



Vivek R
Senior Associate

CALCUTTA HIGH COURT ON ABSENCE OF WRITTEN ARBITRATION AGREEMENT

A. Introduction:

Calcutta High Court (“**HC**”), on August 18, 2022 in the *Eastern Coalfields Limited* case,¹ held that in the absence of a written agreement to refer disputes in the contract to arbitration, the conduct between the parties cannot be construed to mean that the parties had agreed to arbitration.

B. Brief Facts:

1. RREPL-KIPL (JV) (“**RREPL**”) had filed petition under Sec. 11 of the Arbitration and Conciliation Act, 1996 (“**Act**”) before the HC for appointment of arbitrator by relying on settlement of disputes clause (*i.e.*, clause 13) of the contract, in respect of the disputes arising out of the contract in relation to the electronic tender of 2017. Petition was disposed in April 2021 appointing an arbitrator.
2. Eastern Coalfields Limited (“**ECL**”) preferred a special leave petition which was disposed of by the Supreme Court (“**SC**”) in November 2021. SC also granted liberty to ECL to file a review application before the HC.
3. In the review application, ECL contended that no written arbitration agreement existed between the parties. Only on the ground that ECL did not dispute the same, the court could not have appointed the arbitrator.

C. RREPL’s Contentions:

1. Since ECL did not dispute the arbitration agreement in its pleadings, it was a consent order and it should not be allowed to take a different stand after the order.
2. ECL had submitted to jurisdiction of the Arbitration Tribunal, filed the counter claim and also an application under Sec. 16² of the Act.
3. By ECL’s conduct subsequent to the April 2021 order, it had waived its claimed right of review of the order.
4. If there is a dispute regarding the existence of arbitration agreement, the same must be determined by the Arbitral Tribunal.

¹*Eastern Coalfields Limited v. RREPL-KIPL (JV)* MANU/WB/1286/2022.

² Procedure for appointment of arbitrators.

D. Judgment & Reasoning of HC:

HC:

1. When disposing of the review application observed that Sec. 2(b) read with Sec. 7³ of the Act enjoins the existence of a writing of the parties agreeing to refer disputes to arbitration.
2. While considering the application under Sec. 11 of the Act, the court must arrive at a finding, even on a *prima facie* basis if the fact situation so warrants, that there exists an arbitration agreement between the parties in writing.⁴
3. In Clause 13 of the contract, the option of arbitration was only available to government enterprises. Since, RREPL is not a government enterprise, it cannot avail the same remedy.⁵
4. By placing reliance on *R N Samanta*,⁶ *South- Eastern Coalfields Ltd.*⁷ and *Mahandi Coalfields Ltd.*⁸ cases observed that: “*In absence of a written agreement to refer the present and future disputes to the contract to arbitration, the conduct between the parties cannot be construed to mean that, the parties had agreed to arbitration.*”⁹
5. Placed reliance on *Pravin Electricals*¹⁰ judgment to observe that: “*[W]here it is not possible for a court exercising its jurisdiction under Section 11 of the [Act] to weed out manifestly and ex-facie non-existent and invalid arbitration agreements and non-arbitrable disputes, then, in such cases, the issue of the existence of arbitration agreement can be referred to the arbitrator for determination as a preliminary issue.*”
6. Reviewed the April 2021 order appointing the arbitrator and held that there is no arbitration agreement between the parties and dismissed the Sec. 11 petition filed by RREPL in view of nonexistence of arbitration agreement between the parties.

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³ Arbitration agreement.

⁴ Paragraph 19 of the judgement.

⁵ Paragraph 21 of the judgement.

⁶ *R N Samanta V. Coal India Ltd.* AP No. 817 of 2021.

⁷ *South-Eastern Coalfields Ltd V. Cart Road Wings JV.* FMA 1497 of 2018.

⁸ *Mahandi Coalfields Ltd V. M/s IVCL AMR Joint Venture.* Civil Appeal No. 4914 of 2022.

⁹ Paragraph 22 of the judgement.

¹⁰ *Pravin Electricals Private Limited V. Galaxy Infra and Engineering Private Limited* MANU/SC/0160/2021.