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**(2008) 06 AP CK 0071**  
**In the Andhra Pradesh High Court**  
**Case No : CRP No. 2744 of 2003**

Pennar Seeds Corporation

APPELLANT

Vs

A.P. State Seeds Development Corporation Ltd. and Another

RESPONDENT

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**Date of Decision :** 25-06-2008

**Acts Referred:**

Arbitration Act, 1940 — Section 11, 12, 2, 20, 21  
Government of India Act, 1935 — Section 175(3)

**Citation :** (2008) 5 ALD 154 : (2008) 5 ALT 641

**Hon'ble Judges :** P.S. Narayana, J

**Bench :** Single Bench

**Advocate :** K. Prabhakar, for the Appellant; Ch. Shyam Sunder Rao, for the Respondent

**Final Decision :** Allowed

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## Judgement

P.S. Narayana, J.—The civil revision petition is filed against an order made in O.P. No. 169 of 1994 on the file of II Senior Civil Judge, City Civil Court, Hyderabad, by the unsuccessful petitioner.

2. The said O.P. was filed under Sections 3, 5, 11 and 12 read with Sections 8 and 9 of the Arbitration Act, 1940, to remove the second respondent-Managing Director, A.P.S.S.D.C. Ltd., as arbitrator in respect of the works "Distribution of seeds for Prakasam District for the period from 1.4.1992 to 31.3.1993 under Lr. No. SSDC/Market/SPSC/92-93, dated 23.5.1992 of the first respondent corporation" and to appoint anyone of the four persons named in the petition as arbitrator to adjudicate the dispute raised by the parties and to award costs. The four persons named in the said O.P. are as hereunder:

1. Sri Justice K. Madhava Reddy, retired Chief Justice of Bombay High Court.
2. Sri Justice C. Kondaiah, retired Chief Justice of A.P. High Court.
3. Sri Justice K. Punneya, retired Judge, High Court of A.P.

4. Sri Justice P. Rama Rao, retired Judge, High Court of A.P.
3. The said O.P. was resisted by second respondent who filed counter on his behalf and also on behalf of first respondent.
4. The learned II Senior Civil Judge, City Civil Court, Hyderabad, after recording reasons, by order dated 1st day of November 2002 appreciating Exs.A.1 to A.5, Exs.B.1 to B.12 marked by the parties, ultimately came to a conclusion that there was no agreement between the parties for referring the matter to the arbitration and accordingly dismissed the O.P. with costs. Aggrieved by the same, the present civil revision petition is preferred.
5. Sri AT. Prabhakar, learned Counsel representing revision petitioner would maintain that pursuant to Ex.B.1 and the terms and conditions, the revision petitioner had deposited a sum of Rs. 5.00 lakhs as security deposit and also furnished bank guarantee for a sum of Rs. 5.00 lakhs and on complying with the same, the first respondent supplied necessary seeds for the purpose of distribution and, thus, the petitioner had distributed the seeds to various third party agencies. The learned Counsel also would submit that in the light of the facts and circumstances there exists a valid contract between the petitioner and the respondents though formal agreement was not engrossed on non-judicial stamp paper. The learned Counsel also pointed out to the oral and documentary evidence available on record and also certain findings recorded by the learned II Senior Civil Judge, City Civil Court, Hyderabad, and would maintain that having made certain observations in favour of the petitioner ultimately dismissing the O.P., that too, relying on a decision delivered under the Arbitration and Conciliation Act, 1996, the present Act, when the present dispute relates to the repealed Act, the Arbitration Act, 1940 cannot be sustained. The learned Counsel also placed strong reliance on several decisions to substantiate his submissions.
6. Per contra, the learned Counsel representing respondents had taken this Court through the contents of Ex.A.1 and Ex.B.1 and would maintain that when there is no written contract and when it was agreed between the parties that in pursuance of initial acceptance a real agreement had been entered into. Unless and until such agreement had been entered into by the parties it cannot be said that there is a conclusion in the contract and in view of the same the reasons recorded by the learned II Senior Civil Judge, City Civil Court, Hyderabad, cannot be found fault and the civil revision petition to be dismissed.
7. Heard the Counsel, perused the findings recorded by the learned II Senior Civil Judge, City Civil Court, Hyderabad, in O.P. No. 169 of 1994.
8. The O.P. was filed by the petitioner for the reliefs already referred to supra. It is the case of the petitioner that the first respondent corporation appointed the petitioner as distributor of seeds for Prakasam District for one year from 1.4.1992 to 31.3.1993. It is also his case that subsequent thereto certain disputes arose between them and vide Clause 32 of the terms and conditions attached to the agreement, the Managing Director of the first respondent is

