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Reserved

Case :- FIRST APPEAL FROM ORDER No. - 1636 of 2000

Appellant :- Chief Engineer (Madhya Ganga) & Others
Respondent :- M/S.Jain Construction Co. Engineers

Counsel for Appellant :- S.C.
Counsel for Respondent:-Pramod Kumar Jain, Amit Shukla, Pankaj Dubey

Hon'ble Pradeep Kumar Singh Baghel, J.
Hon'ble Mahboob Ali, J.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

This is an appeal under Section 39 of the Indian Arbitration Act, 1940[1] preferred by the Chief Engineer (Madhya Ganga), U.P., Irrigation Department, Meerut and the State of Uttar Pradesh with other two appellants against the judgment and order of the Civil Judge (Senior Division), Bijnor passed in Civil Case No. 119 of 1994 dated 27th July, 2000, whereby the application filed under Section 20 of the Act, 1940 by the sole respondent has been allowed and a direction has been issued to the parties to furnish within thirty days the name of a person to be appointed as an Arbitrator.

At the time when the matter was entertained, a preliminary objection was raised by learned counsel for the sole respondent that an appeal under Section 39 (iv) of the Act, 1940 can be filed only after the Court has determined the name of the Arbitrator, to whom the reference is to be actually made and not earlier. In support of his preliminary objection learned counsel for the respondent has relied upon a Division Bench judgment of this Court in the case of **Corporation of India v. Karnail Singh**[2].

The said preliminary objection was opposed by the appellants. In response to the preliminary objection appellants placed reliance on a judgment of this Court in the case of **Union of India v. Mohamad**

1 Act, 1940
2 1987 (1) AWC 10

Usman[3], wherein it has been held that when the plaintiff's application under Section 20 of the Act, 1940 is allowed, such an order is clearly an order directing filing of an arbitration agreement and thus, it is covered under Section 39(1)(iv) of the Act, 1940 and as such, the appeal is competent.

The Division Bench noticed the aforesaid two conflicting judgments of this Court and referred the following issue for consideration by a larger Bench:

> "Whether in the facts and circumstances of the instant case this Appeal is maintainable?"

Pursuant to the said reference a Full Bench was constituted. The Full Bench speaking through Hon'ble Mr. Justice Ferdino Inacio Rebello, the Chief Justice (as he then was) found that the judgment of **Karnail Singh (supra)** was not a correct law, and affirmed the view taken by the Division Bench in **Mohamad Usman (supra)**, wherein it was held that an appeal would lie from an order where the Court passes an order making reference. In view of the said decision, this appeal has been found to be maintainable.

The only question raised in this appeal is that whether Clause-22 of the agreement can be treated as an arbitration clause.

Before considering the said question, a brief reference of the facts is necessary.

The Executive Engineer, Eastern Ganga Canal Division-I, Najibabad, Bijnor invited tender vide Notice No. 8/82-83 dated 14th October, 1982 for construction of Malin Syphon Acqueduct of Eastern Ganga Canal over Malin River at Km. 41.87 of Eastern Ganga Canal. In pursuance of the said notice the sole respondent, amongst others, submitted its tender. On 14th October, 1983 the appellants accepted the offer of the respondent and they entered into an agreement for construction of Malin Syphon Acqueduct of Eastern Ganga Canal. The agreement does

3 AIR 1965 Allahabad 269

not provide any arbitration clause. As per the agreement, the respondent was to complete the work within two years from the date of the contract. However, the work could not be completed within the stipulated period. It is stated that it was completed after 3 & ½ years. The present dispute arose when the appellants refused to make full payment against the bill raised by the sole respondent. Both the parties have made allegation and counter-allegation against each other for the cause of delay, which is not material for the present case.

Later, on 19th September, 1994 the sole respondent moved an application under Section 20 of the Act, 1940 to refer the matter to arbitration tribunal and appoint an arbitrator. The said application was registered as Civil Case No. 119 of 1994 before the Civil Judge (Senior Division), Bijnor. The appellants filed their objection 19-Ka taking various grounds. It raised, amongst others, the ground that there is no clause for arbitration in the agreement dated 14th October, 1983, hence the application moved by the respondent is liable to be rejected.

Learned Civil Judge found that it is true that the word 'arbitration' is not mentioned in Clause-22 of the agreement, but from the language of the said clause the intention of the parties appears to be for the reference of the matter to arbitration. Accordingly, vide impugned judgment and order dated 27th July, 2000 the trial Court allowed the application of the respondent for appointment of an arbitrator. Learned Civil Judge interpreted Clause-22 of the agreement and relying on a judgment of this Court in **State of Uttar Pradesh and another v. M/s. Sardul Singh Kulwant Singh and another**[4] came to hold that a reading of Clause-22 of the agreement shows that the intention of the parties was to enter into an arbitration and accordingly, he asked the parties to furnish name of a person to be appointed as an arbitrator.

