U.P. Rajkiya Nirman Nigam Ltd vs Indure Pvt. Ltd. & Ors on 9 February, 1996

Equivalent citations: 1996 AIR 1373, 1996 SCC (2) 667, AIR 1996 SUPREME COURT 1373, 1996 AIR SCW 980, 1996 ALL. L. J. 526, (1996) 2 SCR 386 (SC), 1996 (2) SCR 386, 1996 (2) SCC 667, 1996 (2) UJ (SC) 48, (1996) 2 JT 322 (SC), (1996) 1 ARBILR 236, (1996) 2 ALL WC 772, (1996) 1 LJR 323, (1996) 2 RRR 31, (1996) 3 ICC 426

Author: K. Ramaswamy

Bench: K. Ramaswamy

PETITIONER:
U.P. RAJKIYA NIRMAN NIGAM LTD.

Vs.

RESPONDENT:
INDURE PVT. LTD. & ORS.

DATE OF JUDGMENT: 09/02/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
AHMAD SAGHIR S. (J)
G.B. PATTANAIK (J)

CITATION:
1996 AIR 1373 1996 SCC (2) 667
JT 1996 (2) 322 1996 SCALE (2)247

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K. Ramaswamy, J.

Leave granted.

This appeal by special leave arises from the judgment and order passed on April 10, 1992 by the Delhi High Court in O.M.P. No.62 of 1992.

The appellant filed an application under Section 33 of the Arbitration Act, 1940 [for short, "the Act"] for declaration that there exist no agreement between the appellant and the first respondent-Indure Pvt. Ltd. on the basis of which a dispute for a claim of Rs.1,68,73,628/- could be referred for arbitration as the agreement set up by the respondent was non est and alternatively the dispute was not arbitrable under the agreement. Accordingly it sought declaration to set aside the said agreement. The learned single Judge of the High Court in the impugned order held that the draft agreement dated June 22, 1984 contains provision for arbitration under clause [14] and the appellant is bound thereby; consequently, the arbitrators are entitled to arbiter the dispute.

The dispute arose in the backdrop of the facts that the U.P. State Electricity Board had floated tenders for construction, supply and erection of mechanical equipment and construction work including consultancy services. Last date for submission of the tender was June 30, 1984. The appellant-Nigam, an Undertaking of State of U.P. had purchased tender documents-from the Board on February 6, 1984. The respondent approached the appellant for their joint participation to submit the tenders to the Board. In furtherance thereof, negotiations were set on foot and they decided to enter into an agreement in that behalf and ultimately draft agreement dated. June 22, 1984 was sent to the respondent for signature. The appellant did not sign the draft agreement. On June 27, 1984, the respondent sent a counter-proposal deleting clause [10] of the agreement suggested by the appellant and materially altering clause [12] therein after signing the same. The tenders were submitted on June 30, 1984, i.e., the last date for submission of tenders; but before negotiating with the Board on February 23, 1985 the appellant had withdrawn the tenders. On February 25, 1985, the respondent had offered in its letter to the Board agreeing to undertake the entire contract by itself and offered to complete the formalities with the Board. Simultaneously, on March 3, 1985, the respondent sent a notice through its counsel claiming damages stating therein that there was no arbitration agreement between the parties. On January 21, 1986, the respondent had further sent a notice nominating an arbitrator an arbitrator on its part and called upon the Appellant to nominate its arbitrator. The respondent purported to have exercised that right under clause [14] of the draft agreement proposed by the appellant on June 22, 1984 alleging that they had accepted the same by letter dated June 27, 1984. The appellant by letter dated February 28, 1986 disputed the existence of the arbitration agreement and also asserted that no concluded contract existed between the parties. It was further stated therein that deletion of material clause [10] of the draft agreement and material alteration of clause [12] constituted substantial modification of the draft agreement and consequently it did not accept the counter-proposal of the respondent and that, therefore, no valid agreement came into existence which was admitted by the respondent in their letter dated March 5, 1985. The question of appointing an arbitrator on their behalf did not arise. However, without prejudice to their right to claim that no valid agreement, much less arbitration agreement, was in existence, they nominated an arbitrator on their behalf to arbiter on the question "whether there existed ant valid or subsisting agreement between the parties and whether there existed any valid and binding arbitration clause between the parties?" Since the arbitrator

nominated by them expired, the respondent was called upon the appellant to nominate another arbitrator. At that stage the appellant filed above petition under Section 33 of the Act.

