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Whether Acceptance of Letter of Award be considered an Agreement?: National Highways and Infrastructure Development Corporation Limited v BSCPL Infrastructure Limited

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The number of lawsuits filed in Indian courts has dramatically increased in recent years, causing pendency and delays, and highlighting the need for alternative conflict resolution methods. It is a new, less combative approach to resolving legal issues that have emerged with the concept of Conflict Management via Alternative Dispute Resolution (ADR), a substitute for adversarial litigation that has been established by the Indian legal system. Therefore, it has become quite typical these days to include terms in agreements requesting arbitration in the event of a dispute. The suit in the case discussed in this case commentary was also brought under Section 7 of the Arbitration and Conciliation Act, 1996 and the author here outlines with respect to Section 7 of the Indian Contract Act, 1872, i.e., acceptance of a proposal, that the parties can resort to arbitration only when the contract is complete and only then can an arbitration clause mentioned in the draught agreement stem in, secondly, it underscores that letter of award is a stage in the contract where the contract is not complete. Additionally, the author discusses how while delivering the judgement the court heavily relied on the previous case PSA Mumbai investments PTE v Board of Trustees of the Jawaharlal Nehru Port Trust and Anr. to establish the principle of Section 7 that, absence of an unqualified and absolute acceptance would render the contract incomplete and ineffective which would thus not lead to the springing in of the arbitration clause.

Keywords: *agreement, award, letter.*

INTRODUCTION

This case is apropos to **Section 7 of The Indian Contract Act, of 1872**¹. The case titled *National Highways and Infrastructure Development Corporation Limited v BSCPL Infrastructure Limited*² was primarily filed as an **application** in the **Honourable Delhi High Court** that was **decided on 26th October 2018**, but later on, filed as an **appeal** in the **Honourable Supreme court, the civil appeal number being 6168 of 2019**³, under **Section 7 of The Arbitration and Conciliation Act, 1996**⁴ (“*CL.1 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, CL.2 The Arbitration Agreement may be in the form of an arbitration clause in a contract or the form of a separate agreement.*”) which **predominantly focuses on Section 7 of The Indian Contract Act, of 1872**⁵ which states, “*Acceptance must be absolute and unqualified.*”

Here, the **National Highways and Infrastructure Development Corporation (hereinafter termed as Appellant)** put forward a **Request for Proposal** for the construction of the road in the state of Meghalaya, which was accepted as a bid proposal by **BSCPL Infrastructure Limited (hereafter referred to as Respondent)** by sending a **Letter of Award**, but because of the unavailability of a no-objection certificate for construction of the road from the required district council, the appellant withdrew the Letter of Award. This circumstance led to the rise of a dispute on **whether a Letter of Award is a binding contract or not and will the arbitration clause of the agreement between the Appellant and Respondent come into play.**

The present Appellant was of the view that at the stage of the Letter of Award, the Agreement was not concluded and thus no arbitration clause should spring in. Contrary to it the Respondent was in favour of the Delhi High Court’s decision that the agreement’s standard draft did contain

¹ Indian Contract Act, 1872, s 7(1)

² *National Highways and Infrastructure Development Corporation Limited v BSCPL Infrastructure Limited* (2019) 15 SCC 25

³ *Ibid*

⁴ Arbitration and Conciliation Act 1996, s 7

⁵ Indian Contract Act, 1872, s 7

an arbitration clause and general reference to it was good enough to conclude the appointment of an arbitrator. That being the case the appellant further approached The Honourable Supreme Court for the final Decree. The case, "**National Highways, And Infrastructure Development Corporation Limited v BSCPL Infrastructure Limited**"⁶ numbered **Civil Appeal No. 6168 of 2019 (Arising out of SLP (C) No. 32010 of 2018)** was presided over by **Honourable Mr. Justice Rohinton Fali Nariman and Honourable Mr. Justice Surya Kant.**

FACTS OF THE CASE

The Appellant issued a Request for Proposal (abbreviated "RFP" for convenience) for the development of roads in the State of Meghalaya. About the RFP, the LOA was sent by letter dated October 31, 2014, in which the Indian government referred to the bid document and asked for a signed copy of the duplicate LOA as an acknowledgement within seven days of receiving the original. The sentence that read, "Thereafter, you are expected to execute the Contract Agreement within 15 days from the date of issue of LOA as per *Clause 1.3 of the RFP*" was quite explicit.

