

(2011) 11 AHC CK 0307

In the Allahabad High Court

Case No : Arbitration and Conciliation Application No. 2 of 2011

M/s. Acurite Contractors and Engineers

APPELLANT

Vs

Allahabad Agricultural Institute Deemed University and
Others

RESPONDENT

Date of Decision : 04-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 2, 7, 7(2)

Citation : (2011) 9 ADJ 701 : (2012) 2 AWC 1444

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon''ble Pankaj Mithal, J.—Hon''ble the Chief Justice has designated/ nominated me to decide this application u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as an Act).

2. The applicant M/s. Acurite Contractors and Engineers, a firm engaged in civil contracts and consultancy work has filed this application for appointment of arbitrator.

3. The above application has been field on the allegations that the applicant was awarded various contracts by the respondents namely Allahabad Agricultural Institute (in short "institute") for construction as per the rates prescribed and even for consultancy work. However, some dispute arose with regard to amount admissible to the applicant under the said contracts. The said dispute was resolved and a memorandum of understanding (in short "MOU") was arrived at between the parties on 19.12.2006 wherein the balance amount admissible to the applicant was decided to be paid by the institute in three instalments by particular dates. However, the institute defaulted and failed to abide by the aforesaid MOU.

4. Aggrieved, the applicant initially filed a suit in the Delhi High Court but the

same was got dismissed as withdrawn on 29.4.2008. Thereafter, the applicant filed writ petition No. 54194 of 2008 claiming the unpaid amount as per the above MOU. In the said writ petition the institute had brought on record letter dated 21.9.2009 whereby representative of the applicant was called for settlement of accounts. The writ petition was dismissed on 16.11.2009 with the observation that the dismissal of the writ petition would not affect the right of the applicant to proceed on the basis of the above-referred letter of the institute with regard to settlement of dispute and recovery of amount. The applicant on the basis of the above order of the High Court requested for settlement of accounts. In response, the institute through the Director, Development and Chairman, Review and Settlement Committee vide letter dated 29th October 2010 required the representative of the applicant to submit rates of different items. The dispute was however not settled. Therefore, the applicant issued a notice dated 24.11.2001 calling upon the institute to appoint arbitrator for its resolution and even suggested three names of the arbitrators. On failure of the institute to appoint an arbitrator despite the above notice, the present application has been filed.

5. The institute has opposed the application by filing counter-affidavit. The main plank of the defence of the institute is that there is no clause for arbitration in any of the agreements and no intention for resolving the dispute, if any, through arbitration is expressed or implied in any of the letters of the institute and as such the application is mis-conceived and is not maintainable. The institute has also disputed the MOU referred to above.

6. The power u/s 11 of the Act to appoint an arbitrator can only be exercised if there exists a valid arbitration agreement between the parties. The question whether there is an arbitration agreement between the parties is to be decided by the Chief Justice or his designate before referring the dispute to arbitration. *SBP & Company v. Patel Engineering Limited*, 2005(8) SCC 618 and *Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra and another*, 2011(2) RJ 1285

7. In view of the above and the respective stand taken by the parties, the basic issue which arises for consideration is as to whether there is any arbitration agreement between the parties so that the dispute, if any, between them may be referred to the arbitration.

"Arbitration agreement" has been defined in Section 2(b) of the Act to mean an agreement referred to in Section 7 of the Act.

Section 7 of the Act reads as under:

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 continues an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

A plain reading of the aforesaid provision would demonstrate that though arbitration agreement is not required to be in any particular form but it shall be in writing and must contain intention of the parties to submit all or certain disputes arising between them to the arbitration and that such an intention may be expressed in a document signed by the parties; letters, telex, telegrams or other means of telecommunications which provide a record of the agreement; or in statement of claim and defence exchanged between the parties in which existence of the agreement is alleged by one party and not denied by the other. In short, arbitration agreement is an agreement in writing expressing intention of the parties to submit disputes to the arbitration and such an agreement may be contained in a document, correspondence, communication or the statement of claim or defence.