The High Court found that the respondent returned the agreement duly signed but after deleting clause [10] and materially altering clause [12] thereof. There was no communication by the appellant refusing or negativing the alternations made in the draft agreement. Tenders were submitted on June 30, 1984 after receipt of the modified agreement. Till March 1, 1986, the respondent had not received any communication disowning the contract between it and the appellant. Clause [14] of the agreement contained an arbitration clause for adjudication of the disputes. The withdrawal of the tenders by the appellant caused damages as claimed by the appellant in the notice. Therefore, the respondent called upon appellant to nominate their arbitrator to adjudicate the dispute intimating in their letter appointment of the arbitrator on their part. From this there emerged a concluded contract containing clause [14] providing for arbitration for adjudication of the disputes.

As stated earlier, the High Court came to the conclusion that from the correspondence between the parties there emerged a concluded contract. After due discussion between the parties the draft agreement duly signed with official seal of the respondent affixed thereon, was communicated to the appellant on June 27, 1984 which contained clause [14] which formed an integral part of the contract. The modifications suggested by the respondent were acted upon by the appellant. At no point of time it was suggested by any communication that the modifications were not accepted. On the other hand, tenders were submitted on June 30, 1984 for the joint participation of the appellant and the respondent. The respondent had sent a bank Draft for a sum of Rs.2 lakhs on October 29, 1984. "(I)t is clear that the petitioner had accepted the agreement and in such an eventuality, the petitioner cannot deny the existence of arbitration clause". "Therefore, from the conduct of the petitioner the inference can be drawn that the agreement had come into force the moment it was signed by the respondent and sent the same to the petitioner and the petitioner though did not sign it but acted upon it which amounts to indirect acceptance".

Section 3 of the Indian Contract Act, 1872 envisages communication of proposal, acceptance of proposal and the revocation of the proposal and acceptance. Communication of proposal is complete under Section 4 when it comes to the knowledge of the person to whom it is made. Communication of an acceptance is complete - as against the proposer, when it is put in the course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. Under Section 7, "in order to convert a proposal into a promise, the acceptance must [1] be absolute and unqualified; [2] be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted...". Under Section 10, "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void". Section 31 defines "Contingent contract" to mean to contract to do or not to do something, if some event, collateral to such contract, does or does not happen". A contingent contract to do or not to do anything, if an unforeseen future event happens, cannot be enforced by law, under Section 32, unless and until that event has happened. If the event becomes impossible, such contract becomes void. Section 2 [a] of the Act defines "arbitration agreement" to mean "a written agreement to

submit, present or future differences, to arbitration, whether an arbitrator is named therein or not". To constitute an arbitration agreement, there must be an agreement between the parties, viz., the parties must be ad idem. The parties are not ad unless they agree to the terms and conditions mentioned in the agreement. As seen, under the Contract Act unless there is an agreement, i.e., there is an acceptance of the proposal, the contract is not complete. It is seen that the draft agreement dated June 22, 1984 was sent to the respondent for acceptance, Admittedly, clause [10] was deleted and clause [12] was materially altered unilaterally to convert joint liability to individual liability of the appellant. It would, therefore, be a counter-proposal signed by the respondent and communicated to the appellant. At this juncture, it is relevant to notice the Articles of Association of the appellant-Company, a State Government Undertaking. Article 125 of the Articles of Association gives power to the Board of Directors of the appellant- Company and Article 126, clause [xii] confers power on the Board of Directors "to refer claims or demands, by or against the Company to arbitration". Under Article 125, the Company has the control and the competent authority has power to sign the contract on behalf of the Company. After the counter-proposal was signed by the respondent, the appellant had not signed any contract to bind the parties.

From this factual matrix, the question arises: whether there emerged any concluded contract pursuant to which the parties are bound by the terms and conditions of the tenders submitted to the Board and for further performance? It is seen that the tenders were not jointly signed by the appellant and the respondent but were unilaterally submitted to the Board by the appellant and were later on withdrawn. There did not exist any concluded contract between the Board and the appellant for the performance of the work as per terms and conditions of the tenders floated by the Board. Under Section 32 it was a contingent contract until it was accepted by the Board. In this background,the question emerges: whether there is an arbitration agreement between the parties? It is see; that clause [141 of the agreement [subject to the dispute whether it is arbitrable under clause [14] which is yet another issue with which were are not concerned] independently does not come into existence unless there is a concluded contract pursuant to the proposal made by the appellant on June 22, 1984 or a counter-proposal by the respondent dated June 26, 1984. It is not the case of the respondent that there exist any such independent arbitration agreement.

