# IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**CR No.2471 of 2016(O&M)**
**Date of Decision-22.10.2016**

National Aluminum Co Ltd ... Petitioner

Versus

Subhash Infraengineers Pvt. Ltd. and another ... Respondents

**CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

Present: Mr. Ashok Kumar, Sr. Advocate with
Mr. Adish Gupta, Advocate for the petitioner.

Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Govind Chauhan, Advocate for respondent No.1.

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***RAJ MOHAN SINGH, J.***

[1]. Petitioner has assailed order dated 25.01.2016 passed by Additional District Judge, Gurgaon and prayed for restoration of order dated 07.10.2015 passed by Civil Judge (Junior Division), Gurgaon.

[2]. Plaintiff-respondent No.1 filed a suit for declaration and permanent injunction on the ground that plaintiff-respondent No.1 is a Private Limited Company duly registered with the Registrar of Companies at Delhi under the name and style of M/s Subhash Infra Engineers Pvt. Ltd and having its registered at New Delhi. Administrative Office of the plaintiff is at Gurgaon.

[3]. Plaintiff-Company is involved in the business of construction as engineers and contractors. Defendant No.1-petitioner is a Public Corporate Company/Government of India Enterprise. Defendant No.2 was a sole arbitrator appointed by defendant No.1 in the alleged adjudication of the dispute between the plaintiff and defendant No.1. Defendant No.1 floated a Notice Inviting Tenders dated 05.05.2011 for construction of Ash Pond-IV in NALCO District Angul, Orissa.

[4]. In response to the notice inviting tenders, plaintiff-respondent No.1 sent its tender dated 06.06.2011. Plaintiff also deposited an amount of Rs.25,00,000/- as earnest money as per terms and conditions of notice inviting tenders.

[5]. Defendant No.1 vide letter dated 09.11.2011, sent work order in duplicate with some terms and conditions to the plaintiff-respondent No.1 for its acceptance by the plaintiff i.e. to be accepted or rejected by the plaintiff within seven days, failing which it would be presumed that work order has been accepted by the plaintiff. A request was made to return the duplicate copy of the work order to defendant No.1-petitioner duly signed by the various signatory holding of power of attorney or proprietor of the firm/plaintiff-respondent No.1 within 7 days as token of acceptance and acknowledgment. If the response was not received within aforesaid 7 days, it was to be presumed that the plaintiff has accepted the work order. The aforesaid work order in duplicate was

received by plaintiff-respondent No.1 on 30.11.2011. Clause 13.0 of the terms and conditions of the said work order was to the effect that in the event of failure on the part of successful tenderer to sign the agreement within the stipulated period, the contract would be considered as cancelled. Clause 13.0 of the terms and conditions of the work order was to the following effect:-

> *"Execution of Agreement: The contractor shall have to execute an agreement on Rs.50/- non-judicial stamp paper to be purchased from any stamp vendor under the jurisdiction of the Orissa High Court, in the specific format enclosed at Annexure VII. Dy. General Manager (Planning & Contracts) shall sign the contract on behalf of NALCO. The agreement should be executed within 15 days of issuance of work order. The agreement shall not be required to be executed for work orders of value less than or equal for Rs.50,000/-"*

[6]. Thereafter, petitioner-defendant No.1 sent E-Mails and letters dated 17.11.2011 to 21.11.2011 to the plaintiff-respondent No.1 asking for kick off meeting between the plaintiff and defendant No.1. In reply, the plaintiff sent letter dated 21.11.2011 informing that they did not receive any original document and no acceptance could be given till receipt of final specifications. Defendant No.1 once again asked for initiation of work by plaintiff-respondent vide letter dated 22.11.2011.

[7]. According to the plaintiff, since the work order was not technically sound, therefore, the same was not accepted by the plaintiff. Plaintiff sent its refusal to accept the contract vide

registered letter dated 02.12.2011 i.e. within 7 days of receipt of work order.