We have heard Sri Rishi Kant Shukla, learned Standing Counsel for the appellants, and Sri Amit Shukla, learned counsel for the respondent.

Learned Standing Counsel submitted that Clause-22 of the

4 AIR 1985 All 67

agreement cannot be construed as an arbitration clause. The said clause simply mentions that any claim for compensation shall be referred to the Engineer and the learned Civil Judge has misinterpreted it. He further submits that non-inclusion of arbitration clause in the agreement and other circumstances clearly indicate that there was no intention of the parties to refer the matter to the arbitration. Learned Civil Judge has erred in presuming acceptance of the arbitration in the matter. He further submitted that the respondent had accepted the agreement and did not raise any objection regarding the absence of the arbitration clause at the time of signing of the agreement. Thus, the terms of the agreement are binding on the parties. Lastly he urged that the finding of the trial Court on the point of limitation is also erroneous. Learned Standing Counsel has relied on a judgment of the Supreme Court in the case of **Karnataka Power Transmission Corporation Limited and another v. Deepak Cables (India) Limited**[5].

Learned counsel for the respondent submits that mere absence of word 'arbitration' in Clause-22 of the agreement does not make any difference. The substance of the clause indicates that all the disputes between the contractor and the department will be referred to the Engineer and the decision of the Engineer shall be final. He has submitted that the word 'decision' used in Clause-22 itself shows that the intention of the parties was to refer the matter to the arbitration.

Learned counsel for the respondent has placed reliance on the judgments of the Supreme Court and different High Courts in **Smt. Rukmanibai Gupta v. Collector, Jabalpur and others**[6], **M/s. Sardul Singh Kulwant Singh and another (supra)**, **K.K. Modi v. K.N. Modi and others**[7], **M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited and others**[8], **Ganga Pollution Control Unit and another v. Civil Judge,**

5 (2014) 11 SCC 148 : Civil Appeal No. 4424 of 2014, decided on 07th April, 2014
6 (1980) 4 SCC 556
7 AIR 1998 SC 1297 : (1998) 3 SCC 573
8 (1993) 3 SCC 137

Allahabad and others[9], **M.P. Housing Board and another v. Satish Kumar Raizada**[10], and, **P. Madhusudhan Rao v. Lt. Col. Ravi Manan and another**[11].

Before adverting to the submissions of the rival sides made at the bar it is useful to extract Clauses-21 and 22 of the agreement dated 14th October, 1983, which read as under:

> "**21**. All works to be executed under the contract shall be executed under the direction and subject to the approval in all respect of the Engineer-in-charge for the time being shall be entitled to direct at what point or points and in what manner they are to be commenced, and from time to time carried on.
>
> **22**. Except where otherwise specified in the contract the decision of the Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meeting of the specifications, designs, drawings and instructions herein before mentioned. The decision of such Engineer 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 or of relating to the contract, designs, drawing, specifications estimates, instructions, order of these conditions or otherwise concerning the works or the execution of failure to execute the same whether arising during the progress of the work or after the completion as abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor."

From a careful perusal of Clause-22 of the agreement it is evident that the word 'arbitration' is not used therein.

The issue whether such a clause merely refers the matter for expert opinion or arbitration, fell for consideration in a large number of cases before the Supreme Court and English Courts.

Russel on Arbitration, 21st Edition, at page 37, deals with the issue how to determine the reference for an expert opinion or arbitration clause. Relevant part of Paragraph 2-014 of the said book reads as under:

> "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties.

9 2000 (3) AWC 2515
10 2003 (2) Arb.LR 553 MP : 2003 (1) MPHT 205
11 Civil Revision Petition No. 4515 of 2014, decided on 12th March, 2015 (Andhra High Court)

First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive........... Where there is no express wording, the Court will refer to certain guidelines. Of these, the most important used to be whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert;........... An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion......"

Somewhat similar clause in the agreement as in the agreement in the present case came to be considered by the Supreme Court in the case of **State of U.P. v. Tipper Chand**[12]. In the said case the contract provided that the decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions. The relevant part of the judgment is extracted below:

"**4**. 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 spelled 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."

In the case of **State of West Bengal and others v. Haripada Santra**[13] the High Court found that in the agreement it was provided that

12 (1980) 2 SCC 341 : AIR 1980 SC 1522
13 AIR 1990 Cal 83

the decision of the Superintending Engineer of the Circle shall be final. The agreement further provided that he was also required to act judicially and decide the disputes after hearing both the parties and after considering the material before him. In view of the said provisions, the Court held that it was an arbitration agreement.

