
(2019) 09 DEL CK 0098

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 204 Of 2019,
Miscellaneous Application No. 8616 Of 2019

Apm Air Cargo Terminal Services & Anr

APPELLANT

Vs

Celebi Delhi Cargo Terminal Management India Private
Limited & Anr

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(b), 2(h), 7, 7(2), 7(3), 7(4), 9, 11, 12

Citation : (2020) 1 R.A.J. 658 : (2019) 264 DLT 81 : (2019) 177 DRJ 502 :
(2019) 6 ArbLR 66

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : D. N. Goubardhan, Anubha Agarwal, Rakesh Tikku, Sarul Jain, Kshirja Agarwal, Akshita, Sandeep Soni, Samarendra Kumar

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. The present petition has been filed by the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996, whereby they are seeking directions against the respondent no.1 not to liquidate and encash the Bank Guarantees dated June 6, 2018 and August 2, 2018 and related prayers.

2. The facts as noted from the petition are, there are two petitioners. Petitioner no.1, APM Air Cargo Terminal Services is a division of petitioner no.2 namely APM Infrastructure Pvt. Ltd. which is duly registered under the Micro, Small and Medium Enterprises Development Act, 2006. Respondent no.1 namely Celebi Delhi Cargo Terminal Management India Pvt. Ltd. has been awarded tender by the Delhi International Airport Pvt. Ltd. (DIAL) for granting concession for upgradation, modernising, financing, operating, maintaining and managing the cargo terminal and for the provision of services at the Airport.

3. Respondent no.1 invited proposals from service providers for providing Service Level Agreement ("SLA" in short) based outsourced manpower management at Import International Cargo Terminal at IGI Airport, New Delhi on January 31, 2018. Being successful, the letter of award ("LOA" in short) dated March 26, 2018 was issued in favour of the petitioners.

4. It is the case of the petitioners that the respondent no.1 did not provide any further document / agreement to the petitioners for nearly two months thereafter. However, the petitioners commenced operation w.e.f 01.04.2018 in accordance with the common consensus of the parties on the terms of the agreement. The agreement was duly acted upon by the respondent no.1 and also the payments due to the petitioners under agreement were released from time to time. Clause 12 of the agreement which is based on Request for Proposal ("RFP" in short), stipulates the terms between the parties, which elaborately provides for mechanism of dispute resolution. Respondent No.1 never raised any dispute nor started any negotiations. It was considered that there was a dispute necessitating invocation of Bank Guarantees. The respondent no.1 neither referred the matter for Arbitration and Conciliation nor appointed an Arbitrator. However, the petitioners are in the process of commencing arbitration proceedings. Since the agreement provided by respondent no.1 was at material variance from the terms of RFP in respect of increased Bank Guarantee of Rs. 4.14 Crores, the payment of gratuity, ex-gratia etc. and deployment of additional manpower at domestic Air Cargo Terminal of the manpower, and huge financial implications, the petitioner vide e-mail dated March 30, 2018 enclosed the clauses of the agreement which were required to be discussed. There was no disagreement about all other terms of the contract and the petitioner handed over the Bank Guarantees and performed services during the contract period accordingly.

5. It is averred that the petitioners submitted two Bank Guarantees dated June 6, 2018 and August 2, 2018 issued by the respondent no.2 Corporation Bank for a total amount of Rs. 2.08 Crores in favour of the respondent no.1. The petitioners submitted the said Bank Guarantees to respondent no.1 vide letter dated August 8, 2018. The letter mentioned that any action by respondent no.1 on the Bank Guarantees in any form be initiated post mutual consent only. The said letter was duly received, acknowledged and accepted by C.F.O of respondent no.1. Thereafter the petitioner vide e-mail dated October 18, 2018 again requested the respondent no.1 to look into the concerns in the agreement on urgent basis. However, since the agreement was mutually agreed in principle by both the parties, the petitioner continued working and respondent no.1 made payments, though delayed. After the discussing the concerns of the petitioners, the respondent no.1 vide e-mail dated February 5, 2019 asked the petitioners to sign the agreement and submit points of differences for subsequent discussion. Respondent no.1 vide return e-mail of the same date i.e. February 5, 2019 promptly assured that concerns raised by the petitioners can be discussed further and the agreement be signed. It is averred that vide e-mail dated

February 6, 2019 exchanged between the petitioners and the respondent no.1, the request for addressing the concerns by the petitioners and direction to sign the agreement by the respondent no.1 were reiterated.

