

Jaina Marketing And Associates vs Department Of Women And Child ... on 10 December, 2018

Equivalent citations: AIRONLINE 2018 BOM 1315

Author: R.D.Dhanuka

Bench: R.D. Dhanuka

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CARAP241.18

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION NO. 241 OF 2018

Jaina Marketing & Associates,)
A partnership firm registered under the)
Indian Partnership Act, 1932 having its)
registered office at D-170,)
Okhla Industrial Area, Phase - I,)
New Delhi - 110 020)
Applicant

VERSUS

Department of Women & Child Development,))
Government of Maharashtra,)
First Floor, Raigarph Bhawan,)
CBD, Belapur, Navi Mumbai - 400 614)
Respondent

Mr.Zal Andhyarujina, a/w. Mr.Ankit Lohia, Mr.Sanjay Kadam,
Ms.Apeksha Sharma, Mr.Sanjeel Kadam, i/b. Kadam & Company for
the Applicant.

Mr.A.Y.Sakhare, Senior Advocate, a/w. Kiran Bapat, Mr.Rohan
Nirpury, Mr.Harshvardhan Borse, Ms.Jyoti Chavan, A.G.P. for the
State/Government Pleader for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 2nd NOVEMBER, 2018
PRONOUNCED ON : 10th DECEMBER, 2018

ORDER :

By this application filed under section 11(6) of the Arbitration and Conciliation Act, 1996 the applicant seeks appointment of an arbitrator. Some of the relevant facts for the purpose of deciding kvm CARAP241.18 this application are as under :-

2. On or about 27th June, 2017 the respondent invited bids/e-

tenders for procurement of android based smart phones. On 1 st August,2017, the applicant participated in the said bid and submitted requisite documents.

3. On 11th August,2017 the Commissionerate Integrated Child Development Services Scheme, Maharashtra State, Navi Mumbai addressed a letter to the Project Manager, Central Project Management Unit, ISSNIP MWCD, New Delhi recording that the said authority had invited e-tenders for procurement of android based Handsets. It was mentioned in the said letter that the said authority would like to confirm with the Project Director that the applicant herein was declared as L 1 bidder on 10 th August,2017 and the procurement process was successfully completed. For administrative approval, the proposal was submitted to the State Government. It was further stated that the representative of the authority would come to Delhi to submit the handset (Karbonn K9 Smart Eco) pre-loaded with Common Application Software (CAS) in the mobile device along with Non Disclosure Agreement (NDA) and OEM declaration. The said authority requested the Project Director to check the compatibility for Common Application Software (CAS) form Dimagi and to share the report with the said authority to take necessary action.

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4. On 17th August,2017, the applicant submitted a duly signed Non Disclosure Agreement to the respondent. The said agreement contained various undertakings. On 21st August,2017, the Commissionerate Integrated Child Development Services Scheme, Maharashtra State, Navi Mumbai addressed a letter to the applicant stating that the said office had been recently submitted by the MWCD that the android based mobiles must be complied with USB OTG (USB on the Go) which then had a standard that enabled the mobile devices to talk to one another. The applicant was requested to do the needful. In the said letter, the applicant was informed that the respondent could offer the applicant two months starting from 19th August,2017 to comply and saturate with OTG requirements in all the android handsets to be distributed in future.

5. The applicant by its letter dated 21st August,2017 to the Project Director, ISSNIP, Commissionerate of ICDS Scheme, Department of Women & Child Development responded to the said letter dated 21st August, 2017 and informed that the applicant would require additional 60 days over and above the provisioned delivery timeline for providing the functionality of OTG on the smart phones quoted by the applicant as requisitioned by the respondent in the letter dated 21st August,2017. The applicant confirmed that it would accede to the request of the respondent of provisioning of OTG functionality at no cost to the respondent in the quoted model besides the same having a financial bearing on the applicant. The applicant requested the respondent to release the purchase order at the earliest to enable the kvm CARAP241.18 applicant to initiate the process of component procurement and the time start from the date of receipt of the purchase order.

