IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1227 OF 2016

The Board of Trustees of the Jawaharlal Nehru Port Trust, A Major Port incorporated under the Major Port Trusts Act, 1963 Having its Administrative Office at Administration Building, Sheva, Taluka Uran, Navi Mumbai 400 707 ..... Petitioner

Versus

1. M/s.PSA Mumbai Investments Pte. Limited) A company incorporated under the Laws of Singapore, having its office at 38th Floor, PSA Building, 460 Alexandra Road, Singapore 119963

2. M/s.ABG Ports Limited, A Company incorporated under the Companies Act, 1956 having its office at 5th Floor, Bhupati Chambers, 13th Mathew Road, Mumbai 400 004 ..... Respondents

Mr.Rafiq Dada, Senior Advocate, a/w. Ms.Poornima Advani, Mr.Om Prakash Jha, Ms.Surabhi Chatterjee, i/b. The Law Point for the Petitioner.

Mr.D.J.Khambatta, Senior Advocate, a/w. Mr.Nikhil Sakhardande, Mr.Rohan Rajadhakshya, Ms.O.Negi, i/b. AZB and Partners for the Respondent no.1.

Ms.Sonu Tandon for the Respondent no.2.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 8th DECEMBER, 2017

PRONOUNCED ON : 1st MARCH, 2018

JUDGMENT :

By this petition filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act',) the petitioner seeks to impugn the order dated 18th April, 2016 passed by the learned arbitrator accepting the plea of jurisdiction raised under section 16 (2) of the Arbitration Act that there is no arbitration clause/agreement between the parties and thus the learned arbitrator had no jurisdiction to entertain the dispute filed by the petitioner. The petitioner was the original claimant before the learned arbitrator whereas the respondents were the original respondents in the arbitral proceedings. By consent of parties, the matter was heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner is a major port constituted under the Major Port Trusts Act, 1963. On 2nd March,2009, the petitioner issued a global invitation of Request for Qualification (hereinafter referred to as “RFQ”) vide tender no. PPD/M-I/'4th CT/T-60/2009 inviting applications for the development of 4th Container Terminal project on design, build, finance, operate and transfer basis. Pursuant to the said RFQ, eight bids were received from various bidders by the petitioner. The respondent no.1 (a subsidiary of PSA International Pte. Ltd. Singapore) as the lead member and the respondent no.2 i.e. M/s.ABG Ports Private Limited entered into a joint bidding agreement dated 21st August,2009 for the said project. As per the terms of the joint bidding agreement, the respondent no.1 was to be the lead member having 74% share having consortium and the respondent no.2 having 26% share in the consortium. The consortium was shortlisted to bid for the said project and Request for Proposal (hereinafter referred to as “The RFP”) was issued to it. The consortium submitted its RFP bid on 15th October,2010. The financial bid was opened on 28th June, 2011. The consortium having quoted revenue share of

50.828% was declared a successful bidder of the said project. The said RFP bid was submitted by the consortium comprising of respondent nos. 1 and 2 in three parts. On 26th September,2011, the petitioner issued a letter of award upon the consortium of the respondents. The consortium accepted the letter of award and returned a duly signed copy thereof to the petitioner on 29th September,2011. Clause 6 of the said letter of award provides that the consortium agreement was to be signed within a period of 30 days of the date of letter of acceptance.

3. It is the case of the petitioner that the respondent no.1 however raised the issue of payment of stamp duty in the sum of Rs.5.5 crores on the said concession agreement. According to the respondent no.1, the concession agreement was not compulsorily registerable and therefore they were not liable to pay stamp duty on the said agreement. The respondent no.1 sought extension of time for signing of the agreement vide its letter dated 3rd January,2012. The respondent no.1 agreed to sign the consortium agreement on 11th January,2012. It is the case of the petitioner that the signing event was cancelled at the instance of the respondent no.1.

4. It is the case of the petitioner that sometime in the month of March 2012, due to some inter se disputes between the respondent no.1 and the respondent no.2, the respondent no.2 sought to withdraw from the said consortium of respondent nos.1 and 2. The respondent no.2 addressed a letter to the respondent no.1 on 31st March,2012 recording that such intended withdrawal should only be after approval from the petitioner and without any penal action being resorted to against the respondents under the said provisions of RFQ and RFP. On 2nd April, 2012, the respondent no.1 addressed a letter to the petitioner to allow the respondent no.2 to withdraw as member of the consortium. The said

request of the respondent no.2 was referred to the Ministry of Shipping, Government of India by the petitioner. The Minister of Shipping in consultation with the Ministry of Law concluded that the change in composition could not be allowed at this stage and advised the petitioner to call the consortium for signing the concession agreement.

5. The petitioner accordingly addressed a letter dated 30th August,2012 to the respondent no.1 and informed that the change in composition could not be allowed and also called upon the consortium to sign the concession agreement within 10 days from the date of receipt of the said letter. It is the case of the petitioner that the respondent no.1 had been making representation to the petitioner to allow the change in composition of the consortium and that the respondent no.1 on its own also is competent to satisfy all the conditions of the tender documents, however did not sign the said concession agreement.

6. The petitioner thereafter issued a show cause notice on 12th September,2012, upon the respondent no.1 as the lead member of the consortium, calling upon it to show cause as to why no action should be taken against them in terms of termination of the contract and other remedial measures as per provisions of tender conditions and letter of acceptance. The respondent no.1 vide its letter dated 15th September,2012 to the petitioner reiterated its request and also raised some *nonest* issues but still did not come forward to sign the concession agreement. The respondent no.1 had provided an irrevocable, unconditional bank guarantee dated 15th October,2010 issued by the Standard Chartered Bank for Rs.67 crores in favour of the petitioner. The said bank guarantee was extended from time to time and was valid till 30th September,2012. The petitioner encashed the said bank guarantee and forfeited the said bank guarantee amount on 18th

September,2012 and appropriated the same.

7. The petitioner vide its letter dated 16th October,2012 terminated the letter of acceptance granted to the said consortium of the respondent nos. 1 and 2. The petitioner raised a demand vide its letter dated 26th November,2014 upon the respondents calling upon them to pay a sum of Rs.4,46,28,46,454/-. The respondent no.1 vide its advocate's letter dated 26th December,2014 denied any liability and called upon the petitioner to withdraw its claim. The petitioner thereafter issued a notice of arbitration dated 18th February,2015 invoking the arbitration clause alleging contained clause 19.3 of the concession agreement. The petitioner nominated a former Judge of this Court as its arbitrator. Since the respondents failed to nominate their arbitrator within 30 days, the learned arbitrator nominated by the petitioner became the sole arbitrator.

8. The learned arbitrator entered upon the Reference. The petitioner filed a statement of claim before the learned arbitrator *inter alia* praying for a sum of Rs.4,46,28,46,454/- as damages for the loss alleged to have been caused to the petitioner with interest at the rate of 14% per annum and interest at the rate of 10% per annum and cost from 11th September, 2015. On 15th July, 2015, the respondent no.1 filed an application under section 16(2) of the Arbitration Act before the learned arbitrator *inter alia* challenging the jurisdiction of the learned arbitrator to proceed with the arbitration proceedings. It was contended in the said application that in view of certain material issue emerged between the parties in respect of the stamping of the concession agreement, that required resolution before executing the concession agreement, the date of the execution of the concession agreement was extended mutually between the petitioner and the respondents and during that period the respondent nos. 1 and 2 mutually decided that the respondent no.2

would withdraw from the consortium.

