

HIGH COURT OF MADHYA PRADESH : JABALPUR

WRIT PETITION No.4437/2005

Pooranchandra Agrawal

Vs.

Union of India & others

Shri Sanjay Agrawal, learned Counsel for the petitioner.

Shri James Anthony, learned Counsel for respondents No.1 to 4.

Present : Hon'ble Shri Justice K.K. Trivedi

O R D E R

(23/03/2015)

This petition under Article 227 of the Constitution of India by the petitioner is directed against the order dated 07.03.2005 passed in the proceedings initiated by the petitioner in the Court of Additional District Judge, Bhopal, under Section 8 of the Arbitration Act, 1940 (herein after referred to as 'Act of 1940'). Since the application for appointment of Arbitrator has been rejected by the Court below, this writ petition is required to be filed.

2. The facts giving rise to filing of the writ petition in brief are that a tender was floated by the respondents-Railways for certain work. The petitioner was interested to take part in the said tender proceedings and obtained a tender document. The tender document contained certain annexures where in the first sheet of the tender document a condition was specifically prescribed in paragraph 4 that a formal agreement is required to be executed in case the tender is accepted and till such formal agreement is

executed, the tender itself shall constitute a binding contract between the contractor and the Railways, subject to the modification as may be mutually agreed in between the parties. Annexure-I, part of the tender document, further prescribes the second sheet, which include the instructions to the tenderers and conditions of tenders. It was specifically prescribed that the documents mentioned in Clause (1) of this sheet will form the part of the tender/contract. It was further provided that general conditions of contract and standard specification for materials and work as laid-down in the **Works Hand Book** and **Sanitary Works Hand Book** of Railway as amended/corrected would form the part of the tender document.

3. On acceptance of the tender submitted by the petitioner, a memo was issued to the petitioner on 03.03.1989 by the competent authority of the respondents calling upon him to furnish the security amount and to execute the formal agreement. It is the case of the petitioner that a formal agreement was signed by the petitioner and was given to the respondents-authorities for signing the same and to return one copy to the petitioner. However, despite long lapse of time, formal agreement was not signed by the respondents nor the copy thereof was returned to the petitioner. It is contended that this was the reason the execution of formal agreement between the petitioner and the Railways could not be completed.

4. It appears that there were certain disputes raised in respect of demands. The petitioner by a registered letter dated 07.05.1990 called upon the respondents to refer the matter to the Arbitrator in terms of the tender conditions. In this letter the petitioner categorically stated that he has signed and delivered the formal agreement in the office of

the respondents but copy of the agreement was not delivered to him. The respondents have acknowledged the receipt of the said registered notice by their letter dated 20.06.1990 and it was communicated to the petitioner that the matter has been referred to the appropriate authority to take action. The petitioner was called upon to approach the said authority. It is the case of the petitioner that despite the approach, neither the dispute raised by the petitioner was decided nor any reference of the same to the Arbitrator was made. He, therefore, issued legal notice by registered post on occasions and later filed an application under Section 8 of the Act of 1940 before the District Judge, Bhopal, which was registered as RCS No.125-A/2000, for appointment of Arbitrator.

5. The said application was entertained, notices were issued to the respondents, who filed their reply categorically denying the execution of any agreement containing arbitration clause. It was said that since there was no arbitration agreement between the parties, the application itself was not maintainable under Section 8(2) of the Arbitration and Conciliation Act, 1996 (herein after referred to as 'Act of 1996'). It appears that such a stand was taken only because the Act of 1940 was repealed and the new Act was made in the year 1996. The Trial Court proceeded to decide the application of the petitioner, reached to the conclusion that some additional work, allegedly done by the petitioner, was not to be treated as part of the original contract, there was no arbitration agreement to refer the matter to the Arbitrator, the original agreement was not produced and, therefore, application filed by the petitioner was not maintainable and the same was liable to be rejected. It is alleged in the writ petition that since the provisions of the law were not rightly seen and since the

claim made by the petitioner was rejected in improper manner without application of mind by the Trial Court, the order impugned is bad in law and is liable to be set aside.

6. Upon service of the notice of the writ petition, a return has been filed by the respondents contending inter alia that there was no arbitration agreement. Even otherwise the petitioner was called upon to fulfill certain conditions, which were not fulfilled by the petitioner and, therefore, in absence of fulfillment of such conditions, which were required to be fulfilled for continuance of the contract agreement, there was no question of making reference to the Arbitrator as there was virtually no dispute. It is, thus, contended that the writ petition being wholly misconceived, is liable to be dismissed. Though a rejoinder is filed but nothing much is required to be referred from the rejoinder.

