

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).8338-8339 OF 2019
(ARISING OUT OF SLP (C) NO(S) 36438-36439/2017

FOOD CORPORATION OF INDIA

APPELLANT(S)

VERSUS

NATIONAL COLLATERAL MANAGEMENT
SERVICES LIMITED (NCMSL)

RESPONDENT(S)

O R D E R

1. Leave granted.
2. These appeals take exception to the judgment and order dated 08.09.2017 read with Modification Order dated 20.09.2017 passed in Arbitration Petition No.384/2017 and Order dated 27.11.2017 passed in I.A. No.13954/2017 filed in Arbitration Petition No.384/2017 whereby, the High Court of Delhi at New Delhi allowed the arbitration petition filed by the respondent.
3. The relevant clause in the agreement dated 13.04.2007 reads thus :

"9. principal and Agent either party can terminate the Agency Agreement by way of giving 3(three) months notice to the other.

This Agency Agreement may be executed in duplicate by the FCI/Principal and agent, and each of the said copy shall be deemed to be an original and retained by the FCI/Principal and the agent, and such counter parts together shall constitute one and the same instrument.

Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this Agency Agreement shall be referred to the Chairman and Managing Director of F.C.I./Principal for settlement and whose decision shall be final and binding on the FCI/Principal and the agent”

Similarly the applicable clause in Agreement dated 04.01.2008 reads thus :

“Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this Agency Agreement shall be referred to the Chairman and Managing Director of F.C.I./Principal for settlement and whose decision shall be final and binding on the both FCI/Principal and Agent”

4. The High Court construed these clauses to mean that the parties had intended to resort to arbitration, in case of any disagreement or dispute regarding the claims arising from the aforesaid agreements. While so interpreting, the High Court placed reliance on clause 37 of the third Agreement dated 29.09.2008, which reads thus:

“Any dispute between the parties arising out of this agreement or pertaining to any matter which is the subject matter of this Agreement other than an issue to which finality has been ascribed in the present agreement shall be referred for decision to the Chairman and Managing Director of FCI for settlement whose decision shall be final and binding on the FCI and the Agent. It is clerly understood by the parties that the present clause is not an arbitration clause. In case, the dispute still subsists, then Civil Court shall have jurisdiction to adjudicate the same.”

5. It is common ground that clause 37 of Agreement dated 29.09.2008 (third agreement) is not the subject matter of the present arbitration

petition but the High Court relied upon the said clause to interpret the clauses contained in Agreements dated 13.04.2007 and 04.01.2008, referred to above, as being an arbitration agreement.

6. After hearing counsel for the parties, we have no manner of doubt that the above referred clauses in Agreements dated 13.04.2007 and 04.01.2008 respectively, merely predicate that the dispute shall be referred to Chairman and Managing Director of F.C.I./Principal for "settlement" whose decision shall be final and binding on both F.C.I./Principal and the Agent. Such agreement cannot be construed as an arbitration agreement, keeping in mind the exposition of the three Judge Bench decision of this Court in P. Dasaratharama Reddy Complex vs. Government of Karnataka & Anr. reported in (2014) 2 SCC 201. In paragraph 27 of the said decision this Court observed thus :-

"27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the

work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. **The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression 'in the first place' unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause."**
(emphasis supplied)

7. In the present case, the High Court has adverted to other decisions which are already considered by the three Judge Bench of this Court, referred to above.

8. Reverting to the interpretation given by the High Court in reference to Clause 37 of Agreement dated 29.09.2008, in our opinion, the same is tenuous. It cannot be sustained in law. For, a bare reading of the said clause clearly indicates that it is merely declaratory and clarificatory in nature, to restate the position

that reference made to the Chairman and Managing Director of F.C.I./Principal for settlement of disputes cannot be construed as an Arbitration clause. That is evident from the text that *it is clearly understood by the parties that the present clause is not an arbitration clause.*

9. Be that as it may, we are of the considered opinion that the High Court committed manifest error in construing clause 9 of Agreement dated 13.04.2007 and Clause 10 of Agreement dated 04.01.2008, referred to above, as an Arbitration clause. Accordingly, the impugned judgment and orders are set aside and the arbitration petition stands dismissed.

10. It is made clear that dismissal of arbitration petition in terms of this order shall not come in the way of the parties to pursue their claims by way of other appropriate remedies and the time spent by the respondent in pursuing arbitration petition shall not be reckoned whilst computing Limitation in terms of Section 21 of the Arbitration Act read with Section 14 of the Limitation Act. In other words, if civil suit is filed by the respondent, it will be open to the parties to pursue their claims on its own merits

in accordance with law subject to other period of limitation and subject to just exceptions.

10. The appeals and pending applications are disposed of in the above terms.

....., J.
(A.M. KHANWILKAR)

....., J.
(DINESH MAHESHWARI)

NEW DELHI
NOVEMBER 04, 2019

ITEM NO.54

COURT NO.6

SECTION XIV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s) 36438-36439/2017

(Arising out of impugned final judgment and order dated 27-11-2017 in IA No. 13954/2017 08-09-2017 in ARBP No. 384/2017 passed by the High Court Of Delhi At New Delhi)

FOOD CORPORATION OF INDIA

Petitioner(s)

VERSUS

NATIONAL COLLATERAL MANAGEMENT
SERVICES LIMITED (NCMSL)

Respondent(s)

Date : 04-11-2019 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE MR. JUSTICE DINESH MAHESHWARI

For Petitioner(s) Mr P.S. Narsimha, Sr. Adv.
Mr. Om Prakash, Adv.
Mr. Devendra Singh, AOR
Ms. Arpita Tripathi, Adv.

For Respondent(s) Mr. Rana Mukherjee, Sr. Adv.
Mr. Jayesh K. Ashar, Adv.
Mr. Dhaval Mehrotra, Adv.
Mr. Divyakant Lahoti, Adv.
Mr. Sudhanshu Sikka, Adv.
Ms. Amrita Grover, Adv.
For M/S. K Ashar & Co., AOR

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeals and pending application(s) are
disposed of in terms of the signed order.

(NEETU KHAJURIA)
COURT MASTER

(VIDYA NEGI)
COURT MASTER

(Signed order is placed on the file.)