In the case of **State of Orissa and another v. Damodar Das**[14] the Supreme Court followed its earlier judgment in **Tipper Chand (supra)** and held that the clause, which made the decision of the Public Health Engineer final, conclusive and binding in respect of all questions relating to the meaning of specifications, drawing and instructions or as to any other question claim, right, matter of thing whatsoever in any way arising out of or relating to the contract, drawings, specifications, estimates or otherwise concerning the works or the execution or failure to execute, was not an arbitration clause as it did not envisage that any difference or dispute that may arise in execution of the works should be referred to the arbitration of an arbitrator.

In **Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur**[15] Clauses 23 & 24 of the agreement were similar to Clause 22 of the agreement in the present case. The Supreme Court held as under:

> "In the present case, reading Clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act."

In **K.K. Modi (supra)** the Supreme Court after considering large number of the judgments has culled out the following principle:

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14 (1996) 2 SCC 216
15 AIR 1999 SC 899 : (1999) 2 SCC 166

> "**17**. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
>
> (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
>
> (2) That the jurisdiction of the tribunals to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,
>
> (3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
>
> (4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
>
> (5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
>
> (6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.
>
> **18.** The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

In **Karnataka Power Transmission Corporation Limited (supra)** the Supreme Court took note of its earlier decisions and has quoted with approval the judgment of **Tipper Chand (supra)**.

Applying the judgments of the aforesaid cases particularly in the case of **Tipper Chand (supra)**, which has been approved by the Supreme Court in its recent judgment in **Karnataka Power Transmission Corporation Limited (supra)**, and reading of Clauses 21, 22 and other Clauses of the agreement we find that there was no intention of the parties to refer the matter for arbitration.

The various clauses of the agreement do not indicate that the parties have agreed to refer dispute between them to a decision of the private tribunal. We also find that one of the ingredients that the private tribunal

should be empowered to adjudicate upon a dispute in an impartial manner after furnishing opportunity to the parties to put forth their case is also missing in this case. It is true that in the agreement there is no specific clause of arbitration or anything that detract from the arbitration agreement but other ingredients are completely lacking in the present case. Hence, we are of the view that there was no arbitration clause and the parties had no intention to refer the matter for the arbitration.

Insofar as the judgments relied upon by learned counsel for the respondent is concerned, those cases have been decided on the construction of the agreement involved in the said cases. Learned counsel for the respondent has heavily relied upon a judgment of this Court in **M/s. Sardul Singh Kulwant Singh and another (supra)**, which has been relied upon by the trial Court also. In the said case the application was moved under Section 8 of the Act, 1940 calling upon the authority concerned to enter on a reference and adjudicate the dispute. No plea regarding existence of the agreement was raised initially and the only objection raised was that the private party did not prefer claim within forty-eight hours as required under Clause 5.12 of the said agreement and it was also urged that the claims are false and imaginary and, in fact, there is no dispute between the parties. It was also urged that Clause 34 of the agreement therein does not provide for arbitration. We find that Clause 34 of the agreement was not similar to the agreement in the present case and on the basis of the said agreement the Court held that intention of the parties was to refer the matter for the arbitration.

The judgment of **K.K. Modi (supra)** does not assist the respondent. On the other hand, it has also referred the judgment of **Tipper Chand (supra)**. The Supreme Court has interpreted Clause 9 of the memorandum of understanding in the said case. The said judgment is distinguishable on the facts of the said case.

In the case of **M. Dayanand Reddy (supra)** the Court has considered the agreement in the said case. It was found therein that there was a clause containing the arbitration agreement but the plea taken by the

respondents therein was that due to mistake the clause containing arbitration agreement was not scored out in the copy of the agreement since forwarded to the applicant therein. From the said facts it is clear that there was intention of the parties for arbitration. We have carefully perused the other judgments also cited by learned counsel for the respondent and found that they have been decided on their own facts.

For all the reasons mentioned above, we find that Clause 22 of the agreement in the present case is similarly worded as in the case of **Tipper Chand (supra)** and, therefore, applying the principle laid down by the Supreme Court in the aforesaid case we are of the view that the parties had no intention for reference to the arbitration. The view taken by the trial Court is erroneous and is liable to be set aside. Accordingly, the impugned judgment and order dated 27th July, 2000 passed by the Court below is set aside.

Thus, the appeal is allowed. No order as to costs.

Order Date :- 1 November, 2018
SKT/-