9. In the said application, it was the case of the respondent no.1 that under the terms of the RFQ and RFP biding stage was to end upon signing of the concession agreement and thus such change was permissible under the terms and conditions of the said RFQ and RFP. It was contended that the concession agreement containing that the arbitration clause was never signed by the parties and thus there was no valid and enforcible agreement between the parties. It was contended that since there was no signed arbitration agreement between the parties, the invocation of the unsigned arbitration clause by the petitioner and the subsequent request to the learned arbitrator for a preliminary meeting for directions was *ex-facie*, bad in law and not maintainable.

10. In clause (6) of the said application, it was contended by the respondent no.1 that it had denied the existence of an arbitration agreement in its reply dated 29th April, 2015 sent through its advocates to the notice of arbitration issued by the petitioner. In the said reply, it was alleged that a proposal was made to the petitioner in good faith for signing the arbitration agreement for referring the disputes between the petitioner and the respondents to arbitration. The draft of the said arbitration agreement was annexed to the said reply. It was stated in the reply that subject to the execution of the arbitration agreement attached to the reply, the respondent no.1 would proceed to appoint its nominee arbitrator within 30 days of execution of such arbitration agreement. The petitioner however did not respond to the said reply and also did not sign the arbitration agreement.

11. It was contended by the respondent no.1 that the disputes between the parties in any event was arising out of the alleged violation of the terms of the

RFQ and RFP and letter of acceptance by the consortium and were not as a result of any breach of the terms of the unsigned concession agreement. In its alternate submission, the respondent no.1 contended that the said unsigned concession agreement was an unstamped document and the same was not admissible in evidence and thus arbitration clause contended in such agreement was bad in law. The respondent no.1 prayed that the reference made by the petitioner to the arbitration be dismissed by the learned arbitrator with cost.

12. The petitioner filed its affidavit in reply in the month of September 2015 to the application filed by the respondent no.1 under section 16(2) of the Arbitration Act before the learned arbitrator and denied the contentions raised by the respondent no.1 in its affidavit in reply. The petitioner contended that the learned arbitrator had jurisdiction to adjudicate upon the disputes arising between the parties. It was contended that the acceptance of bid constituted a valid contract which by reference to the concession agreement contain a valid arbitration agreement. The respondent no.1 filed a rejoinder to the said affidavit on 5th January,2016 before the learned arbitrator. Both the parties also filed their written submissions before the learned arbitrator on the issue of jurisdiction raised by the respondent no.1 under section 16 of the Arbitration Act.

13. On 18th April, 2016 the learned arbitrator passed an order on the said application filed by the respondent no.1 under section 16 of the Arbitration Act holding that there did not exist arbitration agreement between the parties and thus there was no question of referring any dispute to the arbitral tribunal. It is held that the arbitral tribunal has no jurisdiction to entertain the said dispute. The learned arbitrator allowed the said application filed by the respondent no.1 and rejected the reference made by the petitioner to the learned arbitrator. Being

aggrieved by the said order dated 18th April, 2016, the petitioner has filed this petition under section 37(2)(a) of the Arbitration Act.

14. Mr.Dada, learned senior counsel for the petitioner invited my attention to the impugned order passed by the learned arbitrator, various averments made in the pleadings filed by both the parties, documents forming part of record before the learned arbitrator, written arguments filed by both the parties and also placed reliance on the copy of Bid Document submitted by consortium of the respondent nos.1 and 2. He also invited my attention to the relevant terms from "Request For Qualification" (RFQ) and also "Request For Proposal" (RFP). He tendered a copy of the letter dated 15th October, 2010 sent by the respondent no.1 to the petitioner i.e. a letter comprising of the bid referring to clauses 2.1.5 and 2.14.

15. Learned senior counsel made the following submissions :-

(a). Clause 1.2 of the RFQ defines the Bid Process. The tender is governed by a two – stage process which comprises of qualifications stage and subsequently bidding stage. The petitioner first considered the applications made pursuant to the requirement of the RFQ (Qualifications Stage). At this stage, the petitioner considers whether the applicants who have submitted their applications pursuant to the RFQ are eligible to meet the criteria / fulfill the requirement of executing the project. This is called the qualification stage.

(b). Reliance is placed on clause 1.2.1 of RFQ which defines the bid process, qualification stage and bidding stage. Once the applicants were pre-qualified and shortlisted, they would be invited to submit their bids for the project. The qualification stage ends with shortlisting of qualified applicants, capable of implementing

the project, if awarded. Clause 2.1.3 of the RFQ defines bids as financial offers submitted in respect of the project in accordance with the RFP and other documents provided by the Authority, pursuant to the RFP. These were collectively defined as Bidding Documents.

(c). The bidding documents also included the Draft Concession Agreement as provided in clause 1.27 of the RFQ. The applicants were informed that RFP issued to the qualified applicants would include a copy of the Draft Concession Agreement and they shall be deemed to be part of the bidding document. The bidding document would include the RFP as well as the Draft Concession Agreement provided to the applicants to enable the qualified applicants to make financial offers / bid. The bidding documents were provided to the respondents herein.

(d). Reliance is placed on clause 2.2.6 which provided that where the applicant is consortium, the principals of consortium shall *inter-alia* form an appropriate “Special Purpose Vehicle”. If the applicant is single entity, it is required to form an appropriate Special Purpose Vehicle to execute Concession Agreement and implement the project. If the applicant was consortium, it should comply with various additional requirements set out in clause 2.2.6. The principles of consortium were bound to enter into a binding Joint Bidding Agreement for the purpose of making an application and submitting the bid in the event of being shortlisted. The principals of consortium were required to convey the intent to form a Special

Purpose Vehicle with shareholding / ownership equity commitments in accordance with RFQ which would enter into the Concession Agreement and subsequently carry out all responsibilities as concessionaire in terms of the Concession Agreement, in case Concession undertakes the project is awarded to the consortium.

(e). The respondents submitted various documents as required pursuant to the RFQ to the petitioner which included a filled and signed copy of the RFQ. The requirements having been found satisfied by the bidders to participate in the price bidding process, the bidders were shortlisted on the basis of their application pursuant to the RFQ. Though the RFP was neither an agreement, nor an offer, nor an invitation, financial offers submitted pursuant to RFP were offers made to the petitioner by the respondents and which if accepted would form a concluded contract.

(f). Under clause 1.1.2 of the RFP, the selected bidder i.e. concessionaire shall be responsible for designing, financing, procuring, constructing, operating and maintenance of the project in accordance with the provisions of a long term Concession Agreement. This agreement was to be entered into between the bidder and the authority in the stipulated form as provided by the authority as a part of bidding document, provided under the RFP.

(g). Clause 1.1.7 read with clause 1.2.3 define the bidding documents which included the RFP, Draft Concession Agreement

as well as other documents provided by the petitioner to the respondents. The petitioner was to receive the bids pursuant to the said RFP in accordance with the terms set forth in the said RFP and other documents to be provided by the petitioner pursuant to the RFP as modified, altered, amended and qualified from time to time by the petitioner and all the bids were to be prepared by the applicants (bidders) and submitted in accordance with such terms. Clause 1.2.3 clearly provided that the bidding documents included the Draft Concession Agreement for the project and any addendum issued subsequent to RFP document shall be deemed to form part of the bidding document, before the bidding due date. Under clause 1.2.5 read with clause 1.2.7 of the RFP, the selected bidder was ordinarily be the highest bidder which would be computed on the basis of the percentage of a revenue offered by the bidder with the petitioner. Since the concession period was already pre-determined, the revenue share was the sole criteria in evaluation of bids.