6. It is the case of the petitioners that vide e-mail dated February 6, 2019, petitioners categorically requested that certain clauses, in the agreement, be put on hold and the issues can be concluded. It is averred that the petitioners sent a copy of the duly signed agreement to respondent no.1. After completion of the period of contract, the operations of the Import Cargo Terminal were handed over by the petitioner at midnight of March 31, 2019 to the new vendor.

7. It is the case of the petitioners that part payments for the last month of March, 2019 were still outstanding and have to be made by respondent no.1 to the petitioners. It is their case that the respondent no. 1 vide two separate e-mails dated April 8, 2019 admitted an outstanding payment of more than Rs. 35 Lacs. It is also their case that the petitioners duly acknowledged the e-mail assuring the release of fund and further requested the release of Bank Guarantees of Rs. 2.08 Crores.

8. It is averred in the petition that the petitioner vide email dated April 9 2019 intimated respondent no.1 that the process of salary credit into each workmen account and cheques are being readied for transfer, as committed. Hence, in view of the same, it was again requested that Bank Guarantees of Rs. 2.08 Crores be released to the petitioner. It is the case of the petitioners despite the fact that respondent has been assuring the petitioners that the concerns of the petitioners would be discussed after the signing of the agreement, the petitioners were shocked to receive email dated May 22, 2019, stating that concerns of the petitioners are not accepted and contract is not executed and not valid.

9. It is the case of the petitioners that they vide email dated May 23, 2019 reiterated that the points of concern were being repeatedly discussed as they have financial and statutory implications, that were never a part of RFP and inserted in the agreement unilaterally. It was further stated that earlier there was no mention to remove the concerns. In fact, it has always been stated that points raised can be discussed and acted upon. Since the payments had not been made to the petitioner even after 20 days of commitment, the petitioner vide e-mail dated May 29, 2019 again requested respondent no.1 to release balance amount of more than Rs. 35 Lacs for the month of March, 2019 as the petitioner was in urgent need of funds and had complied with all statutory compliances, but the respondent no.1 vide letter dated June 20, 2019 requested respondent no.2 bank to liquidate the Bank Guarantees submitted by the petitioner. Pursuant thereto, petitioner received an e-mail dated June 21, 2019 from respondent no.2 bank to make arrangements for deposits of the funds in the bank account since respondent no.1 has sought for encashment of both the Bank Guarantees submitted by the petitioner. It is this action which has been challenged by the petitioners.

10. It is the case of the respondent No.1 in their reply that RFP and LOA do not have any arbitration clause which was only part of the MSA which by admission of both the parties can be established to have not been executed, as such no occasion or cause of action arose for the petitioner to file the present petition under Section 9 of the Arbitration and Conciliation Act, 1996. Further it is stated that the respondent no.1 invited RFP for providing SLA based Outsourced Manpower Management Services at the Import International Cargo Terminal, IGI Airport, New Delhi. The petitioner was the successful bidder and was awarded LOA dated March 26, 2018 by the respondent No.1 for providing SLA based outsourced manpower management services on 24 x 7 basis effective from April 1, 2018. As per the expressed terms of both the RFP and LOA the bidder / petitioners will be solely responsible for all statutory liabilities and payments including but not limited to PF, ESIC, Gratuity, Leave, Bonus, Medi Claim, Workmen Compensation, Group Personal Accidental Policy etc. with respect to the manpower deployed by it. By way of LOA, it was also accepted by the parties that cost on account of the above-mentioned legal / statutory obligations were inclusive in the tonnage rate and costs accepted by the petitioners and payable by the respondent No.1. That apart, from the above and other conditions precedent in the RFP and LOA, the payments against the services rendered by the petitioners were divided into two parts, wherein part 1 was payable upon submission of monthly invoice and part 2 was payable upon submission of cogent proof by petitioner to demonstrate discharge in compliance of all statutory / labour related obligations and compliances.

11. It is the case of the respondent No.1 that vide RFP and LOA the petitioners also accepted to render services as per Service Level Set, communicated and accepted by them. The RFP and LOA also had condition of submission / furnishing of Performance Bank Guarantees of INR 2.08 Crores as security to respondent no.1 against any liability whatsoever that may be accrued upon the respondent No.1 due to non-performance, non-discharge or any faults committed by the petitioner in discharge of its financial obligations as agreed.

