

**(1992) 04 DEL CK 0033**

**In the Delhi High Court**

**Case No :** Original Miscellaneous Petition No. 62 of 1987

Uttar Pradesh Rajkiya Nirman Nigam Ltd.

APPELLANT

Vs

Indure Private Ltd. and Others

RESPONDENT

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**Date of Decision :** 10-04-1992

**Acts Referred:**

**Citation :** (1992) 2 ARBLR 269 : (1992) 47 DLT 268

**Hon'ble Judges :** Usha Mehra, J

**Bench :** Single Bench

**Advocate :** Divya Kapoor and O.K. Sharma, for the Appellant;

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## **Judgement**

Usha Mehra, J.

(1) Uttar Pradesh Rajkiya Nirman Nigam Ltd.(hereinafter called the petitioner) has alleged that since there does not exist any legal, valid and binding Arbitration Agreement between, the parties hence the reference of disputes made by Indure (P) Ltd. (hereinafter called respondent No. 1) to the arbitrator (respondent No. 2 herein) and calling upon the petitioner to enlarge the time for making and publishing the award by the arbitrator ,(respondent No. 2) illegal, void and bad in law. In nut shell the case is that the petitioner decided to take up contract with U.P State Electricity Board for erection of mechanical equipment and construction work including consultancy services. Petitioner purchased the tender on 6.2.1984. On23.5.1984, respondent No. 1 had written to the petitioner offering to join the petitioner in this work. Respondent No. 1 wanted it to be a joint venture with the petitioner. Therefore, respondent No. 1 approached the petitioner. Parties negotiated and ultimately terms were settled which formed part of draft agreement .Draft agreement for approval and signature was sent to the respondent No. 1on 22.6.1984. The respondent instead of signing the draft agreement ,made modifications in the said draft agreement. The modifications suggested by respondent No. 1 completely changed the terms of the agreement. Modification suggested amounted to new offer hence a valid and subsisting agreement never came into existence. The petitioner never signed the said

agreement .As the parties did not enter into an agreement for joint venture, hence the petitioner withdrew its offer with U.P. State Electricity board. Respondent No. 1 had given an undertaking that in the event of the order being placed on them, by the U.r. State Electricity Board, they will do the entire work. After the withdrawal of the tender by petitioner, respondent No. 1 offered to U.P. State Electricity Board to complete all the formalities required by the said Board and to carry out the work. This act of the respondent No. 1 establishes that no agreement had been arrived at between the petitioner and respondent No. 1. The respondent also admitted vide its notice dated 5.3.1985 that there was no arbitration agreement, containing arbitration Clause, existed between the parties. Respondent No. 1 appointed respondent No. 2 as its arbitrator .Petitioner on the other hand asserted that there did not exist an arbitration agreement, however, in order to solve the controversy respondent agreed to nominate respondent No. 3 as its arbitrator but for a limited purpose. The purpose of appointment of respondent No. 3 was to find out whether there existed any arbitration agreement between the parties. Since the question about the existing of arbitration clause or agreement can not be decided by an arbitrator ,who is a creature of the agreement, hence this petition u/s 33 of the Arbitration Act.

(2) This petition has been contested by the respondent No. 1 on the ground that draft agreement was discussed by the respondent with the representation of the petitioner. After discussion certain terms and clauses of the agreement were modified with mutual consent of the parties which fact find mention in the forwarding letter sent Along with the duly signed agreement. Moreover from the conduct of the parties and the correspondence exchanged it is apparent that a subsisting and valid agreement came into existence between the petitioner and respondent No. 1. The said agreement contained Arbitration Clause No. 14 which is reproduced as under :Clause No. 14

(3) "IF any question dispute or difference whatsoever shall arise between UPRNN and the Indure upon, or in relation to or in connection with the agreement ,either party may forthwith give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of two arbitrators, one to be nominated by UPRNN and the .other to be nominated by the Indure, or in the case of the said arbitrators not agreeing then to the adjudication of an Umpire to be appointed by the arbitrators in writing, before proceeding with the reference and the award of the arbitrators or of the Umpire appointed by them, in the event of their not agreeing shall be final and binding on both the parties and the provisions of the Indian Arbitration Act, 1940 and of the rules made there under with any statutory modification thereof shall be deemed to apply to, and be incorporated in this agreement."-

(4) Pursuance to this clause Arbitrators were appointed and they entered upon the reference. Hence now the petitioner cannot be permitted to dispute the arbitration clause.

