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**(1983) 04 MP CK 0017**

**In the Madhya Pradesh High Court**

**Case No : Civil Revision No. 320 of 1982**

Chitram Company Private Ltd., Madras

APPELLANT

Vs

Madhya Pradesh Electricity Board, Rampur, Jabalpur

RESPONDENT

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**Date of Decision : 27-04-1983**

**Acts Referred:**

**Citation : AIR 1984 MP 88 : (1983) ILR (MP) 572 : (1984) JLJ 310**

**Hon'ble Judges : B.C. Varma, J**

**Bench : Single Bench**

**Advocate : T.K. Seshadri and V.R. Rao, for the Appellant; M.L. Jaiswal, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

B.C. Varma, J.—This and the other Civil Revision No. 337 of 1982 involve common question of facts and law and are, therefore, being decided by this common order.

2. The non-applicant Madhya Pradesh Electricity Board floated two tenders for the supply of turbine hall crane (E.O.T.) for its two Thermal Power Stations at Korba and Salpura. The applicant M/s. Chitram and Company Private Ltd., Madras made two offers dated 7-8-1974 to supply the cranes. By letters, dated 30-12-1974 and 24-1-1975, addressed to the applicant, the Board directed it to make the supply at Satpura and Korba Thermal Power Stations respectively. The contract to supply the crane at Korba Thermal Power Station was cancelled and penalty was levelled in respect of the supply at Satpura Thermal Power Station. Dispute thus arose between the applicant and the non-applicant regarding those contracts to supply the cranes. The applicant after due notice to the non-applicant appointed Shri M.A. Krishna Murthy as its arbitrator and called upon the non-applicant to nominate its arbitrator. The Board nominated Justice K.L. Pandey as its arbitrator although at the same time contended that no arbitration agreement existed and the dispute raised by the applicant was not referable to any arbitration. Justice S.M.N. Raina was named as an umpire. The arbitrators

entered upon the arbitration and the applicant filed two claims before them in respect of each of the two contracts. The Board denied the applicant's claim and made a counter-claim. At the same time, the Board also contended that in absence of any agreement between the parties to refer the dispute to arbitration, the proceedings before the arbitrators were wholly without jurisdiction. The Board then preferred two applications before the District Judge, Jabalpur, u/s 33 of the Arbitration Act with a prayer that it be declared that the proceedings before the arbitrators are wholly without jurisdiction in absence of any arbitration agreement. By the impugned order, the applications have been allowed and it has been held that between the parties there exists no arbitration agreement relating to the two contracts and, therefore, the disputes relating to and arising out of those contracts were not referable to the arbitrators.

3. The bone of contention on behalf of the applicant has been that the circumstances and the documents exhibited in the case do spell out an agreement between the parties to refer the dispute to arbitration. Section 2(a) of the Arbitration Act defines an arbitration agreement to mean a written agreement to submit present or future disputes to arbitration, whether an arbitrator is named therein or not. This definition is taken from the English Arbitration Act, 1934 and is retained in Indian Arbitration Act of 1940, It postulates that an agreement to refer disputes to arbitration must be in writing. All valid written documents to submit differences to arbitration, whether such differences are present or future and whether or not an arbitrator is named in the agreement, are arbitration agreements within the meaning of Section 2(a). Thus, the basis of an agreement under the Act is a written submission by the parties. No particular form is necessary, but the words used for this purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. It is not even necessary that the formal word such as arbitration is used but what is essential is that the parties should intend to make a reference or submission to arbitration and should only be *ad idem* in this respect. (See *Ram Lal Jagan Nath Vs. Punjab State and Another*, The agreement expressed in writing should be such that it binds both the parties and that signatures of both the parties on the agreement is not essential. It should be expressed by one party in writing and should be accepted by the other. The acceptance may even be oral. In *Chandi Prasad Misir Vs. Balaji Misir and Others*, , Sulaiman, J. observed;

"It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents, and a "written agreement" does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient.

And, in *Union of India (UOI) Vs. A.L. Rallia Ram*, , the law has been stated in these terms (para 10):

"A writing incorporating a valid agreement to submit differences to arbitration is,

therefore, requisite; it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both "he parties thereto, nor is it required to be signed by the parties. There must be an agreement to submit present or future differences to arbitration, this agreement must be in writing and must be accepted by the parties."

Arbitration agreement may at the same time contain a collateral clause and may even arise by incorporation of one document containing an arbitration clause in another under which the dispute arises. (See Ram Lal's case (supra)). In a Division Bench of the Allahabad High Court, in Fertilizer Corporation of India Limited Vs. Domestic Engineering Installation, , the facts were that A accepted the tender for execution of certain work offered by B and gave his work order to B which contained the terms of the contract including the arbitration clause and, in spite of the fact that, the formal agreement was signed at a later date, the parties treated themselves bound by that agreement from the date of the work order, It was held that an arbitration agreement was in existence from the date of the work order.

