SWARUPA GHOSH LAW CHAMBER (INDIA)

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ARBITRATION

Arbitration Proceeding or not- How to decide?

This issue came up Delhi High Court in Buildmyinfra Private Limited vs. Gyan Prakash Mishra [ARB.P. 340/2022]. Petitioner is into IT related the services and hired the Defendant as employee, offered employment letter and also "Confidentiality and Non-Compete Agreement" was signed by the Defendant. Petitioner alleged violation of non-compete clause and seek to appoint arbitrator for dispute resolution. Defendant challenged this appointment of arbitrator stating that

- Agreement was not part of the employment letter
- Agreement is not the terms and conditions of employment
- Agreement is a one way document for which no consideration was paid to Defendant and it was therefore void.
- Agreement lost its validity as no copy of the Agreement was ever supplied to Defendant.

Section 11 of Arbitration and Conciliation Act, 1996 was invoked by parties.

Upon production of the disputed Agreement, it was observed that Defendant had signed every pages of it but none from plaintiff have signed it.

Hob'ble court observed that the said Agreement indeed has been signed by the party (that is the Defendant) who is opposing the appointment of arbitrator, so the non-signing of the Agreement by the petitioner, who asserts its validity, cannot in these circumstances come to the aid of the Defendant. The dispute was ultimately referred to arbitration by the Hon'ble High Court.

Similar issue went upto Hon'ble Supreme Court in Mahanadi Coalfields Ltd & Anr. vs M/s IVRCL AMR Joint Venture regarding disagreement regarding invocation of arbitration clause.

In this case Appellant Mahanadi Coalfields (subsidiary of Coal India Limited) granted work to the Respondent but due to issue of delays the work order wan terminated by Mahanadi Coalfields. Thereafter respondent raised a claim of hefty amount alleging liability of Mahanadi Coalfields in causing delay. On getting no response, Respondent sought for approval/ consent of Mahanadi Coalfields for appointing arbitration. On getting no response the respondent filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the High Court of Orissa, which was allowed for appoint a sole arbitrator. Appellant pleaded before Supreme Court that there is no arbitration agreement within the meaning of Sections 2(b) and 7 of the 1996 Act, hence invocation of section 11(6) is void. Appellant referred to clause 15 of the Contract Agreement only talks about settlement of disputes between contractors and company and nothing on the manner of such settlement

Respondent referred to a policy document issued by Coal India Limited to its General Managers for the settlement of disputes or differences arising out of works and services contracts through arbitration; and further argued that Mahanadi Coalfield being a subsidiary of CIL is bound by such policy document.

"Past/existing work order/contract: With regards to dispute/differences cropping up in existing work order/contract, employer (department) shall adopt procedure for settlement of the same, through arbitration process. As you are aware that neither the CIL Manuals nor contract document at present contains any clause regarding arbitration, therefore, dispute/differences cannot be referred to arbitration straight away. Hence, before referring the matter to arbitration, consent of the other party (contractor) is necessary for redressal of dispute/differences through arbitration. Once, the contractor agrees for settlement of dispute/differences arising out of contracts through arbitration, an agreement may be signed between employer and contractor for referring the dispute/differences to Sole Arbitration by a person appointed by Competent Authority of CIL/CMD of Subsidiaries (as the case may be). The rest of the procedure shall be as per the Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015 and also as per instruction incorporated in clause "Settlement of Disputes through Arbitration"."

Court held that through such policy document, nothing is inferred to be as arbitration clause at all for past or future disputes..... 'Neither does the substantive part of the clause refer to arbitration as the mode of settlement, nor does it provide for a reference of disputes between the parties to arbitration. It does not disclose any intention of either party to make the Engineer-in-Charge, or any other person for that matter, an arbitrator in respect of disputes that may arise between the parties. Further, the said clause does not make the decision of the Engineer-in-Charge, or any other arbitrator, final or binding on the parties. Therefore, it was wrong on the part of the High Court to construe clause 15 of the Contract Agreement as an arbitration agreement.' and set aside the order of High Court.

So like always much depends on facts of the case.