(h). Pursuant to the RFP, the respondent submitted its offer on 15th October, 2010. The bid included the Concession Agreement which was initialed by the authorized signatory on each of the page forming part of the bid, as mandated by clause 2.10.2 of the RFP. The bid submitted by the respondents was opened on 28th June, 2011. The consortium of the respondents having quoted a revenue share of 50.828% was found and declared to be successful bidder for the said project. The offers submitted by the respondents including Concession Agreement were accepted by the petitioner by issuing a Letter of Award vide dated 26th September, 2011. The

respondent no.1 duly signed and accepted of the said Letter of Award and returned the same to the petitioner on 29th September, 2011.

(i). Upon submission of the bids by other applicants and/or the respondents, the Bidding Process as defined in clause 1.2.1 of the RFQ stood complete and ended thereunder. It is submitted that issuance of the Letter of Award dated 26th September, 2011 by the petitioner to the respondents in response to the respondents' highest financial offer formed a concluded contract between the parties. The acceptance of offer communicated to the respondents is duly acknowledged by the respondents and was communicated back to the petitioner. The successful bidder is concessionaire in terms of clause 1.1.2 of the RFP read with clause 2.2.6 (f), (g) and (i) of the RFQ.

(j). Clause 2.2.6 of RFQ requires formation of a Special Purpose Vehicle if the successful bidder would be a single entity to execute the Concession Agreement for implementation of the project awarded post Bidding Process in furtherance of its contractual obligation. Such successful bidder has to submit a performance guarantee. The bids security may be forfeited if the selected bidders fails to sign the Concession Agreement. Various documents duly executed between the parties, envisaged and created various rights and obligations. Failure to sign the Concession Agreement amounted to breach of the contractual obligation and the security of the respondents was forfeited without

prejudice to the petitioner's further rights and remedies.

(k). Once a Letter of Award is issued pursuant to the offer of the respondents, the contract is concluded between the parties. The respondents could not place reliance on the disclaimer in the RFQ and the RFP since it is not the case of the petitioner that the contract is concluded by the RFQ or the RFP. Admittedly the respondents had returned a signed copy of the Letter of Award to the petitioner on 29th September, 2011 which clearly proves that the respondents had expressly accepted the other terms and conditions of the bidding document which included the Concession Agreement.

(l). Clause 2.2.6 (f) and 2.2.6 (g) and (i) clearly show that if the consortium is awarded the contract, the parties to consortium shall form a Special Purpose Vehicle.

(m). Though the contract was concluded between the respondent nos.1 and 2 as concessionaire members, formation of the Special Purpose Vehicle for signing of the Concession Agreement was one of the obligation upon the successful bidder, concessionaire post concluded contract for implementation of the project through the Special Purpose Vehicle.

(n). Reliance is placed on clauses 3.3.5 and 3.3.6 of the RFP which provide that upon acceptance of the financial offer and

acknowledgement of the Letter of Acceptance, selected bidder, concessionaire is precluded from seeking any derivation in the Concession Agreement which is submitted along with the bid. It is submitted that the contract was concluded well before signing of the Concession Agreement. It was the case of the petitioner in the statement of claim that by failing to sign to the Concession Agreement by the respondents, the respondents failed to take the first step in performing the contract and thus the said contract came to be terminated. The requirement of singing the Concession Agreement does not preclude a binding contract from having come into force. Singing of the Concession Agreement was one of the obligation of the binding contract. The fact that the respondents gave an offer to the petitioner, the petitioner accepted the offer vide its Letter of Award, the contract came into being in force.

(o). Learned senior counsel placed reliance on the following judgments :-

i). The judgment of the Supreme Court in case of ***Union of India vs. A.L. Rallia Ram, AIR 1963 SC 1685***,

ii). The judgment of the Delhi High Court in case of ***M/s.Progressive Constructions Ltd. vs. Bharat Hydro Power Corporation Ltd., AIR 1996 Del. 92.***

iii). The judgment of the Supreme Court in case of ***National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd., (2007) 5 SCC 692***,

iv). The judgment of the Supreme Court in case of ***Everest Holding Limited vs. Shyam Kumar Shrivastava & Ors.,***

(2008) 16 SCC 774,

v). The judgment of the Supreme Court in case of ***M.R. Engineers & Contractors Pvt. Ltd. vs. Som Datt Builders Ltd., (2009) 7 SCC 696***,

vi). The judgment of the Supreme Court in case of ***Reva Electric Car Company Pvt. Ltd. vs. Green Mobil, (2012) 2 SCC 93***,

vii). The judgment of the Supreme Court in case of ***Today Homes And Infrastructure Pvt. Ltd. vs. Ludhiana Improvement Trust And Anr., (2014) 5 SCC 68***,

16. Mr.khambatta, learned senior counsel for the respondent nos.1 and 2 on the other hand made the following submissions :-

(a). The respondent nos.1 and 2 together had formed a consortium and had submitted an application for qualification to the petitioner in response to the RFQ on 31st December, 2009. The respondent no.1 was a lead member, technical member and financial member of the consortium. The petitioner issued RFP to the consortium and other selected pre-qualified bidders and invited them to submit their bis for the project. The consortium thereafter submitted its bid on 15th October, 2010 along with the bank guarantee in favour of the petitioner as the bid security of Rs.67.00 crores as per the terms of the RFP. By a Letter of Award dated 26th September, 2011, the consortium emerged as the successful bidder and was awarded the project by the petitioner.

(b). Since there were certain material issues arose between the

parties in respect of the registration and stamping of the Concession Agreement, the date of execution of the Concession Agreement was extended by mutual agreement between the petitioner and the consortium. The respondent nos.1 and 2 mutually decided that the respondent no.2 would withdraw from the consortium. The RFQ and RFP permitted a change in the consortium composition until the end of the bidding stage. The bidding stage was to end upon signing of the Concession Agreement and till such Concession Agreement was signed, such change was permissible.

(c). The petitioner refused to approve such change in view of the directions issued by the Ministry of Shipping though the petitioner was initially agreeable to withdraw the respondent no.2 from the consortium. The respondent no.1 had incorporated a new company by name Bharat Mumbai Terminals Private Limited and adjusted its position to comply with the instructions of the petitioner. Several letters were exchanged between the parties. Instead of permitting the withdrawal of the respondent no.2 from the consortium, the petitioner issued a show cause notice dated 12th September, 2012 to the consortium and withdrew the letter of acceptance by a letter dated 16th October, 2012. The petitioner illegally encashed the bid security on 18th September, 2012. Though there was no arbitration agreement between the parties, the petitioner purported to invoke the alleged arbitration agreement through its advocate's notice dated 18th February, 2015 in terms of Article 19.3 of the Concession Agreement. The respondent no.1 replied to the said notice of arbitration vide letter dated 29th April, 2015 and denied the

existence of the arbitration agreement between the parties.

(d). The respondent no.1 made a proposal to the petitioner in good faith for signing an arbitration agreement for referring the disputes between the parties and consortium to the arbitration and forwarded a draft of the arbitration agreement to the petitioner. There was no response to the said letter dated 29th April, 2015. The petitioner also did not sign the arbitration agreement forwarded by the respondent no.1 to the petitioner. The petitioner thereafter illegally appointed the learned arbitrator.

(e). Learned senior counsel invited my attention to various portions of the written arguments filed by the petitioner before the learned arbitrator in which the petitioner had contended that the alleged arbitration agreement was incorporated by reference. The petitioner had relied upon the judgment of the Supreme Court in case of ***M.R. Engineers & Contractors (Pvt.) Limited vs. Som Datt Builders Ltd. (2009) 7 SCC 696.*** He submits that since the consortium of the respondent nos.1 and 2 had submitted the bid, the formation of the Special Purpose Vehicle was mandatory under clause 2.2.6 and the Concession Agreement was to be signed by the said consortium which would to be entered by the Special Purpose Vehicle and not by the respondents.

