

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Arbitration Application No.8 OF 2014

Between:

Sterlite Technologies Limited,
Having its registered office
At Survey No.68/1,Rakholi,
Madhuban Dam Road-396230,
Union Territory of Dadra & Nagar Haveli. ... Petitioner

Vs.

Aster Private Limited,
Having its registered office at
Lakshmi Towers, 10, G-Block Colony,
A.S.Rao Nagar,
Secunderabad-500062. ...Respondent

DATE OF JUDGMENT PRONOUNCED: 07.01.2020

Submitted for approval.

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

- 1 Whether Reporters of Local newspapers may
be allowed to see the Judgments? Yes/ No
- 2 Whether the copies of judgment may be
marked to Law Reporters/ Journals Yes/ No
- 3 Whether Their Ladyship/ Lordship wish to see
the fair copy of the Judgment? Yes/ No

A.RAJASHEKER REDDY, J

*** THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**

+Arbitration Application. No.8 of 2014

% Dated 07.01.2020

Sterlite Technologies Limited.

... Petitioner

Vs.

\$ Aster Private Limited.

..Respondent

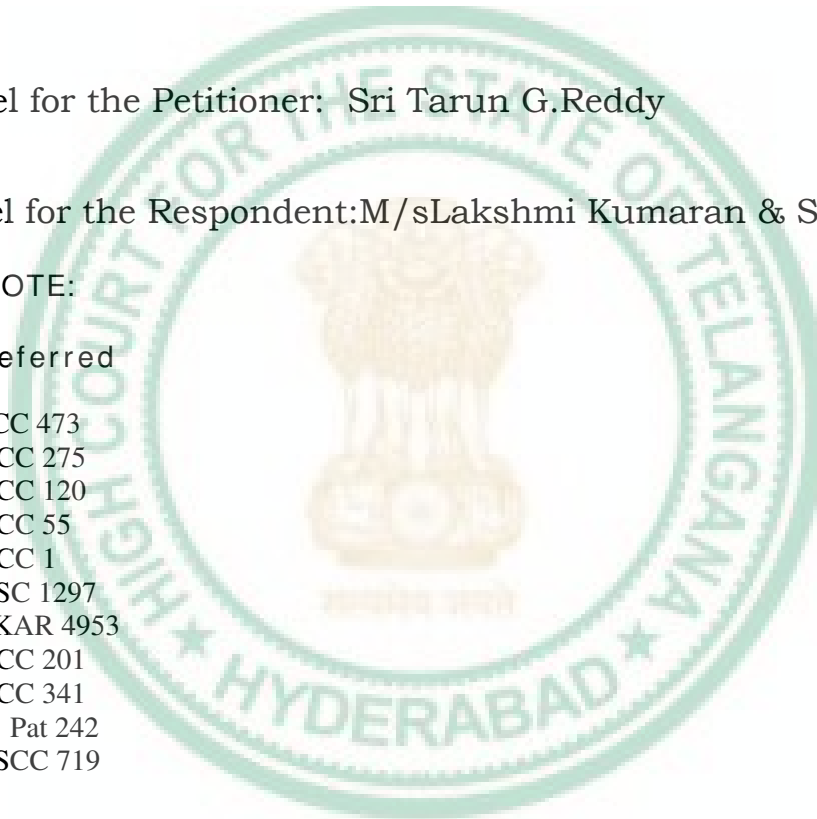
! Counsel for the Petitioner: Sri Tarun G.Reddy

^ Counsel for the Respondent:M/sLakshmi Kumaran & Sridharan.

> HEAD NOTE:

? Cases referred

- ¹ (2001) 7 SCC 473
- ² (2006) 5 SCC 275
- ³ (2007) 7 SCC 120
- ⁴ (2009) 2 SCC 55
- ⁵ (2014) 5 SCC 1
- ⁶ AIR 1998 SC 1297
- ⁷ ILR 2000 KAR 4953
- ⁸ (2014) 2 SCC 201
- ⁹ (1980) 2 SCC 341
- ¹⁰ AIR 1961 Pat 242
- ¹¹ 2007 (5) SCC 719



HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**Arbitration Application No.8 of 2014****ORDER:**

This application is filed by the petitioner under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') read with Scheme for Appointment of Arbitrator, 1996 to appoint the arbitrator on behalf of the respondent, to adjudicate the claims and disputes between the applicant and respondent.

