

IN THE HIGH COURT FOR THE STATE OF TELANGANA  
AT HYDERABAD

FRIDAY, THE THIRTEENTH DAY OF SEPTEMBER  
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE THE CHIEF JUSTICE ALOK ARADHE

ARBITRATION APPLICATION NO: 108 OF 2024

**Between:**

Archon Powerinfra India Private Limited, A registered company having its office at Shop No. 3, Vinaya Complex, VinayakBunglows NR Sola Railway Crossing, Sola Road, Ghatlodiya, Ahmedabad, Authorized by Bhavik Vaghela, Gujarat, India - 380061.  
...**APPLICANT**

**AND**

M/s. Chabbra's Associates, A registered Partnership Firm having its office at 11-1-776/14, Railway Colony, Chilakalguda, Secunderabad, Telangana 500025 Rep. by General Managing Partner Mr. Dubba Narshima Chary.

...**RESPONDENT**

Arbitration Application Under Section 11 (6) of Arbitration and Conciliation Act, 1996 praying that this Hon'ble Court may be pleased to appoint the sole arbitrator of its choice, on behalf of the parties to commence arbitration for the adjudication of the dispute regarding payment of money as claimed by the Applicant against the Respondent and any other issues which may be raised before the Arbitral Tribunal.

**Counsel for the Applicant : Sri N. Lomesh Kiran Counsel representing  
Mr. Emil Joseph**

**Counsel for the Respondent: Sri P. U. Bhaskara Rao**

**The Court made the following ORDER:**

**THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE**

**ARBITRATION APPLICATION No.108 of 2024**

**ORDER:**

Mr. Lomesh Kiran N, learned counsel representing  
Mr. Emil Joseph, learned counsel for the applicant

Mr. P.U.Bhaskara Rao, learned counsel for the  
respondent.

2. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed to seek appointment of an arbitrator to adjudicate the claims and disputes between the parties as envisaged under Clause 32 of Memorandum of Understanding (hereinafter referred to as "MoU") dated 25.01.2019.

3. Facts leading to filing of this application briefly stated are that the applicant is a company incorporated on 18.09.2017 in Ahmedabad. The respondent is also a company situated in Hyderabad. The applicant and

respondent entered into an MoU on 25.01.2019 whereunder the respondent agreed to render complete support to the applicant to participate in the tenders as mentioned in the MoU dated 25.01.2019. Sometime in the month of January, 2019, the respondent participated in Tender Ref: HCC/LPG-32/Pt-171/2018-19 (hereinafter referred to as "the Tender") for a bid titled "Construction of Plant Buildings, Non-Plant Buildings, ground improvement and allied works at grass root LPG bottling facility at Motihari, Bihar" (hereinafter referred to as "the Project") raised by the Indian Oil Corporation Limited (IOCL). The respondent was awarded the contract on 28.03.2019 and a letter of acceptance was issued to it.

4. Thereafter on 29.04.2019, a Work Order was issued in favour of the applicant to execute the work under the Project. The respondent by a communication dated 02.01.2020 made an additional demand to the applicant for a bank guarantee for the escrow account. The additional bank guarantee was not a part of the MoU dated 25.01.2019. However, the applicant submitted a bank

guarantee worth Rs.35,00,000.00, which was encashed by the respondent sometime in the month of April, 2020.

5. On 01.04.2020, the respondent issued an e-mail in which the status of the applicant was acknowledged as "MoU holder" and the respondent requested the applicant to share all information regarding value of work conducted on the Project site and dues receivable from IOCL in order to furnish the information to IOCL so that further payments may be disbursed to the applicant.

6. The applicant issued a notice on 29.09.2021 to the respondent, in which the various breaches committed by the respondent under the MoU dated 25.01.2019 were highlighted. The respondent sent a reply on 19.10.2021, in which the claims made by the applicant were denied. Thereafter, the applicant issued an e-mail on 14.07.2023 invoking arbitration under Clause 32 of the MoU dated 25.01.2019. The aforesaid e-mail was responded to by the respondent on 24.07.2023. Thereafter, this petition has been filed seeking appointment of an Arbitrator.

