

(2021) 07 TEL CK 0069

In the Telangana High Court

Case No : Arb.Appl Nos.85, 86 And 87 Of 2019

**M/S Sri Avantika Contractors (I) Ltd. Vs M/S National Buildings
Construction Corporation Limited**

Date of Decision : 30-07-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(b), 2(1)(h), 7, 8, 11, 30, 61, 73,
74, 77, 80, 81 Evidence Act, 1872 — Section 66
Code Of Civil Procedure, 1908 — Section 89

Citation : (2021) 07 TEL CK 0069

Hon'ble Judges : Challa Kodanda Ram, J

Bench : Single Bench

Advocate : K.C. Reddy, T. Anand Subramaniam

Final Decision : Dismissed

Judgement

1. ARB.APPL No.85 of 2019 is filed seeking appointment of independent Sole Arbitrator for adjudication of dispute under LOA.No.NBCC/SBG-

INFRA/CIVIL/IDCT-RIHAND/2010/LOA-2228-1160/ D.No.2226 dated 17/08/2010. ARB.APPL No.86 of 2019 is filed seeking appointment of

independent Sole Arbitrator for adjudication of dispute under LOA.No.NBCC/SBG-I/CIVIL/IDCT-VINDHYACHA/2010/LOA-2228-1136/

D.No.1405 dated 14.05.2010. ARB.APPL No.87 of 2019 is filed seeking appointment of independent Sole Arbitrator for adjudication of dispute under

LOA.No.NBCC/SBG-I/CIVIL/IDCT-MOUDA/2010/LOA-2228-1129/ D.No.1445 dated 19.04.2010.

2. As the applications are connected, they are taken up for disposal by this Common Order. At the request of the applicant's counsel, the facts contained in ARB.APPL No.86 of 2019 are taken for discussion.

3. The brief facts which are not in dispute are that pursuant to the notice inviting tender for carrying out Civil, Structural and Misc. Civil Works of

Induced Draught Cooling Towers 11A, 11B, 12A, 12B, 2 Nos. Auxiliary tower and 1 No. Switch Gear Room Vindhyachal-STPP Stage-IV, (2x500

MW), Singrauli District, Madhya Pradesh. The applicant was issued with a Work Order on 19.05.2010 followed with an entering into an Agreement

on 22.11.2010. Disputes arose between the applicant and respondent in the course of, and in relation to, execution of the contract resulting in

cancellation of the work order by letter dated 10.04.2013 and certain claims have been made by the applicant on the respondent under various Heads.

In an effort to settle the disputes amicably, the respondent appointed one Sri K.B.Dubey, Former Director (Projects) NTPC, (hereinafter referred to

as "conciliator") on 09.12.2013, as sole conciliator to review the disputes/claims raised by the applicant in relation to the contract between the

parties and to assist the parties in their attempt to reach an amicable settlement in an independent and impartial manner, and to submit a report to the

respondent. The appointed conciliator submitted his report on 09.07.2014 opining certain claims to be admissible and certain other claims as not

admissible. In relation to the claims which were not admitted by the conciliator and also certain other claims, the applicant vide letter dated 27.11.2017

requested the respondent to appoint a sole arbitrator under the Arbitration and Conciliation Act, 1996. The same was rejected by the respondent vide

letter dated 17.11.2017 specifically refuting the claims. It was asserted that there being no provision for settlement of disputes through Arbitration, the

demand for appointment of Arbitrator is not tenable; that condition No. 21 read with condition No.15 of Work Order dated 19.05.2010 and Article 5

read with Article 2 of the Agreement dated 22.11.2010 with regard to settlement of legal disputes, excludes jurisdiction of any other Court other than

Courts at Delhi. In General Conditions of Contract which were made part of the letter of Award and the Agreement, Clause 76 providing for

Arbitration specifically stands deleted.

