

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL APPLICATION (O) NO. 134/2020
IN
M.C.A. NO. 276/2018

Anupam Rai Construction
..VS..
M/s. Spacewood Office Solutions Pvt. Ltd.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.C. Mehadia, Advocate for the applicant
Shri C.S. Samudra, Adv a/b Shri A. Sudame, Adv for the respondent

CORAM : N.B. SURYAWANSHI, J.
ORDER RESERVED ON : 05/02/2020
ORDER PRONOUNCED ON : 14/02/2020

1] This application is filed by the respondent for recall of the order dated 20/04/2018 and judgment dated 02/05/2018 passed by this Court (Coram : Z.A. Haq, J.). This Court, vide order dated 20/04/2018, observed that Clause 24 of the General Conditions of Contract provides for settlement of disputes by appointing an arbitrator and name of Mr. A.M. Patankar, Retired Deputy Chief Engineer (Civil) was proposed to be appointed as arbitrator to resolve the dispute between the parties. Mr. A.M. Patankar, Retired Deputy Chief Engineer (Civil) showed his willingness to act as an arbitrator in the matter and thereafter this Court, vide judgment dated 02/05/2018, appointed Mr. A.M. Patankar, Retired Deputy Chief Engineer (Civil) as arbitrator.

2] Learned advocate for the respondent contends that while recording the evidence before the arbitrator, it was revealed that there was no arbitration agreement between the

parties, which is *sine qua non* for appointment of an arbitrator. While recording the evidence of Project Management Consultant i.e. Architect Mr. A.A. Chati, he has stated that tender documents were prepared by him only for the guidance and the idea of tripartite agreement was abandoned subsequently. He has further stated that he has neither executed any tripartite tender document nor agreement with Contractor, Client nor signed any such document. Thus, the tripartite contract does not exist at all. He further contends that in absence of tripartite agreement, there is no arbitration agreement and hence the arbitrator could not have been appointed in the matter. Hence, he prays for recall of the orders appointing the arbitrator and dismissal of M.C.A. No. 276/2018.

3] Learned advocate for the applicant opposed the said prayer contending that Clause 24.4 of the Tender Notice contains the arbitration clause. The respondent signed the tender document by accepting all the terms and conditions mentioned in the tender. The employer has accepted the tender and awarded contract to the respondent and hence, there is no necessity of entering into a separate agreement. He further contends that in the reply filed in the arbitration proceedings, the conditions of tender are mentioned, so also there was a cross-examination by the respondent in respect of the terms and conditions of the tender. There is no pleading of the respondent that there was no arbitration agreement. In these circumstances, there is no substance in the said contention of the respondent that there was no arbitration agreement.

4] Learned advocate for the applicant has raised preliminary objection to this application contending that under the garb of recalling of the orders, the respondent is seeking infact review which cannot be done. The arbitrator was appointed after hearing the parties, and therefore the contention of the respondent is not acceptable. Learned advocate for the applicant placed reliance on the ratio in *Unissi (India) Private Limited. Vs. Post Graduate Institute of Medical Education And Research (2009) 1 SCC 107* wherein it is held as under :-

"12. Before we proceed further, we may examine Section 7 of the Act which runs as under :

"7. Arbitration agreement.----(1) In this Part, "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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement;
or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

13. We have carefully examined the provisions made under Section 7 of the Act which deals with arbitration agreement. In [Smita Conductors Ltd. vs. Euro Alloys Ltd.](#) Article II Para 2 of New York Convention came up for consideration before this Court. The provisions of Article II, Para 2 of New York Convention is in pari materia to the aforequoted provisions of Section 7 of the Act. The provisions of Article II, Para 2 of New York Convention is being quoted herein now. Para 2 runs as under :-

"2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

5] The ratio in the above referred case is squarely applicable to the facts of the present case. In the present case, the tender document contains an arbitration clause and by reason of acceptance of a tender by the employer, it must be

held that there was a valid arbitration agreement between the parties.

6] There is no dispute that the order appointing the arbitrator was passed after hearing the parties. The parties have already submitted to the jurisdiction of the arbitrator and the evidence is already led before the arbitrator. In this view of the matter, the argument of the learned advocate for the respondent that in absence of separate agreement, arbitrator could not have been appointed and/or the matter could not have been referred for arbitration, cannot be accepted. Taking into consideration the facts of the present application and in view of the fact that the tender itself contains an arbitration clause, there is no substance in the argument of learned advocate for the respondent and the same deserves to be rejected.

7] In the result, Civil Application (CAO) No. 134/2020 is **dismissed**.

JUDGE

ANSARI