(f). Learned senior counsel for the respondent no.1 placed reliance on section 7(5) of the Arbitration & Conciliation Act, 1996 and would submit that general reference of the provision of any

other contract is not enough. There has to be a specific reference to the arbitration agreement in the main document. He submits that the entire argument of the petitioner before this Court is as and by way of after-thought and is contrary to the submissions urged before the learned arbitrator across the bar and also in the written arguments. The submissions made by the petitioner are also contrary to the contentions raised in the notice of arbitration purporting to invoke the alleged arbitration agreement in terms of Article 19.3 of the Concession Agreement. There was no reference to any so called contract having been concluded between the parties. It was not the case of the petitioner that Article 19.3 of the Concession Agreement was allegedly applicable on account of the same having been allegedly incorporated by reference to it in a so called contract between the parties.

(g). In his alternate submission the learned senior counsel for the respondent no.1 submits that for a valid arbitration agreement to exist in terms of section 7(5) of the Arbitration & Conciliation Act, 1996, all the requirements must be established i.e. (i) there is a written contract between the parties, (ii) the said contract refers to a document that contains an arbitration clause and (iii) the reference is such as to make that arbitration clause in the document part of the contract, provided that it is not repugnant to any term of such contract.

(h). The RFQ, RFP and letter of acceptance are not the contracts in writing within the meaning of section 7(5) of the Arbitration &

Conciliation Act, 1996. The RFQ was a document seeking information on the technical and financial capacity of interested bidders for the project. Based on the response to the RFQ from potential bidders, the petitioner shortlisted qualified bidders to send the RFP. The consortium had submitted the information in response to the RFQ and was shortlisted as a bidder for the project. Subsequently the RFP was provided to the consortium for submitting its bid for the project in accordance with the terms and conditions contained in the RFP. The RFQ and RFP do not qualify as contracts in writing for the purposes of section 7(5) of the Arbitration & Conciliation Act, 1996. There is disclaimer provided in the RFQ that the RFQ is not an agreement and is neither an offer nor invitation by the petitioner to the prospective applicants or any other person. Similar disclaimer is also recorded insofar as the RFP is concerned.

(i). The letter of acceptance was issued to the consortium in accordance with clause 3.3.5 of the RFP. It provided that upon selection as the successful bidder and issuance of the letter of acceptance by the petitioner, the selected bidder was required to sign and return a copy of the letter of acceptance for acknowledgement within seven days. Mere acknowledgement of letter of acceptance by the consortium by signing the same does not signify that a concluded contract for developing the project has come into existence. Reliance is placed on clause 3.3.6 of the RFP and it is submitted that it would only follow the execution of the Unsigned Concession Agreement that the concluded contract would

come into existence between the petitioner and the selected bidder and not before. A letter of acceptance was merely a reflection of an "intent to award the concession" to the selected bidder. Reliance is also placed on clause 3.3.5 of the RFP and also the recitals (F) and (H) of the Concession Agreement in support of this submission.

(j). Issuance of the letter of acceptance was a part of the bidding process which came to an end only upon signing of the Unsigned Concession Agreement. Since the bidding process had not been concluded, issuance of the letter of acceptance and the acknowledgement thereof would not by itself result into a concluded contract for the project as between the petitioner and the consortium. Reliance is placed on the judgment of the Supreme Court in case of ***Dresser Rand S.A. vs. Bindal Agro Chem Ltd. (2006) 1 SCC 751*** and in particular paragraph 40. None of the ingredients specified by the Supreme Court for treating the letter of acceptance as a concluded contract are satisfied in this case. The letter of acceptance did not provide for work being started by the consortium until the execution of the Concession Agreement. The detailed contractual terms between the parties were also set out in the Concession Agreement which was not executed admittedly and not in the letter of acceptance.

(k). No work was carried by the respondents nor any amount was expended by the parties based on the letter of acceptance or otherwise. The correspondence thereafter exchanged between the parties and contemporaneous conduct of the petitioner would

clearly indicate that no concluded contract between the petitioner and the consortium came into existence. If according to the petitioner, letter of acceptance itself resulted in a concluded contract, the petitioner would not have insisted the respondents to execute the Concession Agreement and ultimately to withdraw the letter of acceptance and to encash the bid security on the ground that the consortium failed to execute the Concession Agreement. None of the parties treated the letter of acceptance as a concluded contract or acted upon the letter of acceptance for the purpose of starting the work under project.

(l). The general reference to the Concession Agreement does not amount to incorporation of its arbitration clause. The references of Concession Agreement in the RPQ, RPF and the letter of acceptance to the consortium agreement would not be relevant for the purpose of section 7(5) of the Arbitration & Conciliation Act, 1996. Even if a concluded contract had come into existence between the petitioner and the consortium, the reference to the Concession Agreement in the RFQ, RPF or the letter of acceptance is not such as to make arbitration clause contained in the Unsigned Concession Agreement a part of the alleged concluded contract between the petitioner and the consortium. Reliance is heavily placed on the judgment of the Supreme Court in case of ***M.R. Engineers & Contractors (Pvt.) Limited*** (supra) and more particularly on paragraphs 14 to 17, 19, 20, 22 and 24.

(m). The RFQ, RFP and the Letter of Acceptance do not contain

any clause that expressly or impliedly makes the arbitration clause i.e. Article 19.1 of the Concession Agreement a part of these documents. A general reference to the Concession Agreement in RFQ, RFP or the Letter of Acceptance does not amount to incorporating the arbitration clause from the Concession Agreement into any of the said documents. Clause 6.1 in the RFQ as well as the RFP respectively contained a distinct dispute resolution process for the settlement of the disputes which is clearly inconsistent with the intention to incorporate the arbitration clause from the Unsigned Concession Agreement. Clause 1.2.1 read with clause 1.3 of the RFP make it clear that the bidding process comes to an end only upon signing of the Concession Agreement.

(n). The RFQ and RFP provide a specific dispute resolution process to be followed with respect to disputes arising under, pursuant to and/or in connection with the Bidding Process. Clause 6.1 of RFQ/RFP are extremely wide in their sweep and are ex-facie intended to cover any and all disputes between the parties during the Bidding Process. The alleged failure by the consortium to sign the Consortium Agreement would amount to a dispute arising under clause 6.1 of the RFQ or RFP and not under Article 19.1 of the Concession Agreement. The arbitration clause in the Concession Agreement has not been incorporated and was never intended to be incorporated in the alternate contract concluded between the parties.

(o). In his alternate submission, learned senior counsel for the

respondent no.1 submits that Article 19.1 of the Concession Agreement reveals that it governs disputes and differences *inter-alia* connected with and arising out of "this Agreement" i.e. the Concession Agreement which must be understood in contradistinction with disputes "under, pursuant to and/or in connection with the Bidding Process. Article 19.1 of the Concession Agreement is not an arbitration agreement between the parties. The said Article indicates that it was proposed to be an arbitration agreement between the "Concessioning Authority" and the "Concessionaire". The concessionaire is a special purpose vehicle required by the petitioner to be incorporated by the successful bidder under clause 2.2.6 of the RFQ. The petitioner cannot be allowed to equate concessionaire with consortium for the purpose of Article 19.1 of the Concession Agreement to suit its own convenience. Reliance is placed on paragraphs 36 and 38 of the judgment of the Supreme Court in case of ***M.R. Engineers & Contractors (Pvt) Ltd.*** (supra) in support of this submission.