(5) On the pleadings of the parties following issues were made :to dispute the

arbitration clause.

1. Whether there exists a valid arbitration agreement between the parties. 2. Relief.

The parties were permitted to lead their evidence by way of affidavits" ..Ms. Divya Kapoor appearing for the petitioner contended that modifications and alterations made by the respondent to the draft agreement amounted to counter offer which unless accepted by the petitioner cannot constitute subsisting and valid agreement. Parties must agree to all the terms in order to prove that a valid contract came into existence. No party has a right to unilaterally change the terms of the agreement suggested by the other party. Both the parties must sign such an agreement and if it is not done, there is no valid and subsisting agreement. The Consensus at Idem to the agreement between the parties is the essence of the agreement which is missing in this case. The reference made by the petitioner to respondent No. 3 as to whether there exist an arbitration agreement was bad in law. It is a settled principle of law that it is the Courts alone and not the arbitrator who can decide about the existence of an arbitration agreement. Without agreement, if the matter is to be referred to arbitrator, then there has to be a separate arbitration agreement. In this case there is no separate agreement between the parties to refer the dispute regarding the existence of an arbitration clause. The arbitrator cannot be vested with the jurisdiction by consent of the parties particularly when there existed none. Respondent No. 3 was nominated under a non existing agreement and under a mistaken belief and Therefore, reference to arbitrator was bad and cannot be acted upon. Ms. Kapoor, in order to prove that parties were never at one regarding arbitration agreement drew my attention to the notice sent by respondent No. 1. In that notice respondent No. 1 also admitted that there did not exist any arbitration agreement. The legal notice issued by the respondent is Ex. P.I dated 5.3.1985. In this notice at the bottom a note has been given by the respondent which is reproduced as under:

"NOTE: Since the pre-tender tie up agreement was initiated by you mala fide the arbitration clause thereof is not applicable."

(6) Ms. Kapoor, contended that since parties were only at the negotiating stage and had not reached any consensus, Therefore, there was no question of any subsisting agreement having come into existence. From the perusal of the above note it is clear that respondent was also aware of this fact. This note was inserted by the respondent because he was aware that the counteroffer made by him vide letter dated 27.6.84 was not accepted by the petitioner. The respondent deleted Clause 10 which was with regard to furnishing of the bank guarantee for their earnest money. Respondent also deleted certain material items of clauses 9 and 10. The amendments made in the draft agreement were very material. Those touched the material terms of the agreement and goes to the root of the agreement, hence in the absence of these counter offer being accepted by the petitioner no concluded contract came into existence.

(7) Since the agreement never came into existence nor there was any Consensus ad Idem hence the provision of Clause 14 of the alleged Agreement could not be invoked. She further contended that even though the petitioner in the initial stages agreed to refer, to a limited extent, the dispute about the existence of the arbitration agreement to the arbitrator, but that does not mean that the petitioner ever admitted the existence of the arbitration agreement. The fact is that the petitioner never admitted the arbitration agreement, and Therefore, never made any reference of disputes to the arbitrator. Only reference was to find out about the existence of Arbitration Agreement. However, subsequently it dawned upon the petitioner that the question of the existence of arbitration agreement cannot be adjudicated by the arbitrator as has been held by the House of Lords in the case of Heyman and Another v. Darwins Limited reported in 1942 App Cas 356, where it was held that, "if a party denies that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains" Moreover the respondents have already repudiated the Arbitration Agreement vide their notice now cannot rely on the same arbitration agreement and Clause No. 14. In the case of Heyman & Another (supra) it was held that "it is not a sound law to permit a person to repudiate a contract and thereupon "specifically to found upon a term in that contract which he has thus repudiated". It was also observed that it cannot be understood how the person "setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced .If the dispute is whether the contract which contains the arbitration clause has ever been entered into at all, that issue cannot go to arbitration under the Clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. If one party to the alleged contract is contending that it is void ab initio the arbitration clause cannot operate, for on this view the clause itself is also void. In the present case, Ms. Kapoor contended that since the agreement never came into existence so applying the observation of the House of Lords in this case the provision of Clause 14 of the Agreement cannot be invoked. It is only when parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, such differences should be recorded as differences which have arisen "in respect of" or "with regard to" or "under the contract", and an arbitration clause which uses these, or similar expression should be construed accordingly .But that is not the case in hand. and Therefore, the matter cannot be referred to arbitration. It is clear that as the arbitration clause is the matter of agreement, the first thing is to ascertain according to the ordinary principle of construction what the parties have actually agreed. According to Ms. Kapoor from the documentary evidence placed on record it can be said that the parties never agreed and they were at no point of time one on any issue .She, Therefore, contended that this Court has jurisdiction to determine whether there existed an arbitration agreement or not. The reference made by the petitioner to the arbitrator was under a mistaken belief of law.

