

A M/s. NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD.

v.

M/s. BSCPL INFRASTRUCTURE LTD.

B (Civil Appeal No. 6168 of 2019)

AUGUST 7, 2019

[R. F. NARIMAN AND SURYA KANT, JJ.]

- Arbitration: Arbitration clause – Whether an arbitration clause would spring into being at the stage of Letter of Award (LOA) acceptance or whether it would be necessary to sign the ultimate agreement which would then bring in the arbitration clause contained therein – In the instant case, Request for Proposal (RFP) was sent out by the appellant for road construction – In the LOA, the Government of India made reference to the bid document and a request to return signed copy of duplicate LOA as its acknowledgment and to execute contract agreement within 15 days from date of issue of LOA – Respondent accepted the bid proposal and enclosed copy of LOA received by fax duly signed with an acknowledgement – After 2 years, appellant decided to withdraw the LOA due to non-availability of NOC from District council which was sine qua non for the land for the project – High Court held that the arbitration clause is contained in the standard form of the draft agreement and that general reference to it was sufficient to appoint arbitrator – On appeal, held: A perusal of the clauses contained in the RFP would only show that a bidder is liable for disqualification and forfeiture of bidding security at all stages of the agreement, notwithstanding that there may not be execution of the agreement between the parties – The schedule of bidding process begins with the last date for receiving queries and ends with the signing of concession agreement, LOA being Item No. 7 and part and parcel of this bidding process – The moment this is so, then under clause 6.1, dispute resolution can only take place by the Courts of Delhi – It is not possible to say that a standard form arbitration clause contained in a draft agreement would then oust clause 6.1 and disturb the entire scheme of the schedule of bidding*

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process – This being the case, even at the stage of acceptance of LOA, if disputes arose between the parties, they could only be resolved by the Courts of Delhi and not by arbitration – Jurisdiction.

Allowing the appeal, the Court

HELD : 1. A perusal of the clauses contained in the RFP would only show that a bidder is liable for disqualification and forfeiture of bidding security at all stages of the agreement, notwithstanding that there may not be execution of the agreement between the parties. The expression “shall be liable to be terminated...” in clause 2.1.14 is only in this context, thereby making it clear that even after the LOA may have been accepted, such disqualification and forfeiture of bid security, if the other conditions exist, can be done by the appellant. The same interpretation goes for clauses 2.6.3 and clause 2.20.7. [Paras 14 and 15] [645-D-F]

2. The schedule of bidding process begins with the last date for receiving queries and ends with the signing of concession agreement, LOA being Item No. 7 and part and parcel of this bidding process. The moment this is so, under clause 6.1, dispute resolution can only take place by the Courts of Delhi. It is not possible to say that a standard form arbitration clause contained in a draft agreement would then oust clause 6.1 and disturb the entire scheme of the schedule of bidding process. This being the case, it is clear that even at the stage of acceptance of LOA, if disputes arise between the parties, they can only be resolved by the Courts of Delhi and not by arbitration. [Paras 17 and 18] [645-G-H; 646-A]

PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust and Another (2018) 10 SCC 525 – relied on.

Inox Wind Ltd. v. Thermocables Ltd. (2018) 2 SCC 519 : [2018] 1 SCR 86 – referred to.

Case Law Reference

[2018] 1 SCR 86	referred to	Para 5
(2018) 10 SCC 525	relied on	Para 6

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- A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6168 of 2019.

From the Judgment and Order dated 26.10.2018 of the High Court of Delhi at New Delhi in Arbitration Petition No. 278 of 2018.

- B Debal Banerjee, Sr. Adv., Prasenjit Keswani, Abhishek Singh, Upmanyu Tewari, Kabir Shankar Bose, Advs. for the Appellant.

Ms. Kiran Suri, Sr. Adv., Abhay N. Das, S. J. Amith, Satish Kumar, Vishnu Shankar Jain, K. V. Kharlyngdoh, Advs. for the Respondent.

The Judgment of the Court was delivered by

- C **R. F. NARIMAN, J.** 1. Leave granted.

