



ELP Arbitration: Update



WHEN 'A' HAS SIGNED THE CONTRACT CONTAINING THE ARBITRATION CLAUSE AS PROVIDED BY 'B' AND 'B' HAS ISSUED A WORK ORDER BASED ON THE SAID CONTRACT, THEN EVEN IF THE CONTRACT IS NOT SUBSEQUENTLY SIGNED BY 'B', IT CANNOT BE SAID THAT THE PARTIES WERE NOT AD IDEM ON THE APPLICABILITY OF THE ARBITRATION CLAUSE.

M/s Chaitanya Construction Company v. Delhi Jal Board¹

FACTUAL BACKGROUND

- The Respondent issued notices inviting tenders for supply of various materials. In response to the same, the Petitioner submitted its bids which were ultimately accepted. The Respondent, thereafter, sent the Petitioner copies of the contracts (**Contracts**) for signatures.
- Based on the terms and conditions contained in these Contracts, the work orders were to be issued by the Respondent. Once the Petitioner duly executed the Contracts and submitted the same to the Respondent, the work orders (**Work Orders**) were issued to it by the Respondent. The said Work Orders did not contain an arbitration clause. The Contracts however, though signed by the Petitioner, were never signed by the Respondent.
- Thereafter, disputes arose between the parties when despite the Work Orders, the Respondent neither handed over the site of work to the Petitioner, nor permitted it to work there. As the Respondent failed to address the Petitioner's said grievances, the Petitioner invoked the arbitration clause contained in the Contracts.
- When the Respondent failed to respond to the notice invoking arbitration, the Petitioner approached the Hon'ble Delhi High Court (**Court**) under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**the Act**) for appointment of an arbitrator.

ARGUMENTS ADVANCED BY THE PARTIES

- During the course of arguments, the Petitioner contended that once its bid was accepted, the Respondent specifically directed it to sign the Contracts, which was a precondition to formulate the terms of the Work Order. The Respondent's decision to issue the Work Orders after presenting the draft Contracts to the Petitioner for signatures,

¹ Order dated 01 September 2020 in ARB.P. 795/2019.

indicated that the Respondent itself proposed the terms and conditions therein, including the arbitration clause, to the Petitioner.

- The Respondent, on the other hand, argued that despite issuing the Work Orders in favor of the Petitioner, the Respondent never signed the Contracts containing an arbitration clause and therefore, the Contracts and the arbitration clause contained therein were inchoate documents. *Inter alia*, the Respondent also argued that mere issuance of a Work Order in favor of the Petitioner, which did not contain any arbitration clause, would not be sufficient to vest a right in the Petitioner to approach the Court under the Act.
- By placing reliance upon the Supreme Court's decision in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*² (**Uttarakhand Purv Sainik**) which held that arbitration clauses contained in draft agreements were invalid, the Respondent contended that once it was undisputed that the Contracts were never signed by the Respondent, there was no question of any right of arbitration arising in favor of the Petitioner.
- The Respondent also contended that though the Work Orders were issued by the Respondent, shortly thereafter, the Respondent was subject to a vigilance inquiry due to which it could not execute the Contracts with the Petitioner.

FINDINGS OF THE COURT

- Upon hearing the contentions of the parties, the Court held as follows:
 - It was a matter of practice that the Respondent issued Work Orders only once the bidder agreed to accept the terms of the draft agreement.³ Once the Petitioner had signed the Contracts, as provided by the Respondent, and the Respondent had issued the Work Orders based on such Contracts, it could not be said that the parties were not *ad idem* on the applicability of the arbitration clause. Merely because the Work Orders did not contain any specific arbitration clause, it was not sufficient to hold that there was no arbitration clause. Section 7(4) of the Act provides that the arbitration agreement need not be in any concrete or particular form.⁴
 - The Respondent's reliance on the decision in *Uttarakhand Purva Sainik* was misplaced as the said case did not involve a situation where the draft agreement was signed by one party and a work order was subsequently issued by the non-signing party on the basis of such agreement. Rather, the case pertained to a situation where the parties were trying to enter into an agreement but ultimately did not follow through.
 - The Respondent's contention that the Contracts were not executed due to a subsequent vigilance enquiry cannot be accepted because even then, the Respondent ought to have formally withdrawn its Work Orders granted to the Petitioner.
- Thus, finding in favor of the Petitioner, the Court allowed the petition and proceeded to appoint an arbitrator to adjudicate the disputes between the parties.

CONCLUSION AND ANALYSIS

The present judgement of the Court appreciated the provisions of Section 7 of the Act which state that except for being in writing⁵, the arbitration agreement need not be in any particular form. The kind of practice adopted by the Respondent, i.e. not signing the Contract even after the issuance of Work Orders, has been deprecated by the Court. In the facts of the case, allowing the contentions as raised by the Respondent would have indeed amounted to letting the Respondent take advantage of its own wrong.

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² (2020) 2 SCC 455. See Paragraph 7.11.

³ The Court also found that the said position had been clearly laid down in the practice directions issued by it to the Respondent in paragraph 8 of *K.G.Bhandari v. Delhi Jal Board & Ors.*, (2003) 102 DLT 938.

⁴ In this regard, further reference was made both by the Petitioner and the Court to the judgment in *Govind Rubber Limited v. Louis Dreyfus Commodities Asia Private Limited*, (2015) 13 SCC 477.

⁵ Section 7(3) of the Act.