7. Heard learned Counsel for the parties at length, perused the record and the laws.

8. After going through the complete proceedings, one thing is clear that the notice inviting tender was floated by the respondents-Railways much before coming into force of Act of 1996. The acceptance of the tender of the petitioner was even much before coming into force of the Act of 1996 as the tender was accepted on 03.03.1989 by communication and the said fact is not denied by the respondents. Dispute was raised by the petitioner much before coming into force of Act of 1996 as the notice raising such dispute for the first time by registered post was sent on 07.05.1990, which was said to be served on the respondents as was acknowledged by them on 20.06.1990. Rather the petitioner was asked to appear before the Divisional Railway Manager (Works), Central Railway,

Bhopal, for the action to be taken on such a demand as the matter was referred to him with necessary instructions. It was this cause which gave the petitioner a right to approach the Court for appointment of Arbitrator. Now the sole question would be whether there was an arbitration clause or not. Though the petitioner has filed the tender form first sheet and second sheet and has very categorically contended that in the general conditions of contract, which were made part of the tender document, arbitration clause was incorporated but the said fact is not specifically denied by the respondents while filing the return. In fact there is no parawise reply of the petition. This being so, it has to be held that the arbitration clause was incorporated in the tender document.

9. For the purpose of convenience, abstracted relevant parts of the tender document are reproduced hereunder, which read thus :

“ANNEXURE I - TENDER FORMS (FIRST SHEET)

XXX XXX XXX

4. Until a formal agreement is prepared and executed, acceptance of this tender shall constitute a binding contract between us subject to modifications, as may be mutually agreed to between us and indicated in the letter of acceptance of my/our offer for this work.

XXX XXX XXX

ANNEXURE I - TENDER FORM (SECOND SHEET)

1. **Instructions to tenderers and conditions of tender :-** The following documents form part of Tender/Contract :-

XXX XXX XXX

(d) General Conditions of Contract and Standard Specifications for materials and works as laid-down in Works Hand Book and Sanitary Works

Hand Book of.....Railway, as amended/ corrected upto correction slips mentioned in First Sheet of Tender Form, copies of which can be seen in the office of.....or obtained, from the office of the Chief Engineer.....Railway.....onpayment of Rs..... Rs..... & Rs..... respectively.”

10. If these conditions are seen, it would be clear that in fact there was an arbitration clause in the general conditions of contract, which contract was made a part of tender document and, therefore, in terms of Clause (4) of first sheet until formal agreement was prepared and executed, the acceptance of the tender constituted a binding contract between the petitioner and the respondents-Railways. It is not in dispute that the tender document of the petitioner was accepted as on two occasions the said fact was categorically mentioned; one when the acceptance letter was issued on 03.03.1989 and second time when on 20.06.1990 reply to the registered notice sent by the petitioner was communicated to him. Thus, when there was no such stand available to the respondents that there was no arbitration agreement between the petitioner and the respondents, such a stand was not to be taken in the Court.

11. The other question is that the application for appointment of Arbitrator was filed under Section 8 of the Act of 1996. The same power was available to the Court under the Act of 1940 as well. Whether there is an arbitration agreement or not, was to be tested in terms of the law, which was in vogue when the work was assigned or the tender of the petitioner was accepted. The arbitration agreement as prescribed in Section 7 of the Act of 1996 was not necessary to be in existence as the work was assigned to the petitioner on acceptance of his contract in the year 1989 when the Act of 1996 was not in vogue. At the best

the respondents could have said that in terms of the Act of 1940, there was no arbitration agreement and such a claim made by the petitioner before the Court was not to be saved in terms of Section 85 of the Act of 1996 and, therefore, in absence of arbitration agreement, the Court had no jurisdiction to appoint the Arbitrator or to refer the matter to the Arbitrator.

12. On a perusal of the findings recorded by the Court below, it is clear that entire consideration was done as if there was no arbitration agreement nor such application was containing the original arbitration agreement in terms of sub-section (2) of Section 8 of the Act of 1996. Since such a prayer was to be seen in terms of the fact whether in eye of law there was an arbitration agreement in between the petitioner or respondents-Railways or not prior to coming into force of the Act of 1996, which aspect is not tested by the Trial Court, it has to be examined whether such an approach of the Court below was correct or not.

13. For the aforesaid reason, the law laid-down by the Apex Court is required to be examined whether there was any agreement containing an arbitration clause between the parties and whether an application for enforcement of said arbitration clause could be filed even when the Act of 1940 was repealed and the new Act of 1996 had become applicable. The Apex Court in the case of ***Union of India vs. A.L. Rallia Ram, AIR 1963 SC 1685***, has categorically held, after discussing the law at length, the essential features of the valid arbitration agreement under the Act of 1940 and it has been held that no form of such agreement has been prescribed and that the execution of the formal agreement containing such clause is necessary but it is not necessary that the agreement should be signed by all

concerned. The other basic essential features for constituting a valid contract containing the arbitration clause have also been discussed at length. Considering the law laid-down by the Apex Court in the case of ***A.L. Rallia Ram*** (supra), in yet another case of ***M. Dayanand Reddy vs. A.P. Industrial Infrastructure Corporation Limited and others, (1993) 3 SCC 137***, the Apex Court further laid-down that only the arbitration agreement in writing is recognized by the Act of 1940 and it is not necessary that the contract between the parties should be signed by both the parties. The very aspect has been further explained in paragraph 8 by the Apex Court, which reads thus :