(p). It was not the case of the petitioner before this Court that the Concession Agreement is a standard form contract and therefore, the petitioner must be taken to have correctly given up the said contention. Reliance is placed on paragraph 22 of the judgment of the Supreme Court in case of ***M.R. Engineers & Contractors (Pvt) Ltd.*** (supra) and it is submitted that the petitioner cannot claim the benefit of the exception carved out by the Supreme Court in paragraph 22 of the said judgment in case of the standard form agreement. The petitioner did not press this contention before the

arbitral tribunal at the oral hearing on 12th February, 2015 and have deemed to have given up. The petitioner thus could not have raised the said contention belatedly in the written submissions filed before the arbitral tribunal.

(q). The said agreement has been specifically drafted for the project it contains extensive terms specific to the project i.e. relating to the construction phase, designs and drawing etc. The Concession Agreement cannot be considered as a written contract. The Concession Agreement could be modified and was in fact amended to some extent which amendments were communicated by the letters of the petitioner dated 2nd August, 2010 and 26th August, 2010. The parties were discussing the modification of the Concession Agreement as is apparent from the letter dated 16th October, 2012 addressed by the petitioner.

(r). There is no valid and enforceable arbitration agreement exists between the parties for referring the dispute contained in the statement of claim to the arbitration. The learned arbitrator has correctly held that there is no arbitration agreement between the parties and has rightly allowed the application filed by the respondent no.1 under section 16 of the Arbitration & Conciliation Act, 1996.

17. Mr.Rafiq Dada, learned senior counsel for the petitioner in rejoinder submits that the arguments made by the respondent no.1 in this Court were not

made before the learned arbitrator. He submits that it is the case of the petitioner that there was a concluded agreement. In support of this submission, learned senior counsel invited my attention to various submissions made by the petitioner which were reflected in the written arguments filed by the petitioner which were also dealt with by the respondent no.1 in its written arguments. He submits that in response to the bids invited by the petitioner even a single entity could apply for contract. At this stage, it was not known whether the bidder would be a consortium or would be a single entity. Reliance is once again placed on clause 2.2.6.

18. It is submitted that in case of two companies, special purpose vehicle would prefer a contract. The contract entered into between the parties was enforceable in law. It was not the case of the petitioner that the RFP incorporated the Concession Agreement. The RFP was given by the petitioner. It was one of the condition therein that the bid must include the Concession Agreement duly initialed and to be submitted by both the respondents. Both the respondents were obliged to form special purpose vehicle having concessionaire. The documents exchanged between the parties and duly signed were to be understood in the commercial sense. The special purpose vehicle was to be formed under the contract after the contract came into existence. The formation of the special vehicle purpose was one of the term of the contract which was to be formed post formation of the contract.

19. Reliance is placed on the judgment of the Supreme Court in case of ***Kollipara Sriramulu (dead) by His Legal Representative vs. T. Aswatha Narayana (dead) by His Legal Representative & Ors. AIR 1968 SC 1028*** and in particular paragraph 3 thereof. Reliance is also placed on clause 1.1.2 of the RFP and it is submitted that the selected bidder itself was a concessionaire. Reliance is

also placed on clause 1.2.3 in support of the submission that the Concession Agreement was a part of the bidding document. Reliance is also placed on clauses 2.1.4, 2.1.17 and 3.3.5 and also the scheduled annexed at page 373 of the bid document. It is submitted that if the respondent no.1 is allowed to urge that if the special purpose vehicle was not formed, the Concession Agreement would not be binding on the respondents, it would nullify the whole process.

20. Learned senior counsel placed reliance on clause 6.1 and would submit that the dispute arising if any of the bidding process has to be referred to the Court having jurisdiction. The dispute or controversy relating to the bidding process thus has to be referred to the Court and not upon the formation of the contract. He submits that one of the Appendix to the bid document is a Concession Agreement. The offer includes the Concession Agreement and thus is binding on the respondents. The offer is accepted in the form of a Letter of Acceptance dated 26th September, 2011. He submits that once the respondent no.1 accept the Letter of Award and the terms and conditions mentioned therein, various obligations kicked in. The bidder was concessionaire. The bidder could be two companies or even more. Till the consortium was brought in picture, the bidder was concessionaire.

21. Reliance is placed on clause 3.3.6 in support of the submission that after the acknowledgement of letters of acceptance, specific period is prescribed to comply with various obligations. The selected bidder is not entitled to seek deviation. It is submitted that as a matter of record, the respondent no.1 has been accepted as a contractor by the petitioner in the next bid and the said contract is in force.

REASONS AND CONCLUSION

22. It is not in dispute that the petitioner had invited bids for selection of a Concessionaire for the construction and operation of the 4th container terminal at Jawaharlal Nehru Port, Sheva. Clause 1.2 of the Request for Qualification (RFQ) defines the Bidding Process. It is the case of the petitioner that the tender was governed by the two-staged process which comprises of qualification stage and thereafter the bid stage. The petitioner first considered the applications received pursuant to the Request for Qualification. At that stage, the petitioner considered whether the applicants who had submitted their applications pursuant to the Request for Qualification were eligible to meet the criteria of fulfilling the requirements of executing the project. The said stage was qualification stage according to the petitioner.

23. Clause 1.2.1 of the RFQ defines the Bidding Process, Qualification Stage and Bid Stage. Clause 1.2.3 of the RFQ defines bids as financial offers submitted in respect of the project in accordance with the Request for Proposal (RFP) and other documents provided by the petitioner, pursuant to the RFP. It is the case of the petitioner that the bidding documents also includes a Draft Concession Agreement as provided in clause 1.2.7 of the RFQ.

24. Clause 1.2.7 of the RFQ provides that as part of the bidding document, the authority will provide for the project a draft concession agreement as project reports/feasibility reports prepared by the authority/its consultants and other information pertaining to the project available with it. Under the RFQ, the respondents were informed that the RFQ issued to the qualified bids would include a copy of the draft concession agreement and they should be deemed to be a part of the Bidding Document. In my view on conjoint reading of clauses 1.2, 1.2.1, 1.2.3 and 1.2.7 referred to aforesaid would clearly indicate that the bidding

documents would include RFP as well as draft concession agreement already provided to the respondents to enable the respondents to make their financial offer/bid.

25. Under clause 2.2.6, it was clearly provided that where the bidder is a consortium, the members of the consortium was *inter alia* to form an appropriate special public vehicle to execute the project if awarded to the consortium. The members of the consortium shall enter into a binding Joint Bidding Agreement for the purpose of making the application and submitting bid in the event of there being shortlisted. It is not in dispute that pursuant to the said RFQ, the respondents submitted various documents to the petitioner including the signed copy of RFQ duly filled. It is also not in dispute that the respondents were found eligible to participate in the price bidding process and were shortlisted on the basis of their application pursuant to the RFQ.

26. The RFP was provided to the qualified parties so as to enable them to make their financial offers pursuant to their qualification. A perusal of the RFP indicates that the said RFP itself was not an agreement or an offer or an invitation, financial offers submitted by the respondents pursuant to the RFP were offers made to the petitioner. The petitioner accepted the said offer which would form a concluded contract between the parties. Under clause 1.1.2 of the RFP, the consortium shall be responsible for designing, financing, procuring, constructing, operating and maintenance of the project in accordance with the provisions of a long term concession agreement to be entered into between the selected bidder and the authority in the stipulated form as provided by the authority as a part of the bidding documents provided under the said provision. It is thus clear that clause 1.1.7 and clause 1.2.3 which defines bidding documents includes RFP, the draft

concession agreement as well as other documents provided by the authority in those provisions.

