

(2004) 07 DEL CK 0014
In the Delhi High Court
Case No : OMP 211 of 2004

Tulip I.T. Services Limited

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 16-07-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 32, 7, 79

Citation : (2004) 2 ARBLR 447 : (2004) 4 BC 165 : (2005) 123 CompCas 288 :
(2004) 112 DLT 638 : (2004) 75 DRJ 624

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : G.L. Rawal and Kuljeet Rawal, for the Appellant; Jagdeep Kishore,
for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—The petitioner company which provides information technology service was an unsuccessful tenderer for computer networking connectivity in respect of a tender floated by the respondent Punjab National Bank on 4th June, 2004 and consequently its technical bid was rejected. This led to the filing of the present application u/s 9 of the Arbitration Act, 1996 (hereinafter referred to as the Act) by which interim orders u/s 9 of the Act are sought on the basis of the applicability of the Arbitration clause contained in clause 24 of the terms of tender.

2. The issue involved in the present case is whether before the signing of agreement an arbitration clause contained in the tender documents can be availed of by a unsuccessful tenderer. The learned counsel for the parties have relied upon clauses 22 and 24 of the tender terms which read as follows :

""22. SIGNING OF CONTRACT

The successful bidder(s) shall be required to enter into a rate contract with PNB, within 7 days of the award of the tender or within such extended period as may

be specified by Bank on the basis of the Tender Document, the Tender of the successful bidder, the letter of acceptance and such other terms and conditions as may be determined by the Bank to be necessary for the due performance of the work in accordance with the Bid and the acceptance thereof, with terms and conditions shall be contained in a memorandum of Understanding to be signed at the time of execution of the Form of Contract. The rate contract will be valid up to 31.03.2005, unless terminated by the Bank before that date. Bank reserves the right to extend the validity of the rate approval contract beyond 31st March, 2005, after re-negotiations with the approved vendor.

24. GOVERNING LAWS AND DISPUTES

All disputes or differences whatsoever arising between the parties out of or in relation to the construction, meaning and operation or effect of these Tender Documents or breach thereof shall be settled amicably. If, however, the parties are not able to solve them amicably, the same shall be settled by arbitration in accordance with the applicable Indian Laws, and the award made in pursuance thereof shall be binding on the parties.

The vendor shall continue work under the Contract during the arbitration proceedings unless otherwise directed in writing by the Bank or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrator or the umpire, as the case may be, is obtained. The venue of the arbitration shall be Delhi.""

3. The learned counsel for the petitioner has relied upon the first part of paragraph 24 to contend that this is a broad enough clause so as to cover even disputes prior to award of the tender including the refusal of tender. In particular he has referred to the phrase ""all disputes or differences whatsoever out of or in relation to the construction meaning and operation or effect of these tender documents"" . The counsel for the respondent has, however, pointed out that the second paragraph of Clause 24 demonstrated that the arbitration proceedings are only available after the award of contract. He also relied upon Clause 22 which specifies signing of the contract and was a pre-requisite for invoking clause 24. He has also relied upon Section 7 of the Act which provide for an agreement in writing which according to him does not exist.

4. The relevant statutory provision which governs the present dispute in Section 7 of the 1996 Act which defines an arbitration agreement and reads as follows:-

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

The issue raised in the present petition is whether an unsuccessful tenderer can avail of the arbitration clause contained in the tender documents or such a clause can only be invoked by a successful tenderer who had signed the contract as specified by clause 22. The restoration of the said issue would depend upon the interpretation of clause 22 and 24 of the tender terms.

5. Reliance has also been placed by the petitioner on the judgment of the Hon"ble Supreme Court reported as Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, to contend that applicability of an arbitration clause in the agreement to the facts of the case goes to the root of the matter and must be raised before the arbitrator. He laid particular emphasis on the law laid down in para 15 and 16 which read as follows:-

"15. The question then would arise: what would be the role of the civil court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the civil court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the civil court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., with reference to the power of the arbitrator u/s 16 has laid down thus:

"21. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the

Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, Therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, Therefore, it had no jurisdiction.'"

16. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Konkan Railway* that if there is any objections as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act.

In my view the above observations by the Supreme Court were made in the context of an agreement between the parties which had been signed by both the parties. In paragraph 4 of the aforesaid judgment it is clearly indicated that the arbitration was pursuant to clause 41 of the agreement dated 26th March 1997 executed by the parties. Accordingly the aforesaid judgment in my view does not support the plea advanced by the learned counsel for the petitioner as it related to an agreement which had undeniably been signed by both the parties.