12. It is the case of the respondent No.1 that RFP and LOA both provided that the parties shall enter into a detailed Service Agreement namely "Import Cargo Handling SLA Based Outsourced Manpower Services Agreement" ("MSA" in short). In pursuance thereof, the respondent No.1 provided the printed copy of the said agreement to the petitioners and during pending execution / signing of the said agreement, the petitioners took over the services effective from April 1, 2018 and started rendering services in accordance with RFP and LOA. During this period, even though, the Agreement was not executed, the petitioner furnished Bank Guarantees of an amount of INR 2.08 Crores, which was condition precedent in LOA and also MSA, proposed and pending to be executed. The said Bank Guarantees were unconditional and irrevocable agreement between the banker and respondent no.1, which categorically stated that at the mere request of the respondent no.1, the bank shall immediately on its first demand pay the guaranteed amount to respondent no.1 without any protest or demur, contest,

reservation, recourse, reference for breach of failure of petitioners to perform any of its obligations under the agreement.

13. It is the case of the respondent no.1 that after a lapse of first three quarter months" of service being rendered by the petitioners, it unilaterally raised the conditions to be included in the draft MSA, which were never accepted by the respondent No.1. According to the respondent No.1 the unilateral conditions raised by the petitioners were in the nature of financial implications / obligations to be undertaken by it and were entirely in contradiction with the terms and conditions of RFP and LOA, the cost of which was already considered and included in the cost payable by respondent no.1 to the petitioners for the services rendered. However, the unilateral conditions raised by the petitioners were not accepted by respondent no.1. Such conditions hampered performance under the agreement / arrangement between the parties and was causing unwarranted and unacceptable financial implications upon the respondent no.1. As a concluding measure, respondent no.1 vide its letter dated March 26, 2019 was constrained to conclude the services of the petitioners effective from April 1, 2019 and requested the petitioners to settle all dues and carry out full and final settlement of its departing employees by paying all legal dues as required under the applicable laws.

14. It is the case of the respondent No.1 that several discussions and meetings between the parties took place thereafter and the petitioners were informed several times that the dues of its employees on account of bonus, gratuity and leave encashment are still unpaid. During this process, the full and final settlement and accounting of payables towards SLA failures by petitioners, charges for uniforms and other VSS compliances were also informed and requested to be paid by the petitioners to the respondent No.1. In fact, it is the case of the respondent no.1 that during the full and final settlement, the statutory dues accepted under RFA and LOA and MSA, which are payable by the petitioner ran over the amount of the Bank Guarantees. It was under these circumstances, when the petitioner was admittedly not willing to take discharge of its own statutory and legal obligations which ran into huge sums, that the respondent no.1 was left with no other alternative but to seek encashment of Bank Guarantees specifically furnished by the petitioners to discharge its own liabilities. As such the entire averments of the petitioners as stated in the petition that there were no dues payable by the petitioners or that the respondent no.1 has allegedly, fraudulently acted in encashment of Bank Guarantees does not stand any ground and are liable to be rejected. In fact, they have stated that the present petition has become infructuous as the Bank Guarantees have already been encashed / liquidated even before the first listing of the instant matter and on this score the petition needs to be dismissed. They have also justified the encashment of Bank Guarantees in terms thereof and as such the impugned action cannot be interdicted.

15. Rejoinder has been filed by the petitioners controverting the averments made

in the reply.

16. Mr. D. N. Goubardhan, learned counsel appearing for the petitioners would submit that the impugned action of the respondent is illegal and arbitrary. According to him, as per the agreement, the petitioners were to be paid at a specified fixed rate per tonnage of cargo handled / services rendered. Liability of the petitioners to pay any amount to respondent No.1 could have arisen only on account of liquidated damages due to mishandling of cargo by the petitioners if any. According to him, as per the agreement, the amount of penalty / liquidated damages levied on the petitioners were to be based on joint investigation report and all claims had to be reconciled on a monthly basis. According to him, it is a matter of record, that no grievance / claim was ever raised by the respondent No.1 regarding any amount payable by the petitioners during the entire period of one year. Thus, there was no liability against the petitioners for which Bank Guarantees could be liquidated by the respondent No.1. On the contrary, in fact, payments had to be received by the petitioners for services rendered as per the agreement. He submitted that the action of the respondent No.1 in liquidating the Bank Guarantees is clearly illegal, malicious, fraudulent, unjust and to cause irreparable harm and injury to the petitioners.

