

(1999) 05 AHC CK 0063
In the Allahabad High Court
Case No : C.M.W.P. No. 3 of 1996

Integrated Informatics (P.) Ltd.	Vs	APPELLANT
Indian Telephone Industries Ltd. and another		RESPONDENT

Date of Decision : 13-05-1999

Acts Referred:

Arbitration Act, 1940 — Section 20
Arbitration and Conciliation Act, 1996 — Section 21, 85, 86

Citation : AIR 1999 All 293 : (1999) 3 AWC 2096

Hon'ble Judges : Sudhir Narain, J

Bench : Single Bench

Advocate : U.S. Awasthi, for the Appellant;

Judgement

Sudhir Narain, J.—The petitioner has prayed for appointment of an Arbitrator under Clause 11 of the Arbitration and Conciliation Ordinance, 1996 (in short the Act).

2. The petitioner is a Private Limited Company engaged in the business of Electronic Hardware and Software products including Automatic/Semi-Automatic Test Equipment at Gurgaon. Haryana. Indian Telephone Industries Ltd., E.S.S. Unit, Mankapur, district Gonda opposite party No. 1 invited tenders on 27.4.1991 for development and supply of Line Card Testers. The petitioner submitted its tender on 25.5.1991 for Line Card Testers. The tender was accepted by opposite party No. 1 and a letter of acceptance was given to the petitioner. It also issued purchase order on 27.2.1992.

3. Opposite party No. 1 placed Order No. 1900482-2/1394, dated 27.2.1992 for purchase of 5 sets Line Card testers (Semi-Automatic Tester Model OIS). The petitioner is alleged to have supplied 5 Nos, Line Card Testers on 31.3.1993. The grievance of the petitioner was that he was not paid price as agreed by the opposite party No. 1 and it suffered loss.

4. The petitioner filed a petition on 31.10.1994 before the Court of Additional

Civil Judge (Senior Division), Gurgaon for appointment of an Arbitrator u/s 20 of the Arbitration Act, 1940 on the allegation that there is an arbitration clause under which opposite party No. 1 was liable to refer the dispute to the arbitrator. The tender contained an arbitration clause which reads as under :

"Arbitration Clause

If any dispute shall arise between parties touching on the contract arising out of this tender, the construction or operation thereof or the rights, duties or liabilities, under these except any matters, the decision of which are Specially provided for the general or special conditions, such dispute shall be referred to two arbitrators, one to appointed by each party and the said arbitrator shall appoint an umpire in writing before entering in the reference and the award of the arbitrators or the umpire as the case may be shall be final and binding on both the parties. The arbitrators or umpire as the case may be with consent of the parties may enlarge the time frame for making and publishing the award. Such arbitration shall be governed in all respects by the provisions of the Indian Arbitration Act. 1940 and rules thereunder any statutory modification or re-enactment thereof."

5. Opposite party No. 1 contested the petition. It took a preliminary objection that the Court at Haryana had no jurisdiction to entertain the petition as in the agreement, there was a clause that all disputes and differences arising out of or in connection with this order shall be subject to the exclusive jurisdiction of Courts at Gonda (U. P.). The Additional Civil Judge (Senior Division). Gurgaon upheld this contention and held that the civil courts at Gurgaon had no jurisdiction to entertain the petition u/s 20 of the Arbitration Act vide its order dated 13.2.1996.

6. The petitioner is alleged to have served a notice by Registered post dated 4.4.1996 to opposite party No. 1 that it had appointed Sri Rustam Ali, 7052 DDA Flats, Sector B, Pocket 10, Vasant Kunj, New Delhi as arbitrator and requested the opposite party No. 1 to appoint an arbitrator of their choice within 30 days from the date of receipt of the notice in terms of agreement/contract dated 27.4.1991 and 25.5.1991. The opposite party No. 1 is alleged to have sent a reply on 26.5.1996 informing the petitioner that appointment made by the petitioner was misconceived and stands rejected. The petitioner, thereafter, has filed this petition under clause 11 (4) (a) read with sub-clause (6) of the Arbitration and Conciliation Ordinance, 1996. The Ordinance has been repealed by Section 86 of Arbitration and Conciliation Act, 1996 and the arbitration matters are to be decided in accordance with the provisions of this Act.

7. On behalf of opposite party No. 1 a counter-affidavit has been filed. It is not denied that it invited tenders and in pursuance of the said tender, the petitioner had submitted the tender which was accepted by it. It is also admitted that the purchase order was placed by it but the petitioner supplied sub-standard quality of Line Card Testers which could not meet the requirement and parameter of the

specifications. It requested the petitioner to rectify the defects and on the other hand, it pressed only to release amount. Subsequently, the petitioner vide letter dated 23.6.1993 intimated the opposite party No. 1 about its inability to continue the projects. The opposite party No. 1 suffered set back as items supplied by the petitioner were of sub-standard quality. The question as to whether the petitioner supplied the goods to the opposite party No. 1 as per terms of the agreement, is to be decided by the arbitrator and not by this Court.

8. Opposite party No. 1 has raised two fold objections in regard to the appointment of an arbitrator by this Court. Firstly, there is no arbitration agreement and secondly, the arbitration proceedings should be taken under the provisions of the Arbitration Act. 1940 and not under the provisions of Arbitration and Conciliation Act. 1996.

9. It is contended that there is no written arbitration agreement duly signed by the parties and, therefore, arbitration clause cannot be invoked by the petitioner. The opposite party No. 1 has not denied that it invited the tender and that contained the arbitration clause. The petitioner submitted the tender in the prescribed form as invited by opposite party No. 1 and that contained arbitration clause. Opposite party No.1 accepted the tender. Once the tender has been accepted, the terms given in the tender are part of the contract and that is enforceable under law. The petitioner was to comply with the terms of the arbitration agreement whereby each of the parties was to appoint one arbitrator and the arbitrators so appointed, were to appoint an umpire. The contention of the opposite party No.1, in the facts and appointment of an arbitrator u/s 20 of the Arbitration Act, 1940, the proceedings should have been taken under the provisions of the said Act. Section 85 of the Act provides for repeal and saving. Subsection (2) is a saving clause which reads as under :

"(2) Notwithstanding such repeal :

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force ;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

Section 21 of the Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

10. The petitioner had submitted its claim before opposite party No.1 and requested for arbitration prior to the commencement of the Act, 1996. The petitioner itself had filed petition u/s 20 of the Arbitration Act. 1940 on

31.10.1994 in the Court of Additional Civil Judge (Senior Division) Gurgaon. In Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, Hon'ble the Supreme Court has held that if the arbitration suits are filed before 26.1.1996, the suit under the Arbitration Act, 1940 shall continue. In view of the fact that the arbitral proceedings had commenced prior to the commencement of Act, 1996, the petitioner is entitled to file a petition u/s 20 of the Act before the civil courts at Gonda as per terms of the contract.

11. The petition is, accordingly, disposed of finally.