4. Learned counsel Sri K.C. Reddy in an innovative and brief manner while making references to various documents/correspondence filed with the

application, contends that notwithstanding there not being an Arbitration Clause in the Agreement, the fact that the disputes were referred to

Conciliation invoking part-III of the Arbitration and Conciliation Act (for short, "the Act"), and the Conciliator had conducted the proceedings

and submitted a report by making specific reference to the provisions of the Act more specifically Section 61 of the Act, and the same has resulted in an Arbitration Agreement coming into existence. As the conciliation which was conducted under the Act has failed, the natural consequence of such failure would result in the unsettled disputes to be settled through arbitration. Learned counsel would contend by making a reference to Section 74 of the Act, just like the settlement reached before the conciliator partaking the character of Award in terms of Section 30 of the Act, which is enforceable under the Act, the failure to reach an amicable settlement would automatically result in the matter to be settled through arbitrator/arbitrators.

5. Learned counsel to buttress his arguments would place reliance on the judgments of the Supreme Court in *Unissi (India) Private Limited v. Post*

Graduate Institute of Medical Education and Research (2009) 1 SCC 107, *VISA International Limited v. Continental Resources (USA) Limited*

(2009) 2 SCC 55, *Shakti Bhog Foods Limited v. Kola Shipping Limited* (2009) 2 SCC134, and *TRIMEX International FZE Limited Dubai v. Vedanta*

Aluminium Limited, India (2010) 3 SCC 1. Learned counsel would further submit that reference to conciliation and appointing a Conciliator has by

inference brought into existence an Arbitration agreement between the parties.

6. On the other hand, learned counsel for the respondent would raise a preliminary objection by making specific reference to the Agreement dated

22.11.2010 entered into between the parties and by specifically drawing attention to Article 5 Governing Law and jurisdiction and contends that the

Court(s) at Delhi alone would have jurisdiction to consider the application under Section 11. Learned counsel for the respondent would raise an

objection with respect to maintainability of the application under Section 11 before this Court in view of the Article 5.0 of the Agreement between

parties restricting the jurisdiction to the Courts at Delhi. Further, by drawing attention to Article 2.0 read with Clause 76 of GCC, would submit that the

parties to the contract have specifically omitted the Arbitration as mode of dispute resolution. He would also specifically point to the Work Order

dated 19.05.2010 by drawing attention to Condition No.15 with respect to inclusion of GCC clauses, and restriction of Courts jurisdiction to the

Court(s) at Delhi and Clause 24 the work order came to be accepted by the

applicant.

7. Learned counsel for the respondent would place reliance on the judgments of the Honâ??ble Supreme Court in *Swastik Gases Private Limited v.*

Indian Oil Corporation Limited (2013) 9 SCC 32, *Brahmani River Pellets Limited v. Kamachi Industries Limited* (2020) 5 SCC 462. By relying on the

above judgments, learned counsel would submit that the jurisdiction of the Court for dispute resolution having been specifically restricted to the Courts

at New Delhi, the application made before this Court is not maintainable, and further the Arbitration Clause in the Agreement itself being an

independent contract, in the facts of the present case, there is no material to come to the conclusion that the parties have agreed to refer their disputes

to Arbitration, more particularly in the face of specific exclusion under Clause 76 of the GCC.

8. There being no dispute with respect to the applicant being awarded with a contract, alleged failure of the applicant in execution of contract resulting

in termination of the contract, claims having been made by the applicant, the reference of the same for consideration by a Conciliator, the conciliator

finally submitting a report, the applicant not satisfied seeking appointment of arbitrator and the refusal to the same, the questions which fall for

consideration are:

1) Whether any arbitration agreement is said to have been come into existence merely on account of the respondent seeking to resolve the disputes

amicably with respect to the claims made by the applicant by referring the claims to a Conciliator.

2) Whether, in the facts of the present case and in the light of the Agreement dated 22.11.2010 between the parties, this Court has no jurisdiction to

entertain an application made by the applicant under Section 8 of the Conciliation Act.