(8) In order to prove that there was no subsisting contract she pointed out few glaring facts for example :

1. That the draft agreement was amended by the respondent without the permission of the petitioner. 2. These material alterations or the counter proposals had an important bearing on the contract. 3. When the negotiation failed and the petitioner withdrew the tender of U.P. Electricity Board, the respondent went ahead and took up the work alone. This shows that there was no agreement arrived at between the parties. 4. On 5/03/1985, a legal notice was sent by the respondent admitting that there was no concluded contract came into existence. The said notice is Ex. P.I, dated 5/03/1985. 5. There is no separate agreement between the parties to refer the dispute regarding the existence of arbitration clause.

(9) The disputes referred by the petitioner to the arbitrator/respondent No. 3 are outside the scope of arbitration. Even if for the sake of argument it is presumed that the dispute was referred still that will not apply as estoppel. In view of the above points raised and the fact that there does not exist Arbitration Clause, the arbitrators cannot cloth themselves with the power which never existed nor the time can be enlarged. In this regard, she has placed reliance to the decision of Supreme Court in the case of Raymon and Co. (India) Private Ltd. Vs. Khardah Co. Ltd., where it was held that where the contract was banned by the Act, the arbitration agreement contained in it as well, will be void and the arbitrators will have no jurisdiction to adjudicate on the dispute for less to decide their own jurisdiction by deciding whether or not the contract was a valid contract there can be no question in such a case of the parties who have submitted to arbitration being bound by estoppel. Ms. Kapoor, Therefore, contended that even though the petitioner under mistaken belief referred the matter to arbitration and submitted to his jurisdiction still petitioner will not be debarred from challenging the jurisdiction of the Arbitrator before this Court. The decision of the Calcutta (reported supra) was upheld by the Supreme Court in the case of Khardah Comp. Ltd. v. Raymon & Co. (India) (P) Ltd., where the Supreme Court observed that a dispute that the contract of which the arbitration clause forms an integral part is illegal and void is not one which the arbitrators are competent to decide under the arbitration clause although it is of sufficient amplitude to take in a dispute as to the validity of the agreement and in consequence a party to the contract is entitled to maintain an application u/s 33 for a declaration that the contract is illegal and that in consequence the proceedings taken there under before the arbitrators and the award were all void. Since there is no separate agreement between the parties to refer the dispute regarding the existence of arbitration clause, therefore, also the arbitrator cannot cloth with power nor this jurisdiction can be vested in arbitrator by consent of parties particularly when there existed no arbitration agreement. The arbitrators in this case were nominated upon a non existing agreement.