6. The learned counsel for the respondent has submitted that the offer of the petitioner was scrutinized and there was no concluded contract and the invitation of a tender was only an invitation to the parties to make an offer. He further submitted that unless and until such an offer was accepted, no concluded contract came into being. He has further relied upon the judgment of *N.P. Singh vs. Forest Officer* reported as AIR 1962 Man 47 wherein it was held that in a notice calling for tenders do is not create a contract. He has also relied upon the decision of *A. Mohd. Basheer vs. State of Kerala* reported as 2003 SOL Cas 385, where the Hon"ble the Supreme Court held as follows:

"4. We find substance in the argument. In the present case we find that there was only a bid for removal of residual tree growth and fire wood, a substantial part of which was destroyed in fire. It is under such circumstances, the appellant wrote to the Divisional Forest Officer for cancellation of his bid or reduction of the bid amount. In the case of *Abdul Rahiman's* case (*supra*) the breach of contract stood admitted. In *Abdul Rahman* (*supra*) the Full Bench referred to an earlier decision reported in 1980 K.L.T. 830 and distinguished the same on the ground that what was sought to be recovered therein was not an amount due on account

of or in respect of timber tender under any contract thereof and, thus, Section 79 could not be invoked. The case of the appellant, however, appears to be squarely covered by the decision of the Kerala High Court reported in 1980 K.L.T. 830.

4. It is true that the question as to whether there is a breach of terms of the notice inviting tender or not should be adjudicated by an authority declared to be competent therefore. In a case where there is a dispute as to whether a damage has occurred, a finding of fact in that behalf must be arrived at by competent authority, where after the amount of damages should be quantified. Such quantification of damages must also be in consonance with the terms of the relevant rules.

5. As indicated hereinbefore, the appellant herein sought reduction in money offered by him as a result of a subsequent event which was a "vis major". No concluded contract, thus, could come into effect and under such circumstances, the question of retaliation of shortfall in the form of damages does not arise.""

From the above extract of the judgment of the Supreme Court it is clear that the Supreme Court came to a conclusion that no concluded contract has come into effect by mere reason of a bid given by a tenderer. Learned counsel for the respondent further relied on U.P. Rajkiya Nirman Nigam Ltd. vs. Indure Pvt. Ltd. reported as 1996 SOL Cas 412 wherein in para 16 it was held by the Supreme Court as follows:

""From this factual matrix, the question arises: whether there emerged any concluded contract pursuant to which the parties are bound by the terms and conditions of the tenders submitted to the Board and for further performance? It is seen that the tenders were not jointly signed by the appellant and the respondent but were unilaterally submitted to the Board by the appellant and were later on a withdrawn. There did not exist any concluded contract between the Board and the appellant for the performance of the work as per terms and conditions of the tenders floated by the Board. u/s 32, it was a contingent contract until it was accepted by the Board. In this Background, the question emerges: Whether there is an arbitration agreement between the parties? It is seen that Clause (14) of the agreement (subject to the dispute whether it is arbitrable under clause (14) which is yet another issue with which we are not concerned independently does not come into existence unless there is a conceded contract pursuant to the proposal made by the appellant on June 22, 1984 or a counter proposal by the respondent dated June 26, 1984. It is not the case of the respondent that there exist any such independent arbitration agreement.

Thus withdrawn tenders were held not lead to a concluded contract enabling resort to the arbitration clause in the tender terms.""

Consequently, the position of law appears to be clear and since the response to the tender by the petitioner was not accepted, it had not transformed into a contract and no arbitration agreement could be said sought to exist between the

parties permitting the petitioner a resort to arbitration as per the terms of the tender.

7. Furthermore while the plea of Shri Rawal in respect of the interpretation of the first part of clause 24 is a possible interpretation, if the latter part of clause 24 is perused it makes it evident that clause 24 in its entirety pertains to a position which obtains post signing of the contract and an unsuccessful tenderer cannot resort to the said clause in order to seek arbitration. In this context the impact of clause 22 which relates to the signing of the contract assumes significance. This also demonstrates that clause 24 can only be resorted to by a party who has signed the contract specified under clause 22. In so far as reliance by the petitioner on Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, is concerned, the said decision arose from Arbitration Act 1940 and did not in any event relate to a pre-contract stage and cannot come to the aid of the petitioner. The above case only dealt with the plea whether the arbitration agreement need to be in a particular form and the issue whether prior to signing contract a party could seek the appointment of an arbitrator was not involved. Furthermore, in Rukmanibai's judgment (supra) both parties had signed the lease which contained clause 15, the arbitration clause.

8. Even otherwise no party inviting tenders for execution of a work can contemplate or visualize a situation where several unsuccessful tenderers for a given contract, even before the award of a contract, can all enter into separate arbitration proceedings. Such an interpretation given to clause 24 will lead to an wholly anomalous and unreasonable state of affairs. Floating of a tender and the response thereto cannot constitute an agreement contemplated by Section 7 and Section 11 of the Act.

9. Consequently the plea of Shri Rawal that the petitioner was entitled to an interim order u/s 9 of the Act as it was entitled to invoke the arbitration clause contained in the tender terms, even if it was unsuccessful in the tender, is devoid of any substance as there was no arbitration agreement in existence between the parties as contemplated by Section 7 and 11 of the Act and accordingly no orders in favor of the petitioner u/s 9 can be passed. However this does not bar any other remedy which may be available in law in any other fora to the petitioner, to challenge the legality of the rejection of its technical bid by the respondent.

10. This application u/s 9 of the Act is accordingly dismissed.