

(2017) 09 BOM CK 0174
In the Bombay High Court
Case No : 39 of 2016

Kakade Infrastructure Pvt. Ltd.

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 19-09-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Arbitration and Conciliation Act, 1996, Section
11(6) - Appointment of arbitrators

Citation : (2017) 09 BOM CK 0174

Hon'ble Judges : G.S.Kulkarni

Bench : SINGLE BENCH

Advocate : Aspi Chinoy, Ashish Kamat, S.K.Srivastav, Manorama Mohanty,
Kushal S.Amin, S.K. Srivastav, A.Y.Sakhare, Rohan S.Mirpury, U.S.Upadhyay

Final Decision : Dismissed

Judgement

1. The applicant in this petition has invoked the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act,1996 (for short "the Act") seeking appointment of an arbitrator to adjudicate the disputes stated to have arisen between the parties under a Concession Agreement. Prayer in the application reads thus:

"(a) That this Hon"ble Court may be pleased to appoint Arbitrator u/s.11(6) of the Arbitration & Conciliation Act,1996 as per the Arbitration Agreement contained in the Concession Agreement which forms part of the Tender Document issued by the Respondents at Exhibit "B" hereto;"

(emphasis supplied)

2. The factual antecedents on which the controversy arises may be illustrated by the following facts: The respondentState of Maharashtra through its Public Works Department had issued a tender notice dated 26 March 2009 for the project

"Development of the Government Colony, PlotPart I, Survey No.341, C.T.S. No.629 at Bandra (East), Mumbai", through privatization under build, operate and transfer scheme (BOT). The tender document inter alia contained several details some of them being the "draft of the concession agreement" to be entered, and the forms of letter of acceptance of the bid etc, which obviously were informative in nature for the prospective bidders. As per the said notice inviting bids the estimated cost of the project was Rs.160.03 crores and the period of construction was to be eighteen months, including the monsoon period. The tenders were opened by the respondent on 16 April 2009.

3. The applicant being the successful bidder, the respondent accepted the applicant's bid, by issuance of an acceptance letter dated 27 July 2010. The acceptance letter inter alia provided the applicant to pay an upfront amount of Rs.146.45 crores as one time payment to the respondent at the time of signing of the agreement, as also submit a performance security in the form of a bank guarantee of a nationalised/scheduled bank amounting to Rs.6.40 crores twice separately, first within fifteen days from issuance of the letter and the second at the time of starting the construction. Two paragraphs of the acceptance letter on which the parties have joined an issue are required to be noted as appearing at page 377 of the paper book which reads thus:

" Conditions of enforcement of contract will be decided by the Government with the help of "Transaction Advisor" who will be appointed in consultation with PPP cell of Government of Maharashtra and such terms and conditions shall be binding on you as a developer and shall become part of the agreement. The fees of the transaction advisor shall be borne by you as a developer.

The agreement between Government and developer shall be executed simultaneously on payment of one time upfront amount as mentioned above. Meanwhile, you can take up the activities like planning of shifting of occupants existing on the plot, preparation of layout plans if required, Geo technical investigation and clearances required from concerned Competent Authorities etc.

The contents of this letter shall form part of the agreement, and shall be read alongwith the term and conditions contained in the tender. "

(emphasis supplied)

4. The applicant's case is that after the receipt of the acceptance letter dated 27 July 2010, the applicant on 27 September 2011 paid a sum of Rs.146.45 crores to the respondent by a pay order, as also a performance bank guarantee of Rs.6.40 crores was furnished to the respondent on 11 August 2010 which was later on extended for a further period of one year till 10 August 2012.

