

16.05.2024
Sl. No.4.
D/L.
Mithun
Ct.No.2.

**Calcutta High Court
In the Circuit Bench at Jalpaiguri
Civil Revisional Jurisdiction
Appellate Side**

CO 76 of 2024

**The Executive Engineer, National
Highway Division No.IX & Anr.
Vs.
M/s. Dilip Kumar Das & Sons.**

Mr. Joyjit Choudhury, Ld. A.A.G.,
Mr. Nabankur Paul

...for the petitioner.

The petitioner herein has challenged an order dated 22nd March, 2023 passed by the learned District Judge, Jalpaiguri in O.C. Execution No.70 of 2017(Arb.). Although, the challenge to the said order is foisted only on 6th May, 2024 when this application has been made yet in view of the peculiar circumstances of the case, the matter is considered for interim protection ignoring the delay and in absence of the opposite party.

The facts of the case may be briefly narrated as under:-

The petitioner published a notice inviting offers for strengthening of existing pavement from km 598/00 to km 612/00 and km 630/00 to km 634/00 of

National Highway-31 (in short NH-31) in the State of West Bengal (hereinafter referred to as the said contract). The respondent was the successful bidder and was awarded the contract. The contract provided a mechanism for resolution of dispute which is set out hereunder for convenience:-

"24. Disputes

24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer's decision.

25. Procedure for Disputes

25.1 The Dispute Review Expert (Board) shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The Dispute Review Expert (Board) shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Dispute Review Expert. Either party may

give notice to the other to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert's written decision. If neither party refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract."

On a plain reading of the clauses set out hereinabove it is clear that if the contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contractor or that decision was wrongly taken, the decision shall be referred to a Dispute Review Expert within 14 days of the notification of Engineer's decision. The opposite party being agreed by such a decision referred the matter to the Dispute Review Expert. The Dispute Review Expert passed an order on 19th February, 2017. In view of the Clause 25.2 set out hereinabove, either party may give notice to the other to record the decision of the Dispute Review Expert to an arbitrator within 28 days of the Dispute Review Expert's written decision. If neither party

refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding. The petitioner being the principal was not satisfied with the decision of the Dispute Review Expert but did not give a notice to the opposite party within 28 days to refer the dispute to arbitration. The petitioner says that being a Government organization, the decision to challenge the order of the Dispute Review Expert came at a belated stage and, therefore, the notice to refer the Dispute to arbitration was given on 22nd December, 2017. The opposite party responded to such notice by a letter dated 9th January, 2018 by which he contended that he has filed an execution case for executing the order of the Dispute Review Expert dated 19th February, 2017 as the notice period of 28 days have long expired. The petitioner appeared in the execution proceedings and made an application for dropping the execution case contending that the order of the Dispute Review Expert is not an award and therefore, has not culminated into a deemed decree to be executable under the provisions of Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act). The learned District Judge, Jalpaiguri has rejected the said application by the order impugned. Before the learned

District Judge, Jalpaiguri two judgments are found to have been relied upon. One is reported in **2006(2) ShimLC 369 (Satluj Jal Vidyut Nigam Ltd. Vs. Nathpa Jhakri Joint Venture)** and a judgment of the Delhi High Court delivered on 27th August, 2018 in **S.J.V.N. Ltd. Vs. Jayprakash Hyundai Consortium** to urge that the order of the Dispute Review Expert after the expiry of the notice period has become an arbitral award which can only be challenged under Section 34 of the 1996 Act. In absence of the contract considered in Satluj (supra) it cannot be arrived at whether the terms contained therein were *pari materia* with the terms of the instant case. The judgment in S.J.V.N. Ltd. (supra) in view of the recording in the order impugned is apparently not applicable to the instant case because there has been no agreement between the parties to consider that the order of the Dispute Review Expert below a particular sum is final and will become a binding award.

In the aforesaid facts and circumstances, the interpretation of the terms of the contract in the light of Section 28 of the Indian Contract Act, 1872, whether the order of the Dispute Review Expert fulfills the test of being an award to be executable as a deemed decree on the same having not been

challenged and the judgments operating in this field are required to be considered.

The petition is admitted.

Let a copy of the petition be served upon the opposite party. The proceedings in execution case no. O.C. Execution No.70 of 2017(Arb.) shall remain stayed until further orders. The interim order of stay is necessary in the facts of the case as any further order in the execution case is likely to render this application infructuous wherein serious law points are involved. That apart and in any event, on allowing the execution case to proceed there is every likelihood of multiplicity of judicial proceedings and that the balance of convenience is in favour of the petitioner apart from having made out a prima facie case.

Let this application appear in the list on 22nd May, 2024 under the heading "For Orders" when the petitioner shall demonstrate service upon the opposite party, failing which, the interim order passed today may be vacated.

(Arindam Mukherjee, J.)