17. It is also his submission that the Bank Guarantees clearly stipulate that the respondent No.2 would be liable to pay only on failure of the awardee to perform its obligations. He states that as per the agreement if any claims arose in favour of the respondent No.1, upon failure of the petitioners to perform its obligation, the same would have to be jointly inspected, monthly reconciled and mutually agreed. Since, none of the above steps were taken by the respondent No.1, Bank Guarantees could not have been encashed in any case.

18. In substance, it is his plea that liquidating Bank Guarantees in violation of the terms of the agreement is clearly mala fide and unjustified. In this regard, he has drawn my attention to letter dated June 20, 2019 issued by the respondent No.1 to the Bank for liquidating Bank Guarantees and states it is clearly mala fide inasmuch as it does not disclose any cause of action for invoking the Bank Guarantees. It does not mention that the respondent No.1 suffered any loss for which the Bank Guarantees are being invoked. The Bank Guarantees were not unconditional, but conditional upon the decision that petitioners have failed to discharge obligations under the agreement. The respondent No.1 has made a very bald unilateral statement, which could not be the basis for liquidating the Bank Guarantees. There has been no adjudication or decision making which could have led to the conclusion that the petitioners have failed to discharge its obligations under the agreement. Rather it is his submission that the petitioners had duly discharged all its obligation under the agreement. Hence, the Bank Guarantees could not have been invoked.

19. It is also his submission that after the term of contract, the petitioners have been requesting the respondent No.1 to make payment of balance admitted dues, which have been outstanding for more than two months, and to return

Bank Guarantees since the term of the contract had expired and all compliances had been made. Still, the respondent No.1 neither made any grievance nor communicated any amounts payable by the petitioners. The petitioners were under bona fide belief that the payments due to the petitioners would be released shortly and Bank Guarantees submitted would also be returned. In any case, it is his submission that after the expiry of the period of contract, the Bank Guarantees could not have been invoked. In support of his submission Mr. D. N. Goubardhan has relied upon the following judgments:

- (i) Hindustan Construction Co. LTD. v. State of Bihar and Others, (1999) 8 SCC 436;
- (ii) United Commercial Bank v. Bank of India and Others., AIR 1981 SC 1426;
- (iii) Gangotri Enterprises Limited v. Union of India and Others., (2016) 11 SCC 720;
- (iv) Ansal Properties and Industries Ltd. v. Union of India, 1994 (54) DLT 307;
- (v) Jyoti Structure Ltd. v. Dakshinanchal Vidyut Vitran Nigam Ltd. & Ors. 2016 (233) DLT 207; and
- (vi) Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544.

20. At the outset, Mr. Rakesh Tiku, learned Senior Counsel appearing for the respondent No.1 would submit that the present petition is not maintainable, inasmuch as there is no agreement between the parties which contemplates, dispute between the parties shall be referred to the arbitration for adjudication. He qualifies his submission by stating that the RFP and LOA did not have any arbitration clause. The arbitration clause was only part of MSA, which by clear admission of both the parties can be established to have not been executed.

21. In substances, it is his plea that in the absence of any arbitration clause in any agreement between the parties, the parties cannot seek adjudication of the dispute through a sole Arbitrator / Arbitral Tribunal, and the present petition under Section 9 which pre-supposes adjudication of disputes between the parties by way of arbitration, needs to be dismissed.

22. On merit, he justifies the invocation of the Bank Guarantees, inasmuch as the same has been in terms of the conditions stipulated in the Bank Guarantees. In this regard, he has drawn my attention to page 62 of the documents along with page 193 which is letter of invocation dated June 20, 2019 of the respondent No.1. In support of his submission Mr. Rakesh Tiku has drawn my attention to two judgments in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineer Works (P) Ltd. and Ors., MANU/SC/0639/1997 and IVRCL Ltd. v. Rail Vikash Nigam Limited and Ors., MANU/DE/5916/2017.

23. It is also the submission of Mr. Rakesh Tiku that the present petition has become infructuous, inasmuch as after the invocation of the Bank Guarantees vide letter dated June 20, 2019 the respondent No.1 is in receipt of letter dated

June 25, 2019 from the respondent No.2 Corporation Bank whereby the Bank had forwarded two demand drafts for Rs. 1,48,00,000/- and the invocation of the Bank Guarantees is complete. In any case, it is his submission that the amounts have since been credited in the account of the respondent no.1, the petition has become infructuous.