[8]. Plaintiff asserted in the plaint that he did not give any consent to the offer made by defendant No.1-petitioner and therefore, no contract came to be in existence between plaintiff-respondent No.1 and defendant No.1-petitioner as per Indian Contract Act. Since, there was no agreement signed between the parties, therefore no contract came to be in existence. Plaintiff claimed that the plaintiff was not under any legal obligation to work for defendant No.1-petitioner.

[9]. Defendant No.1 issued a letter dated 05.12.2011, informing the plaintiff that since the plaintiff had refused to execute the work, therefore, defendant No.1 will take necessary action as per terms and conditions of the notice inviting tender. The earnest money deposited by the plaintiff was forfeited vide letter dated 17.12.2011. It was again informed by defendant No.1-petitioner vide letter dated 03.01.2012 that the earnest money deposited by plaintiff was converted into security deposit and was forfeited. Vide letter dated 30.01.2012, defendant No.1-petitioner informed plaintiff-respondent No.1 that since the plaintiff had refused to work, the work would be got carried out through some other agency at the risk and cost of the plaintiff.

[10]. Plaintiff-respondent No.1 contested the claim of defendant No.1-petitioner vide letter dated 16.02.2012 on the

ground that since there was no contract between them, question of getting the work executed at their risk and cost did not arise. Risk and cost was demanded by defendant No.1-pettiioner for non-execution of Ash Pond-IV construction work by the plaintiff. A demand of Rs.4,86,61,440/- was made towards risk and cost amount for non-execution of the work from defendant No.1-plaintiff vide letter dated 06.02.2015. Plaintiff filed reply to the said demand letter on 28.02.2015, refusing the claim of defendant No.1-petitioner on the ground that there was no contract between them.

[11]. Defendant No.1 vide notice dated 10.06.2015 issued by Deputy General Manager (P & C), NALCO to the Chairman-cum-Managing Director, NALCO with a copy to the plaintiff, requested for appointment of an Arbitrator under Clause 22.00 of NIT & WO and Clause-87 of GCC against claim of risk and cost amount along with LD for non-execution of Ash Pond-IV construction work by the plaintiff.

[12]. The said claim of defendant No.1-petitioner was contested by plaintiff-respondent No.1 on the ground that there was no binding agreement/contract between the parties, therefore there was no question of any dispute having arisen between them. Plaintiff-respondent No.1 informed defendant No.1-petitioner that there was no occasion for appointment of any arbitrator vide letter dated 20.06.2015.

[13]. Thereafter, vide letter dated 04.07.2015, defendant No.1-petitioner requested plaintiff-respondent No.1 to select any one name from the panel of three persons for appointment of an Arbitrator under Clause 22.00 of NIT & WO and Clause-87 of GCC against claim of risk and cost amount along with LD for non-execution of Ash Pond-IV construction work by the plaintiff. Plaintiff reiterated its earlier stand of no binding contract between the parties and therefore, there was no occasion for appointment of any Arbitrator.

[14]. Vide letter dated 02.09.2015, defendant No.1-petitioner informed the plaintiff that one Sh. C.R. Pradhan, former CMD, NALCO-defendant No.2 had been appointed as a sole arbitrator for adjudication of the dispute. Plaintiff received notice dated 07.09.2015 from the aforesaid sole arbitrator that he had fixed 09.10.2015 as first hearing. Plaintiff was requested to be present.

[15]. The entire proceedings were assailed by the plaintiff in the civil suit on the cause of action which firstly arose on 05.12.2011 when defendant No.1-petitioner vide the aforesaid letter informed plaintiff-respondent No.1 that since the plaintiff had refused to execute the work, defendant No.1-petitioner will take necessary action as per terms and conditions of notice inviting tender. Secondly, it arose when on 17.12.2011 defendant No.1-petitioner by another letter dated 17.12.2011 informed the plaintiff that the earnest money was converted into security deposit and was

forfeited. Again the cause of action arose on 02.09.2015, when sole arbitrator was appointed by defendant No.1-petitioner, even though there was no agreement signed between the parties. Lastly, it arose on 07.09.2015, when the sole arbitrator issued notice of appearance to the plaintiff. With this background, suit came to be filed by respondent No.1-plaintiff.