2. The present case involves the question as to whether an arbitration clause would spring into being at the stage of Letter of Award (referred to as 'LOA' for brevity) acceptance, or whether it would be necessary to sign the ultimate agreement which would then bring in the arbitration clause contained therein.

3. The skeletal facts necessary to appreciate the controversy in the present case is that a Request for Proposal (referred to as 'RFP' for brevity) was sent out by the appellant for road construction in the State of Meghalaya. The LOA so far as the RFP is concerned, is by a letter

- E dated 31.10.2014, in which the Government of India referred to the bid document and requested for return of a signed copy of duplicate LOA as its acknowledgment within seven days of the receipt of the LOA. It was clearly stated therein that "Thereafter, you are required to execute the Contract Agreement within 15 days from the date of issue of LOA as per clause 1.3 of the RFP....."

- F 4. In answer to this letter, on 05.11.2014, the respondent accepted the bid proposal and enclosed a copy of the LOA received by fax duly signed with an acknowledgment. By a further communication dated 08.11.2014, the respondent then wished to sign the contract agreement for the above work on 13.11.2014. Nothing happened until August, 2016, except that the guarantees that were required under the RFP were kept alive by the respondent. Finally, on 04.08.2016, the appellant decided to withdraw the LOA due to non-availability of No Objection Certificate from the Khasi Hill Autonomous District Council, which was a *sine qua non* for the land for the project. It is in this factual scenario that the

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controversy has arisen in this case, which is, as to whether the LOA is a binding contract, and further that, if it is found to be a binding contract, whether the arbitration clause of the draft agreement between the parties would kick in.

5. The Delhi High Court, by its judgment dated 26.10.2018, went through various clauses of the draft agreement which is part of the RFP, and after referring to this Court's judgment in *Inox Wind Ltd. v. Thermocables Ltd.* (2018) 2 SCC 519 found that, contained in the standard form of the draft agreement, is an arbitration clause, and that a general reference to it is good enough, so that an arbitrator could be appointed. The Court then went on to appoint Justice Shiavax Jal Vazifdar, former Chief Justice, Punjab and Haryana High Court, after which two other arbitrators would then be appointed by the International Centre for Alternate Dispute Resolution.

6. According to Shri Debal Banerjee, learned senior counsel, events have overtaken the respondent. This Court's judgment in *PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust and Another* (2018) 10 SCC 525 would squarely cover this case. He prepared for our perusal a chart in which he pointed out the similarity of this case with the facts in *PSA Mumbai Investments PTE. Limited*'s case - the disclaimer clause referred to by us in the said judgment; the schedule of bidding process; the signing of the LOA; and most importantly the fact that the entire bidding process shall be governed by and construed in accordance with the laws of India and that the Courts at Mumbai shall have exclusive jurisdiction over all disputes arising under, pursuant to or in connection with the bidding process; and the fact that the authority may, in its own discretion, cancel the bidding process at any stage prior to entering into the ultimate contract agreement.

7. According to him, the minor difference between the *PSA Mumbai Investments PTE. Limited*' judgment containing a reference to the formation of a Special Purpose Vehicle, which is absent in the facts of this case, would be entirely immaterial for the purpose of discovery as to whether an agreement exists in this case and whether an arbitration clause contained in a standard form would, therefore, govern the parties.

8. Ms. Kiran Suri, learned senior counsel appearing on behalf of the respondent, has taken us through the impugned judgment as well as

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- A our judgment, and has pointed out various differences which according to her should conclude the matter in her favour. Most importantly, according to her, what is important is contained in clause 2.1.14, which makes it clear that in the facts of the present case, the moment the stage of LOA of the agreement is reached, the agreement between the parties “shall be liable to be terminated...” thereby indicating that at the stage of the LOA, an agreement has, in fact, been reached between the parties.
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9. She also relied upon clause 2.6.3 and clause 2.20.7 to indicate that, on the facts of the present case, since an agreement had been entered into at the stage of acceptance of the LOA, the arbitration clause contained in the standard form would definitely kick in.