8. The principles for constituting an arbitration agreement have been spelled out by the Supreme Court in the case of Jagdish Chandra v. Ramesh Chandra and Others, (2007)5 SCC 719. It lays down that while there is no specific form of an arbitration agreement, the words used should disclose a determination and an obligation on part of the parties to go to arbitration and not merely contemplate the possibility of going for arbitration. The intention of the parties shall have to be gathered from the terms of the agreements and if the terms clearly indicate intention on part of the parties to the agreement to refer their disputes to a private tribunal for their adjudication and their willingness to be bound by the decision of such tribunal, it may constitute an arbitration agreement. The essential attributes or elements of an arbitration agreement were thus summarized as under:

(a) agreement should be in writing;

(b) the parties should have agreed to refer the disputes (present and future) between them to a decision of private tribunal;

(c) the private tribunal should be empowered to adjudicate upon the disputes in

an impartial manner after giving opportunities to the parties to put their case; and

(d) the parties should have agreed that the decision of the tribunal in respect of the disputes will be binding on them.

9. In *State of Orissa and Others Vs. Bhagyadhar Dash*, the Supreme Court in view of Section 2(b) read with Section 7 of the Act in laying down the essential elements of an arbitration agreement held that even every clause that provides that the decision of specified authority would be final may not be an arbitration clause.

10. In the instant case admittedly there is no arbitration agreement in writing. The applicant in paragraph 27 of the application has clearly accepted that there is no arbitration agreement either written or oral but the dispute is referable to arbitration in view of the order of the High Court dated 16.11.2009.

The aforesaid paragraph 27 of the application is quoted below:

That though there was no arbitration clause in any agreement either written or oral for the settlement of dispute entered into between the applicant and respondent University but in view of direction made by this Hon"ble Court under order dated 16.11.2009 on the basis of letter produced by respondent University by means of supplementary counter-affidavit in Civil Misc. Writ Petition No. 54194 of 2008 filed by the applicant, it appears that respondent University has decided to settle the dispute by an agency independent either from the applicant or respondent University.

The applicant is further said to have drawn interference from the letter dated 29.10.2010 and on its basis had issued notice to the institute on 24.11.2010 for referring the dispute to the arbitrator.

11. Learned counsel for the applicant as such contended that the arbitration agreement is implicit in the order of the High Court dated 16.11.2009 and the letter dated 21.9.2009 referred to in the above order as also the letter dated 29.10.2009.

12. The order of the High Court dated 16.11.2009 is enclosed as Annexure 13 to the application. This is an order dismissing the applicant's writ petition No. 54194 of 2008 wherein it prayed for payment of unpaid bills as per the MOU. The petition was dismissed but without affecting the rights of the applicant on the basis of the letter purported to be dated 21.9.2009 issued on behalf of the institute.

The relevant extract of the above order is reproduced herein below:

Therefore, the writ petition cannot be held to be maintainable and as such the same is dismissed. However, passing of this order will in no way affect the right of the petitioner to proceed on the basis of letter of the respondent with regard to the settlement of dispute and recovery of amount. If the petitioner so

approaches then it will be decided as expeditiously as possible.

No orders as to costs.

The above order of the High Court in no terms reveals any intention on part of the parties to submit the dispute to the jurisdiction of the arbitrator or that any decision of such an independent body would be binding upon them.

13. The letter dated 21.9.2009 is filed as part of Annexure-12 to the application. It has been written by the Director Estate Division of the institute in reference to the letter of the applicant dated 9.9.2009. It only requires the representative of the applicant to contact the authorities of the institute on 8.9.2009 for settlement of accounts. This letter only conveys that some effort was made to sort out the dispute of settlement of account amicably. It in no way expresses any intention for settlement of the dispute by referring it to any independent body.

