

**AP 251 of 2020**  
**IN THE HIGH COURT AT CALCUTTA**  
**Original Civil Jurisdiction**  
**Original Side**  
**BLA PROJECTS PRIVATE LIMITED**  
**V.**  
**WEST BENGAL POWER DEVELOPMENT CORPORATION LIMITED**

For the Petitioner : Mr. Jaydip Kar, Senior Advocate  
Mr. Suman Kumar Dutt, Advocate  
Mr. Debdeep Sinha, Advocate

For the Respondent : Mr. Sarvapriya Mukherjee, Advocate  
Mr. Arnab Sardar, Advocate

Hearing concluded on : March 9, 2021

Judgment on : March 12, 2021

**DEBANGSU BASAK, J. :-**

1. The petitioner has applied for appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. Learned Senior Advocate appearing for the petitioner has submitted that, the petitioner participated in the notice inviting tender dated January 8, 2019 issued by the respondent. He has referred to the various terms and conditions of the notice inviting tender. He has submitted that, one of the terms and conditions of the notice inviting tender required deposit of earnest money by way of a bank guarantee.

The petitioner had obtained a bank guarantee dated February 11, 2019 for the sum of Rs. 60 lakhs acting in terms of the notice inviting tender. According to him, upon the petitioner downloading the tender documents, and examining the same, the petitioner had found discrepancies in the bid documents. The petitioner had raised queries with regard to such discrepancies. The respondent had remained silent. The respondent had informed the petitioner that the petitioner was declared as the lowest bidder and awarded the contract. The petitioner had written to the Chairman of the respondent explaining the situation and requested him to intervene and not to invoke the bank guarantee. However, the respondent had invoked the bank guarantee.

3. Learned Senior Advocate appearing for the petitioner has referred to the arbitration agreement. He has submitted that, the arbitration agreement is contained in the general conditions of contract. He has drawn the attention of the Court to the definition of contract obtaining in the notice inviting tender. He has submitted that, the parties understood the contract to mean notice inviting tenders, conditions of tendering, tender format, general conditions of contract, supplementary conditions of contract, technical specifications,

schedule of items, letter of acceptance, contract agreement and drawings and any other document which may be included at the time of signing of the contract agreement. He has referred to the Informations to the Bidders and submitted that, Clause 7 thereof required deposit of earnest money. Clause 7 had also reserved the right of the respondent to forfeit the earnest money deposit in case the bidder after obtaining of the tender, withdraws, impairs, derogates or revoke his tender within the validity period or extension thereof. He has referred to Clause (xvii) of the Terms and Conditions of the Tender which prescribes the validity period. He has also referred to Clause 8 of the Special Terms and Conditions which allows forfeiture of security deposit/earnest money. He has submitted that, the respondent could have invoked the bank guarantee and forfeited the proceeds of the bank guarantee only on the basis of the contract which contains an arbitration clause.

4. Learned Senior Advocate appearing for the petitioner has relied upon **2021 Volume 2 Supreme Court Cases 1 (Vidya Drolia & Ors. v. Durga Trading Corporation)** and submitted that, the Court has to refer a matter to arbitration or appoint an arbitrator unless a party has established a prima facie case of non existence of a valid

arbitration agreement by summarily portraying a strong case that it is entitled to such a finding. The Court should refer a matter to arbitration where the validity of the arbitration agreement cannot be determined on a prima facie basis.

5. Learned Senior Advocate appearing for the petitioner has submitted that, although, a paragraph of ***Vidya Drolia & Ors. (supra)*** has been doubted in ***2021 SCC Online SC 13 (N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors.)***, the ratio of ***Vidya Drolia & Ors. (supra)*** so far as reference to an arbitrator is concerned, is still good law.

6. Learned Senior Advocate appearing for the respondent has submitted that, there is no arbitration agreement between the parties. He has referred to the documents and submitted that, the arbitration agreement is a part of the contract which is yet to be signed. He has relied upon ***2006 Volume 1 Supreme Court Cases 751 (Dresser Rand S.A. v. Bindal Agro Chem Ltd.)*** and submitted that, since the parties did not enter into a contract containing an arbitration agreement, the Court should not refer the disputes to arbitration.