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10. Having heard learned counsel for the both the parties, it is important to set out some of the important clauses contained in the RFP in the present case. These clauses are as follows:

‘Disclaimer

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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) pursuant to this RFP. This RFP includes statements which reflect various assumptions and assessments arrived at by the Authority in relation to the project.

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...The issue of this RFP does not imply that the Authority is bound to select a Bidder or to appoint the Selected Bidder JV or Contractor, as the case may be, for the Project and the Authority reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

Clause 1.3:

Schedule of Bidding Process

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The Authority shall endeavour to adhere to the following schedule:
Event Description:

1. Last date of receiving queries: 09.06.2014

2. Pre-bid meeting: 16.06.2014

3. Authority response to queries latest by: 04.07.2014

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4. Last date of sale of BID document: 25.07.2014 A

5. Bid Due Date: 28.07.2014 up to 1100 Hrs.

6. Opening of Bids: 28.07.2014 upto 1100 Hrs

7. Letter of Award (LOA) : Within 30 days of Bid Due Date

8. Validity of Bids: 120 Days of Bid Due Date B

9. Signing of Concession Agreement: Within 15 days of award of LOA.

Clause 3.3.5

After selection, a Letter of Award (the 'LOA') shall be issued, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the BID Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the NOI in conformity with 3.3.3. C

Clause 3.3.6

After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the bidder to execute the Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the Agreement. D

Clause 2.20.5

The Selected Bidder's BID Security will be returned, without any interest upon the bidder signing the Contract Agreement and furnishing the Performance Security in accordance with the provisions thereof. The Authority may, at the Selected Bidder's option, adjust the amount of BID Security in the amount of Performance Security to be provided by him in accordance with the provisions of Agreement. E

Clause 6.1

The Bidding Process shall be governed by, and construed in H

- A accordance with, the laws of India and the Courts at Delhi shall have exclusive jurisdiction over all disputes arising under, purusant to and/or in connection with the Bidding Process.
- Clause 6.2(a)
- B The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;
- (a) suspend and/or cancel the Bidding Process and/or amend and/or supplement the bidding Process or modify the dates or other terms and conditions relating thereto;..."
- C 11. Even a cursory look at the aforesaid clauses will show that barring one or two small differences, these clauses are virtually identical with the clauses contained in the *PSA Mumbai Investments PTE. Limited case*.
- D 12. After setting out some of these clauses, this Court in its judgment in *PSA Mumbai Investments PTE. Ltd.*'s case, held:
- E 12) On a conjoint reading of the aforesaid clauses, a few things become clear -
- (i) first and foremost a Disclaimer at the forefront of the RFP makes it clear that there is only a bid process that is going on between the parties and that there is no concluded contract between the same,
- (ii) it is equally clear that such bid process would subsume a Letter of Award to be issued by the Respondent No.1 with two further steps under the schedule to be gone into before the draft Concession Agreement finally becomes an agreement between Respondent No.1 and the Special Purpose Vehicle that is constituted by the Consortium for this purpose,
- (iii) that through out the stage of the bid process, the forum for dispute resolution is exclusively with the Courts at Mumbai, and
- F (iv) that right upto the stage of the entering into the Concession Agreement, the bid process may be annulled without giving any reason whatsoever by the Respondent No.1.
- G 14) Under Section 7 of the Indian Contract Act, 1872 in order to convert a proposal into a promise, the acceptance must be absolute
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and unqualified. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the Letter of Award – two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties.

19) Mr. Dave also strongly relied upon the judgment in *INOX Wind Limited v. Thermocables Limited*, (2018) 2 SCC 519. This judgment in paras 17-19 thereafter made it clear that an exception to the general rule laid down in *M.R. Engineers and Contractors Private Limited* (2009) 7 SCC 696 as to standard forms of practice containing arbitration clauses would be extended also to standard forms between individual persons and not merely standard forms of professional assessments.

20) We may hasten to add that this judgment in *INOX Wind Ltd. case* would have no manner of application on the facts of this case for the reason that it has been found by us that there is no agreement between the parties at all in the facts of the present case, making it clear, therefore, that the arbitration clause contained in the draft Concession Agreement would not apply.

