

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

Arbitration Application No.136 of 2016

ORDER:

This application, under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act'), is filed by the applicant for appointment of an arbitrator.

As the dispute in the present application relates to the very existence of an arbitration agreement, it is necessary to briefly note the contentions urged by the Learned Counsel on either side. Sri K. Siddharth Rao, Learned Counsel for the applicant, would draw my attention to the letter addressed by the applicant to the respondent dated 21.04.2014, under reference No.GJ-B-231, submitting their revised proposal for the project relating to supply and installation of steel structures and components for the food processing Shed at Anand in Gujarat. Clause K-13 of the said proposal stipulated that unresolved issues, if any, would be settled by arbitration as per the Indian Arbitration and Conciliation Act, and the venue of the arbitration would be in Hyderabad.

Sri K.Siddhartha Rao, Learned Counsel for the applicant, would submit that the respondent, vide letter dated 21.04.2014 under the same reference No.GJ-B-231, had forwarded a revised work order to the applicant for erection of steel structures and components for their Anand Project; the said letter, after referring to the building specifications, records that all other terms, conditions, payment terms and completion schedule would remain the same as mentioned in the offer, which was being attached as an integral part of the work order; since Section 7(4)(b) of the 1996 Act stipulates that an arbitration agreement can be said to be in

writing if it is contained in an exchange of letters which provide a record of the arbitration agreement, the fact that the respondents had, by their letter dated 21.04.2014, accepted the terms of the proposal forwarded to them by the applicant earlier shows that parties had agreed to have their disputes resolved through arbitration in terms of the arbitration clause in the proposal; and since the respondent had, by their letter dated 21.04.2014, agreed that the other terms in the applicant's offer (in their letter dated 21.04.2014) would apply, it is evident that the respondent had agreed that the arbitration clause, in clause K-13 of the proposal, would also apply.

On the other hand Sri Pratap Narayan Sanghi, Learned Counsel for the respondent, would submit that, in terms of Section 7 of the 1996 Act, there must be an arbitration agreement in which event alone can the applicant request this Court to appoint an arbitrator; the proposal submitted by the applicant was subjected to modifications, from time to time, as is evident from the letters addressed by the applicant themselves; firstly in their letter dated 17.01.2014, thereafter in their letter dated 15.04.2014, and again in their proposal; and as it is evident that the parties had not specifically agreed for the appointment of an arbitrator, and as it is evident that there does not exist an arbitration agreement, the present application, seeking appointment of an arbitrator, is not maintainable. Learned Counsel would rely on **U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd**¹; and **Vijay Kumar Sharma @ Manju v. Raghunandan Sharma @ Baburam**².

¹ AIR 1996 SC 1373

² 2010 (1) SCR 582

The question which necessitates examination is whether there exists an arbitration agreement, between the parties, justifying reference of their inter-se disputes to the arbitral tribunal, for it is only if there exists an arbitration agreement can an application under Section 11(6) of the 1996 Act be entertained. Section 7(1) of the 1996 Act stipulates that an 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Section 7(2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract, or in the form of a separate agreement. Section 7(3) stipulates that an arbitration agreement should be in writing. Section 7(4)(b) provides that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement. Consequently even an exchange of letters, which provide a record of the arbitration agreement, would constitute an arbitration agreement in writing under Section 7(4)(b), in which event the parties, who exchanged such letters, are bound, in terms thereof, to refer the disputes to arbitration, failing which any one of the parties is entitled to invoke the jurisdiction of this Court under Section 11(6) of the 1996 Act.

The next question which necessitates examination is whether the letters, exchanged between the applicant and the respondent, contain a record of an arbitration agreement. The fact that the offer letter addressed by the applicant to the respondent

has undergone several changes is evident from the series of letters to which Sri Pratap Narayan Sanghi, Learned Counsel for the respondent, has drawn my attention to. Suffice it to refer to the revised offer letter dated 21.04.2014 to which is enclosed the proposal submitted by the applicant for the review and acceptance of the respondent. Clause K-13 of the proposal stipulates that unresolved issues would be settled by arbitration as stipulated under the Indian Arbitration and Conciliation Act. In reply to the revised offer letter of the applicant dated 21.04.2014 to which is enclosed the proposal, which contains in Clause K-13 the arbitration clause, the respondent by their letter of the very same day i.e. 21.04.2014, issued a revised work order for erection of steel structures. This letter of the respondent dated 21.04.2014 specifically records that all other terms, conditions, payment terms and completion schedule shall remain the same as mentioned in the applicant's revised offer letter dated 21.04.2014, which was being attached as an integral part of the work order.

As noted hereinabove, to the revised offer made by the applicant in its letter dated 21.04.2014 is enclosed a proposal Clause K-13 of which stipulates that all unresolved issues would be settled by an arbitration as per the 1996 Act. It is evident, therefore, that the exchange of the letters both dated 21.04.2014, between the applicant and the respondent, provides a record of the agreement between the parties to have the unresolved issues settled by arbitration under the Arbitration and Conciliation Act.

