

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**FAO No. 584 of 2016 (O&M)
Date of decision: 19th April, 2023**

Sanjay Sharma

Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam and another

Respondents

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Rose Gupta, Advocate for the appellant.
Mr. B. R. Mahajan, Senior Advocate with
Mr. Kartar Singh Malik, Advocate for respondent No. 1.

AVNEESH JHINGAN, J (Oral):

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for brevity 'the Act') is filed aggrieved of dismissal of objections under Section 34 of the Act.

2. The brief facts are that Dakshin Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as 'the Nigam') invited tender on 27.9.2007 for construction of building for SDO(OP), Fatehabad. The tender was allotted to the appellant. The appellant could not start the work as he was involved in a criminal case and was granted bail on 5.3.2008. In consonance with the terms and conditions of the tender, Nigam got the work completed at the risk and cost of the appellant. The Nigam raised a claim for the loss sustained by getting the construction done through another contractor and an arbitrator was appointed. The proceedings culminated in award dated 2.2.2012. During arbitration proceedings, the appellant filed a counter

claim which was rejected. The objections filed under Section 34 of the Act were dismissed on 20.10.2015, hence the present appeal.

3. Learned counsel for the appellant submits that there was no formal contract signed between the parties, hence the matter could not have been referred for arbitration. He relies upon the decision of the Supreme Court in *Harsha Constructions v. Union of India and others, (2014) 9 SCC 246*.

4. Learned senior counsel appearing for the Nigam submits that the terms and conditions of the tender containing clause for arbitration were signed by the appellant. He further relies upon Clause 73 of the Notice Inviting Tender (NIT) and submits that all disputes in any way connected or arising from the instrument were to be referred for arbitration.

5. The undisputed facts are that tender was allotted to the appellant but it was a non-starter. The terms and conditions provided that in case of appellant failing to do the needful within the stipulated time, the Nigam shall get the work completed from another contractor at his risk and cost. Further that the appellant himself submitted to the jurisdiction of the arbitrator and filed a counter claim.

6. The issue now raised by learned counsel for the appellant was dealt with in detail and rejected by the Additional District Judge by relying upon the fact that the appellant had signed the terms and conditions of NIT produced as Annexure C-2.

7. Relevant portion of Clause 73 of the terms and conditions of the tender is reproduced below:

“CLAUSE 73: ARBITRATION

If any question, dispute, difference or objection whatsoever arises in any way connected with or arising out of this instrument or meaning or operation of any part thereof or the rights, duties or liabilities of either party, including the termination of the contract by either party and correctness thereof, at any stage whatsoever, it shall be referred to the

arbitration of the Chief Engineer of DHBVNL/ HVPNL/ UHBVNL/ HPGCL or his nominee not below the rank of a Superintending Engineer subject to the following conditions:-

xx

xx

xx”

8. Clause 73 of the terms and conditions is widely worded. The dispute or objection in any way connected or arising out of the instrument and its meaning or operation are to be settled through arbitration.

9. It is not disputed that the terms and conditions of the tender were signed by both the parties and thereby accepting Clause 73 i.e. dispute resolution through arbitration.

10. Section 7 of Act is reproduced for ready reference:-

“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 [including communication through electronic means] 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. Section 7 defines arbitration agreement as an agreement whereby the parties agree that all or certain dispute arising or which may arise, in respect of defined legal relationship, contractual or otherwise shall be submitted for arbitration. Sub-section 2 provides that arbitration clause may be in the contract or in a separate agreement. As per sub-section 3, agreement should be in writing. Sub-section 4 stipulates that written agreement of arbitration can be contained in document signed by the parties; exchange of letter, telex, telegram or other means of telecommunication providing a record of agreement. As also if the existence of an agreement alleged in a statement of claim and defence is not denied by other party. Under Sub-section 5 a document containing arbitration clause referred to in a written contract in a manner making the clause part of the contract would constitute an arbitration agreement.

12. The contention that there was no formal contract between the parties in which there was an arbitration clause is noted to be rejected. The arbitration clause was part of terms and conditions of NIT which was signed by both the parties. The pre-requisite of Section 7 of the Act for Arbitration agreement are fulfilled. Moreover, the appellant submitted to jurisdiction of arbitrator by filing counter claim.

13. In ***J. K. Jain and others v. Delhi Development Authority and others, 1996 AIR (SC)318***, the Supreme Court while dealing with the contention “the stand of the appellant is that the said clause shall not be deemed to be a part of the agreement, inasmuch as it is only part of the tender form which is issued to every contractor intending to supply materials to the respondent” held as under:

“It is true that there must be an arbitration agreement, to confer jurisdiction on the Arbitrator to hear and decide the dispute. Where there is no such agreement there is an initial want of jurisdiction. That is why it has been impressed by Courts that one of the essential ingredients of submission to

arbitration is that the parties should agree that the dispute should be determined by an Arbitrator. Where there is an arbitration clause in a contract, it amounts to two contracts into one, one relating to the execution of the work entrusted in the manner prescribed and the other how to resolve the dispute in event any such dispute arises in respect of the said contract. Whenever one party to the dispute asserts that there is an arbitration agreement by which the parties had agreed to refer the dispute to an Arbitrator which is disputed and challenged by the other party to the agreement, it has to be examined and determined. To constitute "an arbitration agreement" it is not necessary that there should be a formal agreement or that the terms should all be contained in one document. All that is necessary that from documents it must appear that parties had agreed to submit present or future differences to arbitration."

14. The decision of the Supreme Court in **Harsha Constructions case (supra)** relied upon by learned counsel for the appellant is of no help as the Supreme Court was dealing with the following issue:

“When in a contract or arbitration, certain disputes are expressly 'excepted', whether the arbitrator can arbitrate on such excepted issues and what are the consequences if the arbitrator decides such issues?”

15. No case is made out for interference, the appeal is dismissed.
16. Since the main appeal has been dismissed, pending application, if any, is rendered infructuous.

[AVNEESH JHINGAN]
JUDGE

19th April, 2023

mk	1. Whether speaking/ reasoned	:	Yes / No
	2. Whether reportable	:	Yes / No