27. Under clause 1.1.7, the petitioner has to receive a bid documents pursuant to the said RFP in accordance with the terms set forth in the said RFP and other documents to be provided by the petitioner pursuant to the said RFP, as modified, altered, amended and clarified from time to time by the petitioner, and all bids were to be prepared and submitted in accordance with such terms. Clause 1.2.3 clearly indicates that the bidding documents include the draft concession agreement for the project.

28. A perusal of the record clearly indicates that the concession period was already pre-determined and thus the only criteria for evaluation of the bids was revenue share offered by the bidder under clause 1.2.7 of the RFP. Under clause 2.10.2 of the RFP, all the pages forming part of the bid were to be initialed by the authorized signatory of the respondent no.1 who was authority to sign the bid which was done by the respondent no.1.

29. It is not in dispute that the consortium of the respondents having quoted a revenue share 50.828%, the said consortium was declared to be the successful bidder for the said project. The petitioner thereafter issued a Letter of Award by letter dated 26th September,2011. Consequent to the opening of the financial bids and after accepting the bid of the consortium by the petitioner, the respondents returned the said letter of acceptance to the petitioner duly signed and accepting the copy of the said Letter of Award on 29th September,2011. The respondents also submitted a bid security to the petitioner by way of performance guarantee.

30. In my view, the bidding process came to be completed upon submission of the bids by the respondents and other bidders in accordance with clause 1.2.1 of the RFQ. The Letter of Award dated 26th September,2011 issued by the petitioner to the respondents in response to the highest financial offer made by the respondents and return of the said Letter of Award duly counter signed by the respondent no.1 formed a concluded contract between the parties. The respondents have not disputed that the said Letter of Award issued by the petitioner was duly signed by the respondents and would return to the petitioner. The authorized representative of the respondent no.1 had also put his initials on every page of the said bid document submitted by the respondent no.1 which included the draft concession agreement. I am inclined to accept the submissions made by Mr.Dada, learned senior counsel for the petitioner that the bidding process came to be an end on the bid due date, when qualified bidders had to submit their financial offer and that upon acceptance of the financial offer of the respondent by the petitioner and communication of the acceptance to the respondents through Letter of Award the contract stood concluded.

31. Under clause 1.1.2 of the RFP read with clauses 2.2.6(f) and (g)(i) of the RFQ, the successful bidder is a consortium who shall incorporate as special public vehicle for carrying on the responsibility of concessionaire in accordance with concession agreement. A perusal of clause 2.2.6 of the RFQ indicates that the said provision provides for incorporation of special public vehicle in the event of the successful bidder being a consortium for the signing of concession agreement for implementation of the project awarded to such consortium post bidding process in furtherance of its contractual obligations. Such successful bidder also has to submit performance guarantee in compliance with Article 4 of

the concession agreement. Such bid security may be forfeited if the selected bidder fails to sign the concession agreement under clause 2.20.7 of the RFP. In my view, Mr.Dada, learned senior counsel for the petitioner is right in his submission that if the argument of the respondent no.1 is accepted that there was no concluded contract merely because the concession agreement was not signed, the petitioner shall not be entitled to take action in respect of breach and enforce its contractual right of invoking the security. In my view, that was not the intent and meaning of the provisions of the contract entered into between the parties.

32. In my view, signing of a concession agreement after issuance of Letter of Award was one of the requirement to be complied with by the respondents and was not a condition precedent for formation of the contract as sought to be canvassed by the respondent no.1. The contract was already concluded between the parties prior to the date of signing the concession agreement.

33. Insofar as the submission of the learned senior counsel for the respondent no.1 that in view of the disclaimers in RFQ and RFP that the same were not the contract is concerned,a perusal of the record indicates that it is not the case of the petitioner that in view of the issuance of the said RFQ and RFP, the contract was concluded. The said two documents itself provide that the same were not the contract. It is the case of the petitioner that the Letter of Award is issued pursuant to the offer of the respondents which concludes the contract between the parties. The respondents had returned the signed copy of the Letter of award duly acknowledged on 29th September,2011 and accepting all the terms and conditions of the bidding documents which includes the concession agreement.

34. A perusal of clause 2 of the RFQ indicates that the instruction to the

bidders were that those instructions were applicable not only to the single entity but also group of entities i.e. consortium.

35. A perusal of clauses 3.3.5 and 3.3.6 of the RFQ clearly indicates that the bidders were made clear that upon acceptance of financial offer and acknowledgement of Letter of Award, the selected bidder concessionaire is precluded from seeking any deviation in the concession agreement which is submitted along with the bid and the bid is accepted by the petitioner. The said provision further provides that after selection, a Letter of Award shall be issued, in duplicate, by the petitioner to the selected bidder and the selected bidder and such selected bidder has to sign and return the duplicate copy of the Letter of Award within seven days from the date of receipt of such Letter of Award with acknowledgment thereof. In the event of selected bidder not signing the duplicate copy of the Letter of Award within a period of seven days from the receipt of Letter of Award by the petitioner, unless the petitioner grants extension of time for submission of such duplicate copy of the Letter of Award, the petitioner is entitled to appropriate the bid security of such bidder and can consider the bid of the next eligible bidder.

36. Clause 3.3.6 clearly provides that after acknowledgement of the Letter of Award by the selected bidder, it shall execute the concession agreement within the period prescribed in clause 1.3 and such selected bidder is not entitled to seek any deviation in the concession agreement.

37. A perusal of the record clearly indicates that the biding documents included “draft concession agreement” as per clause 2.7.2 of RFP. When a bidder seeks to submit its financial offer filled in RFP, such bidder is required to submit

concession agreement in compliance with clause 2.14.4 and not draft concession agreement. In my view, the Letter of Award and acceptance of Letter of Award would be by virtue of Article 19 of concession agreement in the RFP clearly incorporates the arbitration agreement which was rightly invoked by the petitioner.

38. In my view clause 2.7.2 of the RFP clearly indicates that all the terms of the draft concession agreement are deemed to be a part of the RFP and would form a part of the concluded contract between the parties.

39. A perusal of the correspondence exchanged between the parties also clearly indicates that the consortium has also accepted the Letter of Award and had returned the duly signed copy thereof to the petitioner on 29th September,2011. Clause 6 of the said Letter of Award clearly provides that the consortium agreement was to be signed within a period of 30 days of the date of letter of acceptance. The respondent no.1 however raised an issue of payment of stamp duty in the sum of Rs.5.5 crores in the said concession agreement. It was contended by the respondent no.1 in the correspondence that the concession agreement was not compulsorily registerable and thus the consortium was not liable to pay stamp duty on the said concession agreement.

40. A perusal of the correspondence further indicates that vide its letter dated 3rd January,2012, the respondent no.1 had requested for extension of time for signing of the concession agreement and agreed to sign the said agreement on 11th January,2012. The respondent no.1 however did not sign the said concession agreement. In my view, the respondent no.1 thus cannot be allowed to contend that signing of concession agreement was a mandatory requirement for formation of a concluded agreement. In my view, the defence raised by the respondent no.1

is not *bonafide*.