[16]. Defendant No.1-petitioner appeared in the suit. Ad-interim injunction was sought by the plaintiff to restrain the sole arbitrator from proceeding with the arbitration proceedings. Since no contract came to be in existence between the parties, therefore, the plaintiff was not under legal obligation to work for defendant No.1-petitioner. The notice of the appearance issued by the sole arbitrator on 02.09.2015 requiring the plaintiff to participate in the arbitration proceedings was claimed to be bad in law.

[17]. Civil Judge (Junior Division), Gurgaon vide order dated 07.10.2015 dismissed the application for interim injunction on the ground that plaintiff can address its grievances before the arbitrator.

[18]. Feeling aggrieved against the order dated 07.10.2015, plaintiff respondent No.1 filed an appeal before the lower Appellate Court. Lower Appellate Court vide order dated 25.01.2016 accepted the appeal and held that since the issue of jurisdiction of the Court is a mixed question of law and fact and can only be decided at the relevant stage, therefore at this preliminary stage of the case and that too in the absence of any written statement, the order dated

07.10.2015 passed by Civil Judge (Junior Division), Gurgaon was found to be unsustainable in law and was accordingly, set aside. Defendant No.1-petitioner and Arbitrator-defendant No.2 were restrained from proceeding with arbitration proceedings till pendency of the suit. That is, how, the present revision petition came to be filed at the instance of defendant No.1-petitioner.

[19]. I have heard learned counsel for the parties.

[20]. Learned counsel for the petitioner vehemently contended that petitioner floated a Notice Inviting Tenders dated 05.05.2011 for construction of Ash Pond-IV in NALCO District Angul, Orissa. Bidders were asked to submit their sealed offer after considering all the terms, conditions and specifications. Respondent No.1 submitted its tender and deposited earnest money to the tune of Rs.25 lakhs on 06.06.2011. Thereafter, petitioner accepted the offer made by respondent No.1 and sent work order on 09.11.2011. Petitioner also requested respondent No.1 to attend the kick off meeting on 19.11.2011. Once again respondent No.1 was requested to come for kick off meeting on 21.11.2011. On 21.11.2011, the petitioner was informed by respondent No.1 that respondent No.1 was not interested in executing the work unless certain specifications were changed. Petitioner informed respondent No.1 that the work order was as per tender specifications and requested respondent No.1 to start activity for execution of work order with immediate effect. Respondent No.1 communicated to the

petitioner on 02.12.2011 that the work order was not acceptable to them. Respondent No.1 was informed about risk and cost factor as they had failed to execute the work order.

[21]. Learned counsel for the petitioner submitted that a financial loss to the tune of Rs.4,86,61,440/- was suffered by petitioner and respondent No.1 was asked to deposit the same, otherwise, petitioner will be forced to invoke the Arbitration Clause 22.00 of NIT and work order Clause 87 of the General Conditions of the Contract. Learned counsel further submitted that respondent No.1 cannot say that the agreement was not binding between the parties as the offer given by the respondent was duly accepted by the petitioner and nothing was required thereafter as the same amounted to lawful contract. The petitioner invoked the arbitration clause and appointed Sh. C.R. Pradhan as sole arbitrator.

[22]. On the strength of ***Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Private Limited, (2015 13 SCC 477, Kvaerner Cementation India Limited Vs. Bajranglal Agarwal and another, (2012) 5 SCC 214, Pappu Rice Mills Vs. Punjab State Cooperative Supply, AIR 2000 P&H 276, State of Uttar Pradesh and others Vs. Combined Chemicals Company Private Limited, (2011) 2 SCC 151, Hughes Communication India Ltd. and others Vs. East West Traders and another, (2013-3) PLR 258***, ***CWP No.4046 of 2005*** decided on 12.03.2005 titled as ***Maharshi Dayanand University and another Vs. The Anand***

***Cooperative L/C Society Ltd. and another*** and ***Maharshi Dayanand University and another Vs. Anand Cooperative L/C Society Ltd. and another, AIR (2007) SC 2441,*** learned counsel contended that an arbitration agreement even though in writing, is not required to be signed by the parties, if the record of agreement is provided by exchange of letters, telex, telegrams and other source of telecommunication. Arbitration agreement is not required to be signed by all the parties. It can be prima facie shown that the parties were at *ad idem*, then mere fact of one party not signing the agreement cannot absolve other party from the liability arising out of the agreement. Signing of agreement is not mandatory. Arbitration clause has to be interpreted in such a manner so as to give effect to the agreement rather than to invalidate it. This is more so in a commercial document having arbitration clause where presumption is in favour of the validity of the agreement.