In response to this letter, the Respondent accepted the bid proposal on November 5, 2014, and included a copy of the LOA that was received by fax and officially acknowledged. The Respondent subsequently requested to execute the contract agreement for the work on November 13, 2014, in a subsequent email dated November 8, 2014. Up until August 2016, nothing happened besides the Respondent maintaining the guarantees that were demanded by the RFP. The Appellant ultimately decided to withdraw the LOA on August 4, 2016, citing the lack of a Khasi Hill Autonomous District Council No Objection Certificate, which was a requirement for the project's land. This factual situation is what has given birth to the disagreement in this case, which is whether the LOA is a binding contract and, if so, whether the arbitration clause in the draught agreement between the parties would apply if it were.

The Delhi High Court determined that an arbitration clause is included in the standard form of the draught agreement and that a general reference to it is sufficient to appoint an arbitrator

⁶ *National Highways and Infrastructure Development Corporation Limited v BSCPL Infrastructure Limited* (n 2)

by reviewing the various clauses of the draught agreement that is a part of the RFP and citing this Court's decision in *Inox Wind Ltd. v Thermocables Ltd.*⁷. Justice Shiavax Jal Vazifdar, a former chief justice of the Punjab and Haryana High Court, was next appointed by the Court. The International Centre for Alternate Dispute Resolution would then appoint two additional arbitrators.

While granting the appeal, it further stated that: A review of the articles in the RFP would only demonstrate that a bidder was responsible for disqualification and forfeiture of bid security at all stages of the agreement, even though the parties may not have executed the contract.

- The phrase "shall be liable to be terminated in clause" was only used in this context, making it clear that the Appellant might still be disqualified and have the bid security forfeited if the other conditions were met, even after the LOA may have been accepted.
- It was impossible to predict how a standard form arbitration clause included in a draught agreement would affect the Schedule of the bidding process. As a result, it was obvious that any issues between the parties, even after LOA acceptance, could only be settled by the courts and not through arbitration.

The Appellant further approached the Supreme Court for the final verdict.

ISSUES IN THE CASE

- Whether the acceptance of the Letter of Award will be considered an agreement.
- Whether the concession agreement in the tender document (request for proposal-RFP) containing an arbitration clause would be binding between the parties.

ARGUMENTS ADVANCED

Appellant's Side

Through the learned counsel, the appellant kept a detailed view of the arguments before the court. He made clear that this matter would be completely covered by the ruling in *PSA*

⁷ *Inox Wind Ltd. v Thermocables Ltd* (2018) 2 SCC 519

Mumbai Investments PTE. Limited v Board of Trustees of the Jawaharlal Nehru Port Trust and Anr. He provided a chart for our review in which he noted the similarities between the facts of this case and PSA Mumbai Investments Pvt. Limited's case: the disclaimer Clause mentioned by the court in the aforementioned judgment; the schedule of the bidding process; the signing of the LOA; and most importantly, the fact that the entire bidding process shall be governed by and construed by the laws of India and that the Courts at Mumbai shall have exclusive jurisdiction over all disputes arising under, under, or in connection with the bidding process; and the fact that the authority may, in its discretion, award the contract.

He claimed the small distinction between the **PSA Mumbai Investments PTE. Limited** judgment and the facts of this case, which do not include the formation of a Special Purpose Vehicle, would be completely irrelevant to determining whether an agreement exists in this case and whether an arbitration clause found in a standard form would govern the parties.