5. The applicant contends that the concession agreement was to be simultaneously executed after payment of Rs.146.45 crores, however despite several requests, the respondent failed to execute the concession agreement as per the conditions of the tender document. The applicant therefore was required

to file Writ Petition No.2527 of 2013 in this Court seeking directions to the respondent, to execute the concession agreement in respect of the said project and for other reliefs. At the hearing of this writ petition, the respondent through its Counsel informed the Court that the project has been scraped by the respondent and accordingly the parties tendered to the Court, minutes of the order dated 11 March 2014, as signed between the parties and which were without prejudice to the rights of the applicant. In pursuance of the minutes of the order, the State was to refund to the applicant, within six weeks the amount of Rs.146.45 crores, as also to return the bank guarantee of Rs.6.40 crores. By an order dated 11 March 2014, this Court disposed of the said writ petition in terms of the said minutes of the order dated 11 March 2014. It would be appropriate to note the contents of the minutes of the order which reads thus:

" 1. Without prejudice to the rights and contentions of the Petitioners, the Respondents to refund back to the Petitioners within six weeks from this date, a sum of Rs.146.45 crores deposited by the Petitioners with the Respondents as per the terms of the Tender on 27/9/2011 as also to return back to the Petitioners the Bank Guarantee for Rs.6.40 crores issued by Punjab National Bank duly cancelled.

2. Since the Petitioners were successful bidders of PartI of the project and had complied with all their obligations like upfront payment of Rs.146.45 Crores and first tranche of Bank Guarantee i.e. Rs.6.40 crores, and since the Government has decided not to go ahead with the project as on this date it is agreed that, in the event the Respondents decide to proceed with the development of Government Colony, Plot No.1, Survey No.341, C.T.S. No.629, Bandra (East), Mumbai under Build, Operate and Transfer Scheme (BOT) Scheme as per the Tender dated 26/03/2009, the Petitioners shall have the first option to carry out the said development work.

3. The Petitioners shall be entitled to exercise the legal remedies as available to them under law."

6. As despite the aforesaid order passed by this Court, the respondent failed to refund the sum of Rs.146.45 crores as also return the bank guarantee, the applicant moved this Court in Contempt Petition No.91 of 2014. The contempt petition was however dismissed by the Division Bench of this Court by an order dated 30 March 2016. However, thereafter on 31 March 2016 the respondent refunded the applicant the amount of Rs.146.45 crores as per the said order dated 11 March 2014 passed in Writ Petition No.2527 of 2013, as noted above.

7. The applicant contends that due to the respondent scraping the project, the applicant suffered huge losses/damages on different counts some of them being, loss of business opportunity, loss on account of infrastructure and manpower, bank guarantee expenses, legal, professional and consultant fees, bank charges etc, and thus the applicant's had become entitled to recover from the respondent a sum of Rs.275 crores.

8. On the above backdrop, the applicant by its letter dated 6 April 2016 requested the respondent to resolve the said claim as per the dispute resolution mechanism provided under clause 19.3 of the Concession Agreement or refer the dispute to its Chief Engineer within thirty days from receipt of the said letter. The respondent replied to this letter by its letter dated 30 May 2016 refusing to resolve the said claim inter alia stating that as the Concession Agreement was never executed between the parties and thus the question of application of article clause 19.3 of the Concession Agreement does not arise. The applicant, therefore, by its letter dated 1 June 2016 invoked the arbitration agreement as contained in clause 19.3 of the Concession Agreement draft of which was part of the bid document, and nominated a retired Judge of this Court as a sole arbitrator and requested the respondent to give its consent for appointment of sole arbitrator and/or to appoint or nominate its arbitrator within thirty days from the receipt of the said letter. Clause 19.3 of the said draft concession agreement reads thus:

" 19.3 Arbitration

a) Arbitrators

i) Any Dispute which is not resolved amicably as provided in Article 19.1(a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act, 1996....."

9. Respondent failed to reply to the applicant's said letter dated 1 June 2016 within thirty days and also failed to appoint or nominate its arbitrator within the stipulated time and thus the applicant has filed the present application seeking appointment of an arbitrator.