Shri R.F. Nariman, the learned counsel for the respondent, therefore, contended that the counter-offer made by the respondent amounts to acceptance by conduct of the appellant and he placed reliance on paragraphs 53 [Acceptance by conduct] and 99 [Agreement in principle only] of the i on Contract. Paragraph 53 provides ' that "an offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them; and an offer to sell goods, made by sending them to the offeree, can be accepted by using them". The substance of paragraph 99 is that parties may reach agreement in principle but the details may be worked out at a later date. There is no dispute to the proposition of law but two factors have to be kept in mind, viz., when the counter offer was made by the respondent and whether the unilateral offer amounts to acceptance by submitting the tenders by the appellant to the Board. We find that it does not amount to acceptance of counter proposal. It is seen that admittedly, clause [10] which thrusts responsibility on the first respondent was deleted in the counter- proposal. In clause 12, for joint responsibility unilateral liability was incorporated. In other words the respondent disowned its material responsibilities. Unless there is acceptance by the appellant to those conditions no concluded contract can be said to

have emerged. It is seen that the appellant is a Government Undertaking and unless contract is duly executed in accordance with the Articles of Association, the appellant is not bound by any such contract. Shri Nariman sought to rely on the passage from Palmer on Companies Law containing that it is an indoor management between the appellant and its officers. When the negotiations were undertaken on behalf of the appellant, the respondent was led to believe that the officer was competent to enter into the contract on behalf of the appellant. When the counter- proposal was sent, The appellant had not Returned the proposal. Therefore it amounts to acceptance and thus concluded contract came into existence. We fail to appreciate the contention. As seen, the material alterations in the contract make world of difference to draw an inference of concluded contract, The joint liability of the parties was vade unilateral liability of The appellant. Thereby, the respondent sought to absolve itself From the liability of further performance of the contract with the Board. Similarly, clause [10] which contains material part of the terms for the performance of the contract with the Board was deleted Thereby, there is no consensus A on the material terms of the contact which contains several clauses. In the absence of consensus ad idem on the material terms of the contract to be entered into between the parties, there emerged no concluded contract. Apart from the draft agreement and the counter- proposal, there is no independent contract for reference to arbitration. Clauses [14] which is an integral part of the draft agreement proposed by the appellant and the counter- proposal is the foundation for reference to the arbitration.

Section 31 [2] of the Act provides that notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in the Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been or may be, filed, and by no other Court. Section 33 envisages that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits. Under the proviso, if the Court deems it just and expedient, it may set down the application for hearing on other evidence also and may pass such orders for discovery and particulars as it may do in a suit.

In "Law of Arbitration" by Justice Bachawat [2nd Edn.] at page 19 of Chapter II it is stated that "to constitute an arbitration agreement, there must be an agreement, that is to say, the parties must be ad-idem. The parties are not ad

-idem if there is an arbitration clause in the bought note while there is none in the sold note. To be enforceable, the agreement must be made by the free consent of the parties".

We find no force in the contention of Shri Nariman that the appellant had submitted to the jurisdiction of the arbitrators and having nominated the arbitrator, they are estopped to go back upon it Acquiescence does not confer jurisdiction, The arbitrability of a claim depends on the construction of the clause in the contract. The finding of the arbitrator/arbitrators on arbitrability of the claim is not conclusive as under Section 33, ultimately it is the Court that decides the controversy. It being a jurisdictional issue, the arbitrator/arbitrators cannot cloth themselves with jurisdiction to conclusively decide the issue. In "Russel on Arbitration" [19th Edn.] at page 99 it is

stated thus:

> "It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction and in one case where rules of an institution prepared to conduct arbitrations gave the arbitrator such power, the court will ignore this when asked to enforce the award, and decide the question itself. However, an arbitrator is always entitled to inquire whether or not he has jurisdiction. An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, can arise can adopt one of a number of courses. He can refuse to deal with the matter at all and leave the parties to go to court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the contract, he can proceed accordingly."