[23]. Learned counsel for the petitioner further submitted that in view of Section 16 of the Arbitration Act, it is explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub Sections (2), (4) and (6) of Section 16 of Arbitration Act would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Arbitration Act. Reference was made to ***Kvaerner Cementation India Limited case (supra)***.

[24]. In view of observations made in ***M/s Pappu Rice Mills case (supra)*** , learned counsel for the petitioner submitted that all disputes and differences arising out of or in any manner touching or concerning the agreement, shall be referred to the sole arbitrator. Arbitrator has already issued notice to the parties to the arbitral proceedings. Plaintiff would be competent to raise all pleas before the Arbitrator including the plea of competence of arbitrator in respect of its own jurisdiction. In the event of dismissal of the objection of the plaintiff, Section 34 of the Arbitration Act would be resorted to. Civil Court would not be competent to restrain the Arbitrator to proceed with the arbitration proceedings in view of Section 5 of the Arbitration Act.

[25]. Learned counsel further submitted that in view of ratio laid down in ***Hughes Communication India Limited case (supra),*** Arbitration and Conciliation Act, 1996 is a complete Code and once arbitral process has started, the interference by a Civil Court would not be justified. No Civil court will exercise jurisdiction without reference to provisions of the Arbitration and Conciliation Act itself.

[26]. Learned counsel again emphasized that in view of Section 16 read with Sections 12 and 13 of the Act, issue was adjudicated by this Court in ***CWP No.4046 of 2005*** vide order dated 12.03.2005. On the ratio of ***State of Orissa and Others Vs. Gokulnanda Jena, 2003 (4) Indian Civil Cases 79*** and ***New India Assurance Co. Ltd Vs. Hanjer Fibres Ltd. 2003(3) RCR (Civil)***

***289***, it was contended that Arbitrator has the power to rule on its own jurisdiction including any objection with regard to existence or validity of the arbitration agreement. Ultimately, it was held that all these grounds can be raised before the Arbitrator in the arbitration proceedings. The aforesaid judgment passed by this Court was upheld by the Apex Court in the year 2007 when Civil Appeal No.2133 of 2007 was decided in case titled ***Maharshi Dayanand University and another Vs. Anand Cooperative. L/C Society Ltd. and another***.

[27]. Per contra, learned counsel for respondent No.1 submitted that the contract was never a binding contract between the parties. For making a complete contract in terms of Section 2(a) and 2(b) of the Indian Contract Act, 1872, it was essential that such proposal/offer should have been accepted by the offeree.

[28]. Learned counsel further submitted that the acceptance must satisfy Section 7 of the Indian Contract Act, 1872 which prescribes that in order to convert a proposal into a contract (promise), the acceptance should be absolute and unqualified. In the absence of such feature, there cannot be any acceptance in the eyes of law. It would be a case of mere counter offer which would require further acceptance by the offerer. Learned counsel also submitted that work order dated 09.11.2011 was not an absolute acceptance of its offer as the acceptance of the petitioner was made conditional to respondent No.1 i.e. to accept or reject the work offer

within a stipulated period of 7 days from the date of its receipt. The copy of work order dated 09.11.2011 in duplicate was received by respondent No.1 only on 30.11.2011 by registered post. Since the work order was not technically sound, therefore, respondent No.1 proceeded not to accept the same and sent its refusal vide registered letter dated 02.12.2011 within stipulated period of 7 days from receipt of the work order. The work order was a counter offer and not an unconditional acceptance which further required the acceptance on the part of respondent No.1. This aspect of the matter was further fortified by letters darted 05.12.2011, 17.12.2011, 01.01.2012 and 30.01.2012 wherein the petitioner specifically stated that respondent No.1 has refused to accept the work order.