10. In seeking a relief in this application, the principal contention of the applicant is that the applicant had submitted its bid in pursuance of the respondent's notice inviting bids dated 26 March 2009. The applicant's bid was accepted by the respondent by issuance of the acceptance letter dated 27 July 2010, and that the letter of acceptance was to form part of the agreement to be entered into and was to be read alongwith the terms and conditions contained in the tender. The applicant relies on clause 19.3 (Supra) of the Draft Concession Agreement, which provides for a reference to arbitration, to contend that Article 19.3 of the concession agreement has become applicable, in view of the letter of acceptance dated 27 July 2010 which specifically provides that the said letter shall form part of the agreement, and shall be read alongwith the terms and conditions contained in the tender. It is submitted that the contention as raised by the

respondent that the Concession Agreement being never executed and consequently that there is no arbitration agreement between the parties, is not tenable. It is the applicant's case that the letter of acceptance dated 27 July 2010 indicates the intention of the parties to incorporate the terms of the tender document (including the draft concession agreement) in its entirety to be binding upon the parties. It is submitted that the letter of acceptance also specifically provides that the said letter should be read as part of the agreement along with the terms and conditions of the tender form and which is required to be read as a contract between the parties. It is submitted that thus the intention of the respondent was to incorporate the entire tender document into the contract and thus there is valid and enforceable arbitration agreement executed between the parties and the same is binding upon the respondent.

11. Mr. Chinoy, learned Senior Counsel for the applicant has read and reread the contents of the acceptance letter dated 27 July 2010, as also the "Form for submission of bid" being "Annexure A" and the part of the blank tender document titled as "To be submitted along with Financial Bid i.e. Volume-III in Envelope No.2. Annexure"A'". My attention is also drawn to the orders dated 11 March 2014 passed by this Court in Writ Petition No.2527 of 2013 along with the minutes of the order. Mr. Chinoy would also refer to clause 29 of the "Volume I" being instruction to the tenderers which reads thus:

"29. NOTIFICATION OF AWARD:

Prior to the expiration of bids validity period or any such extended period, the Employer will notify the successful bidder in writing by a registered letter that his bid has been accepted. This letter (herein after and in conditions of contract called letter of acceptance) shall name the built up area of Government component of work to be constructed and hand over to Government by Concessionaire and details of plot for which development and disposal rights shall be assigned to the Concessionaire. This notification of award will constitute formation of contract. Upon furnishing the performance security by the successful bidder in accordance with the Clause 30 of ITB, the order to start work will be given. The work order shall be accompanied by a true copy of the agreement bearing the number under which it is registered in the office of the Engineer In Charge." (emphasis supplied)

Mr. Chinoy, in referring the clause 29 (supra) would submit that as the said clause contemplates that the notification of the award would constitute formation of contract, the draft of the tender and the conditions therein would constitute a binding agreement between the parties, entitling the applicant to invoke the arbitration agreement. Mr. Chinoy submits that clause 29 (supra) needs to be read, in the context of paragraph 5 of the "draft bid letter" as annexed to the tender document which states "'unless and until a formal Agreement is prepared and executed, this bid, together with your written acceptance thereof, shall constitute a binding contract between us." It is thus submitted that the respondent is not correct in its contention, that the applicant and the respondent

having not executed a formal concession agreement, there is no contract between the parties precluding the applicant to invoke the arbitration agreement. To support the contention that although there is no formal document of concession agreement executed between the parties, the form of tender document which includes the draft concession agreement containing the arbitration clause is required to be treated as an executed agreement to invoke arbitration agreement, Mr. Chinoy has placed reliance on the decision of the Supreme Court in "Unissi (India) Private Limited V/s. Post Graduate Institute of Medical Education and Research reported in (2009) 1 Supreme Court Cases 107".