24. In rejoinder submissions Mr.D. N. Goubardhan would deny the submissions made by Mr. Rakesh Tiku that the present petition has become infructuous by stating that it is the respondent No.1 which mislead the Court during the hearing on June 26, 2019 by placing the letter dated June 23, 2019 addressed by the respondent No.2 Bank to the respondent No.1 informing them that the Bank Guarantees have been invoked and encashed and the demand drafts have been remitted. According to him, the said statement was made only to thwart adjudication by this Court regarding grant of interim protection to the petitioners. The respondent No.1 has undermined the majesty of this Court by making false statement. It is his case that after the date of hearing on June 26, 2019 the petitioners wrote an e-mail to respondent No.2 Bank to provide relevant documents relating to payment made to respondent No.1. The respondent no.2 Bank has in unequivocal terms stated that the demand drafts were sent to respondent No.1 through registered post A.D. on June 26, 2019. It is also stated by the bank that the demand drafts were encashed only on June 28, 2019.

25. In substance, it is his plea that the misleading statement was made intentionally, deliberately, malafidely on behalf of the respondent No.1 which inferred and obstructed the administration of justice by this Court and in the peculiar facts and circumstances of this case by relying upon the judgments of the Supreme Court in Meghmala and Ors. v. G. Narasimha Reddy and Ors., (2010) 8 SCC 383 and Oswal Fats and Oils Limited v. Additional Commissioner (Administration), Bareilly Division, Bareilly and Ors., (2010) 4 SCC 728; wherein the party has abused the process of Court / law and played fraud on the Court, in such eventuality, the party i.e. respondent No.1 be directed to deposit the amount received before this Court. Even on the plea of maintainability of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 on the ground that there is no arbitration clause in the agreement, he submits that the respondent No.1 cannot deny the agreement and invoke the Bank Guarantees under the agreement at the same time. In other words, he submits that there is an arbitration clause in the agreement executed between the parties.

26. Having heard the learned counsel for the parties, the first and foremost question which arises for consideration is whether the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 is maintainable. It is a conceded case of the parties that the respondent No.1 had issued a RFP for SLA based outsourced manpower management at Import International Cargo Terminal at IGI Airport, New Delhi. The petitioners had also bid for the same and being successful in the bid were issued the LOA. The letter of award dated March 26, 2018 inter alia contemplates the validity of the period of the term of contract

as three years. I have been informed that the said period was later reduced to one year. It stipulates that the petitioners shall furnish performance Bank Guarantees within seven working days for an amount of Rs. 2.08 Crores. It is necessary to state here that the LOA contemplates contract with detailed terms and conditions along with SLA as per the RFP terms and conditions will be issued to the petitioners within two days from the date of acceptance of LOA.

27. There is no dispute that the petitioners were issued a contract called "Import Cargo handling SLA based outsourced manpower services agreement". The said agreement was to be executed by both the parties. There is no dispute that the petitioners had signed the said agreement and in fact had sent a copy of the same to the respondent No.1. It appears certain issues arose between the parties with respect to certain clauses in the agreement. It transpired that the respondent No.1 in its communication dated May 22, 2019 (page 187 of the document) has stated as under:

"This is an response to your trailing Email, we wish to inform you that the contract shared by us was executed by you with certain conditions which were not acceptable to us and we have repeatedly requested you to remove the conditions since they are not in line with RFP and letter of intent accepted by you, but you failed to accept the same. Hence the contract is not executed and is not valid."

The aforesaid letter of the respondent No.1 clearly reveal (till the term of contract which expired on March 31, 2019) that the respondent no.1 did not sign the contract.

28. If that be so, the reference made by the petitioners in the petition and also by Mr. Goubardhan to the terms of the agreement, is the one that has not been signed by the respondent No.1. In fact, I find that a copy of the agreement annexed by the petitioner No.1 (at pages 81-180) shows that the same has been signed only on behalf of the petitioners and not on behalf of respondent No.1. It is in this draft agreement that Section 12 specify to dispute resolution mechanism / arbitration clause.

29. The question would arise that as the respondent No.1 has not signed the contract which stipulates the arbitration clause can it be said that there is a valid arbitration agreement between the parties which need to be adhered to. The answer to this question has to be in the negative. This I say so, in view of Section 7 of the Arbitration and Conciliation Act, 1996 which refers to "arbitration agreement" to mean the following:

"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."