7. Learned counsel for the applicant submitted that neither the execution of the MoU dated 25.01.2019 nor the existence of the arbitration clause has been denied on behalf of the respondent. Attention of this Court has also been invited to by Clause 16.1 and Clause 27 of the Memorandum of Understanding dated 25.01.2019 and it has been submitted that the respondent is at liberty to urge all such contentions before the Arbitrator. In support of his submission, reliance has been placed on decision of Supreme Court in **In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899**<sup>1</sup>.

8. On the other hand, learned counsel for the respondent submits that the MoU dated 25.01.2019 is only a pre-tender MoU and thereafter no back to back agreement has been executed between the parties. It is further submitted that the MoU is not in existence. It is also contended that there is neither an agreement nor an arbitration clause under which the dispute raised by the

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<sup>1</sup> 2023 SCC OnLine SC 1666

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applicant can be referred for adjudication. It is further submitted that the applicant has been debarred by IOCL from participating in the tender. Therefore, the applicant cannot enter into a contract with IOCL.

9. I have considered the submissions made on both sides and have perused the record. Before proceeding further, it is apposite to take note of the relevant clauses of the MoU dated 25.01.2019. Clauses 5, 16.1 and 27 of the MoU dated 25.01.2019 are extracted below for the facility of reference:

"5. That 2<sup>nd</sup> Party shall furnish through RCGS/NEFT for an amount of Rs.15.00 lakhs as security money with the first party towards participation in tenders of the works cited above, such money provided to the first party shall be free of interest and shall be returned back to the 2<sup>nd</sup> party in the event of the tenders not being successful or cancellation of the tender. If the 1<sup>st</sup> party is a successful bidder in the tender after opening the price bid the security money deposited with the 1<sup>st</sup> party shall be returned back to the 2<sup>nd</sup> party within a period of one week upon receiving of mobilization and commencement of work by the 2<sup>nd</sup> party.

16. For benefit & profit of their contribution, both the parties will be getting the fund sharing as under by opening an escrow account with any designated bank.

1) In case of sub contract

- a) the 1<sup>st</sup> party shall receive 2.5% (two point five percent)+(applicable 2% TDS) exclusive of GST on the gross value of the bills received for work done items.

For understanding in more detailed way, it is further scheduled to be paid in stages as below:

- i) Upon successful bidding and award of Letter of acceptance performance bank guarantee should be arranged and submitted by second party alone.
- ii) In case of sub contract the principle contractor shall receive 2.5% + 2% TDS which is exclusive of GST and the balance shall be passed on to 2<sup>nd</sup> party.

27. The agreement will be valid till completion of the particular contract work in all respect shall be dissolved thereafter subject to clearance of audit.”

10. From perusal of the aforesaid clauses, it is evident that Clause 5 of the MoU dated 25.01.2019 deals with furnishing of bank guarantee whereas Clause 16.1 of the MoU dated 25.01.2019 provides for benefit and profit of

the contribution and Clause 27 of the MoU dated 25.01.2019 shall be in existence till the completion of the Project.

11. Clause 32 of the MoU dated 25.01.2019, which is an arbitration clause, is extracted below for the facility of reference:

“32. All disputes shall be resolved through direct negotiations at the office of 1<sup>st</sup> party. In case the dispute is not resolved through negotiations it shall be finally resolved in accordance with the Arbitration & Conciliation Act 1996 by a sole Arbitrator nominated by both the parties whose decision will be final & binding on both the parties. The jurisdiction of Arbitration shall be at Hyderabad only.”

12. In a proceeding under Section 11(6) of the Arbitration Act, this Court has to satisfy itself whether underlying contract contains an arbitration agreement which provides for arbitration pertaining to disputes which have arisen between the parties. In the instant case, notice was sent by the applicant on 14.07.2023, to which the respondent filed a reply on 24.07.2023.



13. Section 16(1) of the Arbitration Act provides that Arbitral Tribunal may rule on its own jurisdiction. In **Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited**, a two-Judge Bench of Supreme Court held that the *doctrine of kompetenz-kompetenz* is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by one of the parties. It was further held that Section 16 of the Arbitration Act is an inclusive provision of very wide ambit.