41. It appears that there was *inter se* disputes between the respondent no.1 and the respondent no.2 prior to month of March 2012 and thus the respondent no.2 wanted to withdraw from the said consortium of respondent nos.1 and 2. On 31st March,2012 respondent no.2 addressed a letter to the respondent no.1 indicating its intention to withdraw from the said consortium of respondent nos. 1 and 2. The respondent no.2 however in the said letter clearly provided that such withdrawal should be only after approval from the petitioner and without any penal action being resorted to against the respondents under the said provisions of RFQ and RFP. Accordingly, the respondent no.1 addressed a letter on 2nd April, 2012 to the petitioner and requested to permit the respondent no.2 to withdraw as member of the consortium. The Ministry of Law however did not permit the change in composition at this stage and advised the petitioner to call the consortium for signing the concession agreement.

42. The petitioner accordingly addressed a letter dated 30th August,2012 to the respondent no.1 about the decision taken by the Ministry of Law and called upon the consortium to sign the concession agreement within 10 days from the date of receipt of the said letter. The consortium however did not sign the concession agreement. The bank guarantee submitted by the consortium was extended from time to time and was valid till 30th September, 2012. The petitioner encashed the said bank guarantee and forfeited the said bank guarantee amount on 18th September,2012 and appropriated the same. The petitioner vide its letter dated 16th October,2012 terminated the letter of award.

43. A perusal of the record thus clearly indicates that the respondent no.1

had applied for extension of time to execute concession agreement. The respondent no.1 had also acted upon the letter of award and submitted bid security. In view of the internal dispute between the respondent nos.1 and 2 and the dispute regarding the payment of stamp duty on the said concession agreement, the respondent no.1 backed out and did not sign the concession agreement.

44. Supreme Court in case of ***Kollipara Sriramulu (dead) by his legal representative*** (supra) has held that a mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties referred to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. In this case the consortium was not allowed to make any change in the concession agreement once executed. The terms of the contract were thus already finalized and concluded. A perusal of the documents exchanged between the parties and the letter of award duly accepted by the respondents clearly indicates that the none of the parties could be permitted to seek modification in the concession agreement and letter of award would be binding as a concluded contract. The intention of the parties in this case is very clear that the parties had intended that the letter of award issued by the petitioner and accepted by the respondents and returned of such letter of award to the petitioner would amount to a concluded contract. The principles of law laid down by the Supreme Court in case of ***Kollipara Sriramulu (dead) by his legal representative*** (supra) would squarely apply to the facts of this case.

45. It is the case of the respondent no.1 also that the respondent nos. 1 and 2 together had formed a consortium and had submitted an application for qualification to the petitioner in response to the RFQ on 31st December,2009. The

respondent no.1 was a lead member, technical member and financial member of the consortium. The petitioner had issued RFP to the consortium and other selected pre-qualified bidders. It is the case of the respondents themselves that the date of execution of the concession agreement was extended by mutual agreement in view of there being certain material issues having arisen about the registration and stamping of the concession agreement. I am not inclined to accept the submission of the learned senior counsel for the respondent no.1 that the bidding stage was to end upon signing of the concession agreement and till concession agreement was signed, such change was permissible.

46. A perusal of the impugned order passed by the learned arbitrator indicates that the learned arbitrator has held that the draft concession agreement was never signed by either of parties. Other documents exchanged between the parties did not have any arbitration clause as contemplated in Section 16 read with Section 7 of the Arbitration and Conciliation Act, 1996. The learned arbitrator mainly placed reliance on the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Private Limited (supra)*** which was also relied upon by both the parties.

47. Learned arbitrator placed reliance on paragraphs 14 to 19 of the said judgment. It is held that the request for qualification was a request and not a contract. Similarly the request for proposal was also request and not a contract. It is held that both these documents were requests made by the petitioner herein to the respondents asking for their qualification and proposal. None of these documents did have any reference to any arbitration clause. There was no such reference in the Letter of Award and therefore there was no contract in which there was a reference to a document incorporating an arbitration clause.

Learned arbitrator held that after withdrawal of the Letter of Award, there cannot exist any document or even request which can be said to to have been incorporated in a contract, factually also the concession agreement not having been signed by either of the parties and thus there is no reference to the document or contract, the existence of which can fulfill the requirement of Section 7(5) of the Act.

48. Learned arbitrator held that it was the case of the petitioner itself that failure to sign the concession agreement itself is a ground for withdrawal of the Letter of Award and that change in the Constitution of the consortium amounted to change in the draft concession agreement which was not acceptable to the petitioner resulting in withdrawal of the said Letter of Award.

49. Learned arbitrator placed reliance on Article 19(3) which provides that failing amicable settlement and/or settlement with the assistance of expert appointed by the parties by mutual consent, the dispute may be settled by arbitration. It is held that it was not the case of the petitioner that the parties had made an effort to resolve such dispute, difference or claim by discussion between them nor is there any averment that any expert was appointed for resolution of the dispute. Learned arbitrator however held that after withdrawal of the Letter of Award, no dispute could exist between the parties in relation to the contract sought to be awarded by the petitioner coupled with the fact that the concession agreement was never signed. Learned arbitrator accordingly held that there did not exist any arbitration agreement between the parties and there was no question of referring any dispute to an arbitration tribunal.

50. A perusal of the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Private Limited (supra)*** indicates that the question

for consideration of the Supreme Court in the said matter was whether an arbitration clause contained in a main contract, would stand incorporated by reference, in a sub-contract, where the sub-contract provided that it "shall be carried out on the terms and conditions as applicable to the main contract." The said contract was between the Public Works Department and the respondent therein which contained a provision for arbitration. The said arbitration clause provided that any dispute in respect of which the decision, if any, of the Engineer has not become final and binding pursuant to clause 67.1 and amicable settlement has not been reached, such dispute shall be referred to the adjudication of a committee of three arbitrators. One of the arbitrator to be nominated by the employer, one to be nominated by the contractor and the third who will act as the Chairman of the committee, but not as umpire, to be nominated by the Director General (Road Development), Ministry of Surface Transport (Roads Wing), Government of India.

51. The appellant before the Supreme Court was the sub-contractor of the contractor respondent. The said contractor respondent entrusted a part of the work entrusted to it by the PW department to the sub-contractor. In the work order issued by the the contractor to the sub-contractor, it was provided that the construction shall be carried out as per the tender specification and drawings issued for construction by the client i.e. PW Department. This clause was considered by the Supreme Court in the said judgment and has held that there is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a

reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.

52. It is held by the Supreme Court that if a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document, (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. It is held that if the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

53. In paragraph 18 of the said judgment, it is held by the Supreme Court that if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Supreme Court gave another illustration in the said judgment that if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as

part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into. Supreme Court also referred to various passages from Russell on Arbitration on doctrine of "incorporation." In paragraph 24 of the said judgment, Supreme Court summarised the scope and intent of Section 7(5) of the Arbitration and Conciliation Act, 1996. It is held that where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

54. Supreme Court in case of ***M/s.Inox Wind Ltd. vs. M/s.Thermocables Ltd., 2018 SCC OnLine SC 3*** has considered a situation where the parties had agreed in Purchase Order that the supply was to be according to the terms mentioned in the order and the Standard Terms and Conditions that were attached thereto. An arbitration clause was recorded in the Standard Terms and Conditions. The dispute arose between the parties. One of the party invoked the arbitration agreement recorded in the Standard Terms and Conditions. High Court took a view that the arbitration clause in the main contract was not incorporated by reference in the contract between the parties. Supreme Court adverted to the judgment in case of ***M.R.Engineers*** (supra) and also adverted to a passage from Russell on Arbitration, 23rd and 24th Edition. Supreme Court held that there is distinction between incorporation by reference of standard form terms and of the terms of a different contract, and concluded that in a single contract case, general words of incorporation are sufficient, whereas by its nature a two contract case may require specific reference to the other contract, unless the secondary document is stated to be based on standard form terms containing an arbitration agreement.