30. From the perusal of the definition, it is clear that an arbitration agreement can be in the form of; (1) an arbitration clause in a contract or in the form of a separate agreement; (2) it shall be in writing; (3) an arbitration agreement is in writing if it is contained in a document "signed by the parties". Admittedly, there is no document shown by the petitioners which has been signed by the parties and contains an arbitration agreement / clause. Even the letters, telex, telegrams or other means of telecommunication and other means of communication exchange between the parties do not show that the parties have agreed for adjudication of the disputes through the process of arbitration. It is also not the case of the petitioners that exchange of statements of claim and defence between the parties reveal the existence of an agreement and not denied by the respondent No.1.

31. In this regard, I may refer to the judgment of the Supreme Court in the case of Karnataka Power Transmission Corporation Limited and Ors. v. Deepak Cables (India) Ltd., MANU/SC/0290/2014 wherein paras 8 and 9 has stated as under:

"8. Before we advert to the rival submissions advanced at the Bar, we think it appropriate to refer to Section 7 of the Act and what it conveys and, thereafter, refer to few authorities to understand what constitutes an arbitration clause in an agreement entered into between two parties. Section 7 of the Act 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 statement 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."

9. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/ disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute.

The Supreme Court even in the case of *Vijay Kumar Sharma Alias Manju v. Raghunandan Sharma Alias Baburam*, (2010) 2 SCC 486 has in paras 17 and 18 held as under:

"17. Sub-sections (2) and (3) of section 7 require that an arbitration agreement shall be in writing (whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement). Sub-section (4) of Section 7 enumerating the circumstances in which an arbitration agreement will be considered as being in writing, is extracted below:

"7(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.

18. In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in section 7 between the parties."

32. Further, in the case of Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors., MANU/SC/0913/2016 the Supreme Court referring to Section 2(b) of the Arbitration and Conciliation Act, 1996 which defines "arbitration agreement" and also to Section 2(h) which defines "party" and Section 7 has in paras 23 and 24 held as under:

"23. A reading of the aforementioned sections in juxtaposition goes to show that in order to constitute a valid, binding and enforceable arbitration agreement, the requirements contained in Section 7 have to be satisfied strictly. These requirements, apart from others, are (1) there has to be an agreement (2) it has to be in writing (3) parties must sign such agreement or in other words, the agreement must bear the signatures of the parties concerned and (4) such agreement must contain an arbitration clause.

24. In other words, aforementioned four conditions are sine qua non for constituting a valid and enforceable arbitration agreement. Failure to satisfy any of the four conditions would render the arbitration agreement invalid and unenforceable and, in consequence, would result in dismissal of the application filed under Section 11 of the Act at its threshold."

From the above, it follows that the qualification which the person, invoking jurisdiction of the Court under Section 9, must possess is of being "party" to an arbitration agreement and a person not party to an arbitration agreement cannot enter the Court seeking protection under Section 9 of the Arbitration and Conciliation Act, 1996.

33. In fact, it is the case of Mr. D. N. Goubardhan that the respondent No.1 cannot deny the agreement and invoke the Bank Guarantees under the agreement at the same time. In other words, the respondent no.1 cannot disown the arbitration clause as they have invoked the Bank Guarantees. This plea of Mr.D. N. Goubardhan does not answer the question whether there is a valid arbitration agreement between the parties which would make the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 maintainable.

34. It is one thing to say that there is no arbitration agreement, but other that the respondent No.1 has invoked the Bank Guarantees.

35. I may state here as the respondent No.1 had vide letter dated May 22, 2019, refused to sign the MSA, it cannot be said that the agreement has been duly executed and that arbitration clause in the agreement shall govern the relationship between the petitioners and the respondent No.1 insofar as the reference of the dispute to arbitration.

36. Further, it is not even the case of Mr. D. N. Goubardhan that the letters, telex, telegrams or other means of telecommunication have been exchanged between the parties for referring that dispute to the arbitration. Nor, it is the case of the petitioners that there is an exchange of statements of claim and defence in

which the existence of the agreement is alleged by the petitioners and not denied by the respondent No.1.

37. Accordingly, in view of my above discussion, I hold that the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable. The petition is dismissed. The petitioners shall be at liberty to seek such other remedy as available in law.

I.As. 8616/2019, 10285/2019

Dismissed as infructuous.