“8. Under the Arbitration Act, 1940, only an arbitration agreement in writing is recognized by the Act. It has been held by this Court in *Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji* that it is not necessary that the contract between the parties should be signed by both the parties. But it is necessary that the terms should be reduced in writing and the agreement between the parties on such written terms is established. It has also been held by this Court in *Union of India v. A.L. Rallia Ram* that it is not necessary that all the terms of the agreement should be contained in one document. Such terms may be ascertained from the correspondence consisting of number of letters. In *Rukmanibai Gupta (Smt.) v. Collector, Jabalpur*, this Court has laid down that an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or 'arbitrator' or 'arbitrators' has been used in the agreement. It is also not necessary that agreement to arbitration should appear in the document containing the other terms of agreement between the parties. Law is well settled that arbitration clause may be incorporated by reference to a specific document which is in existence and whose terms are easily ascertainable. It is to be noted, however, that the question whether or not the arbitration clause contained in another document is incorporated in the contract, is always a question of construction.....”

14. In the case of ***Chander Nath Ojha, Jaipur vs. Suresh Jhalani and others, (1999) 8 SCC 628***, while dealing with such circumstances again relying on the earlier decision, the Apex Court has categorically held in paragraph 7 that it is not necessary that the agreement should bear the signatures of the parties. The requirement of law is that it should be in writing. In the case of ***Pyrites, Phosphates and Chemicals Ltd. vs. Sebilan Compania and another, (2002) 9 SCC 353***, again considering the law, the Apex Court has very categorically held that in a bill of lading if it is specifically provided for incorporation of relevant terms and conditions of the charter party contract and said charter party contract is providing that dispute be referred to the arbitration under the Arbitration Act, 1940, such incorporation of bill of lading amounts to binding arbitration agreement between the parties. From the analysis of law laid-down by the Apex Court in aforementioned cases, it would be clear that there was an arbitration agreement in between the petitioner and respondent-Railway, inasmuch as the terms and general conditions of the contract were made applicable to the tender proceedings and the said conditions were to govern the contract between the parties.

15. In view of the aforesaid pronouncements of law, if it is seen that categorical averments made by the petitioner that there was an arbitration clause in the general conditions of the tender document, which in fact was form of tender document and which has to be treated as an agreement upon acceptance of the tender, until a formal agreement is prepared and executed, in terms of the law which was in vogue on the date of entering into the agreement of assignment of work to the petitioner, i.e. on 03.03.1989, it

was to be held that there was an agreement containing the arbitration clause and, therefore, the Arbitrator was required to be appointed. If there was a requirement of a formal agreement, which agreement was signed according to the petitioner and delivered to the respondents but was not signed and returned and delivered back to the petitioner, it was not possible even for the petitioner to produce such agreement in the Court for the purpose of invoking the arbitration clause. Though issuance of the notice to the respondents by the petitioner was accepted by the respondents but they have not denied the fact that the agreement said to be signed by the petitioner and delivered to respondents was never produced before the respondents. If the said agreement was not signed by them or was not returned back to the petitioner, he cannot be held responsible for that lapses. In fact the respondents were duty bound to produce such documents before the Court to prove that there was no agreement containing any arbitration clause in respect of the dispute raised by the petitioner. Having failed to do so, the respondents were not entitled to seek rejection of the application filed by the petitioner for appointment of Arbitrator.

16. While dealing with the provisions of the Act of 1996, vis-a-vis the arbitration agreement executed under the Act of 1940, the Apex Court has categorically held that the proceedings are to be done by the Court for appointment of Arbitrator treating as if there was an arbitration agreement in terms of Section 7 of the Act of 1996. If though the arbitration agreement was executed under the Act of 1940, the proceedings were initiated only after coming into force of Act of 1996. In the cases of ***National Aluminium Co. Ltd. vs. Metalimpex Ltd., (2001) 6 SCC 372***, and ***Kalpna Kothari (Smt.) vs. Sudha Yadav (Smt.) and***

others, (2002) 1 SCC 203, it has been held by the Apex Court that if the agreement containing arbitration clause was executed under the Act of 1940, after the repeal of the said Act, the proceeding can be done under the provisions of Act of 1996 and the Court is required to proceed to decide such a dispute as if there was an arbitration agreement between the parties in terms of the provisions of Act of 1996. Such a law was pronounced on the basis of the detailed decision in the case of **Thyssen Stahlunion GmbH vs. Steel Authority of India Ltd., (1999) 9 SCC 334**. Therefore, it was necessary on the part of the Trial Court to decide the application of the petitioner for appointment of Arbitrator and not to reject the same holding that there was no arbitration agreement in terms of the provisions of Section 8 of the Act of 1996. Such approach of the Court below cannot be countenance nor can be given the stamp of approval.

17. In view of the aforesaid, the order passed by the Court below is, thus, bad in law and the same is liable to be and is hereby set aside. The matter is remitted back to the Trial Court with a direction to nominate an Arbitrator in terms of the agreement between the parties and to refer the matter to the Arbitrator for deciding the same in accordance to law.

18. The writ petition is allowed to the extent indicated herein above. There shall be no order as to costs.

(K.K. Trivedi)
Judge

Skc