2. The facts, in brief, as pleaded by the petitioner are as follows:

The petitioner company is a Public Limited Company incorporated under the Companies Act, 1956, having its registered office at Union Territory of Dadra & Nagar Haveli. It is engaged in the business of offering products for extra high voltage data and power transmission. The respondent is a private limited company engaged in the business of providing products and services in the power and telecom infrastructure segments. In the month of July, 2011, the respondent approached the petitioner stating that the Power Holding Company of Nigeria (for short 'PHCN') required certain quantities of ACSR BEAR Conductors (Aluminium Conductors Steel Reinforced) and OPGW (Optical Ground Wire) for the purpose of PHCN Nigeria Project. Pursuant

thereto, after several correspondence and negotiations through email, the respondent placed the following purchase orders; a) POIBSP20021, dated 19.08.2011 relating to Lot-812 Kms ('Lot 7 PO'); and b) POIBSP20022, dated 19.08.2011 relating to Lot 8-92 Kms ('Lot 8 PO'). By virtue of the said Purchase Orders, the respondent was obligated to issue necessary manufacturing clearance in respect of the said lots and also a purchase order in respect of OPGW. Subsequently, the respondent communicated the manufacturing clearance in respect of Lot 8 PO and the OPGW. However, the respondent could not issue said clearance despite several reminders by the petitioner. The respondent issued purchase order on 25.06.2012 relating to ACSR BEAR Conductor, for the second Lot 8 and also purchase order relating to OPGW over head ground wire for 18.5 Kms, (third purchase order), but by email dated 01.11.2012, the respondent informed the petitioner that he was not willing to give manufacturing clearance for the purchase orders placed by him and asked the petitioner to sell the products under the purchase orders to third parties. Thereafter, vide email dated 22.11.2012, the petitioner raised a Debit Note APL/01, dated 21.11.2012 upon the respondent. In response to the same, the respondent vide letter dated 28.12.2012 contended that the same 'shall become operational only after the Client/Principal Employer' opens a

letter of credit in its favour and failed to fulfill his obligations. Subsequently, vide email dated 08.02.2013, the respondent cancelled all the three purchase orders placed by him. Vide emails dated 08.02.2013 and 12.02.2013, the petitioner requested the respondent to comply with the contractual obligations and to reverse the termination. As there was no response to the aforesaid emails from the respondent, the petitioner got issued legal notice dated 23.05.2013 calling upon him to pay a sum of Rs.4,27,78,528/- on account of damages suffered by the petitioner due to the failure on his part to perform his contractual obligations. The respondent sent reply dated 23.07.2013 denying his liability to pay the demanded amount. Since the respondent denied his liability, disputes arose between the parties, the petitioner invoked arbitration clause provided at Annexure-I in the purchase orders and also proposed Hon'ble Mr. Justice Shri M.Jagannadha Rao (Retired) to be appointed as the Sole Arbitrator for adjudication of disputes between the petitioner and the respondent. Vide letter dated 06.11.2013, the respondent failed to give consent for the appointment of sole arbitrator and willfully chosen not to appoint an arbitrator for the adjudication of disputes between the parties. The time period of 30 days as stipulated in Section 11(4)(a) of the Act of 1996 from the date of notice of arbitration dated 14.10.2013 had also lapsed. On the respondent's failure to

appoint an arbitrator on his behalf, present application is filed.

3. Counter affidavit is filed by the respondent denying the averments in the affidavit filed in support of the application stating that in pursuant to a tender floated by the Transmission Company of Nigeria PLC (for short 'TCN') for design, manufacture, supply, erection, testing and commissioning of all equipment and material for the construction of 132 KV DC Double Circuit Overhead Transmission Lines of approximately 120 kms from the existing Ganmo 330/132/33 Kv substation to the proposed Shonga 132/33 Kv Substation (Lot 7) and approximately 15 kms length from Oshogbo 132/33 Kv Substation to the proposed Ede 132/33 Kv ('Lot 8'), the respondent placed its bid for the same, which was awarded to the respondent by TCN. In pursuant thereto, the respondent executed two contracts on 10.01.2010 and 16.01.2010 for the work mentioned under Lots 7 and 8. As per the terms and conditions, the TCN had agreed to make 15% advance payment to the respondent in case of procuring off-shore material/equipment from the respondent's own suppliers. It was also agreed between the TCN and the respondent that a letter of credit shall be opened for the balance of 85% payment against such off-shore material/equipment. At the time of execution of contracts, TCN had not opened the