12. On the other hand, Mr. Sakhare, learned senior counsel for the respondent would contend that the present application is wholly misconceived, in as much as the applicant relies on a arbitration clause in a "draft concession agreement" which was part of the bid document. It is submitted that the concession agreement was never executed between the parties and consequently there is no arbitration agreement between the parties. It is submitted that, the applicant was very well aware of this position, and it was surprising as to how this application has been filed de'hors the factual antecedents in that regard. It is submitted that it was clear from applicants own showing, namely from the averments in the applicant's Writ Petition No. 2527 of 2013, in which the applicant had made specific prayers seeking a direction against the respondent, to finalize the terms and conditions of the concession agreement to be executed between the applicant and the respondent in regard to the tender project. The Courts attention is also drawn to the prayers as made in the said writ petition from the copy of the memo of the petition, annexed to the reply affidavit of the respondent. Learned senior counsel would also refer to the specific averments as made in several paragraphs of the petition which in the contention of the respondent indicate that the applicant was fully aware that, after the acceptance letter dated 27 July 2010, was issued by the respondent, there was a further step which was required to be undertaken namely of a concession agreement to be entered/executed between the parties. Learned senior counsel for the respondent then has referred to correspondence between the respondent and the applicant, which in his submission, would indicate that the applicant was never agreeable to execute a standard agreement, but wanted material variations which were not acceptable to the respondent and for this reason, the concession agreement was not executed between the parties. It is submitted that the contention as urged on behalf of the applicant, that the acceptance letter read with Condition5 of the draft bid letter, can be construed to mean that the concession agreement is executed between the parties, and accordingly clause 19.3 of the draft concession agreement becomes an arbitration agreement between the parties, is totally untenable and contrary to the clear facts on record.

13. Learned senior counsel for the respondent would also rely on the second last paragraph of the acceptance letter as noted above in paragraph 3 to contend that in terms of the acceptance letter there was a clear requirement to execute a concession agreement, inter alia after the payment of the upfront amount, and

the same was never executed. The attention of the Court is drawn to page 205 of the bid document, which provides for the form of a letter, which the respondent's say would clearly indicate that, after the receipt of the acceptance letter, the applicant was required to furnish a performance security within 15 days thereof and "thereafter execute an agreement". It is submitted that thereafter a formal work order was required to be issued by the respondent after the receipt of performance security from the applicant, and that such a work order was never issued, as the precondition for issuance of the work order, was the parties entering into a concession agreement. The attention of the Court is also drawn to the draft concession agreement which defines the work order to mean "a order to start the work issued to Concessionaire after he has paid the Performance Security and signed the agreement in the prescribed form". The case of the respondent is that the applicant had several issues and counter terms to be incorporated in the concession agreement and which were not acceptable to the respondent and therefore, the applicant never came forward to execute the concession agreement. It is submitted that in fact, the respondent had called upon the applicant by a letters dated 20/08/2011, 29/09/2011 and 03/07/2012, to execute the concession agreement, however, the applicant insisting on specific variations of the terms of the agreement the same was not executed, and on this background, the applicant had approached this Court in Writ Petition No. 2527 of 2013 inter alia praying for reliefs that the respondent be directed to execute a concession agreement. It is further submitted that pertinently the said writ petition was disposed of, by the Division Bench by an order dated 11/03/2014, in view of the parties arriving at an amicable understanding and settling the disputes in terms of the minutes of the order, and in which the respondent agreed to refund to the petitioner the upfront amount and the return of the bank guarantee. It is submitted that the minutes of the order recorded that the amount is being refunded and the bank guarantee is being returned, as the Government has decided not to go ahead with the project and it was agreed that in the event, the government decided to proceed with the development under the BOT scheme as per tender dated 26/03/2009, the applicant shall have the first option to carry out the first development work. The contention as urged on behalf of the respondent is that, it is in this context that it was agreed that the applicant would be entitled to exercise the legal remedies as available to them under law which can never be recourse to an arbitration in the absence of an arbitration agreement. It is submitted that all these facts namely filing of the writ petition and the Court passing an order cannot be construed to mean that the concession agreement was executed and the arbitration clause therein had become available to the applicant to be invoked and the only remedy which would be available to the applicant, in case the applicant intended to raise any dispute, was to file a civil suit.