6. By letter dated 22nd August, 2017 from the Commissionerate Integrated Child Development Services Scheme, Maharashtra State addressed to the applicant, the applicant was informed that the proposal of the applicant for the subject mentioned in the said letter was in process with Project Directorate, ISSNIP in ICDS. The total amount mentioned in the tender was INR 12,03,12,937/- including all taxes and had been preliminarily under consideration subject to the terms and conditions in the e-tender. By the said letter, the applicant was required to comply with various conditions under the said letter of intent such as (1) to sign and submit the agreement attached to the said letter on stamp paper of Rs.200/-, (2) to submit the project plan and resource mobilization plan in order to start the work at the earliest, (3) to submit the bank guarantee of INR 36.09 lakhs from the nationalized/scheduled commercial bank in favour of the State Project Director, ISSNIP, Maharashtra State. It was provided that the validity of the bank guarantee should be minimum 3 years of the specimen of bank guarantee attached to the said letter of intent dated 22nd August, 2017.

7. On 28th August, 2017, the applicant forwarded a sample mobile phones for confirmation to the respondent. On 29th August, 2017, the applicant submitted a project plan to the respondent. On 1st September, 2017, the applicant submitted a bank guarantee of Rs.36.09 lacs to the respondent. On 3rd September, 2017, the report of the respondent confirming the sample mobile phone submitted by the applicant for testing was shared with the applicant.

8. On 5th September, 2017, the applicant executed a contract and forwarded to the respondent. On 11th September, 2017, in accordance with the terms of the Letter of Intent and in the format forwarded by the respondent. On 30th November, 2017, the respondent informed the applicant that the department had communicated to the applicant earlier regarding installation of OTG (on the go) for mobile devices. The applicant was further informed that the department had submitted the said proposal to Mantralaya for administrative approval and would get the administrative approval very soon. The applicant was instructed to prepare the devices with OTG enabled at their back end.

9. The applicant vide its letter dated 30th November, 2017 to the respondent recorded that the applicant had already vide its letter dated 21st August, 2017 had confirmed its willingness to comply to the OTG feature, provided two months of additional time was granted for delivery of the smart phones over and above the stipulated time line of 30 days from the date of purchase order duly stating that the time would start from the date of receipt of purchase order. The applicant recorded that the applicant had received the Letter of Intent dated 22nd August, 2017 post these communications of 21st August, 2017 but the said Letter of Intent did not mention of OTG and grant of additional Rs.36,09,388/- time for delivery. The applicant submitted the required documents i.e. the performance bank guarantee of Rs.36,09,388/-, the project plan and signed agreement on the stamp paper vide its letter dated 4th September, 2017. The applicant thanked the respondent for confirmation issued for inclusion of OTG feature vide their letter dated 30th November, 2017. The applicant requested to include provision of 60 additional days for delivery of OTG to enable the smart phones as requested by the applicant vide letter dated 21st August, 2017. On 19th January, 2018, the applicant addressed a letter to the respondent recording that the said smart phones were ready for delivery.

10. On 5th February, 2018, the applicant addressed a letter to the respondent for delivery of the said smart phones. The applicant requested the respondent to confirm the contact details of the authorized official for receiving the OTG enabled ordered smart phones and confirm the convenient date for delivery. There was no response to the said letter. The applicant therefore addressed another letter on 5th February, 2018 and 13th March, 2018 for delivery of the smart phone. There was no response to those two letters also.

11. On 23rd April, 2018, the respondent addressed a letter to the applicant. The respondent confirmed that vide letter dated 22 nd August, 2017 the applicant was informed that as per the terms and conditions of the e-tender, the applicant was supposed to pay 3% performance security on total purchase price by bank guarantee. It was further confirmed that on 1st September, 2017, the applicant has paid a kvm CARAP241.18 total Rs.36,09,388/- towards the performance bank guarantee. The applicant was informed that the government has withdrawn the tenders of the purchase materials and has directed to purchase the material from GoM portal. The applicant was informed that the tender was withdrawn and thus the respondent was returning the bank guarantee and other documents.

12. On 2nd June, 2018, the applicant through its advocates' notice to the respondent invoked the arbitration agreement and appointed Mr. Prasad Shenoy, Advocate as the arbitrator. The applicant called upon the respondent to nominate the arbitrator on their behalf within 30 days from the date of receipt of the said notice. On 11 th June, 2018, the applicant filed Arbitration Petition (L) No.619 of 2018 under section 9 of the Arbitration Act for the interim measures for protection.