[29]. According to learned counsel for respondent No.1, Clause 13.0 of General Conditions of Contract prescribed signing of contract where the successful tenderer shall be required to execute an agreement with the owner in the proforma attached with tender document within 10 days of the receipt by him of the notification of acceptance of the tender. In the event of failure on the part of successful tenderer to sign the agreement within the above stipulated period, the earnest money or its initial security deposit will be forfeited and the acceptance of the tenderer shall be considered as cancelled. No bill would be payable unless the agreement is executed. The offer dated 06.06.2011 was never converted into promise as per Section 2(a) and 2(b) read with Section 7 of the Indian Contract Act, 1872.

[30]. Learned counsel further submitted that there was no absolute acceptance by the petitioner to the offer of respondent No.1 and no contract came into existence. Under the agreement as per Clause 13.0 of General Conditions of Contract, “instruction to bidders” was required to be executed by respondent No.1, therefore the same was not executed. No contract was required to be signed between respondent No.1 and the petitioner in terms of Clause 13.0 of General Conditions of Contract and therefore, the same was not signed. In the absence of any agreement entered into between the parties, there was no question of any arbitration which can only arise if there was any written agreement in view of Section 7 of the Arbitration Act.

[31]. In support of his contention, learned counsel for respondent No.1 relied upon ***Indowind Energy Limited Vs. Wescare (I) Ltd. and another, 2010(5) SCC 306*** in which a distinction was drawn between arbitration agreement and contract. A contract can be entered into even orally and can be spelt out from correspondence or conduct of the parties. An arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner as prescribed under Section 7 of the Arbitration Act. Arbitration agreement has to be in writing in terms of requirement of Section 7 of the Arbitration Act.

[32]. Learned counsel further relied upon ***M/s Harsha Constructions Vs. Union of India and others, 2015 AIR (SC) 270***

and ***Travancore Devaswom Board Vs. Panchami Pack Pvt. Ltd., 2004(13) SCC 510*** to submit that arbitration agreement is required to be in writing in terms of Section 7(3) of the Arbitration and Conciliation Act, 1996. In the absence of specific written agreement, a contract with regard to arbitration cannot be presumed. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Arbitration Act stipulates that the contract with regard to arbitration must be in writing. The disputes referable in terms of Clause of the Contract cannot be arbitrated upon by the arbitrator as there was a specific clause whereby the said dispute has been excepted. When the law specifically provides a provision with regard to formation of a contract/agreement in a particular manner, there cannot be any exception or presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act itself. Even participation before the arbitrator would not preclude the respondent from assailing the jurisdiction of arbitrator.

[33]. On the strength of aforesaid judgment, learned counsel contended that the dispute is non-arbitrable. If such type of dispute is referred to arbitrator, there cannot be any conclusion to the effect that the parties had agreed to refer the issue to the arbitrator. In such an eventuality, arbitrator would give decision on excepted dispute. Arbitrator cannot decide such excepted dispute.

[34]. Learned counsel also relied upon ***State of U.P and others Vs. M/s Combined Chemicals Company Private Limited, 2011(2) SCC 151*** on the analogy that letter of intent merely expressed an intention to enter into a contract. There was no binding relationship between the parties at this stage as the respondent was entitled to look at the totality of the circumstances in deciding whether he should enter into a binding contract with petitioner or not.

[35]. It is also a settled principle that judicial intervention in arbitration proceedings should be minimal, but for that, there must be a lawful arbitration agreement. The legality of arbitration agreement has to be viewed from compliance of Sections 7 and 8 of the Arbitration Act. Reference can be made to ***P. Anand Gajapathi Raju and others Vs. P.V.G. Raju (died) and others, 2000 AIR SC 1886*** and ***Atul Singh and others Vs. Sunil Kumar Singh and others, 2008 (2) Apex Court Judgments 217 (Supreme Court).*** Existence of arbitral dispute is *sine quo non* for adjudicating the same by an arbitrator. The judicial authority has to consider the objection objectively. The judicial authority is not supposed to act mechanically and refer the matter to arbitration simply because there is an arbitration clause in the agreement.