designated arbitrator and therefore the petitioner submitted its claims on 3.11.1993 to the said person i.e., second respondent with a request to enter upon the reference and adjudicate upon the disputes. Though the second respondent received the claims of the petitioner, the second respondent failed to enter on the reference and pass award as per Sections 8 and 9 of the Arbitration Act, 1940. As per the explanation to Section 9 of the Arbitration Act, 1940, an arbitrator, umpire after a request by either party to enter on and proceed with the reference does not do within one month, it may constitute a neglect or refusal to act within the meaning of Sections 8 and 9 of the aforesaid Act. Hence, in view of the failure on the part of second respondent to enter upon and adjudicate the disputes referred to him, he becomes functus officio and since the arbitration agreement does not show that it was intended that the vacancy should not be supplied, any party may serve the other party with a written notice to concur in the appointment or in supplying the vacancy. Hence, the petitioner sent a notice on 12.3.1994 to the first respondent marking a copy thereof to second respondent calling upon the first respondent to concur in the appointment of any one of the learned Judges as a sole arbitration to adjudicate the disputes and the names of the said Judges are referred to supra. The first respondent though received the said notice on 16.3.1994, did not express its concurrence for the appointment of sole arbitrator nor filled up the vacancy. The second respondent sent a reply on 19.3.1994 stating that there is no question of giving concurrence for adjudicating the disputes. Hence, the O.P. was filed.

9. The second respondent filed counter on his behalf and on behalf of first respondent Corporation as well wherein a stand had been taken that petitioner did not furnish proper particulars of the first respondent and there is no written agreement in between the parties, which contains an arbitration clause, and hence the petition is not maintainable. It is also stated that there is also no dispute between the petitioner and first respondent. It is also averred in the counter that the first respondent appointed the petitioner by its proceedings dated 15.5.1992 and the petitioner had agreed with the clauses contained therein. There was no clause in the said proceedings for referring any dispute to the arbitrator and that the arbitrator was the Managing Director of A.P.S.S.D.C. Ltd. The order appointing the petitioner as distributor of seeds specifically states that the first respondent can supply the seeds to nay other agency in his jurisdiction directly and that the petitioner will not be entitled to any commission for the supplies. It was also specifically mentioned in the said proceedings that first respondent shall be making a regular agreement on a stamp paper worth Rs. 50/- non-judicial stamp paper, but the petitioner had not executed any such written agreement. The petitioner wrote a letter dated 22.12.1992 stating that they are distributing seeds on behalf of first respondent since one year and that they had given bank guarantee for Rs. 5.00 lakhs and now they want to withdraw the distribution of seeds and therefore they requested the first respondent to make arrangements for return of the bank guarantee amount. On the same day the second respondent passed orders on that representation and

the petitioner passed acknowledgment to the effect that he received the bank guarantee. Later, the petitioner again sent an application on 22.12.1992 stating that since the petitioner was withdrawing distributorship requested to settle the accounts and send the balance amount to him. Accordingly, the petitioner's accounts were settled and also returned a sum of Rs. 1,26,662-60 ps. for which the petitioner passed an acknowledgement on 10.3.1993. On 12.7.1993 one of the partners of the petitioner by name P. Satish Kumar Reddy sent a representation to the first respondent stating that there were disputes among the partners of the petitioner corporation and requested the first respondent not to pay any amount to the Managing partner of the petitioner and later issued a legal notice on 24.7.1994 to the same effect. The petitioner did not state in any of the representations filed before the first respondent that there were any disputes. The petitioner simply stated in its letter dated 22.12.1992 that the petitioner himself was withdrawing from the distributorship on his own accord. The petitioner filed a representation on 4.6.1993 claiming commission on the supplies without mentioning any particulars to which the first respondent sent a reply that the petitioner was not entitled to any commission on the seeds supplied directly to the department. The petitioner also filed a representation before the Chief Minister on 12.10.1993, which was referred to the first respondent corporation, to which the first respondent sent a reply to the petitioner stating that the petitioner was not entitled to any commission. It was also further stated that the petitioner was aware of the fact that there was no written agreement appointing the petitioner as distributor of seeds and there was no arbitration clause.