13. On 15th June, 2018, this court passed an order recording the statement made by the learned A.G.P. that pending the arbitration proceedings, the respondent shall issue a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master in the sum of Rs.12,03,12,937/-. This court directed to continue the bank guarantee for a period of 12 weeks from the date of passing of award by the learned arbitrator. It was however further clarified that the petitioner may without prejudice to its rights and contentions submit their bid before the time prescribed for acceptance of the bids. By an order dated 6th July, 2018, this court rejected the Notice of Motion (L) No.1548 of 2018 seeking review of the order dated 15th June, 2018.

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14. The Division Bench of this court passed an order on 7 th September, 2018 in Commercial Appeal (L) No.340 of 2018 arising out of the said order dated 15th June, 2018 and 6th July, 2018 passed by the learned Single Judge in the appeal filed by the respondent herein. This court recorded that the applicant herein had ascertained that there was a binding and concluded contract with the State whereas the State Government nowhere admitted this position. This aspect will have to be investigated and probed deeper and further. The Division Bench of this court accordingly set aside the order dated 15 th June, 2018 passed by the learned Single Judge to the extent that the order dated 6 th July, 2018 shall stand restored to the file of this court for disposal afresh on merits and in accordance with law uninfluenced by the impugned order or any observations therein.

15. This court made it clear that the said order passed by the learned Single Judge directing the respondent herein to furnish a bank guarantee in the sum of Rs.12,03,12,937/- shall continue to operate as an ad-interim order and the bank guarantee shall be furnished and should be kept alive till the disposal of the petition under section 9 of the Act or such other period as the learned Single Judge deems fit and proper. The Division Bench of this court also granted liberty to the respondent to urge that depending on the outcome of the application under section 11 of the Act, the said ad-interim order be modified accordingly.

16. Mr.Lohia, learned counsel appearing with Mr.Zal kvm CARAP241.18 Andhyarujina for the applicant invited my attention to the bid documents and the correspondence and the orders passed by this court in the petition filed under section 9 and would submit that the respondent had already issued a notification (Letter of Intent) on 22 nd August,2017 read with several correspondence referred to aforesaid calling upon the applicant to start the process of delivery. The respondent had also suggested the additional features in mobile sets agreed to be supplied by the applicant to the respondent. The applicant was called upon to submit various documents including the project plan and resource mobilization plan in order to start the work at the earliest, to submit the bank guarantee of a Nationalized Scheduled Commercial Bank and to sign and submit the agreement attached to the said Letter of Intent dated 22nd August,2017. The applicant had acted upon the said letter of intent thereby accepting the bid of the applicant and submitted all the documents requisitioned by the said letter dated 22nd August,2017.

17. It is submitted that after accepting all those details along with the bank guarantee and the contract documents duly signed by the applicant, the respondent also acted upon the said letter of intent. Learned counsel placed reliance on clause 40.1 to 41.2 of the bid documents and would submit that the respondent had notified to the applicant that the bid of the applicant was accepted by the respondent and was called upon to furnish the performance security and to sign the contract form pursuant to ITB Clause 42 which was immediately complied with by the applicant. He submits that since the said kvm CARAP241.18 notification of award/letter of intent was already received by the respondent, till the formal contract was prepared and executed, the said notification of award constituted a binding contract.

18. It is submitted that the applicant has already signed the said formal contract which was forwarded to the applicant by the respondent and were asked to execute such document. He submits that the bid of the applicant was thus accepted by the respondent. The binding contract thus came into existence. The said binding contract contain the arbitration clause in general condition of contract and more particularly clauses 10.1 to 10.3 and in the special condition of contract at page 95 of the bid document.

19. Learned counsel for the applicant placed reliance on the unreported judgment of this court delivered on 10 th September,2014 in case of Lotus Refineries Private Limited vs. National Spot Exchange Limited and in particular paragraphs 5 to 7, 76 to 89 and would submit that the letter of award read with the other correspondence exchanged between the parties constitutes a binding and concluded agreement.

20. In his alternate submission, it is submitted that the power of court under section 11(6A) of the Arbitration Act is confined to the existence of the arbitration agreement and not whether the main agreement exist or not. It is submitted that the conditions of section 7 of the Arbitration and Conciliation Act, 1996 which defines an kvm CARAP241.18 arbitration agreement have been fully satisfied in this case. The other issues raised by the respondent as to whether the contract document not having been signed by both the parties and the consequences thereof has to be considered by the arbitral tribunal and not by this court while hearing this application under section 11(6) of the Arbitration Act.