[36]. Learned counsel stressed upon an issue that firstly there was a no signed agreement between the parties and secondly, the dispute was not worth an arbitral dispute as it was never part of a

concluded contract. Learned counsel relied upon ***M/s S.B.P and Companies Vs. M/s Patel Engineering Ltd. and another, 2005(4) RCR (Civil) 747.***

[37]. Learned counsel further emphasized that in a question related to validity or otherwise of the arbitration agreement, judicial authority would have the jurisdiction to go into the question and pass appropriate order. Learned counsel relied upon ***India Household and Healthcare Limited Vs. LG Household and Healthcare Ltd., 2007(2) RCR (Civil) 362*** in this context.

[38]. At last, learned counsel relied upon ***Vishwa Industrial Company Private Ltd. Vs. Mahanadi Coalfields Limited and others, 2007 AIR (Orissa) 71, Milestone Gears Pvt. Ltd. Vs. Industrial Finance Corporation of India, 2010 (8) RCR (Civil) 1521, Union of India Vs. M/s Uttam Singh Dugal and Company (Pvt.) Ltd., 1972 AIR (Delhi) 110*** and ***Forbes Gokak Limited Vs. Central Warehousing Corporation and another, 2003(1) RAJ 200*** to submit that acceptance with a verification of a condition was not an acceptance. It was merely a counter proposal. In order to convert a proposal into a promise, the acceptance must be absolute or unqualified. It had to be accepted by the original proposer before a contract was made. The cancellation of conditional offer did not result in a valid and binding contract between the parties. An acceptance of an offer must be absolute. When there was variance with the offer and acceptance, even in respect of any material term,

the acceptance could not be said to be absolute and unqualified. Such an offer would not result in the formation of a legal contract. Except in the eventuality of unconditional and unequivocal acceptance, it could not be contended that there was any consensus *ad idem* between the parties. On the strength of aforesaid reasoning, learned counsel for the respondent submitted that there was no existence of arbitral dispute between the parties and the revision petition is liable to be dismissed.

[39]. Having considered the rival submissions made by the parties it is found that as per work order, two hard copies were sent through post on 09.11.2011. The later had the specific recital that respondent No.1 was required to return duplicate copy of work order duly signed by the authorized signatory holding power of attorney or proprietor of the firm within 7 days as token of acceptance and acknowledgment. If nothing was heard from the side of respondent No.1 within stipulated period of 7 days, it was to be presumed that the acceptance of the work order was accepted. The said work order was received by respondent No.1 on 30.11.2011 by registered post. Since the work order was not found to be technically sound, therefore, respondent No.1 did not accept the same and sent its refusal letter dated 02.12.2011 within 7 days of receipt of work order. In the intervening period from 09.11.2011 to 30.11.2011, petitioner also requested respondent No.1 to come forward for kick of meeting preferably on 18.11.2011 or 19.11.2011 and also to take

necessary action for execution of agreement as per Clause 13.0 of the Contract Agreement under general instructions.

[40]. On 21.11.2011, the petitioner also communicated respondent No.1 to come for kick of meeting and to submit master network of project schedule and execute the contract agreement by 26.11.2011, failing which NALCO may take suitable action as deemed fit as per terms and conditions of the subject contract. In response to the aforesaid letter dated 21.11.2011, respondent No.1 vide reply of even date communicated to the petitioner that respondent No.1 cannot give any firm programme unless the final specifications are adopted and conveyed to them. In case the specifications were not changed/revised, then respondent No.1 would not be interested to execute the work. Thereafter, petitioner again requested respondent No.1 to start activity of work order with immediate effect and meet the technical department for finalization of programme and submit the acceptance of work order by 26.11.2011, failing which NALCO would be constraint to take action as per terms and conditions of contract as deemed fit. Vide letter dated 02.12.2011, respondent No.1 on the basis of technical reasons explained earlier, showed its inability to accept the work and returned the same.

