decision holding the ground today, I am of the opinion the locus of the Additional Chief Secretary, Power Department, Government of West Bengal, empowered to appoint the Arbitrator is hit by Section 12(5) read with Clause 1, 2, 5, 8 and explanation 2 of seventh schedule as Additional Chief Secretary becomes de-jure unable to perform his function being ineligible lacking inherent jurisdiction to proceed any further and invoking Section 14(2) terminating the mandate of Additional Chief Secretary, Power Department, Government of West Bengal for the purpose of appointment of Arbitrator.

Hence, it is

Ordered

"the mandate of Additional Chief Secretary, Power Department, Government of West Bengal, is hereby terminated and parties are directed to take steps in appointment of arbitrators in accordance with law".

Accordingly the instant application stands disposed off on contest without cost."

5. After the aforesaid order, applicant has filed the present application under Section 11 of the Act.

6. Learned Counsel for the respondent has raised an objection that no notice making a request to the respondent was issued for appointment of arbitrator, therefore, the application under Section 11 is premature. To this Court, even notice under Section 21 invoking the arbitration clause has not been pointed out. In terms of Section 21 of the Arbitration and Conciliation Act, 1996, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Delhi High Court in the matter of Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd. reported in 2017 SCC OnLine Del 7228 after taking note of Section 21 of the Act has held that:

"25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11 (6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond."

7. The above judgment has been followed by the Bombay High Court in the matter of Malvika Rajnikant Mehta and Others vs. JESS Construction reported in 2022 SCC OnLine Bom 920.

8. In the present case, requirement of Section 21 has not been complied with, therefore, the AP is dismissed as premature with liberty to the applicant to give due notice to the respondent invoking the arbitration clause and in case if the parties fail to appoint the sole arbitrator with consent within the stipulated time, the applicant can approach this Court with appropriate prayer.