letters of Credit in respect of Lots 7 & 8 and same was informed to the petitioner. That it was the primary understanding between the petitioner and the respondent that any agreement between them shall be subject to the Letters of Credit being opened by TCN for respondent's execution of the Nigerian Project and the respondent's confirmation to the petitioner to manufacture and supply the products. Though the petitioner is aware of the fact that unless and until TCN opened Letters of credit in favour of the respondent, it would not require the products at all, the petitioner insisted the respondent for issuance of subject purchase orders, which were issued accordingly on 19.08.2011 only to facilitate procurement of aluminium and also to avoid any RBI related issues, as such, there is no basis for the claims raised by the petitioner against the respondent. It is also stated that though the petitioner raised a Debit Note on 21.11.2012, for an amount of Rs.4,63,03,547/-, but, by the time the said claim was made against the respondent through legal notices dated 23.05.2013 and 14.10.2013 and the present application, the claim got reduced to an amount of Rs.4,27,78,528/-, which is neither explained nor justified. The petitioner failed to prove that the aluminium was purchased or ordered for consequent to the instruction of the respondent and that no document is filed by him to show that it had bought the aluminium and if

bought, whether the same is in its possession or not, as such, the claim of the petitioner is false and sought for dismissal of the application.

4. Rejoinder to the counter affidavit is filed by the petitioner stating that the TCN is a third party, unconnected with the petitioner and the respondent and that the TCN is not a party in any of the purchase orders or the letters of intent that have been executed by the respondent in favour of the petitioner. The merits of the dispute between the parties cannot be raised in an application seeking appointment of an arbitrator under Section 11 of the Act. The purchase orders executed between the parties explicitly state that the Act of 1996 would apply to the contract.

5. Heard Sri S.Niranjan Reddy, learned Senior Counsel appearing for Sri Tarun G.Reddy, learned counsel for the petitioner and M/s.Lakshmi Kumaran & Sridharan, learned counsel for the respondent.

6. Learned Senior Counsel for the petitioner while reiterating the averments in the affidavit filed in support of this application, submits that the respondent having placed purchase orders with the petitioner, failed to perform the contractual obligations and finally cancelled the said purchase orders vide email dated 08.02.2013. He submits that though the petitioner issued legal notice dated 23.05.2013 calling upon the respondent to pay a sum of

Rs.4,27,78,528/- on account of damages suffered by him, the respondent failed to pay the same, as such, the petitioner invoked arbitration clause 21 provided in Annexure-I of the Standard Terms and Conditions of the Work Order of the respondent. He further submits that since the purchase order contains an arbitration clause, the petitioner nominated Hon'ble Mr. Justice M.Jagannadha Rao (Retired) as an arbitrator. He submits that since the respondent entered into contract by way of purchase order, which contains an arbitration clause, the respondent cannot deny the same. He further submits that the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration is to be taken into consideration while appointing an arbitrator. He further submits that the arbitration clause need not be in a particular form and that mere expression of word 'arbitration' is sufficient to invoke the arbitration clause. He further submits that whether the purchase order constitutes an arbitration clause or not can also be decided by the Arbitrator. In support of his contention, he relied on the judgments reported in **The Owners & Parties Interested in the Vessel M.V.Baltic Confidence v. State of Trading Corporation of India**¹, **Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.**,² **Aurohill Global**

¹ (2001) 7 SCC 473

² (2006) 5 SCC 275

Commodities Ltd., v. M.S.T.C. Ltd.,³, VISA International Ltd., v. Continental Resources (USA) Ltd.,⁴, Enercon (India) Ltd., v. Enercon GMBH⁵.

7. On the other hand, learned counsel for the respondent while reiterating the averments in the counter affidavit, submits that there is no arbitration agreement between the parties to resolve the disputes, as such, the same is liable to be dismissed on this ground alone. He further submits that the Clause 21 of the Standard Terms and Conditions of the Work Order merely contemplates governing law of the contract between the parties, but not with an intention to appointment of an arbitrator under the Act of 1996. He submits that unless the ingredients of Section 7 of the Act of 1996 are satisfied, any clause in the contract (purchase order) cannot be construed as an arbitration clause. He further submits that alleged arbitration clause in the purchase order does not contemplate for any reference of disputes or differences by either of the parties to arbitration and that the clause does not even indicate that the parties have consented to alternate dispute resolution method. He submits that the impugned clause is only to make the Act of 1996 applicable to the contract along with other governing laws in India, but not otherwise, as there is no specific