9. Section 2(1)(b) defines â??Arbitration Agreementâ? as an Agreement referred to in Section 7. Section 2(1)(h) defines a â??partyâ? as a party to

an arbitration agreement.

10. Now it is settled by a large number of judicial pronouncements that an arbitration agreement can come into existence even by exchange of letters,

correspondence, or a demand which was not denied and acted upon by other party.

11. In the present case on hand, there is no dispute that the original award does not contain arbitration agreement and further the applicant by signing

the letter of award, had specifically accepted the award of the contract in which Clause 76 of the GCC forms part of the agreement. GCC specifically

providing for arbitration stands deleted. The disputes having arisen between the parties and the claims having been made by the applicant, an effort

was made by the parties to settle the disputes amicably by seeking an independent technical expert. As a matter of fact, the independent technical

expert named as Conciliator had made his report recommending acceptance of certain of the claims made by the applicant.

12. The letter dated 09.12.2013 appointing the Conciliator is not placed on record by either of the parties to verify as to whether there was any

specific reference by the respondent to the Arbitrator and whether there was any specific request made by the conciliator, more particularly the one

under the Act. However, it appears that the appointed conciliator had in fact followed the procedure prescribed under the Act in conducting the

conciliation proceedings.

13. None of the provisions in part-III, starting from Section 61 to 81, provide for any straightjacket answer to the question that in the event of there

being a failure in the conciliation process, the same would create an independent arbitration agreement between the parties even in cases where there

is originally no arbitration agreement.

14. The object of conciliation being resolving of disputes between the parties, the conciliator is not bound by the technicalities of procedure either

under Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 (Section 66). Likewise, the role that is required to be played by the Arbitrator

under Section 66 is a role of a neutral mediator with an objective to encourage both the parties to come to an amicable settlement with respect to the

matter in dispute. It is only for that reason, the submissions to be made before the conciliator by the respective parties need not be in writing and need

not be accompanied by a Statement of Reasons therefor. The conciliator cannot be called as a witness in a judicial proceeding with respect to any of

the information provided to the conciliator in the process of conciliation (Section 80 of the Act). If there is no settlement which is acceptable to both

the parties, the conciliation process would get terminated without prejudice to

the respective parties rights to resolve their disputes as per the original agreement in agreed judicial fora or otherwise. While settlement arrived at before the Conciliator resulting in a settlement agreement in terms of Section 73 of the Act, for all purposes, be treated as an Arbitral Award under the Act and enforceable, and in the event of no settlement agreement, the rights of the parties are preserved as if there was no conciliation proceedings.

15. Sections 77, 80 and 81 of the Act specifically make a reference to Arbitral or Judicial proceedings, treating both as two independent proceedings.

If one takes a view that part-III conciliation being provided as part of the Act and the reference to conciliation can be only in cases where there is an agreement or contract providing for resolution of dispute through arbitration, in the event of failure to arrive at a settlement, the rights of parties under the Arbitration Agreement stands preserved. Assuming that part-III under the Act as an independent part whereunder, in the legislative wisdom, an opportunity is provided for the parties to settle the disputes with an intermediary by making reference to their disputes to an impartial intermediary, notwithstanding there being a provision for pre-litigation amicable settlement either through arbitration or otherwise, such conciliation under part-III cannot be said to create a new agreement between the parties except to an extent that the parties intended to make an attempt to settle their disputes amicably. However, there can be cases where, while parties to the dispute agreeing to take the aid of a conciliator by resorting to the conciliation proceedings, they may also agree, at that stage, for making reference to arbitration in the event of failure of conciliation proceedings. A finding with regard to there being an agreement at that stage is required to be established on facts by reference to specific facts in each case. Relegating the parties to the dispute to avail arbitration or judicial proceedings under Section 77, 80 and 81 of the Act indicate that in cases wherever there is an arbitration agreement, in the event of failure, the parties would take resort to arbitration proceedings and wherever there is no such agreement and in the absence of a new agreement being created, the parties are at liberty to avail the judicial proceedings.