10. On the strength of these pleadings, the following points were settled, by the learned II Senior Civil Judge, City Civil Court, Hyderabad.

1. Whether there is any written agreement between the parties regarding Arbitration clause?

2. Whether the petitioner is entitled for the removal of 2nd respondent as arbitrator and for appointment of an arbitrator out of the four names furnished by the petitioner ?

11. During the course of enquiry Exs.A.1 to A.5 and Exs.B.1 to B.12 were marked and the said documents are as hereunder:

Ex.A.1 : Terms and conditions for dealership issued by R.1

Ex.A.2 : Letter dated 23.5.1992 from R1 to the petitioner

Ex.A.3 : Office copy of claim petition dated 3.11.1993 by the petitioner before R.2.

Ex.A.4 : Office copy of notice u/s 8 dated 12.3.1994 by the petitioner's Counsel to R.1.

ExA.5 : Original reply notice dated 19.3.1994 from R2 to petitioner

Ex.B.1 : Appointment order of petitioner as distributor dated 15.5.1992.

Ex.B.2 : Letter from petitioner withdrawing dealership dated 22.12.1992.

Ex.B.3 : Receipt in respect of bank guarantee dated 22.12.1992

Ex.B.4 : Representation of the petitioner to settle accounts dated 22.12.1992.

Ex.B.5 : Receipt passed by petitioner for full and final settlement of their accounts.

Ex.B.6 : Petitioner's representation with regard to commission.

Ex.B.7 : Reply to Ex.B.6 dated 11.6.1993.

Ex.B.8 : Letter from Satishkumar Reddy dated 12.7.1993.

Ex.B.9 : Registered postal cover Ex.B.10 : Lawyer's notice dated 24.7.1993.

Ex.B.11: Communication from CM's peshi dated 12.10.1993.

Ex.B.12 : Reply to Ex.B.11 dated 16.10.1993.

12. The learned II Senior Civil Judge, City Civil Court, Hyderabad, while answering points 1 and 2 recorded reasons at paras 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the order impugned in the C.R.P. and ultimately dismissed the petition with costs.

13. The principal reason which had been specified in the order impugned in the C.R.P. by the learned Judge is that even from the correspondence of Exs.A.2 and Ex.B.2 with regard to the payment of commission, there was no agreement between the parties with regard to dealership and hence the question of Ex.A.1 forming part of the agreement does not arise and consequently the petitioner does not involve Clause 32 of Ex.A.1 and hence came to the conclusion that there was no agreement between the parties for referring the matter for arbitration. Clause 32 referred to supra reads as hereunder:

In the event of any dispute or difference arising between APSSDC and the dealer in any matter covered by this contract or arising directly or indirectly therefrom or connected said contract in any manner or the implementation of any other terms and conditions of the said contract the matter shall be referred to the Managing Director, APSSDC Ltd. or in his absence General Manager (Marketing) who shall himself act as the sole arbitrator or shall nominate a sole arbitrator for the purpose and the provisions of Indian Arbitration Act, 1940 shall apply to such arbitration. The parties expressly agree that the above arbitration proceedings shall be held at Hyderabad and all applications under Indian Arbitration Act in respect of the said arbitration shall be made to the Civil Courts at Hyderabad City. The parties further expressly agree that this agreement will be deemed to have been entered into at Hyderabad city, or the place where either of the parties may sign the same and that in case any of them wants to file a suit or legal proceedings in respect of any matter arising out of or related directly or

indirectly to this contract, it shall have resort only civil Court at Hyderabad city and to no other Court.

14. Several of the facts appear to be not in controversy though there appears to be some factual controversy on certain aspects between the parties. The fact that the terms and conditions had been agreed upon and the fact that the petitioner also supplied seeds to third party agencies for some time, these aspects cannot be put into serious controversy in the light of the correspondence available on record.