³ (2007) 7 SCC 120

⁴ (2009) 2 SCC 55

⁵ (2014) 5 SCC 1

arbitration clause, agreed upon by the parties. He further submits that there is no *consensus ad idem* between the parties, to refer the disputes to the Arbitrator under the Act, as such, the impugned clause cannot be considered as an arbitration clause. In support of his contention, he relied on the judgments reported in **K.K.Modi v. K.N.Modi⁶, Mysore Construction Co., V. Karnataka Power Corporation Limited⁷, P.Dasaratharama Reddy Complex v. Government of Karnataka⁸, State of U.P v. Tipper Chand⁹, S.K.James v. Dr.Abdul Khair¹⁰ and Jagdish Chander v. Ramesh Chander¹¹.**

8. In view of above rival contentions of both parties, the question that arises for consideration is, whether the impugned clause No.21 contained in the Standard Terms and Conditions of the Work Order, can be construed as an arbitration agreement between the parties or not?

9. In this case, it is to be seen that there is no dispute with regard to the placing of three purchase orders by the respondent on the petitioner, as referred to supra, for the purpose of purchase of ASCR BEAR Conductors and OPGW. All the purchase orders were signed by the authorized signatory on behalf of the respondent. When the respondent failed to comply the terms and conditions of purchase orders by way of giving manufacturing clearance, the petitioner

⁶ AIR 1998 SC 1297

⁷ ILR 2000 KAR 4953

⁸ (2014) 2 SCC 201

⁹ (1980) 2 SCC 341

¹⁰ AIR 1961 Pat 242

¹¹ 2007 (5) SCC 719

issued a legal notice dated 23.05.2013 demanding the respondent to pay a sum of Rs.4,27,78,528/- towards damages suffered by him due to failure on the part of the respondent to complete the transaction. Subsequently, when the respondent failed to pay the said amount, the petitioner proposed to nominate Hon'ble Sri Justice M.Jagannadha Rao, as an arbitrator on his behalf, to resolve the disputes with the respondent, by invoking clause 21 of the Standard Terms and Conditions of the Work Order. Clause 22 provides for jurisdiction. For the sake of convenience, the said clauses are extracted here under:

"21.Legal Construction: The contract shall be governed by Laws of India including Arbitration and Conciliation Act, 1996 with amendments thereof.

22.Jurisdiction: All disputes concerning this P.O are subject to Jurisdiction of Hyderabad Courts only."

10. It is significant to note that in the counter affidavit filed in this case, the respondent had neither denied having placed three purchase orders on the petitioner nor denied the fact that the purchaser orders are contracts and are governed by Laws of India including the Arbitration and Conciliation Act, 1996 with amendments thereof. If the intention of the respondent is only in respect of governing the Contract by the Laws of India, he ought not to have mentioned specifically 'including the Arbitration and Conciliation Act, 1996 with amendments thereof'. When it is specifically stated in the

clause about the Act of 1996, the intention of the respondent in the Purchase Order goes to show that he is willing to invoke the Act of 1996, in case of any disputes with the petitioner. Whether there exists an arbitration agreement as per Section 7 of the Act or not, has to be decided with reference to the Standard Terms and Conditions of the Work Order and not merely basing on the contentions of parties raised before this Court, after the dispute has arisen. (See **Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd. (supra)**). Section 7 of the Act of 1996 provides for Arbitration Agreement, which reads as follows:

“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.

11. In this case, it is to be seen that the purchase orders placed by the respondent on the petitioner are the contracts between the parties and they are subject to Standard Terms and Conditions of the Work Order. The intention of the parties has to be taken into consideration, as to whether they have agreed for resolution of their disputes through arbitration. A plain reading of Section 7 of the Act goes to show that it does not prescribe any particular form and it is immaterial whether or not expression “arbitration” or “arbitrator” or “arbitrators” has been used in the agreement. The intention of the parties to the contract shall determine whether there exists an arbitration clause or not. Since the clause 21 specifically states about inclusion of the Act of 1996 and amendments thereof, it goes without saying that the respondent has intended to invoke the provisions of the Act of 1996 apart from other Laws in India, as such, there is an arbitration agreement between the parties as per Clause 21 of the Standard Terms and Conditions of the Work Order. Therefore, the contention of the learned counsel for the respondent that there does not exist arbitration clause and Clause 21 of purchase order cannot be construed as an arbitration agreement, cannot be accepted.