(10) On the other hand, Mr. G.K. Sharma, appearing for the respondent

contended that a contract containing an arbitration clause No. 14 came into existence when the petitioner sent the draft agreement and the respondent signed the same on a stamp paper and sent it to the petitioner vide letter dated 27/06/1984. The said agreement is Ex. P. 4 and the letter by which it was sent is Ex. P. 3. In Ex. P.3, it was made clear that the respondent discussed the matter with the Engineers of the petitioner for formalizing the arrangement for joint participation. The change of condition in agreement as pointed out in Ex. P. 3 was made after discussing the same with Shri Surinder Mohan Aggarwal of the petitioner and after the petitioner agreed to such a modification. Respondent submitted the agreement to the petitioner with further stipulation that the agreement and the proposal- given by the respondent would suffice the requirement of joint participation. It was also pointed out in Ex. P.3 that if at a later stage, it was decided to appoint the respondent as assignee, they would furnish the earnest money as also the security deposit. The agreement duly signed by the respondent was sent to the petitioner along with Ex. P. 3. It is not disputed that this agreement contained the arbitration clause No. 14 as reproduced above. Therefore, Mr. Sharma contended that the agreement would be deemed to have come into force on 27/06/1984 and all obligations and responsibilities of the parties to this agreement shall be deemed to have commenced from the said date. This letter, Mr. Sharma contended formed an integral part of agreement Ex. P. 4. This letter was addressed to the petitioner, who never refuted the averments made therein, rather petitioner acted on the agreement at a subsequent date. Since this agreement and the letter, which is an integral part of the agreement, i.e. Ex. P. 3, having not been revoked, the acceptance of the proposal is deemed to be there.

(11) In view of these divergent views expressed by the parties, it is necessary to decide the controversy by determining the question, whether there was any arbitration agreement ? From the facts enumerated above, it is clear that there is no arbitration agreement which is signed by both the parties. Since agreement is not signed by both the parties, will it amount to no Arbitration Agreement ? The law is well settled that it is not necessary that the arbitration agreement should be signed. All that is necessary is that there should be an agreement for arbitration reduced to writing. This will be clear from a reference to Section 2(a) of the Arbitration Act. It is necessary to have a written agreement to submit present or future differences to arbitration. Section 2(a) does not enjoin that the arbitration agreement should be signed by both the parties. Per Supreme Court decision in the case of Seth Banarsi Das Vs. The Cane Commissioner and Another, . Therefore, it is necessary to find out whether the agreement containing Arbitration Clause was reduced into writing. The facts which have come on record are that there were discussions and negotiations between the parties. After the negotiations, a settlement was arrived at which was translated into a draft agreement. The said draft agreement was sent to the respondent for signatures. The respondent discussed the draft agreement with the official of the petitioner who in turn agreed to the suggestions/modifications suggested by the

respondent as mentioned in Ex. P. 3, dated 27/06/1984. Pursuance to the consent of the petitioner to those changes, these were incorporated in Ex. P. 3. The agreement Ex. P. 4 was thereupon typed on a stamp paper and signed by the respondent was sent to the petitioner for their signatures. Ex. P. 3 was to form an integral part of the agreement. The agreement Ex. P. 4 contained an arbitration clause (Clause 14). This was in pursuance to the agreement which was agreed upon between the parties. The arbitration clause was, therefore, transformed into writing. That is not disputed. The perusal of Ex. P. 3 dated 27/06/1984, will show that the terms modified by the respondents were agreed upon by the petitioner. It was petitioner's case that the draft agreement which was sent for signatures to the respondent had been modified and those modifications touched the basic issue hence it amounted to a fresh offer by respondent which were not acceptable to the petitioner. Since these modifications were not accepted by petitioner there was no point of signing the agreement. This assertion of the petitioner is belied from the correspondence exchanged between the parties. Fact remains that in response to the letter dated 27/06/1984, Ex. P. 3, the petitioner, however did not state in any of his letter that the terms mentioned in Ex. P. 4 were not acceptable or that modifications made by the respondent were not in consultation with their representative or that the agreements too were revoked. u/s 5 of the Contract Act, so far as the acceptance of any proposal is concerned, it is complete unless the revocation of the proposal is received before the acceptance. That admittedly has not been done in this case. What has been asserted is that this modification was not agreed to by the petitioner but there is no such letter indicating that the petitioner never agreed to those modifications. Therefore, to my mind, even if one accepts the position that there was no formal signing of the agreement, it cannot be accepted that there was no agreement before the acceptance of the letter Ex. P. 3 dated 27/06/1984. This is a letter by which the agreement duly signed by the respondent was sent to the petitioner. Thereafter, vide letter dated 23/07/1984, Ex. R. 2, the petitioner wrote to the respondent intimating that the copy of the joint bid was readily available but the photocopy would be sent to the respondent. It was also mentioned that it would be better if the petitioner and respondent jointly sit together and review their conditions and rates so that they would be well prepared before they meet the U.P. State Electricity Board. The respondents were also advised to meet the Superintendent Engineer at Lucknow for discussing the matter. The respondents were asked to furnish the bank guarantee for this work. This letter was written by the petitioner after the agreement had been received by them. This bank guarantee was called for according to the respondent per the agreement. Therefore this proves that the agreement had come into existence pursuant to which this bank guarantee was demanded. This was followed by a letter dated 17/10/1984 Ex. R. 3 where the petitioner admitted that the tender was submitted on 30/06/1984 in the joint participation of the petitioner and the respondent. Mr. Sharma therefore, contended that if the agreement had not come into existence could the petitioner submit the tender for the joint participation of the parties. In this letter, it was also mentioned that the offer of the petitioner was based on the specific agreed