16. Yet another view is that Section 89 of Code of Civil Procedure provides for mediation and conciliation in Civil suits before a matter goes for trial.

It may be noted that by virtue of judicial pronouncements, virtually it has

become mandatory for a judicial officer to refer the matter for mediation to see whether there is a possibility of mutual settlement between the parties to the suit.

17. The Honâ?? ble Supreme Court while dealing with reference of disputes to arbitration under Section 89 of Code of Civil Procedure in *Afcons*

Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd., (2010 8 SCC 24) and *Kerala SEB v. Kurien E. Kalathil*, (2018 4 SCC 793) has held

that Court cannot refer parties to arbitration unless the parties to the lis consent (by a joint affidavit or joint application) in the absence of an arbitration

agreement.

18. In a given case, it is open for the Court, invoking Section 89 of Code of Civil Procedure, to refer a case for conciliation invoking Part-III of

Arbitration and Conciliation Act, and the proceedings to be conducted under the Rules framed under Part-III of the Act.

19. In such circumstances, there is no reason for this Court to presume merely because in a particular case, in an effort to arrive at a Settlement and

to avoid long drawn litigation either through Arbitration or through Court proceedings, it cannot be presumed that the parties have agreed for

Settlement of Disputes through arbitration.

20. Viewed from any angle, in the considered opinion of this Court, failure of conciliation proceedings in a case where originally there was no

agreement to relegate the parties to arbitration proceedings does not result in creation of an arbitration agreement.

21. Applying the above analogy to the facts of the present case, in the face of specific prohibition of arbitration proceedings by consciously deleting

the Clause 76 of the GCC, it cannot be said that on account of failure of the parties to arrive at an amicable settlement agreement referable to Section

73, the parties are required to resolve their disputes only through arbitration.

22. To put it in simple terms, the failure of conciliation efforts does not automatically result in creation of a new contract between the parties by

creating an arbitration agreement as defined under the Act and satisfying the conditions under Section 7 of the Act entitling the applicant to invoke

Section 8 of the Act.

23. Notwithstanding the innovative and intelligent arguments advanced by the learned counsel for the applicant, in the light of the law laid down by the

Supreme Court interpreting Sections 7, 8 of the Act, the questions are liable to be answered against the applicant.

24. In view of the above, question No.1 is answered in the negative by holding that merely on account of the respondent seeking to resolve the

disputes amicably with respect to the claims made by the applicant by referring the claims to a conciliator, and the conciliation efforts having not been

fruitful, the same would not create an arbitration agreement.

25. So far as question No.2 with respect to jurisdiction of this Court is concerned, the argument of the learned counsel for the applicant that certain

actions i.e., the letter of award of contract was received by the applicant at Hyderabad, the same was accepted by signing and dispatching to the

registered office of the applicant, men and machinery was mobilized from Hyderabad, bank guarantee was provided from a Bank at Hyderabad, all

being within the jurisdiction of the Courts at Hyderabad, a part of the cause of action is said to arise at Hyderabad and thus the High Court of

Telangana at Hyderabad has jurisdiction, is liable to be rejected in view of the specific agreement between the parties restricting the jurisdiction to the

Court(s) at Delhi. The judgments relied on by the learned counsel for the respondent are squarely on the point and the same do not require much

discussion.

26. In those circumstances, there being no dispute that as per the agreement in the instant case, the resolution of disputes being restricted to the

Court(s) at Delhi, and more particularly in the light of the judgment of the Supreme Court confining the jurisdiction to the agreed fora, the question

No.2 is answered in the negative by holding that the arbitration applications are not maintainable before this Court.

Accordingly, the arbitration applications are dismissed. No costs. Miscellaneous petitions, if any pending, shall also stand dismissed.