14. Heard the learned counsel for the parties and with their able assistance, I have perused the documents as placed on record. In the above conspectus, the only question which falls for consideration is whether there is any arbitration

agreement between the parties, so that the Court in exercise of its jurisdiction under Section 11(6) of the Act, can appoint an arbitrator to arbitrate the dispute between the parties.

15. It is not in dispute that the respondent had issued a tender in March 2009 inviting bids for development of Government colony at Bandra (East) Mumbai, and that the applicant had participated in the said tender, and the bid of the applicant came to be accepted by the respondent by issuance of a letter of acceptance dated 27/07/2010. The conditions of this acceptance letter have become relevant in the context of the present application as also both the parties have placed reliance on the contents of the acceptance letter.

16. The relevant terms of the acceptance letter and as specifically extracted in paragraph 3 above, contemplate that conditions of enforcement of contract were to be decided by the Government, with the help of "Transaction Advisor" who would be appointed by the Government and such terms would become binding on the applicant as a developer and the terms were to become part of the agreement. It was a further term of the acceptance letter that an agreement between the government and the developer would thereafter be executed simultaneously on payment of one time upfront amount. It is also quite clear that appointment of the "Transaction Advisor" itself did not take place. Further what is significant is that the applicant itself had addressed letters to the respondent dated 06/01/2011, 13/04/2011 and 10/08/2011 whereby, the applicant insisted for entering into the concession agreement however, only after the modification of the terms as contained in model/standard form attached to the bid document. It is important to note that the contents of letter dated 10/08/2011 whereby the applicant referring to the draft concession agreement requested the respondent to incorporate necessary changes in the said draft concession agreement. The letter reads thus:

"Pursuant to your captioned letter and correspondences prior to the aforesaid, kindly note as per your instruction the Upfront amount of Rs. 146.45 Crore (One Hundred Forty Six Crore and Forty Six Crore and Forty Five Lacs Only) is ready for disbursement and to be deposited with you. However, we request you to kindly incorporate the necessary changes in the draft Concession Agreement and the final draft be forwarded to us, in order to execute the same by the end of this month i.e. 31 s t August, 2011. Apart from the other points agreed to by the Standing Committee, below are the important points to be inducted and included in final draft of the Concession Agreement:

1) FSI (present and future) available for all the plots (including but not limited to Government and Developers Plots) should accrue to the benefit of the Developer ("Kakade Infrastructure Pvt. Ltd"). Premium on extra FSI shall be appropriately settled.

2) Any changes, modification, alteration or revision of the Layout Plan shall solely be as per the decision of the Developer." (emphasis supplied)

17. A perusal of the above letter of the applicant clearly indicates that the applicant was aware that what was annexed to the tender document was a draft agreement and a further step to execute a concession agreement was yet to be performed. Further to this as clear from the letter of the respondent dated 20/08/2011 the applicant's request to make any changes was rejected. The said letter reads thus:

"With reference to your letter this is to inform you that the points which you have requested to include in the concession agreement for final draft cannot be included in the agreement since your offer will become conditional and nonacceptable. Hence you are again requested to pay the upfront payment and attend this office to sign the agreement."

(emphasis supplied)

18. The further sequence of events is equally material namely, that the applicant approached this Court in Writ Petition No. 2527 of 2013 which prayer clauses (c) and (d) are crystal clear as regards the petitioner praying for a direction against the respondent to execute the concession agreement. The prayers in the said writ petition reads thus:

"(a) that this Hon"ble Court may be pleased to issue writ of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records and papers of the present case and after going into the legality and propriety thereof, be pleased to quash and/or set aside the Impugned Order passed by the Respondents thereby refusing to appoint Transaction Advisor as mentioned in the letter dated 6.12.2012 at Exhibit "L" hereto;

(b) that this Hon"ble Court may be pleased to issue a writ of Mandamus or any other appropriate writ, order or direction in the nature of Writ of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India directing the Respondents to appoint an expert as "Transaction Advisor" to finalize the terms and conditions of the Concession Agreement to be executed between the Petitioner and the Respondents in respect of said Project;