[41]. As per Clause 13.0 of the Contract Agreement under general instructions, contractor was required to execute an agreement on non-judicial stamp of Rs.50/- under the jurisdiction of

Orissa High Court in the specific format enclosed at Annexure VII. Deputy General Manager (Planning and Contracts) was required to sign the contract on behalf of NALCO. The agreement was required to be executed between 15 days of issuance of work order. The agreement was not required to be executed on work orders of value less than or equal to Rs.50,000/-. No such execution of agreement was executed between the parties as per the contract document under general instructions.

[42]. Similarly, as per condition No.13.0 of General Conditions of Contract, successful tenderer was required to execute an agreement with the owner in the proforma attached with tender document within 10 days of receipt of the notification of acceptance of the tender. In the event of failure on the part of successful tenderer to sign the agreement within the above stipulated period, the earnest money or initial deposit was to be forfeited and acceptance of the tender was to be considered as cancelled. No bills were payable unless the agreement was executed.

[43]. Admittedly, contract was not signed between the parties. In response to the letter dated 02.12.2011 issued by respondent No.1 refusing to accept the work order, NALCO/petitioner invoked Clause 25.1 of General Conditions of Contract. Contract was terminated from the date of refusal by respondent No.1. Petitioner proposed to take action as per Clause 25.2 of General Conditions of Contract, forfeiting the security deposit of respondent No.1.

Thereafter, petitioner proceeded to get the work done by other agency at the risk and cost of respondent No.1. Petitioner also got the work executed by another agency and the work order issued to respondent No.1 was terminated at its risk and cost on 27.02.2012. Risk and cost of Rs.4,86,61,440/- was sought to be recovered from respondent No.1. Respondent No.1 was required to deposit the aforesaid amount in favour of NALCO payable at Angul, Orissa, failing which it was decided by the petitioner to invoke the arbitration clause under Clause 22.00 of NIT and WO and Clause 87 of General Conditions of Contract. CMD, NALCO would be requested to appoint arbitrator in the matter. Respondent No.1 communicated to the petitioner on 28.02.2015 to withdraw the recovery of Rs.4,86,61,440/- being illegal and unjustified. Thereafter, Arbitrator was appointed who issued notice to the parties.

[44]. Evidently, the proposal was merely a counter proposal as the condition was not executed by respondent No.1. In order to convert a contract into promise, acceptance must be absolute and unqualified. It must be accepted by the original proposer before a contract is made. The acceptance of the offer must be absolute. The variance was suggested by respondent No.1, but the same was not adhered to by the petitioner. The variance between offer and acceptance was in respect of material term and in the event of non-acceptance of the same, the acceptance cannot be said to be absolute and unqualified. Such an offer would not result in the formation of legal contract as per Section 7 of the Indian Contract

Act, 1872. In terms of Section 7 of the Indian Contract Act, except in the eventuality of unconditional and unequivocal acceptance, there cannot be any consensus *ad idem* between the parties. The offeree has to give unqualified consent to the exact terms of offer so as to bring about a concluded contract. There is a contrast distinction between arbitration agreement and a contract. Contract can be entered into even orally. The same can be spelt out from the conduct and correspondence between the parties. In case of arbitration agreement, it can come into existence only in the manner as contemplated under section 7 of the Arbitration and Conciliation Act, 1996. Arbitration agreement has to be in writing.

[45]. In ***Govind Rubber Limited case (supra)***, the Hon'ble Apex Court held in the following manner:-

> *"15. A perusal of the aforesaid provisions would show that in order to constitute an arbitration agreement, it need not be signed by all the parties. Section 7(3) of the Act provides that the arbitration agreement shall be in writing, which is a mandatory requirement. Section 7(4) states that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a perusal of clauses (b) and (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be arbitration agreement. Section 7(4)(b) provides that an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement."*

[16]. On reading the provisions, it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4) (c) provides that there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at *ad idem*, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing *ad idem* between the parties. Therefore, signature is not a formal requirement under Section 7(4)(b) or 7(4)(c) or under Section 7(5) of the Act.