13. However, learned senior counsel for the respondent relied heavily upon clause 2.1.14, which reads as follows:

“2.1.14 A Bidder shall be liable for disqualification and forfeiture of BID Security, if any legal, financial or technical adviser of the Authority in relation to the Project is engaged by the Bidder, its Member or any Associate thereof, as the case may be, in any manner for matters related to or incidental to such Project during the Bidding Process or subsequent to the (I) issue of the LOA or (ii) execution of the Agreement. In the event any such adviser is engaged by the selected Bidder or Contractor, as the case may be, after issue of the LOA or execution of the Agreement for matters related or incidental to the project, then notwithstanding anything to the contrary contained therein or in the LOA or the Agreement and without Prejudice to any other right or remedy or the Authority, including the forfeiture and appropriation of the BID Security or Performance Security, as the case may be, which the Authority may have there under or otherwise, the LOA or the Agreement, as the case may be, shall be liable to be terminated

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- A without the Authority being liable in any manner whatsoever to the Selected Bidder or Contractor for the same. For the avoidance or doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of this RFQ. Nor will this disqualification apply where such adviser is engaged after a period of 3 (three) years from the date of commercial operation of the Project.”
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She also relied upon clauses 2.6.3 and 2.20.7:

- C “2.6.3 In case it is found during the evaluation or at any time before signing of the Agreement or after its execution and during the period of defect liability, subsistence thereof, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the contractor either by issue of the LOA or entering into of the Agreement, and if the Selected Bidder has already been issued the LOA or has entered into the Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the selected Bidder or the Contractor, as the case may be, without the Authority being liable in any manner whatsoever to the Selected Bidder or the Contractor. In such an event, the Authority shall be entitled to forfeit and appropriate the BID Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or the Agreement, or otherwise.”
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- G 2.20.7 The BID Security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and / or under the Agreement, or otherwise, under the following conditions:
 - (a) If a Bidder submits a non-responsive BID as defined in 3.2.
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- (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 4 of this RFP; A
- (c) If a Bidder withdraws its BID during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority; B
- (d) In the case of Selected Bidder, if it fails within the specified time limit -
 - (i) to sign and return the duplicate copy of LOA;
 - (ii) to sign the Agreement; or C
 - (iii) to furnish the Performance Security within the period prescribed therefor in the Agreement; or
- (e) In case the Selected Bidder, having signed the Agreement, commits any breach thereof prior to furnishing the Performance Security. D

14. A perusal of the aforesaid clauses would only show that a bidder is liable for disqualification and forfeiture of bidding security at all stages of the agreement, notwithstanding that there may not be execution of the agreement between the parties.

15. The expression “shall be liable to be terminated...” in clause 2.1.14 is only in this context, thereby making it clear that even after the LOA may have been accepted, such disqualification and forfeiture of bid security, if the other conditions exist, can be done by the appellant. The same interpretation goes for clauses 2.6.3 and clause 2.20.7. E

16. What really puts paid to this agreement is the schedule of bidding process which is identical to the schedule of bidding process in the *PSA Mumbai Investments PTE. Ltd.*’s case. F

17. This schedule of bidding process begins with the last date for receiving queries and ends with the signing of concession agreement, LOA being Item No. 7 and part and parcel of this bidding process. The moment this is so, then what is clear is that under clause 6.1, dispute resolution can only take place by the Courts of Delhi. G

18. It is not possible to say that a standard form arbitration clause contained in a draft agreement would then oust clause 6.1 and disturb H

- A the entire scheme of the schedule of bidding process. This being the case, it is clear that even at the stage of acceptance of LOA, if disputes arise between the parties, they can only be resolved by the Courts of Delhi and not by arbitration. This being the case, it is clear that the *PSA Mumbai Investments PTE. Ltd.*'s judgment is, in fact, on all fours and would govern the facts of the present case.
- B 19. In this view of the matter, we set aside the impugned judgment dated 26.10.2018 and allow the appeal.

Devika Gujral

Appeal allowed.