(c) that this Hon"ble Court may be pleased to issue Writ or Certiorari or any other appropriate writ, order or direction in the nature of Writ of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India to quash and/or set aside the impugned decision dated 3.7.2012 at Exhibit "I" to the Petition thereby rejecting the clarification sought by the Petitioner in the Concession Agreement to be executed between the Petitioner and the Respondents in respect of the said Project;

(d) that this Hon"ble Court may be pleased to issue Writ of Mandamus or any other appropriate writ, order or direction in the nature of Writ of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India directing the Respondents to sign and execute the Concession Agreement in respect of the said Project after providing appropriate clauses to enable the

Petitioner to raise finance from Banks Financial Institution by mortgaging/ Pledging and hypothecating the assets including the free sale area of the said Project;

(e) that this Hon"ble Court may be pleased to issue writ of prohibition or any other writ order or direction under Article 226 of the Constitution of India prohibiting the Respondents from terminating and/or canceling the contract and/or enforcing the Bank Performance Guarantee given by the Petitioner for the said project;

(f) In the alternative to the prayers (a), (b), (c), (d) & (e) above, this Hon"ble Court may be pleased to issue Writ of Mandamus or any other appropriate writ, order or direction in the nature of Writ of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India directing the Respondents to refund the amount of Rs. 146.45 crores (Rupees One Hundred and Forty Six Crores and Forty Five Lakhs) paid by the Petitioner to the Respondents together with interest thereon calculated on the basis of S.B.I. rate of +1% per annum to hand over back to the Petitioner the performance bank guarantee of Rs. 6.40 crores (Rupees Six Crores and Forty Lakhs) submitted by the Petitioner.

(g) That pending the hearing and final disposal of the above Petition, the Respondents their servants, agents and subordinate officer be restrained by an order of injunction of this Hon"ble Court from terminating and/or canceling the Tender awarded to the Petitioner for the said project and/or from encashing and/or enforcing the Bank Performance Guarantee given by the Petitioner for Rs. 6.04 Crores (Rupees Six Crores and Forty Lakhs);

(h) for adinterim in terms of prayer clause (g) above;

(I) For cost of this Petition;

(j) Any other or further reliefs as this Hon"ble Court may deem fit and proper in the circumstances of the case."

(emphasis supplied)

19. The applicant had also made clear averments in the said petition more particularly in para 12 and 15 of the writ petition where the applicant clearly stated that the concession agreement was required to be finalized by the respondent. The averments were that applicants having complied with the provisions of tender document and the delay in execution of the concession agreement has caused financial and reputational loss to the applicant. It was also stated that it was imperative on the part of the respondent to appoint a "Transaction Advisor" to finalize the terms and conditions of the concession agreement to be executed in respect of the said project. Also the grounds as raised in the petition to this effect were grounds (a), (b), (e) and (f) appearing at page 493 and 494 of the paper book. It is further significant that in moving the said writ petition under Article 226 of the Constitution in paragraph 30, the applicant contended that the applicant had no other alternate or efficacious

remedy available to it and if the relief which was sought in the writ petition is granted, the same will be adequate. It is on this above clear understanding of the contractual position as the parties stood, the applicant and the respondent agreed to the Minutes of Order as taken on record by the Division Bench and referred in paragraph 5 above.

20. Taking on record the said Minutes of the Order, the Division Bench of this Court passed the following order:

" The petitioner and the respondent have arrived at an amicable understanding and settled the dispute in terms of Minutes of the Order. It is signed by the Advocate for the petitioner and the respondent. The Minutes of Order be taken on record and marked "X" for identification. The petition is accordingly disposed of in terms of Minutes of Order."

(emphasis supplied)

21. On the above conspectus, it is crystal clear that the concession agreement was not executed between the applicant and the respondent, and a draft of the concession agreement as annexed to the bid document containing an arbitration clause (clause 19) cannot be relied by the applicant to contend that there is any arbitration agreement between the parties. It is writ large from the applicant's letters as noted above which are addressed after the receipt of the acceptance letter that the applicant itself had taken a clear position that the concession agreement be executed. Further this position was reasserted in the said writ petition filed by the applicant. Now contrary to the applicants perception and understanding as held by the applicant and also contrary to the record and representation as made to the Court, the applicant has taken a somersault in contending that by implication the concession is executed and the arbitration clause has become available to the applicant.