Sri Pratap Narayan Sanghi, Learned Counsel for the respondent, would contend that there should exist an unambiguous and specific agreement between the parties to have

their disputes resolved by arbitration, and a vague reference in the work order that all other terms, conditions, payment terms and completion schedule shall remain the same, as mentioned in the applicant's offer, would not suffice; and it is only if the parties are ad-idem, and the work order specifically provides for an arbitration agreement, can an arbitration agreement be said to be in writing.

As noted hereinabove, all that Section 7(4)(b) of the 1996 Act requires is for the exchange of letters to provide a record of the arbitration agreement. The applicant's revised offer, in their letter dated 21.04.2014, included a proposal which, under Clause K-13 thereof, stipulated that unresolved issues would be settled by arbitration under the Indian Arbitration and Conciliation Act. This offer was accepted by the respondent by their work order dated 21.04.2014 which, unambiguously, stated that all other terms, conditions, payment terms and completion schedule shall remain the same as is mentioned in the applicant's revised offer letter dated 21.04.2014. The words "*all other terms*", in the respondent's work order dated 21.04.2014, would bring within its ambit all such terms which were not specified by the respondent in its work order dated 21.04.2014, but which were mentioned in the applicant's revised offer letter dated 21.04.2014. As the proposal, enclosed to the revised offer by the applicant in its letter dated 21.04.2014, contains a specific clause (K-13) to have the unresolved issues settled by arbitration, it is evident that reference to "*all other terms*" in the respondent's work order dated 21.04.2014 would include Clause K-13 of the proposal also.

Reliance placed by Sri Pratap Narayan Sanghi, Learned Counsel for the respondent, on the judgment of the Supreme Court

in **U.P.Rajkiya Nirman Nigam Ltd¹** is misplaced. The dispute therein arose under the Arbitration Act, 1940. Unlike Section 2(a) of the Arbitration Act, 1940, which defines an “arbitration agreement” to mean a written agreement to submit present or future differences to arbitration, Section 7(4) of the 1996 Act is far wider and stipulates that an agreement is in writing if it is contained in anyone of the documents referred to in clauses (a) to (c) thereof. In **U.P.Rajkiya Nirman Nigam Ltd¹** the Supreme Court held that, to constitute an arbitration agreement, there must be an agreement between the parties, viz., the parties must be ad idem; the parties cannot be said to be ad-idem if there is an arbitration clause in the bought note, while there is none in the sold note; and, to be enforceable, the agreement must be with the free consent of the parties. As noted hereinabove the work order issued by the respondent dated 21.04.2014 specifically records their agreement to all other terms referred in the applicant’s offer letter dated 21.04.2014 to which, as noted hereinabove, is enclosed a proposal which specifically provides for unresolved issues to be settled by arbitration.

In **Vijay Kumar Sharma @ Manju²**, reliance on which is placed by Sri Pratap Narain Sanghi, Learned Counsel for the respondent, it was contended that the subject Will provided for arbitration in the event of a dispute among the legatees. The Supreme Court held that the validity of the Will was pending consideration in two Civil suits; the alleged Will did not contain any provision for arbitration; and even if the Will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be

settled by arbitration, and cannot be considered as an arbitration agreement among the legatees.

As held in **Vijay Kumar Sharma @ Manju²**, a Will is merely an expression of the wish of the testator, and cannot be considered an arbitration agreement between the legatees. Unlike, in the aforesaid case, in the present case the respondent, having specifically agreed that all other terms made in the applicant's revised offer letter dated 21.04.2014 would apply, has evidently agreed to the terms of clause K-13 of the proposal enclosed to the applicant's revised offer letter dated 21.04.2014 which stipulates that unresolved issues shall be settled by arbitration. It is evident, therefore, that the exchange of letters between the parties provides a record of an arbitration agreement and is, therefore, an arbitration agreement in writing as stipulated under Section 7(4)(b) of the 1996 Act. As the applicant's request, for appointment of an arbitrator, was not acceded to by the respondent, the former had, necessarily, to invoke the jurisdiction of this Court under Section 11(6) of the Act seeking appointment of an arbitrator.

I consider it appropriate, in such circumstances, to appoint Sri M.Kanthaiah, (Retired District Judge), A-90, H.No.8-2-293/821/J/A/90, Journalist Colony, Jubilee Hills, Hyderabad, as the sole arbitrator to resolve the disputes between the parties. The Learned Arbitrator shall fix his remuneration, and incidental charges for the arbitration proceedings, in consultation with the parties. He shall complete arbitration proceedings, and pass an award at the earliest, preferably within a period of six months from the date of commencement of arbitral proceedings. He shall hold

sittings, as far as possible, in the mediation centre of the High Court.

The Arbitration Application, is accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, ACJ

Date:06.10.2017
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