21. Learned counsel for the applicant placed reliance on the judgment of this court in case of Coastal Marine Construction and Engineering Limited vs. Garware-Wall Ropes Limited, (2018) 3 Mah.LJ 22 in support of the submission that the power of court while deciding an application under section 11(6) are very limited and confined to the existence of the arbitration agreement and nothing more than that. It is submitted by the learned counsel that though the Hon'ble Supreme Court has issued a notice to the special leave petition filed by the respondent in the said matter, the said judgment is not stayed by the Hon'ble Supreme Court till date.

22. Mr.Sakhare, learned senior counsel for the respondent on the other hand tendered a compilation of the documents and placed reliance upon various documents annexed to the arbitration application and also to the said compilation of the documents.

23. Learned senior counsel relied upon clause 6.4 of the instructions to the bidders which provides that the bidder is expected to kvm CARAP241.18 examine all instructions, forms, terms and specifications in the bidding documents and to furnish with its bid all information or documentation as is required by the bidding documents. He strongly placed reliance on clause 40.1 of the said instructions to bidders and would submit that no such notification of award has been issued by the respondent to the applicant. He submits that by the letter dated 22 nd August,2017 strongly relied upon by the applicant addressed by the Commissionerate Integrated Child Development Services Scheme, Maharashtra State, the applicant was informed that the proposal of the applicant was in process with Project Directorate, ISSNIP under ICDS and had been preliminarily under consideration subject to the terms and conditions in the tender. He submits that the said letter cannot be construed as the letter of award.

24. Learned senior counsel strongly placed reliance on the format of letter of acceptance annexed at page 126 of the arbitration application and would submit that the said letter of acceptance has to be issued in the said format only. The said document has to be signed by the authorized signatory with the name and details of such signatory and also shall state the name of the agency. He submits that the said letter dated 22nd August,2017 was not in the said format annexed at page 126. He submits that the applicant was clearly informed that the proposal of the applicant was in process of the Project Directorate, ISSNIP under ICDS and was under consideration. He submits that the respondent has already terminated the entire tender process and there was no concluded and binding contract entered into between the kvm CARAP241.18 parties. The arbitration agreement relied upon by the applicant which was forming part of the said contract also thus did not come into existence.

25. Learned senior counsel invited my attention to various correspondence exchanged between the parties annexed to the arbitration application and also to the compilation of the documents in support of the submission that the applicant has suggested variation in the terms and conditions of the contract which also would clearly indicate that there was no concluded and binding agreement between the parties.

26. It is submitted by the learned senior counsel that the said contract document annexed at Ex.G to the arbitration application dated 5th September, 2017 is admittedly not signed by the respondent but was signed only by the applicant. Since the said agreement was not signed by both the parties, there was no concluded and binding contract between the parties and thus the arbitration clause forming part of the said document would not come into the existence.

27. In his alternate submission, learned senior counsel invited my attention to clause 2 of the said contract agreement dated 5 th September, 2017 and would submit that it was clearly provided that the said agreement shall prevail over all other contract documents and the documents specifically mentioned in that clause at serial nos. (a) to (f) kvm CARAP241.18 shall prevail in the order listed below.

- (a) The letter of Acceptance
- (b) This Contract Agreement
- (c) The Suppliers letter of Bid and original

completed Schedules including Price Schedules.

- (d) Special Conditions of Contract
- (e) General Conditions of Contract
- (f) Technical Requirements (including Schedule

of Requirements and Technical Specifications) Learned senior counsel distinguished the judgment of this court in case of Lotus Refineries Private Limited (supra) on the ground that the facts before this court in the said judgment were totally different and thus is not binding on this court.

28. Learned senior counsel strongly placed reliance on the judgment of this court delivered on 7th September, 2018 in Commercial Appeal (L) No.340 of 2018 filed by his client against the order passed by the learned Single Judge on 15th June, 2018 in Commercial Arbitration Petition (L) No.619 of 2018 and would submit that the order passed by the learned Single Judge recording the alleged statement made by the Officer of the respondent was set aside by the Division Bench. It was specifically recorded in the said order that the respondent had not admitted the assertion of the applicant that there was a binding and concluded contract and this aspect would have been kvm CARAP241.18 investigated and probed deeper and further. He submits that the issue of existence of the main contract and the arbitration agreement thus is not decided by the learned Single Judge or by the Division Bench in the proceedings arising out of the proceedings filed under section 9 of the

Arbitration Act and decided by this court in this application or in the arbitration petition filed under section 9 of the Arbitration Act.