7. The respondent had floated a notice inviting tender dated January 8, 2019 in which, the petitioner participated. The notice inviting tender had required the petitioner to deposit a Bank Guarantee by a sum of Rs.60 Lakhs. The petitioner had obtained such Bank Guarantee and submitted the same with the respondent. The petitioner has claimed that, upon uploading/tender documents and after examining the same, the petitioner found discrepancy in the bid documents. The petitioner sought clarification with regard thereto. The respondent did not respond thereto. The respondent had invoked the Bank Guarantee.

8. The petitioner has relied upon an Arbitration Clause in the contract to claim that there is an arbitration agreement between the parties covering the disputes and therefore, after the petitioner had invoked such arbitration clause and on the respondent of agreeing to the arbitration, and arbitrator be appointed by the Court.

9. The petitioner has referred to and relied upon Clause 17 of the general conditions of contract. The petitioner has also referred and relied upon the definition of contract as appearing in the general condition of contract.

10. According to the respondent, the parties did not execute a contract for the general conditions of contract to have invoked into and therefore, an arbitration agreement does not exist between the parties.

11. In ***Vidya Drolia & Ors. (supra)***, the Supreme Court has held as follows :-

*“244. Before we part, the conclusions reached, with respect to question 1, are:*

***244.1.** Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*

***244.2.** Usually, subject matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.*

***244.3.** The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non –existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*

***244.4.** The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.*

**244.5.** *The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*

**244.5.1.** *Whether the arbitration agreement was in writing? or*

**244.5.2.** *Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*

**244.5.3.** *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

**244.5.4.** *On rare occasions, whether the subject-matter of dispute is arbitrable?"*

12. ***Vidya Drolia & Ors. (supra)*** has been questioned on a different point in ***N.N. Global Mercantile Pvt. Ltd. (supra)***.

13. In ***Dresser Rand S.A. (supra)***, the Supreme Court in the facts of that case, has held that, parties agreeing upon the terms subject to which a contract will be governed when made is not the same as entering into the contract itself. A prelude to a contract should not be confused with the contract itself. In the facts of the present case, the parties had altered their material positions at the Notice Inviting Tender stage. None of the parties have disclosed any evidence to establish that they had entered into the contract as enclosed with the

Notice Inviting Tender. The Notice Inviting Tender of the respondent had made over the entire contract document to the intending bidders so that the intending bidders become aware of the terms and conditions of the contract and are in a position to make an effective bid for the contract having known the parameters of the contract.

13. The petitioner has relied upon the Note in the information to the bidders forming part of the Notice Inviting Tender to the effect that, a bidder is required to fill up Annexures X-1 which is the declaration from the bidder regarding acceptance of the Notice Inviting Tender, General Conditions of Contract and the other information uploaded by the respondent regarding the Notice Inviting Tender. The petitioner has also relied upon Clause (xvii) to the effect that, the tender submitted shall be deemed to constitute agreement between the bidder and the respondent whereof such tender shall remain open for acceptance of the respondent for a period of six months from the date of opening of the technical bid and during such period the bidder shall not withdraw his tender or impair or derogate therefrom.

14. Clause 7 of the Terms and Conditions of the Tender has a mandate on the bidder. It has a requirement on the bidder to keep the

bid alive for a period of six months. The same cannot be construed to mean that, the respondent had entered into the contract with the bidder for the work under the notice inviting tender. The respondent had required a period of six months to decide as to whether or not to award the work under the Notice Inviting Tender to a successful bidder. That is not the same as the respondent having entered into a contract with the bidder for the work under the notice inviting tender. Similarly, the note to the information to the bidder cannot be construed to mean that, the respondent had entered into a contract with every potential bidder on such bidder filling up Annexures X-1 to the Information to the Bidders and submitting the same.

15. ***Vidya Drolia & Ors. (supra)*** has required the Court to examine the prima facie validity of an arbitration agreement. In the facts of the present case, the parties have not entered into an arbitration agreement in writing. The parties have not executed a contract which contains an arbitration agreement. In the facts of the present case, the respondent did not award the contract as obtaining in the bid/tender documents. The parties did not sign the contract. Therefore, it cannot be said that there exists an arbitration agreement in writing between the parties.

16. In view of the discussions above, A.P. No 251 of 2020 fails. The same is dismissed without any order as to costs.

**[DEBANGSU BASAK, J.]**