22. The letter of acceptance and clause 5 of the "draft of the bid letter" as annexed to the tender document is being read together by the applicant, as clause 5 reads that ""unless and until a formal Agreement is prepared and executed, this bid, together with your written acceptance thereof, shall constitute a binding contract between us." In my opinion a conjoint reading of these two documents by no stretch of imagination can be construed to mean that the parties have executed the concession agreement the draft of which contained the above arbitration clause (clause 19.3).

23. The reliance on behalf of the applicant on clause 29 (Supra) of the instructions to bidders, as noted above is also misplaced in as much as clause 29 when it uses the words "this notification award will constitute formation of contract" in my opinion cannot be construed to mean and have a effect that the parties have actually executed the concession agreement either in the form which is annexed to the bid document or with any modification as suggested by the applicant in the letters as noted above. It certainly cannot be overlooked that a further step was to be taken by the parties after the issuance of letter of

acceptance namely to execute the concession agreement, a draft which was contained in the bid document. It would be incorrect and misconceived for the applicant to pick up clause 19 of the draft concession agreement and contend, in my opinion without any basis that there exist an arbitration agreement between the parties. Thus the learned counsel for the respondent would be correct in his contention that there is no arbitration agreement between the parties.

24. As regards, the reliance on behalf of the applicant on the decision of the Supreme Court in "Unissi (India) Private Limited V/s. Post Graduate Institute of Medical Education and Research reported in (2009) 1 Supreme Court Cases 107" in my opinion the same would not assist the applicant. This in as much as the Court, in the facts of the case held that though there was no formal agreement executed between the parties, the tender documents indicated certain conditions of contract containing an arbitration clause which would be required to be accepted as an arbitration agreement, between the parties. The Court had come to the said conclusion as the parties in that case had acted upon the contract under the tender which was accepted by the respondent. The relevant observations in that regard are found in paragraph 6 where the Court has observed in paragraph 6, 18 and 19 as under.

"6. No payment was made by PGI against delivery of goods worth Rs. 22,16,853.60 though the equipments were installed and put in use. PGI, on the other hand, however, forfeited the earnest money of Rs. 2,212,160, which was encashed by them. Eventually, PGI got the equipments lifted and it was found by the appellant that the equipments had been mishandled and were no longer fit to be used/resold in the market. A notice was served on behalf of the appellant on the matter to PGI but no reply was received. It was the case of PGI that no agreement was executed. The appellant was alleged to have committed fraud on PGI by representing themselves as being the manufacturers of the equipments, which were in fact, according to PGI, imported from Korea.

18. We may reiterate that in this case admittedly the documents which are on record apparently show supply of the material by the appellant to PGI and acceptance thereof by PGI in pursuance of the tender enquiry by them wherein tender of the appellant containing the arbitration clause was admittedly accepted by PGI. Accordingly, we hold that arbitration agreement did exist and, therefore, dispute between the parties would be referred to an arbitrator for decision.

19. Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was accepted and the appellant acted upon it. Accordingly, we are of the view that the learned Additional District Judge, Chandigarh erred in holding that there did not exist any arbitration agreement between the parties and, therefore, the order passed by him is liable to be set aside." (emphasis supplied)

Admittedly facts of the present case are materially different. The respondent in the first place did not execute the concession agreement a draft of which was annexed to the bid document containing an arbitration clause thus as noted above there was no question of the applicant undertaking any work under the acceptance letter in the absence of a work order, unlike in the case before the Supreme Court.

25. In the circumstances, the application is devoid of merits, the applicant is not entitled for appointment of an arbitrator in the absence of an arbitration agreement between the parties. Resultantly, the application fails and stands dismissed. No costs.