29. Learned senior counsel for the respondent strongly placed reliance on the unreported judgment of this court delivered on 19 th September, 2017 in case of Kakade Infrastructure Pvt.Ltd. vs. State of Maharashtra in Commercial Arbitration Application No.39 of 2016 and in particular paragraphs 21 to 23 and would submit that in the said judgment with an identical facts, this court had rejected the application filed by the contractor under section 11(6) of the Arbitration Act and had refused to appoint an arbitrator.

30. Mr.Zal Andhyarujina, learned counsel appearing for the applicant in rejoinder submits that the arbitration agreement recorded in the general conditions of contract read with special conditions of contract forming part of the those documents already came into existence. He submits that various letters referred to aforesaid have to be read together including the letter of intent to come to a conclusion that the arbitration agreement already exist. He submits that the applicant is not concerned with the doctrine of 'indoor management' or the departmental procedure required to be followed by the respondent. The court has to see whether the arbitration agreement exist or not and kvm CARAP241.18 not to see whether the main contract is executed or not. The substantive agreement can be formed in various forms including oral agreement whereas the arbitration agreement is a separate and distinctive contract. The court has to see the intent of parties and whether such arbitration agreement is acted upon or not. The issue as to whether the main contract is concluded or not or the exit or not has to be decided by the arbitral tribunal.

31. Learned senior counsel strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of Enercon (India) Limited and others vs. Enercon GMBH and another, (2014) 5 SCC 1 and in particular paragraphs 75 and 77. He also placed reliance on the judgment of Hon'ble Supreme Court in case of Shin-Etsu Chemical Co.Ltd. vs. Aksh Optifibre Ltd. and another, (2005) 7 SCC 234 and in particular paragraphs 77 to 79, 86 and 93 to 95. He also placed reliance on the judgment of Hon'ble Supreme Court in case of Unissi (India) Private Limited vs. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107 and in particular paragraphs 15, 16 and 19 in support of the submission that the offer of the applicant have been accepted by the respondent which contained an arbitration clause and thus although no formal agreement was executed, the arbitration agreement came into existence. He submits that all these statutory requirements of the ingredients of section 7 of the Arbitration Act are made out by the applicant. He submits that all terms and conditions of clauses 40.1 to 40.4 are duly complied with by the applicant though the applicant was not required to follow clause kvm CARAP241.18 40.1 and 40.4.

32. Learned counsel for the applicant invited my attention to the letter dated 21st August,2017 and would submit that the applicant had also accepted the additional requirement suggested by the respondent and to supply the android smart phones along with additional requirements suggested by the respondent. The respondent had called upon the applicant to take into consideration the additional requirements and thus cannot be allowed to urge that there was neither any concluded contract nor any arbitration agreement.

33. Insofar as the unreported judgment of this court in case of Kakade Infrastructure Pvt.Ltd. (supra) relied upon by the learned senior counsel for the respondent is concerned, Mr.Andhyarujina, learned counsel for the applicant strongly placed reliance on paragraphs 16, 17 and 21 to 23 and would submit that the facts before this court in the said judgment were totally different. The applicant in the said matter had backed out from the commitment and to carry out the obligation under the contract between the parties and had taken contradictory stand. In that case, the applicant had suggested various modifications in the contract which were not accepted by the respondent therein whereas in this case, the respondent had suggested the additional requirements which were accepted by the applicant. It is submitted by the learned counsel that the applicant had thus made out a case for appointment of the arbitrator and thus this court shall appoint an arbitrator in accordance with the arbitration agreement entered into kvm CARAP241.18 between the parties.

REASONS AND CONCLUSIONS :-

34. It is not in dispute that the respondent had invited bids from the eligible bidders. The bid of the applicant was found favourable and was accepted by issuing a letter of intent on 22 nd August, 2017 by the Commissionerate Integrated Child Development Services Scheme Maharashtra State. By the said letter of intent, the applicant was informed that its proposal for e-tender no.183 was in process with the Project Directorate. The total amount mentioned in the tender was INR 12,03,12,937, including all taxes and was preliminarily under consideration subject to the terms and conditions in the tender.