Respondent's Side

Through the learned counsel, Respondent has walked us through the contested judgment and our judgment, pointing us various discrepancies that, in her opinion, should result in a favourable outcome. She asserts that Clause 2.1.14, which states that in the circumstances of the present case, the agreement between the parties "shall be liable to be terminated..." as soon as the stage of the LOA of the agreement is reached, is crucial because it shows that the parties have reached an agreement at this stage. She further cited some clauses to support her argument that the arbitration clause in the ordinary form would unquestionably take effect in the circumstances of the current case because an agreement had been reached at the point of accepting the LOA.

JUDGEMENT and RATIONALE

The Court acknowledged the arguments of the appellant and respondents and set out a few important clauses of the Letter of Award and Request for proposal to support its reasoning. The Court noted the clauses of the RFP and remarked that the Disclaimer of the RFP had that it is neither an offer nor an invitation but an information brochure for the potential bidders.

“This RFP is not an Agreement and is neither an offer nor invitation by the Authority to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers (BIDs) under this RFP. This RFP includes statements that reflect various assumptions and assessments arrived at by the Authority about the project,” noted the court.

The Schedule of the bid is mentioned below:

Last date of receiving queries	09.06.2014
Pre-bid meeting	16.06.2014
Authority response to queries latest by	04.07.2014
Last date of sale of BID document	25.07.2014
Bid Due Date	28.07.2014 up to 1100 Hrs.
Opening of Bids	28.07.2014 up to 1100 Hrs
Letter of Award (LOA)	Within 30 days of the Bid Due Date
Validity of Bids	120 Days of Bid Due Date
The Signing of the Concession Agreement	Within 15 days of the award of LOA

The Schedule given above shows the steps before the signing of the Concession Agreement which contained the arbitration clause. The appellant and respondent reached the finalization of LOA but the last two steps of validity of bids and signing of concession were not done due to the impossibility of a no-objection certificate. Therefore, it is evident from the facts that *Section 7(1) of the Indian Contract Act, 1872* was violated here as the acceptance was neither absolute nor unqualified. The mere look at the facts resembles the case decided in the same court (Supreme Court),” *PSA Mumbai Investments PTE. Limited case*.” The Court cited the judgment of the “*PSA Mumbai Investments PTE. Limited case*”.

MAJOR TAKEAWAYS

First and foremost, a Disclaimer at the top of the RFP makes it clear that the parties are only

engaged in a bid process and have not yet reached an agreement.

Second, it is equally clear that this bid process would include a Letter of Award to be issued by Respondent No. 1 and two additional steps under the Schedule to be taken before the draught Concession Agreement becomes a final agreement between Respondent No. 1 and the other party.

Third, The Mumbai courts would serve as the sole forum for dispute resolution throughout the bid process.

Fourth, Respondent No. 1 has the power to void the bid process at any time before the signing of the Concession Agreement without providing any explanation at all.

These fourth points mentioned above properly draw the analogy between the facts of the present case and the above-cited case (Supra). The Court acknowledged that the acceptance must be unconditional and absolute by **Section 7(1) of the Indian Contract Act of 1872** to transform a proposal into a promise. Based on the facts of this case, it is evident that the Letter of Award does not represent a total and unequivocal acceptance; rather, two or three crucial steps must be taken before it can be said that the parties have reached an agreement that is enforceable in court as a contract.

The Court made it clear that the precedents relied upon by the respondent in her arguments do not apply to the present facts of the case for the reason that we have determined that there is no agreement between the parties in the arbitration clause in the draught concession agreement would therefore not be applicable given the circumstances of the current case. This schedule of the bidding process, with LOA being Item No. 7 and an integral part of it, starts with the deadline for receiving questions and ends with the signing of the concession agreement. When this is the case, it is obvious that Delhi's courts are the only ones that can resolve disputes.

It is not possible to claim that a standard form arbitration clause included in a draught agreement will upset the schedule of the bidding process's overall structure. Given this, **it is evident that conflicts between the parties can only be settled by the Delhi courts, not**

arbitration, even at the acceptance of the LOA stage. Given these factors, it is obvious that the **PSA Mumbai Investments PTE. Ltd.** ruling should apply to the facts of the current case and is in fact on all fours.