12. That apart, while ascertaining the intention of the parties, attempt should be made to give meaning to the

incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. (See **the Owners & Parties Interested in the Vessel M.v.Baltic Confidence v. State of Trading Corporation of India Ltd.,(supra)**. An arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression 'arbitration' or 'arbitrator' or 'arbitrators' has been used in the agreement. (see **M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd. [(1993) 3 SCC 137]** and **Visa International Ltd. v. Continental Resources (USA) Ltd., (supra)**. The Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the Court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. In construing an

arbitration clause, it is not necessary to employ the strict rules of interpretation which may be necessary to construe a statutory provision. The court would be well within its rights to set right an obvious omission without necessarily leaving itself open to the criticism of having reconstructed the clause.

(See **Enercon (India) Ltd. v. Enercon GMBH (supra)**).

13. In the present case, admittedly, the petitioner is invoking the provisions of the Act of 1996 in view of Clause 21 of the Standard Terms and Conditions of the Work Order. The question as to whether the purchase order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be decided by the arbitrator. Therefore, there is no merit in the contention advanced on behalf of the respondent that the arbitration petition is misconceived and not maintainable in law for the reason that there is no specific consent of parties for reference of disputes to arbitration.

14. There is substantial correspondence between the parties in regard to the subject contract and the unsatisfactory performance on the part of the respondent, as such, dispute arose between the parties. As already stated supra, the Clause 21 of the Standard Terms and Conditions of the Work Order must be construed as an arbitration clause.

15. I have perused the judgments relied upon by the learned counsel for the respondent. The dispute settlement clause in **K.K. Modi v. K.N. Modi (supra)** needs to be distinguished from the facts of the case on hand. For the convenience sake the clause 9 of the above said judgment is reproduced here.

“3. Clause 9 provides as follows:

“Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups.”

In para 17, the Hon'ble Apex Court has provided with some attributes which necessarily form the basis for an arbitration agreement. The same is being reproduced here for ready reference;

- “17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
- (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
 - (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,
 - (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
 - (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
 - (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
 - (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the

parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.

19. In *Russell on Arbitration*, 21st Edn., at p. 37, para 2-014, the question how to distinguish between an expert determination and arbitration, has been examined. It is stated,

“Many cases have been fought over whether a contract’s chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as ‘arbitrator’, ‘arbitral tribunal’, ‘arbitration’ or the formula ‘as an expert and not as an arbitrator’ are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive.... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an ‘issue’ between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a ‘formulated dispute’ between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion....”

A careful reading of above cited paragraphs makes it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if:

- (i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a court or tribunal) for decision;
- (ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and
- (iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.

Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious

enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement. What is to be seen from the facts of the case is that clause 21 of the Standard Terms and Conditions of the work order doesn't reflect or evinces a desire of the parties rather here the word "shall" has been used and that distinguished it from the above cited case.

16. In ***Mysore Construction Company v. Karnataka Power Corporation Limited (supra)***, in the disputes settlement clause 67 nowhere mentioned the word arbitration or arbitral or arbitral tribunal. Therefore, the Court was right in not granting the permission for arbitration. In fact, another settlement of dispute clause 29, no inference was made to arbitration.

17. Similarly in ***P. Dasaratharama Reddy Complex v. Govt. of Karnataka (supra)***, no reference was made to either arbitration or arbitrator. The judgment followed the reasoning given ***KK Modi (supra)*** and ***Mysore Construction (supra)***. Therefore this judgment too doesn't support the argument of the respondent.

18. In ***Jagdish Chander v. Ramesh Chander***, (supra), Clause 16 of the partnership agreement related to dispute settlement didn't bind the parties for arbitration rather provided them with the liberty to refer it to mutually. Clause 16 reads as follows:

“(16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or *shall be referred for arbitration if the parties so determine.*”

19. After considering several of the judgments delivered by the Hon’ble Apex Court on this aspect, the Hon’ble Apex Court observed as follows;

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi v. K.N. Modi* [(1998) 3 SCC 573] *Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd.* [(1999) 2 SCC 166] and *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd.* [(2003) 7 SCC 418] In *State of Orissa v. Damodar Das* [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an “arbitration agreement” only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(i) *The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.*

(ii) Even if the words “arbitration” and “Arbitral Tribunal (or arbitrator)” are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement.