35. The applicant was required to comply with various conditions mentioned in the said letter of intent. It is not in dispute that pursuant to the said letter of intent, the applicant submitted a project plan on 29th August, 2017, bank guarantee on 5th September, 2017 and forwarded a duly signed agreement dated 5th September, 2017 on 11th September, 2017. The respondent accepted each of those documents and the project plan submitted by the applicant without raising any protest. The applicant was also asked to submit a handset, non- disclosure agreement and OEM declaration by visiting Delhi. The applicant was also called upon to start performing its obligation by submitting a handset, non-disclosure agreement and OEM declaration by visiting Delhi. When the applicant was in process of delivery, the respondent vide its letter dated 21st August, 2017, added a mandate of kvm CARAP241.18 having USB OTG facility in the mobile phones and offered to give two months additional period from 19th August, 2017. The applicant submitted the hand set for testing to the knowledge of the respondent and complied with the additional requirements also. The respondent thereafter on 30th November, 2017 informed the applicant that the respondent would get administrative approval very soon and instructed the applicant to prepare its devices with OTG enable at its end. The applicant was also following up with the respondent to take delivery of the mobile phones during the period 30th November, 2017 and April, 2018. As and by way of after thought, the respondent however, annulled the entire tender and decided to purchase mobile hand sets on Government portal.

36. Clause 38.1 of the Instructions to Bidder provided that the respondent shall award the contract to the bidder whose bid has been determined to be lowest evaluated bid and was substantially

responsive to the Bidding Documents. Clauses 40.1, 40.4, 40.5, 41.1 and 41.2 which are relevant for the purpose of deciding this arbitration application are extracted as under :-

"40.1 Prior to the expiration of the period of bid validity, the Purchaser shall notify the successful Bidder, in writing, that its Bid has been accepted. The notification letter (hereinafter called "Letter of Acceptance") shall specify the sum that the purchaser will pay in consideration of the supply of Goods (hereinafter called "the Contract Price").

kvm CARAP241.18 40.4 Until a formal Contract is prepared and executed, the notification of award shall constitute a binding Contract.

40.5 Upon the successful Bidder's furnishing of the performance security and signing the Contract Form pursuant to ITB Clause 42, the Purchaser will promptly notify each unsuccessful Bidder and will discharge its bid security / Earnest Money Deposit, pursuant to ITB Clause 19.5 41.1 Promptly after notification, the Purchaser shall send the successful Bidder the contract Agreement.

41.2 Within twenty-one (21) days of receipt of the Contract Agreement, the successful Bidder shall sign, date, and return it to the Purchaser."

37. A conjoint reading of the aforesaid clauses it makes it clear that until a formal contract is awarded, the notification of award shall constitute a binding contract. It is not in dispute that the applicant in this case was asked to submit the contract agreement duly signed by it and to be returned to the respondent, was asked to submit the performance security in accordance with the General Conditions of Contract and to comply with various other conditions. It is not in dispute that the applicant had complied with all these conditions and had kept the mobile sets ready for delivery. The applicant was also kvm CARAP241.18 assured by the respondent that the respondent would take approval from the concerned authority and the applicant should keep the mobile sets ready for delivery.

38. A perusal of the record further indicates that the respondent had also made a modification in the terms of the contract and had asked the applicant to modify those terms which the applicant accepted. The respondent also agreed to extend the contract period by two months. In my view in view of clause 40.4, in these circumstances though a formal contract was not executed by the respondent which was executed by the applicant, till such formal contract was executed by both the parties, letter of intent / letter of notification of award constituted a binding contract. The said contract include the arbitration agreement which was duly invoked by the applicant. The respondent even did not bother to give response to the notice invoking arbitration agreement by the applicant recorded in the General Conditions of Contract as well as Special Condition of Contract.

39. I am thus not inclined to accept the submission of Mr.Sakhare, learned senior counsel for the respondent that there was no contract entered into between the parties or that there did not exist any arbitration agreement.

40. Insofar as the submission of the learned senior counsel for the respondent that the letter of intent dated 22 nd August, 2017 was not in the prescribed format prescribed under the contract and thus the said letter of intent could not be considered as a binding contract is kvm CARAP241.18 concerned, it is not in dispute that the said letter was issued by the concerned authority of the respondent. The contract amount was mentioned in the said letter of intent. The applicant was also directed to furnish various documents including security. It is not the case of the respondent that the said letter of intent / notification of award was not addressed by the authorized person. It is also not the case of the respondent that the compliance made by the applicant pursuant to the said letter of intent was not proper or that the same was not accepted by the respondent. The Court has to see the substance and not the form of such letter of acceptance while construing the document.