4. The position in the present case is that the tender floated by the non-applicant Board contained the specification of the work and terms of the contract including the General Conditions of the Contract (Ext. P/1) Clause 43 of which is an arbitration clause. Clause 46 of the General Conditions of the Contract (Ext. P/1) shows that this general condition together with specification, tender drawings and guaranteed technical particulars, tender data with subsequent agreed modification thereof shall constitute the entire agreement between the parties in respect of the subject-matter hereof. No variation or modifications of the Contractor, waiver of any of the terms and conditions thereof shall be deemed valid unless agreed in writing signed by the parties thereto. On this tender being floated the applicant made the offer, vide Exhibit P/2. Clause 34 of that offer, upon which the decision of the lower Court is based, says "the offer to design, manufacture, supply and erect the above crane given in this quotation is not subject to any other specifications, terms or conditions other than those given in this tender." This tender was accepted and the work order per Ext. P/4, was issued by the Board. From these documents what appears is that the tender was floated with general conditions of the contract (Ext. P/1) as forming terms and conditions of the tender, but at the time of making the offer, the applicant mentioned in Ext. P/2 that the offer is not subject to any other specifications, terms or conditions other than those given in this tender. The plain meaning of this is that the applicant had made the offer on the terms and conditions expressly set out in Ext. P/2. Not only that it did not agree to any other condition or terms but vide Clause 34 of Ext. P/2, it expressly deviated from any other condition of tender. It cannot be denied that the applicant had 4 right to do so under the law and in terms of Clause 46 of Ext. P/1, Exhibit P/3 shows that the offer so made vide Ext. P/2 was the offer which was accepted by the Board. It may be noticed that in Ext. P/3 while communicating acceptance of offer to the applicant, the Board has expressly mentioned other major terms and conditions

of the contract. They all appear, at page 2 of Ext. P/3 . and relate to delivery and terms of payment. This was followed by the detailed work order (Ext. P/4). In Exhibit P/4 also there is no mention that general conditions of contract (Ext. P/I) shall be applicable to the contracts in question. It is difficult to accept the argument that in spite of express expression, at the time of making of the offer which was accepted that the offer was not subject to any other specifications, terms or conditions other than those mentioned therein, the general terms and conditions of the contract (Ext. P/I) would still form the part of the ultimate concluded contract between the parties. By expressly excluding any other terms and conditions to the contract in question, the general terms and conditions of contract (Ext. P/I) cannot even by incorporation be read as terms and conditions of the contract between the parties. It is also difficult to accept the contention that Clause 34 of the offer (Ext. P/2) is subject to Clause 43 of the general conditions of the contract (Ext. p/I) on the face of unequivocal expression of exclusion of any other term or condition. The plain language used in Clause 34 of offer (Ext. P/2) expressing the clear intention of the parties must be given effect to as it stands.

5. Learned counsel for the applicant then tried to build up a case that although at the initial stages of the contract there might not have been any express arbitration agreement, the same can be inferred from the subsequent correspondence between the parties and their conduct. There is no room for such a suggestion and the documents placed on record do not permit any such inference. It is also not possible to agree with the learned counsel for the applicant that by nominating Justice K.L. Pandey as its arbitrator and by submitting a counter-claim before the arbitrators, the Board must be deemed to have entered into an appointment and, therefore, the arbitration proceedings were valid. It may be seen in this connection that as soon as the applicant proposed to refer the dispute to arbitration by invoking Clause 43 of the general condition of the contract, the Board vide Ext. P/7, contested the existence of any arbitration agreement between the parties and questioned the jurisdiction of the arbitrators to decide any dispute relating to the contracts. Even before the arbitrators, the Board first denied the existence of any arbitration agreement, challenged the jurisdiction of the arbitrators to enter upon arbitration and then only denied the applicant's claim and submitted a counter-claim. These circumstances, on the other hand, only express a contrary intention to agree to refer the dispute to arbitration. It has also been the contention of the applicant that the Board at no point of time expressed that general condition of the contract including Clause 43 will not be a term of the contract and, therefore, the terms of contract must be deemed to include the general conditions of the contract (Ext. P/I) as a part of the contract. Here too, in my opinion, the applicant is not right. It was the applicant who expressly contracted out of those general terms and conditions when in offer (Ext. P/2) it expressly excluded any other specifications, terms or conditions than those mentioned therein. It is that offer which was accepted and, therefore, there was no occasion for the Board to

mention that the general terms and conditions of the contract are not applicable to the contracts in question. I am, therefore, unable to accept the contention raised on behalf of the applicant that by implication and by conduct the parties must be deemed to have agreed that the general terms and conditions (Ext. P/I) formed part of the terms and conditions of the two contracts in question between the parties.