55. Supreme Court in the said judgment has held that the courts have extended the “single contract” principle applicable to standard form contracts, where general words of incorporation will suffice, to other types of contract where the same rationale can be said to apply. It is held that if the document sought to be incorporated is a bespoke contract between the same parties, the courts have accepted this as a “single contract” case where general words of incorporation will suffice, even though the other contract is not on standard terms and constitutes an entirely separate agreement. The rationale for this approach is that the parties have already contracted on the terms said to be incorporated and are therefore even more likely to be familiar with the term relied on than a party resisting incorporation of a standard term. It is held that if general words of incorporation are sufficient for the latter, they should be even more so for the former. It is held that the courts also appear to have accepted as a “single contract” case a situation where the contract referred to is between one of the parties to the original contract and a third party, where the contracts as a whole “were entered into in the context of a single commercial relationship”.

56. In paragraph 19 of the said judgment, the Supreme Court held that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. It is held that in ***M.R.Engineers***' case, Supreme Court had restricted the exceptions to standard form of contract of trade associations and professional institutions. It is held that however in view of the development of law after the judgment in ***M.R. Engineers’*** case, the court was of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words,

general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. Supreme Court adverted to the passage from Russell on Arbitration 24th Edition and held that the same would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in ***M.R. Engineers'*** case which has rendered to 23rd Edition Russel on arbitration.

57. Supreme Court held that the court was in agreement with the judgment in ***M.R. Engineer's*** case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause. The respondent was duly aware of the standard terms and conditions which were attached to the purchase order. The purchase order was a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause. In my view the principles laid down by the Supreme Court in case of ***M/s.Inox Wind Ltd.*** (supra) squarely applies to the facts of this case.

58. In this case also, the concession agreement was not a separate contract but was one of the document along with other documents forming part of the contract. The contract entered into between the parties in this case was a single contract. The contract was already concluded between the parties by virtue of issuance of the letter of award and acceptance thereof. In my view, the judgment of Supreme Court in case of ***M.R.Engineer*** (supra) relied upon by Mr.Khambata, learned senior counsel for the respondent no.1 is clearly distinguishable in the facts of this case. The later judgment of Supreme Court in case of ***M/s.Inox Wind Ltd.*** (supra) is directly on the issue involved and principles of law laid down by the

Supreme Court in the said judgment after adverting to the judgment of Supreme Court in case of ***M.R.Engineer*** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

59. It is not in dispute that the respondent no.1 had itself made a proposal to the petitioner for signing on arbitration agreement for referring the dispute between the parties and the consortium for referring the parties to the arbitration and forwarded a draft of the arbitration agreement to the petitioner allegedly in good faith. I am not inclined to accept the submission of the learned senior counsel for the respondent no.1 that the arguments of the petitioner before this court is as and by way of after thought and is contrary to the submissions made before the learned arbitrator across the bar and also in the written arguments. A perusal of the affidavit filed before the learned arbitrator and the submissions made in the written submission filed by the petitioner does not indicate that the submissions of the petitioner before the learned arbitrator were different than the submissions made before this court. The petitioner had raised various submissions in the alternative before the learned arbitrator. Similarly there is no substance in the submissions of the learned senior counsel for the respondent no.1 that the submissions made by the petitioner are contrary to the contentions raised in the notice of arbitration in view of the alleged arbitration agreement recorded in 19 of the concession agreement.

60. In my view, there is no substance in the submission of the learned senior counsel for the respondent no.1 that the issuance of the letter of acceptance was only a part of the bidding process which would come from end upon signing of the concession agreement or that since the bidding process had not been completed issuance of the Letter of award and acknowledgment thereof will not

result into a concluded contract for the project as between the petitioner and the consortium. The judgment of Supreme Court in case of ***Dresser Rand S.A.*** (supra) relied upon by the learned senior counsel for the respondent no.1 is clearly distinguishable in the facts of this case and would not assist the case of the respondent no.1.

61. Insofar as submission of the learned senior counsel for the respondent no.1 that if according to the petitioner, the contract was already concluded by issuance of letter of award, the petitioner would not have insisted for execution of concession agreement is concerned, in my view there is no merit in this submission of the learned senior counsel for the respondent no.1. The execution of the concession agreement was one of the condition under the said contract which was required to be executed after the Letter of award was issued. Merely because concession agreement was not executed after taking extension of time to execute such concession agreement, it would not result in non-formation of the contract itself.

62. In my view, the impugned order passed by the learned arbitrator is contrary to section 7 of the Arbitration and Conciliation Act, 1996 and also contrary to the principles laid down by the Supreme Court in case of ***M/s.Inox Wind Ltd.*** (supra) and thus deserves to be set aside.

63. Supreme Court in the case of ***Reva Electric Car Company Private Limited Vs.Green Mobile (supra)*** relied upon by the learned senior counsel for the petitioner has held that even if contract is terminated, arbitration clause continues to be enforceable notwithstanding a declaration of the contract being null and void. The learned arbitrator, in this case, proceeded on the premise that

since the petitioner had terminated the Letter of Award, there did not exist any contract between the parties and therefore question of referring the dispute to the arbitration does not arise. In my view, the findings of the learned arbitrator are ex facie contrary to the principles of law laid down by the Supreme Court in the case of ***Reva Electric Car Company Private Limited Vs.Green Mobile (supra).*** The judgment of the Supreme Court in the case of ***National Agricultural Coop. Marketing Federation India Ltd. Vs. Gains Trading Ltd. (supra)*** relied upon by Mr.Dada, learned senior counsel for the petitioner on the said issue would assist the case of the petitioner. Even if the Letter of Award is terminated, arbitration agreement does not perish with the Letter of Award.

64. Dehli High Court in the case of ***M/s.Progressive Constructions Ltd. Vs. Bharat Hydro Power Corporation Ltd. (supra)*** has considered the similar facts and has held that a concluded contract was reached between the parties. A formal contract had remained to be signed because there were minor discrepancies or variations in the terms which were being negotiated between the parties. The finalisation of the details would not adversely affect the conclusion of the contract which had stood arrived at with the acceptance of tender and award, letter of intent issued by the contractor. It is held by the Delhi High Court that the arbitration clause as contained in the tender document would be thus binding the parties. In my view, the facts before this Court and before the Delhi High Court are identical. The principles of law laid down by the Delhi High Court in the case of ***M/s.Progressive Constructions Ltd. Vs. Bharat Hydro Power Corporation Ltd. (supra)*** would apply to the facts of this case. I am in agreement with the views expressed by the Delhi High Court in the said judgment which would assist the case of the petitioner. Though Mr.Dada, learned senior counsel for the petitioner has relied upon various judgments, to

butress his arguments, this Court need not multiply the authorities on the similar points.

65. I, therefore, pass the following order :-

(a) The impugned order dated 18th April, 2016 passed by the learned arbitrator is set aside.

(b) It is declared that the arbitration agreement recorded in clause 19.3 of the Concession agreement exist between the parties.

(c) The arbitration proceedings are restored to file.

(d) The learned arbitrator is directed to proceed with the arbitration proceedings expeditiously.

(e) The parties to act on the authenticated copy of this order.

66. Arbitration petition is allowed in the aforesaid terms. No order as to costs.

(R.D.DHANUKA, J.)

At the request of the learned counsel appearing for the respondent no.1 for seeking stay of this order, the learned arbitrator is directed not to proceed with the matter for a period of four weeks from today.

(R.D.DHANUKA, J.)