41. A perusal of the affidavit in reply filed by the respondent on 30th July, 2018 and more particularly paragraph 11 clearly indicates that it is the case of the respondent itself that the Committee had granted approval for procurement from L-1 i.e. the applicant if the rates of L-1 were lesser than or equal to the GeM portal rate. In my view, the respondent had acted upon the contract in this case in view of issuing a letter of intent / notification of award, by accepting the documents called for from the applicant, by making modification to the existing conditions in the tender and accepted by the applicant, by getting the products manufactured from the applicant and asking the applicant to be ready for delivery of those mobile phones. There is no substance in the submission made by the learned senior counsel for the respondent that there was no conclusive contract between the parties.

42. This Court in case of Coastal Marine Construction & Engineering Limited vs. Garware-Wall Ropes Limited, (2018) 3 kvm CARAP241.18 Mah.L.J. 22 has held that under section 11(6-A) of the Arbitration & Conciliation Act, 1996, the powers of Court should confine to the existence of the arbitration agreement. Though the Hon'ble Supreme Court had issued a notice in the Special Leave Petition arising out of the said judgment, the said judgment is not stayed by the Hon'ble Supreme Court till date. This Court is of the clear view that the arbitration agreement exists between the parties.

43. The Hon'ble Supreme Court in case of Unissi (India) Private Limited (supra) has considered a similar situation where the tender documents itself contained an arbitration agreement and by reason of acceptance of tender of the bidder by the owner, it was held that there was a valid arbitration agreement between the parties. The Hon'ble Supreme Court held that the appellant had consented to the contract containing the arbitration clause as per the format provided by the owner after duly signing the same by the owner, the owner though admittedly received the same and did not send back the agreement to the bidder after signing it as per the agreement between the parties, it would amount to arbitration clause. The applicant in that matter also had acted upon the letter of acceptance. The principles of law laid down by the Hon'ble Supreme Court in Unissi (India) Private Limited (supra) would clearly apply to the facts of this case. I am respectfully bound by the said judgment.

44. In my view, the judgment of this Court in case of Lotus Refineries Private Limited vs. National Spot Exchange Limited kvm CARAP241.18 delivered on 10th September, 2014 in Notice of Motion

(Lodging) No.2036 of 2013 would clearly assist the case of the applicant holding that the arbitration agreement existed between the parties.

45. Insofar as the judgment of this Court in case of Kakade Infrastructure Private Limited (supra) relied upon by Mr.Sakhare, learned counsel for the respondent is concerned, a perusal of the said judgment clearly indicates that the facts before this Court in the said judgment were totally different. The applicant in the said matter had backed out from the commitment and to carry out the applicant under the contract between the parties and had taken contrary stand. The applicant had suggested various modifications in the contract which were not accepted by the respondent in that matter. In the facts of this case, however, the respondent had suggested the modification after issuing a letter of intent which conditions were duly accepted by the applicant. The respondent has acted upon the said letter of intent issued in favour of the applicant and had also asked the applicant to keep the mobile sets ready for delivery. The said judgment of this Court in case of Kakade Infrastructure Private Limited (supra) thus would not apply to the facts of this case at all and is clearly distinguishable.

46. In my view, Mr.Andhyarujina and Mr.Lohia, learned counsel appearing for the applicant are right in their submission that till the formal contract was executed, the notification of award / letter of intent constituted a binding contract in view of clause 40.4. The said binding contract included the arbitration agreement forming part of the General Conditions of Contract as well as Special Conditions of kvm CARAP241.18 Contract. The respondent thus not having appointed an arbitrator in accordance with the arbitration agreement, this arbitration application filed under section 11(6) of the Arbitration & Conciliation Act, 1996 is maintainable.

47. I pass the following order :-

(a) I propose to appoint Shri Justice R.M. Savant, a former Judge of this Court as the sole arbitrator. Learned prospective arbitrator is requested to file statement of disclosure under section 11(8) read with section 12(1) of the Arbitration & Conciliation Act, 1996 on or before the next date.

(b) The applicant is at liberty to obtain such statement of disclosure from the learned prospective arbitrator and to tender the same before this Court before the next date.

(c) If the learned prospective arbitrator is appointed by this Court, the fees and expenses of the learned prospective arbitrator shall be borne by both the parties equally at the first instance.

48. Place the matter on board for directions on 17th December, 2018.

(R.D.DHANUKA, J.)