6. It was lastly argued that the non-applicant Board is estopped by its conduct to question the arbitration proceedings and plead want of an arbitration agreement particularly when it has participated in those proceedings and has allowed the limitation for filing the regular suit to run out. I am unable to accept this contention also. An arbitrator acts without jurisdiction if the parties have not agreed that the matter in dispute should be decided by the arbitrator. In *Vcnkalarama Krishna Murty v. C.V. Rama Aiyer* (1974 78 C WN 1). reference was made to arbitrator with the consent of the parties to the contract and an award was given. Application was filed for setting aside that award under Sections 33, 30, 15 and 16 of (he Arbitration Act It was held that the licence granted in that case was not transferable and the agreement whereby the parties agreed to affect a transfer of the import licence and further agreed that the machinery to be imported would become the property of the proposed company was illegal being in violation of the conditions of the licence. The arbitration clause was, therefore, also held invalid and consequently, the Division Bench held that the proceedings before the arbitrator was without jurisdiction inasmuch as there was no valid arbitration agreement within the meaning of Section 2(a) of the Arbitration Act. It was held as a matter of law that an arbitration agreement between the patties cannot be set up by estoppel. The Supreme Court in *Khardah Company Ltd. v. Raymon & Company (India) Private Ltd.* (AIR 1962 SC 1810) held that what confers jurisdiction on the arbitrators to hear and decide the dispute is an arbitration agreement as defined in Section 2(a) of the Arbitration Act and when there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. Again, in *Union of India (UOI) Vs. A.L. Rallia Ram*, , it was held that filing of pleadings pursuant to the directions of the arbitrators and agreeing to the trial of the dispute on issues raised by the arbitrators cannot be regarded as a reference of specific questions implying an agreement between the parties that they intended to give up their right to resort to the course even if the award was vitiated on account of an error apparent on the face thereof. In the present case, right from initial stage when the applicant wanted to invoke the jurisdiction of an arbitrator to decide the dispute, the Board objected and denied the existence of any such agreement. It went before the arbitrators and filed the reply and a counter-claim but at the same it continued agitating that there was no arbitration agreement and, therefore, the arbitrators have no jurisdiction to adjudicate the dispute. The participation was without prejudice to the rights of the non-applicant to object to the jurisdiction of the arbitrators. In my opinion, therefore, the non-applicant Board cannot be estopped from denying the existence of any arbitration

agreement and, consequently, from questioning the arbitrators' jurisdiction to decide the dispute. Learned counsel for the applicant submitted that merely because the Board stated that it was filing the written statement and laying a counter claim without prejudice to its right to challenge the arbitrators' jurisdiction, the Board cannot be permitted to subsequently turn round and undo that which it has done causing prejudice to the applicant. In my opinion, the conduct of the non-applicant Board in the present case discloses that right from the time the applicant proposed to refer the dispute to arbitration, the Board denied any agreement and questioned any proposed reference as entirely illegal and without authority. It named its arbitrator and appeared before the arbitrators "without prejudice" to its right to challenge those arbitration proceedings as ultra vires. In Black's Law Dictionary, Fourth Edition, at page 1777, the expression "without prejudice" is explained thus:

"Where an offer, or admission is made "without prejudice", or a motion is denied or a suit dismissed "without prejudice", it is meant as a declaration that no right or privileges of the party concerned are to be considered as thereby waived or lost except insofar as may be expressly conceded or decided."

This statement very correctly brings out the real and true import of the expression. Learned counsel referred to an extract from a judgment in *Haynes v. Hirat* (1927) 27 SRNSW 480 (Australia), reproduced at page 351 of the Second Edition of "Words and Phrases" legally defined, where while dealing with the expression "without prejudice" it is observed that a man only elects once, and when once he has elected he is bound by his election and cannot again avail himself of his former option, merely because he claimed in the first instance to exercise his election without prejudice. The passage further runs to say that a man having eaten his cake, does not still have it, even though he professed to eat it without prejudice. This last sentence in that passage clearly brings out its ratio. It only means that once option is exercised and the matter goes forward and the cake is eaten, nothing remains to go back even if the exercise of option was "without prejudice". In my opinion, by stating that the arbitrator was named and the reply and counter-claim were filed before the arbitrators "without prejudice", the non-applicant Board cannot be said to have exercised any option as such. It cannot thereby be said to have waived its right to challenge the jurisdiction of the arbitrators for want of the arbitration agreement. This last contention is also, therefore, rejected.

7. The revisions fail and are dismissed but without any order as to costs.