condition that the respondent will submit the bank guarantee to the petitioner for Rs. 2,00,000.00 in lieu of bank guarantee for earnest money already submitted by the petitioner. This bank guarantee was to be furnished by the respondent in favor of the petitioner and valid for one year. Pursuant to this letter Ex. R. 3 the respondent furnished the bank guarantee on 29/10/1984 for Rs. 2,00,000.00 in lieu of earnest money and also expressed the hope that the petitioner would be keeping a close watch of their joint interest for the tender. This was so intimated vide letter dated 30/10/1984. Vide letter dated 15/01/1985, Ex. R. 4, the petitioner assured the U.P. State Electricity Board, their cooperation and also extended the validity of their offer up to 28/02/1985. On the same technical and commercial renditions as were submitted with their offer of 30th June, 1984 vide letter dated 22/01/1985, Ex. R. 5, the petitioner asked the respondent's representatives to join them for submitting clarification to the U.P. State Electricity Board at Calcutta. Vide letter dated 23/02/1985, Ex. R. 7, the petitioner admitted that the tender was submitted for the work in association with the respondent on the consideration that they have adequate experience and expertise regarding designing, manufacturing and erection of ash handling plants. But due to certain administrative reasons, they withdrew the offer unilaterally. It is in this background that Mr. Sharma contended that at no stage, the petitioner denied the existence of an agreement. In fact the agreement Ex. P. 4 sent by the petitioner and duly typed and signed by the respondent vide Clause 10 clearly stipulate that Ex. P. 4. was executed only for the purpose of submission of the tender jointly and in case of award of work a detailed agreement was to be entered into between the parties for the working arrangements and cooperation between the two for the execution of work. In the absence of any such agreement what authorised the petitioner to submit the tender on their behalf and on behalf of the respondent. There is no Explanation for the same. In the absence of such an agreement, the petitioner had no authority to submit a joint tender. Therefore, it cannot be said that there never existed any agreement containing Arbitration Clause. In fact it is only after parties entered the agreement Ex. P. 4 and acting upon that the petitioner submitted the tender to the U.P. Electricity Board on 30/06/1984 in the joint participation of the parties. It was in pursuance to this agreement that the petitioner demanded the bank guarantee which was furnished by the respondent on 29/10/1984. It was in pursuance to this agreement that the petitioner had been asking the respondents to send its representative for discussion with the officer of the U.P. State Electricity Board. Had there been no agreement, the petitioner would not have asked the respondent's representative to join in the discussion for the acceptance of the tender.