14. Then there is a reference to the letter dated 29.10.2009. It is a letter written by the Director Development and Chairman Review Settlement Committee intimating the applicant that the Committee had earlier requested the applicant's representative to submit rates of different items used by the applicant in carrying out or completing the contract but as the rates have not been furnished as promised, the same may now be furnished within three days to facilitate the committee's work. The applicant himself in paragraph 26 of the application has stated that before the constitution of the said committee no consent of the applicant was taken but nonetheless it is submitted that the functioning of the said committee was like an Arbitrator. There is no material on record to show the manner of constitution of the said committee and the purpose for which it was set up. The powers and the jurisdiction of the said committee have also not been specified by either of the parties. In the absence of such material, it is not possible to hold that it was an arbitral body whose decision was to be final.

15. It may be pertinent to note that the applicant was conscious of the fact that there was no arbitration agreement and as such for the purposes of settlement of its dues it had entered into MOU with the institute. The existence of such a MOU is not acceptable to the institute. The MOU also does not convey that the disputes between the parties would be referable to arbitration or that on failure of any of the party to abide by the terms and conditions of the said MOU, the differences would be referred to arbitration. It only denotes that there was some settlement regarding the amount which was settled and was agreed to be paid in three instalments by February 2008 after adjusting the amount already paid. Thus, even the said MOU does not contain any arbitration agreement.

16. No intention showing any agreement between the parties to subject themselves to arbitration as such appears either from the order of the High Court dated 16.11.2009, letters dated 21.9.2009 and 29.10.2010 or even MOU dated 19.12.2006. None of the aforesaid documents indicate that the parties ever agreed for the settlement of dispute through any independent body having the

power to finally adjudicate the dispute so as to bind the parties.

17. In view of the above, I am of the opinion that there is no arbitration agreement as contemplated by Section 2(b) read with Section 7 of the Act which may authorize this Court to make a reference u/s 11 of the Act.

18. The decision of the Apex Court in the case of INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC., is not of any help to the applicant. In the said case some of the relevant clauses in the agreement providing for the settlement of the disputes read as follows:

13.1. This agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales;

13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication.

19. The aforesaid clauses clearly stipulated that the parties had agreed that all disputes arising out of original suit in connection with the agreement shall be referred to adjudication. The Court thus in exercise of powers u/s 11 while appointing an arbitrator and referring the dispute held that notwithstanding the use of the word "adjudication", the wordings of the relevant clauses indicated that the parties intended to have their disputes resolved by arbitration. However, no such intention could be inferred in the instant case from any of the documents in question.

20. In K.K. Modi Vs. K.N. Modi and Others, their Lordships of the Supreme Court while interpreting a clause in the MOU arrived at by way of a family settlement which provided that disputes, clarification etc. in implementation of the MOU shall be referable to the Chairman Industrial Finance Corporation of India (IFCI) whose decision shall be final, held that such a clause does not constitute an arbitration agreement but is only a condition to refer issues to an expert for decision. Similarly in the present case, any reference to the committee to settle the bills or the final amount payable to the applicant is only by way of reference to an expert body for decision independent of any arbitration.

21. The Supreme Court in Wellington Associates Ltd. Vs. Mr. Kirit Mehta, in interpreting as to what would constitute an arbitration agreement in view of plain language used in Section 7 of the Act held that an agreement which makes it optional upon the parties to go for arbitration is not covered by Section 7 of the Act as it mandatorily postulates submission of the dispute to arbitration. No such mandate is expressed or implied in any of the documents referred to above.

22. In view of the aforesaid facts and circumstances and the legal position which has been settled, I am of the opinion that the applicant has failed to establish that there exists an arbitration agreement between the parties which is sine qua non for making a reference of the dispute to the arbitrator u/s 11 of the Act and as such this Court refrains itself from appointing an arbitrator for settlement of

the alleged disputes between the parties.

The application is misconceived and deserves to be rejected. It is accordingly rejected. No costs.