In "Law of Arbitration" by Justice Bachawat [2nd Edn.] at page 155 it is stated that "the question whether matters referred to were within the ambit of clause for reference of any difference or dispute which may arise between the parties, it is for the Court to decide". The arbitrator by a wrong decision cannot enlarge the scope of the submission. It is for the Court to decide finally the ambit of the clause in dispute or any clause or a matter or a thing contained therein or the construction thereof. We, therefore, hold that the arbitrators cannot cloth themselves with jurisdiction to decide conclusively the arbitrability of the dispute. It is for the Court under Section 33 or on appeal thereon to decide it finally. The appellant, therefore, is not estopped to challenge the action and to seek a declaration under section 33.

The clear settled law thus is that the existence or validity of an arbitration agreement shall be decided by the Court alone. Arbitrators, therefore, have no power or jurisdiction to decide or adjudicate conclusively by themselves the question since it is the very foundation on which the arbitrators proceed to adjudicate the disputes. Therefore, it is rightly pointed out by Shri Adarsh Kumar Goel, learned counsel for the appellant that they had by mistake agreed for reference and that arbitrators could not decide the existence of the arbitration agreement or arbitrability of the disputes without prejudice to their stand that no valid agreement existed. Shri Nariman contended that having agreed to refer the dispute, the appellant had acquiesced to the jurisdiction of the arbitrators and, therefore, they cannot exercise the right under Section 33 of the Act. We find no force in the contention. As seen, the appellant is claiming adjudication under Section 33 which the Court alone has jurisdiction and power to decide whether any valid agreement is existing between the parties. Mere acceptance or acquiescing to the jurisdiction of the arbitrators for adjudication of the disputes as to the existence of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under section 33 through the Court. In our considered view the remedy under Section 33 is the only right royal way for deciding the controversy.

Since the tenders - the source of the contract between the parties - had not transformed into a contract, even if the proposal and counter proposal are assumed to be constituting an agreement, it is a contingent contract and by operation of Section 32 of the Contract Act, the counter proposal of

the respondent cannot be enforced since the event of entering into the contract with the Board had not taken place.

In Ramji Dayawala & sons [P] Ltd. v. Invest Import [AIR 1981 SC 2085], a two-Judge Bench of this Court considered the existence of the contract and arbitration clause thereunder. This Court had held that in the facts of a given case acceptance of a suggestion may be sub silentio reinforced by the subsequent conduct. Where there is a mistake as to terms of a document, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document. Where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. In that case a sub-contract was signed and executed by the Managing Director of the appellant-Company but part of the contract was altered subsequently since counter-proposal was given by the respondent. This Court had held that one such case is where a part of the offer was disputed at the negotiation stage and the original offeree communicated that fact to the offeror saying that he understood the offer in a particular sense; this communication probably amounts to a counter-offer in which case it may be that mere silence of the original offeror will constitute his acceptance. Where there is a mistake as to the terms of the documents as in that case, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document; to wit, the letter and the cable. It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same senseor as it is sometimes put, there should be consensus ad idem. It was held that there was no consensus ad idem to the original contract. It was open to the party contending novatio to prove that he had not accepted a part of the original agreement though it had signed the agreement containing that part.

As found earlier, there is no signed agreement by a duly competent officer on behalf of the appellant. The doctrine of "indoor management" cannot be extended to formation of the contract or essential terms of the contract unless the contract with other parties is duly approved and signed on behalf of a public undertaking or the Government with its seal by an authorised or competent officer. Otherwise, it would be hazardous for public undertakings or Government or its instrumentalities to deal on contractual relations with third parties.

In view of the fact that Section 2 [a] of the Act envisages a written agreement for arbitration and that written agreement to submit the existing or future differences to arbitration is a pre-condition and further in view of the fact that the original contract itself was not a concluded contract, there existed no arbitration agreement for reference to the arbitrators. The High Court, therefore, committed a gross error of law in concluding that an agreement had emerged between the parties, from the correspondence and from submission of the tenders to the Board. Accordingly it is declared that there existed no arbitration agreement and that the reference to the arbitration, therefore, is clearly illegal. Consequently arbitrators cannot proceed further to arbiter the dispute, if any. The conclusion of the High Court is set aside.

The appeal is accordingly allowed with costs quantified at Rs.15,000/-.