(12) From the correspondence exchanged between the parties and the conduct of the parties, it is clear that the petitioner had accepted the agreement and in such an eventuality, the petitioner cannot deny the existence of arbitration clause. Mr. Sharma in this regard has placed reliance on the decision of the Orissa High Court in the case of State of Orissa and Another, etc. Vs. B.K. Parida



and Bros. and Another, , The Supreme Court in the case of Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, wherein it is held that the arbitration agreement is not required to be in any particular form .What is required to be ascertained is whether the parties had agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration. Relying on this judgment, Mr. Sharma contended that the agreement duly signed by the respondent Along with the forwarding letter Ex. P.3, was sent to the petitioner which proposal was never denied or refuted by the petitioner. Therefore, the intention of the parties to the arbitration clause containing in the said agreement can be inferred from the correspondence exchanged and pointed out above. The arbitration agreement must be in writing but need not be signed by the parties. It has been held by our own High Court in the case of K.N. Khosla and company v. Om Parkash Gupta in First Appeal From Order No. 128-D/1966 decided on 4/04/1975 by Justice H.L. Anand. It is held that an arbitration agreement in the form of a document signed by one party and accepted by the other either orally or by conduct amounts to a valid agreement. In this case as I have already observed above from the correspondence exchanged between the parties and referred to above the existence of such an agreement by the petitioner can be inferred from its conduct. It is in pursuance to the agreement that the petitioner demanded from the respondent the bank guarantee to the tune of Rs. 2,00,000.00. It is in pursuance to the agreement that the petitioner had asked the representative of the respondents to join them for discussion with the U.P. Electricity Board for finalising the tender. Therefore from the conduct of the petitioner the inference can be drawn that the agreement had come into force the moment it was signed by the respondent and sent the same to the petitioner and the petitioner though did not sign it but acted upon it which amounts to indirect acceptance.

(13) The contention of the petitioner that the respondent in its notice of 5/03/1985 had refuted the existence of the arbitration agreement, to my mind, has no force. This argument may- appear to be "convincing on the face of it but when one lifts the veil it is found that this argument is without substance. The defendant after writing letter dated 5/03/1985 made it clear to the petitioner that the said assertion was not correct, that in fact there existed an arbitration agreement and that the disputes should be referred to arbitration. This is so stated in respondent's letter Ex. P.2 dated 21/01/1986. In Ex. P.2 it was also made clear that the respondents were ready and willing to abide by the arbitration clause and called upon the petitioner to appoint an arbitrator. Vide this Ex. P.2, the respondent appointed Shri Prithvi Raj, Senior Advocate and Retired Judge of the Delhi High Court, as their arbitrator and called upon the petitioner to appoint their arbitrator within one month. Therefore, it cannot be said that the respondent denied the existence of the arbitration agreement. The ratio of Heyman's case (supra)cited by the petitioner is not applicable to the facts of this case. As already observed above, respondent did not deny the arbitration clause. Whatever was stated vide Ex. P.I was clarified by their letter

Ex. P.2. Therefore, it cannot be said that respondent after having denied the existence of arbitration agreement are asking the appointment of an arbitrator. There cannot be any quarrel with the proposition of law laid by Calcutta High Court in the case of Raymonds & Co. (Supra) but that again is not applicable to the facts of this case. In Calcutta contract was banned by the Act hence arbitration clause therein was void. But in the instant case neither the agreement is banned by any Act nor arbitration clause can be called void. Nor the contract is illegal in this case as was the case before Supreme Court in Khardah Company Ltd.(supra). Terms of Ex. P.4 would show that these were agreed to, for the purpose of submitting the tender for joint participation and after award of work fresh ,agreement was to be executed. It is the case of the respondent that petitioner unilaterally withdrew the tender and thus caused damage and losses to respondent whereas it is petitioner's case that breach was committed by the respondent. This, to my mind, amounts to a dispute which is covered under Clause 14 of the agreement and is to be adjudicated before an arbitrator. This Court cannot decide this issue. Nor an inference can be drawn that there did not exist any agreement because respondent after the withdrawal of offer by the petitioner, submitted its own tender. In view of the above discussion, I hold there exist valid agreement containing an Arbitration Clause No. 14.

(14) In view of my above discussion, I find no merits in the submission of the petitioner that there existed no agreement containing an arbitration clause. The petition of the petitioner having no merit is accordingly dismissed.