14. A seven-Judge Bench of Supreme Court in **In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899** (supra) has comprehensively dealt with the aforesaid issue and in paragraphs 131, 132 and 162 has held as under:

131. In **Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products** [(2018) 2 SCC 534], one of the issues before this Court was whether a decision on the issue of limitation would go to the root of the jurisdiction of the arbitral tribunal, and therefore be covered by Section 16 of the Arbitration Act. This

Court referred to Section 16(1) to observe that *the Arbitral Tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the Arbitral Tribunal may embark upon an inquiry into the issues raised by the parties to the dispute.*" In **Bhadra Products** (supra), it was held that the issue of limitation concerns the jurisdiction of the tribunal which tries the proceedings.

132. In **Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field** (supra), the issue before this Court was whether a referral court at the stage of appointment of arbitrators would be required to decide the issue of limitation or leave it to the arbitral tribunal. A Bench of two Judges of this Court held that the doctrine of competence-competence is "*intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.*" Moreover, this Court held that Section 16 is an inclusive provision of very wide ambit:

"7.13. In view of the provisions of Section 15, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. **Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal.** The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."

(emphasis supplied)

162. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In ***Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., [(2017) 9 SCC 729]*** (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in ***Vidya Drolia*** (supra) in the context of Section 8 and Section 11 of the Arbitration Act.

190. The decision of the majority in *N.N. Global (2)* assumes that the inadmissibility of the document in

evidence renders it unenforceable. However, the effect of the principle of competence-competence is that the Arbitral Tribunal is vested with the power and authority to determine its enforceability. The question of enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court (or the High Courts, as the case may be) is merely giving effect to the principle enshrined in Section 16. The appointment of an Arbitral Tribunal does not necessarily mean that the agreement in which the arbitration clause is contained as well as the arbitration agreement itself are enforceable. The Arbitral Tribunal will answer precisely these questions."

15. Applying the aforesaid legal principles to the obtaining factual matrix of the case, it is evident that an agreement exists between the parties, the execution of which has not been denied by the respondent. The aforesaid agreement namely MoU dated 25.01.2019 contains an arbitration clause. The dispute has arisen between the parties. The contentions urged on behalf of the respondent with regard to eligibility and admissibility of the dispute raised on behalf of the applicant can be gone into by the arbitral Tribunal as held by Supreme Court in

**Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern  
Coal Field (supra).**

16. Therefore, Mr. Justice P.Naveen Rao, a former Acting Chief Justice of this Court (Resident of #3001, My Home Bhooja, Block-A, Plot Nos.22-24 & 31-33, Rayadurgam, Ranga Reddy District, Mobile No.8374012311) is appointed as sole arbitrator to adjudicate the dispute between the parties. The parties shall appear before the Arbitrator, along with a copy of this order. Thereupon, the sole arbitrator shall proceed with the arbitral proceedings in accordance with law.

17. Accordingly, the Arbitration Application is allowed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

Sd/- C.V. MALIKARJUNA VARMA  
JOINT REGISTRAR

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SECTION OFFICER

To

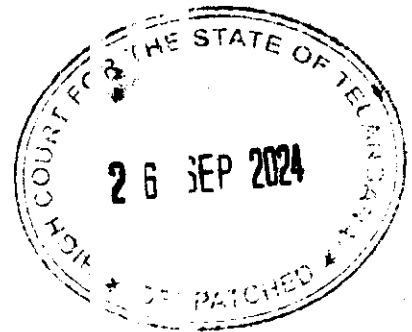
1. Sri Justice P. Naveen Rao, former Acting Chief Justice of High Court for the State of Telangana, R/o. # 3001, My Home Bhooja, Block -A, Plot Nos. 22-24 & 31-33, Rayadurgam, Ranga Reddy District, Mobile No. 8374012311 (By Special Messenger) (along with a copy of affidavit and material papers)
2. One CC to SRI. EMIL JOSEPH, Advocate [OPUC]
3. One CC to SRI. P. U. BHASKARA RAO, Advocate [OPUC]
4. Two CD Copies

HIGH COURT

DATED:13/09/2024

ORDER

ARBITRATION APPLICATION No.108 of 2024



ALLOWING THE ARBITRATION APPLICATION

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25/9/24