CRITICAL ANALYSIS

While signing the concession agreement after receiving the letter of award was one of the requirements that the appellant had to adhere to, the Delhi High Court reportedly stated in the case that it was not a condition precedent for the contract. It was determined that the parties had already achieved an understanding before the execution of the Concession Arrangement. **The Supreme Court, however, fully overruled the Delhi High Court's ruling.** The present facts of the case make it clear that certain essential procedures must be performed before there can be an agreement between the parties that would be enforceable in law as a contract. No comprehensive and unambiguous acceptance of the Letter of Award has been made.

The most heavily relied case, *PSA Mumbai Investments Pte. Limited v Respondent: The Board of Trustees of the Jawaharlal Nehru Port Trust and Ors* guides the decision of the court which I believe is the right decision. If I were looking for similar cases that have already been decided, I would heavily rely on the Supreme Court's decision in *Dresser Rand S.A. v Bindal Agro Chem Ltd. and Anr.*, which was followed in *Bharat Sanchar Nigam Limited v Telephone Cables Limited*⁸, where the court held that the arbitration clause would not be.

According to *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited*⁹, it was decided that the arbitration clause was only intended to address issues arising from a Concession Agreement that had never been signed, and between Respondent No. 1 and the Special Purpose Vehicle and not between Respondent No. 1 and the Appellant and Respondent No. 2, and it was not appropriate to apply it in this case.

On behalf of Respondent No. 1, I would pay close attention to the Supreme Court's ruling in *Kollipara Sriramulu (Dead) by his L.R. v T. Aswatha Narayana (Dead) by his L.R. and Ors*¹⁰.

⁸ *Bharat Sanchar Nigam Limited v Telephone Cables Limited* (2010) 5 SCC 213

⁹ *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited* (2009) 7 SCC 696

¹⁰ *Kollipara Sriramulu (Dead) by his L.R. v T. Aswatha Narayana (Dead) by his L.R. & Ors* (1968) 3 SCR 387

which stated that just because the parties may need to sign a future formal contract does not rule out the possibility of an agreement being reached on the facts in the absence of a future formal contract.

COMPARISON WITH FOREIGN COUNTRIES

Unless otherwise agreed, the arbitration clause shall not be deemed void because the underlying contract has been ineffective, according to *Section 7 of the 1996 English Arbitration Act*¹¹.

*"An arbitration agreement that forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent, or ineffective because that other agreement is invalid, did not come into existence, or has become ineffective, and it shall for that purpose be treated as a distinct agreement unless otherwise agreed by the parties," according to the arbitration agreement*²⁷.

The *French Arbitration Act of 2011's Article 1447* also acknowledges the separability doctrine, stating that "[a]n arbitration agreement is independent of the contract to which it refers. If such a contract is void, it will not have any effect." *The Dutch Arbitration Act of 2015's Article 1053* states in a similar manner, "An arbitration agreement shall be considered and decided upon as a distinct agreement."

In a significant English judgment, *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping*, Lord Diplock explored the nature of the arbitration clause. A self-contained contract peripheral or ancillary to the [underlying] contract itself, he claimed, is the arbitration provision. Two additional House of Lords members agreed with Lord Diplock's remarks. The arbitration clause of the contract is evaluated independently and is unaffected if the contract becomes ineffective or is not concluded, as was the case in our facts, according to reasoning from other nations like Britain, France, or the Netherlands.

Since the arbitration clause is a part of the contract and should not be applied to the case proceedings if the contract was not signed, I think the Supreme Court of India's reasoning is

¹¹ English Arbitration Act, 1996 s 7

sound and deserving of praise.

CONCLUSION

According to *Section 7(1) of the Indian Contract Act 1872*, acceptance of the contract must be complete and unconditional. The Indian Contract Act was upheld by the Supreme Court in its final decision, which also represented a departure from other nations. The Supreme Court's decision is welcomed and accords with the rules of independent India and its promise to uphold justice and the truth. The Supreme Court unhesitatingly overturned the Bombay High Court's earlier ruling, demonstrating that the top court will do whatever it takes to safeguard equality for all and create a just society.