15. The principal contention and stand taken by the respondents is to the effect that pursuant to action of entering into a regular agreement it has not been finalized and inasmuch as there is no specific written agreement between the parties, this action may not fall within the meaning of written agreement and, hence, the relevant provisions of the Arbitration Act, 1940, cannot be invoked at all and shelter cannot be taken under arbitration clause of such relief cannot be prayed for in the O.P.

16. This is a matter arising under the Arbitration Act, 1940. In Union of India (UOI) Vs. A.L. Rallia Ram, , the Apex Court while dealing with Section 2(a) of the Act aforesaid the essentials for validity of arbitration agreement observed at Para 10 as hereunder:

The authority of an arbitrator, depends upon the authority conferred by the parties by agreement to refer their differences to arbitration. By Section 2(a) of the Arbitration Act 1940 "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not" 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 the 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 accented by the parties. Clause 13 in Form F.D. (M) 70 fulfills all these requirements. But the Dominion of India being a party to the arbitration agreement, to be binding the agreement had also to conform to the requirements of Section 175(3) of the Government of India Act, 1935, for an arbitration agreement is a contract within the meaning of the Government of India Act and it must to bind, the Dominion of India be made in the form prescribed by that section. The question which then falls to be determined is whether the letter accepting the tender of the respondent conformed to the requirements of Section 175(3) of the Government of India Act.

In R. Venkata Reddy v. A.P. State Road Transport Corporation and Anr. 2000 (2) An.WR 61, a learned Judge of this Court while dealing with the similar question observed at Paras 6 and 12 as hereunder:

From the foregoing it is clear that there was an offer for execution of a particular

work and the said offer was agreed by the appellant and the said agreement i.e., the tender schedules of the appellant have been accepted by the respondents and therefore merely because the formal agreement has not been signed by the respondents it cannot be said that there was no concluded contract. Once the tender has been accepted and communicated to the contractor and the contractor also acknowledged the said communication, there will be a formation of the contract and therefore the parties are bound by the terms and conditions of the tender schedules.

In respect of this particulars the tender submitted by the appellant has been accepted by the respondents vide their letter dated 4.4.1987 and work order also issued to start the work. Therefore, it cannot be said that there was no concluded contract As a matter of fact, the work order and acceptance of the tender was cancelled only on the ground that the respondents were unable to hand over the site for the construction of the tender work, but not for the fault of the appellant. Therefore, I hold that there was a concluded contract in this case and accordingly the judgment in O.S. No. 545/89 on the file of V Additional Judge, City Civil Court, Hyderabad, is set aside and remanded the matter back to the said Court to call for the original tender documents relating to the work, in question, and to appoint arbitrator for adjudication of the disputes in accordance with law.

17. The said order was carried by way of LPA No. 168 of 2000 and the learned Division Bench of this Court by order dated 13th day of March, 2003, dismissed the said LPA as not maintainable. Reliance also was placed on a decision in Shri Chander Nath Ojha, Jaipur Vs. Shri Suresh Jhalani and Others, , wherein the Apex Court while dealing with arbitration agreement under the Act aforesaid held that it is not necessary that it should bear the signatures of the parties and the requirement of law is only that it should be in writing and u/s 2(a) of the Act an arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

18. In Maheswari Metals and Metal Refinery, Bangalore Vs. The Madras State Small Industries Corporation Ltd., , while dealing with a concluded contract in respect of tender it was held that where material terms were settled by the time of accepting tender, contract becomes concluded even if tenderer required to execute an agreement after acceptance of his tender.

19. In Integrated Informatics (P.) Ltd. Vs. Indian Telephone Industries Ltd. and another, , a learned Judge of Allahabad High Court observed at Paras 10 and 11 as hereunder:

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. Sub-section (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

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.

20. In Gujarat State Fertilizers Co. Ltd. Vs. HJ Baker and Bros. and Others, , a learned Judge of Gujarat High Court at Paras 10 and 13 observed as hereunder:

So far as the question of concluded contract between the parties is concerned, number of documents were referred to by Mr. Shelat and also by the learned Counsel for the respondent. A plain reading of these documents would definitely give an indication that there was prima facie concluded contract between the parties. There can be no dispute that for every contract there should not be written agreement. The contract can be entered into even by correspondence and also by telephonic talk. The only requirement is that there should be an offer any one party who is called the proposer and the offer should be accepted by the

other party who is called the acceptor. Once there is acceptance of the offer the contract comes into existence. The contract can be inferred even from the correspondence. In the case in hand the contract came into existence through tender notice. The tender is nothing, but invitation to offer. In response to such tender offer was made by the respondent No. 1. The offer was accepted with certain modifications by the revisionist. It is very difficult to accept at this stage that there was no concluded contract. The revisionist opened irrevocable letter of credit on 13.11.1992 in favour of respondent No. 1 for discharging its obligation under the contract for which Page No. 110 of the Paper Book can be referred. Secondly the revisionist invoked condition No. 19 of Annexure : A of invitation to offer quoting changed circumstances and severe constraint for requesting the respondent No. 1 to cancel the shipment of sulphur schedule for middle of November, 1992 (vide Page: 108 of the paper book). Thus, having invoked force majeure clause, which can only be invoked when there is a concluded contract, the petitioner cannot contend that there was no concluded contract between the parties for purchase and sale of sulphur. Further Page No. 125 indicates that vide letter dated 5.11.1993 the revisionist, for the reasons given in the telex dated 23.11.1992 repudiated the contract This repudiation of the contract was at the instance of the revisionist If there was no concluded contract, there was no occasion for the revisionist to repudiate the contract Further, in terms of Clause (20) contained in the tender the parties jointly referred the difference and disputes to the Arbitrator. On these facts and circumstances of the case it is difficult to accept the contention of Shri Shelat that there was no concluded contract between the parties. I am unable to accept the contention of Mr. Shelat that the counter offer of the respondent demolished the entire theory of concluded contract. From the documents on record it transpires that there was no counter offer, rather negotiations were going on between the parties regarding certain terms and those terms were essentially relating to shipping terms. Other terms and conditions were already accepted by the revisionist There is no merit in the contention of Mr. Shelat that the petitioner being joint sector public undertaking there cannot be any concluded contract which has not been signed by authorized officer under Articles of Agreement. Since the revisionist chose to enter into contract by floating tender inviting offer it cannot be permitted to say that there was no concluded contract between the parties. Thus on this point no interference in the findings of the trial Court is called for.

Thus, from the above dictum of the Apex Court it is clear that an arbitration agreement must be in writing, but it need not be signed by the parties to the Agreement It is further clear that formal agreement or that the terms should all be contained in one document, is not essential to create valid arbitration agreement All that is necessary mat from documents it must appear that the parties had agreed to submit present or future differences to arbitration. Consequently if the arbitration clause is contained in the tender notice which was accepted by the respondent No. 1 there came into existence arbitration agreement within the meaning of Section 2(a) of the Arbitration Act.

21. In fact the learned Judge had referred to J.K. Jain and others Vs. Delhi Development Authority and others, and the case of U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others, . However, reliance also was placed on the decision in Bemhard Consultancy Private Limited v. Ind. Agro Synergy Ltd., Nagpur 2002 (1) ICC 511, a matter decided by the then Chief Justice of this Court under Arbitration and Conciliation Act, 1996, wherein it was observed that a clause in the agreement with the heading "Arbitration" it merely provides that Courts at Hyderabad shall have jurisdiction to entertain any suit and further that arbitration if any shall also be at Hyderabad and it is not an arbitration clause and further observed that Court can refer the case to the arbitration if there is an arbitration clause in the agreement and in the absence of arbitration clause the question of referring the matter does not arise.

On a careful analysis of different provisions of the Arbitration Act, 1940, and also in the light of the decisions specified supra, this Court is of the considered opinion that the said decision in Bemhard Consultancy Private Limited v. Ind. Agro Synergy Ltd., Nagpur (supra), is distinguishable on facts. It is needless to say that in the light of the facts and circumstances though Clause 32 is available and though the correspondence would go to show that the terms and conditions agreed upon in fact had been acted upon and the same to be taken as concluded contract, declining to appoint an arbitrator as requested by the petitioner, in the facts and circumstances of the case, cannot be sustained.

22. But however, in the light of the decisions specified supra since this Court is inclined to set aside the order impugned in the CRP the impugned order is hereby set aside and the civil revision petition is hereby allowed. No costs. In the light of the order made the matter is remitted to the learned II Senior Civil Judge, City Civil Court, Hyderabad, for the purpose of appointing arbitrator, if necessary, after ascertaining the views of the parties in this regard.