[46]. In the aforesaid judgment, the Hon'ble Apex Court held that in case of commercial document, it must be interpreted in such a manner so as to give efficacy to the contract, rather than to invalidate it. Reference was made to ***Union of India Vs. D.N. Revri and Co., (1976) 4 SCC 147.***

[47]. The view expressed in ***Govind Rubber Ltd. case (supra)*** was in respect of arbitration agreement, even though in writing need not be signed by the parties if the same was discernible from the conduct of the parties in support of existence of such agreement. If the parties were *ad idem* on the factum of agreement, then merely because one of the party did not sign the same was of no consequence. The ratio of aforesaid case does not apply to the facts and circumstances of the present case as the terms and conditions of the tender were not accepted by respondent No.1 being not considered viable by respondent No.1. There were no other supporting documents which infer from the conduct of the parties that the agreement was ever implemented by exchange of letters, telex, telegrams or other means of telecommunication. The parties were never *ad idem* on any agreed terms and conditions of the agreement, therefore, ***Govind Rubber Ltd. case (supra)*** operates in different fields and is not applicable in the facts and circumstances of the present case.

[48]. It is true that Section 16 of the Arbitration and Conciliation Act, 1996 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with reference to existence or validity of arbitration agreement is raised. Sub Section (2), (4) and (6) of Section 16 of Arbitration and Conciliation Act would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Arbitration Act. There cannot be any dispute with

regard to aforesaid proposition, but for the applicability of the same, there must be a concluded document and lawful arbitration agreement.

[49]. Since there was no arbitration agreement existed between the parties as per Section 7 of the Arbitration and Conciliation Act, no agreement was executed in writing as per Section 7(3) of the Arbitration Act, therefore, ratio laid down in ***Indowind Energy Ltd. Vs. Wescare (I) Ltd. and another case (supra)*** and ***M/s Harsha Constructions Vs. Union of India and others case (supra)*** squarely applied to the facts of the present case. In the absence of written agreement between the parties, agreed to refer any dispute arising for arbitration, the same cannot be referred to arbitrator for arbitration by the Court.

[50]. In the instant case, no jurisdiction of the Court was invoked for seeking reference to the arbitrator. There was no participation in the proceedings by respondent No.1, therefore the same would not amount to acceptance of jurisdiction of the arbitrator in any manner. There was no agreement, neither any writing, nor there was any signing of documents between the parties, therefore, there was no concluded agreement/contract between the parties. It is equally true that the new act defined the extent of judicial intervention in the arbitration proceedings. No judicial authority can interfere except where so provided. The object of new act is to encourage resolution of disputes expeditiously and less expensively.

When there is an arbitration agreement, the intervention of the Court should be minimal. The ratio laid down in ***P. Anand Gajapathi Raju and others case (supra)*** is applicable only in the event of an arbitration agreement.

[51]. The entire controversy hinges upon a fact whether there was a lawful arbitration agreement between the parties or not. In the light of different precedents as discussed above, I am of the view that there was no arbitration agreement between the parties as provided under Section 7 of Arbitration and Conciliation Act, 1996, nor the arbitration agreement was in writing executed between the parties, therefore, a contract with regard to arbitration cannot be presumed. An Agreement which is enforceable in law is a contract. The alleged agreement between the parties is not enforceable in law being not a concluded agreement between the parties. It was not a case of acceptance with variance or a condition, but it was a case of counter proposal which was not adhered to or accepted and could not be converted into a promise. The acceptance must be absolute and unqualified. The counter proposal at variance was not accepted by the petitioner and there was no concluded agreement between the parties. Section 16 of the Arbitration and Conciliation Act would operate only in the event where there was a concluded agreement between the parties in terms of Section 7 of the Arbitration and Conciliation Act. There was no consensus *ad idem* between the parties with reference to any terms and conditions of the offer and acceptance.

[52]. In view of aforesaid, I am of the view that the order dated 25.01.2016 passed by the Lower Appellate Court cannot be faulted with. This revision petition is accordingly, dismissed.

22.10.2016 **(RAJ MOHAN SINGH)**
Prince **JUDGE**

**Whether reasoned/speaking** **Yes/No**

**Whether reportable** **Yes/No**