They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an

arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

In view of law laid down by the Hon'ble Apex Court makes it clear that where an arbitration agreement or clause related to the dispute settlement requires further consent or consensus from the parties by using phrases like, 'if the parties so desire' or 'if they so agree' shall not prevent either of the party to take resort of the arbitration. Even the necessity of the words like arbitration or arbitrator has been dispensed with by the courts, but what is ultimately required is the intention of the parties to refer the dispute to the arbitration for the settlement.

Admittedly, in the case on hand that clause 21 provides that;

“21. Legal Construction: The contract shall be governed by Laws of India including Arbitration and Conciliation Act, 1996 with amendments thereof.”

Two things are discernible from the clause reproduced herein; first being that the word ‘shall’ has been used that makes it clear that the parties in this *lis* intended to go for arbitration; the second being the fact that law related to Arbitration i.e., Arbitration and Conciliation Act, 1996 has found mention in the dispute settlement clause.

20. On the same premise, the judgment in ***State of U.P. v. Tipper Chand*, (1980) 2 SCC 341 at page 341** can also be distinguished. I am not unmindful of the fact that the reason behind bringing this law into our legal system is to ease the process of dispute settlement. The intention of the legislature, therefore, must be kept in mind.

In view of the law laid down by the Hon’ble Supreme Court referred to supra, the judgments relied on by the learned counsel for the respondent, are not applicable to the facts and circumstances of the case on hand.

In view of the foregoing discussion, Sri Justice C.V.Nagarjuna Reddy, former High Court Judge, is appointed as sole arbitrator to resolve the dispute between the applicant and the respondent as per clause 21 of the Standard Terms and Conditions of the Work Order. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016

with effect from 23.10.2015, which shall be borne by both parties in equal measure.

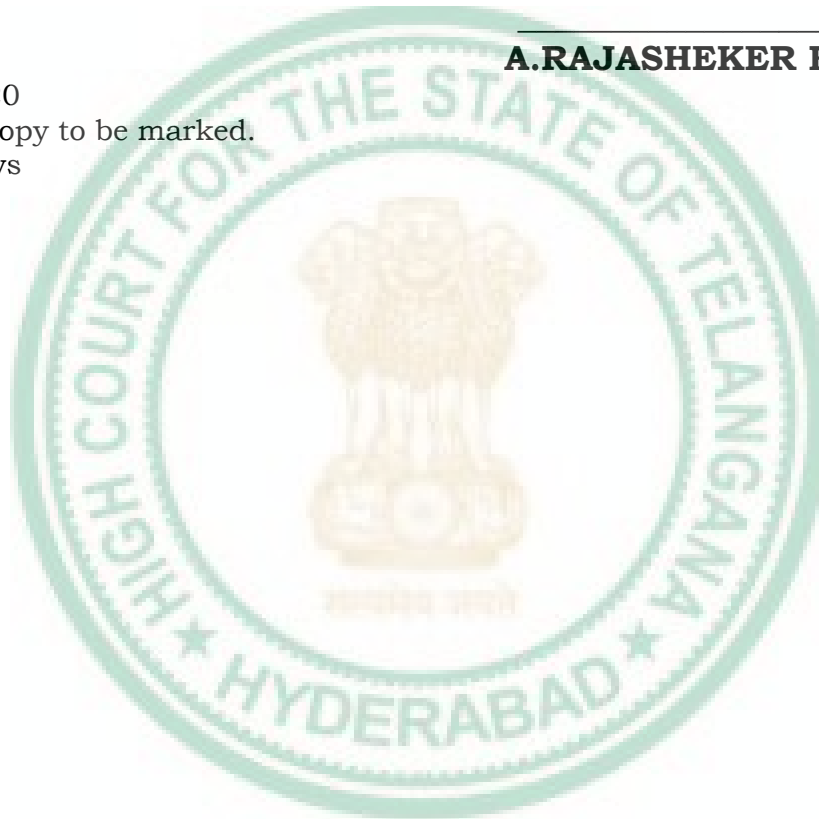
Accordingly, this application is allowed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, shall stand closed.

07-01-2020

Note: LR copy to be marked.

B/okvs

A.RAJASHEKER REDDY, J



HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Arbitration Application No.8 of 2014

Date 07.01.2020.



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