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MAHARSHI DAYANAND UNIVERSITY & ANR.

v.

ANAND COOP. L/C SOCIETY LTD. & ANR.

APRIL 25, 2007

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[TARUN CHATTERJEE AND P.K. BALASUBRAMANYAN, JJ.]

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*Arbitration and Conciliation Act, 1996—Sections 11 and 16—Appointment of arbitrator—Interference with—Tender invited, tender submitted and acceptance conveyed, time for work stipulated and payment not to be made until formal contract signed containing detailed specifications as contemplated by letter of acceptance—However, formal contract not signed—Party deciding not to execute contract—Contractor invoking clause in tender conditions for appointment of arbitrator—Application u/s 11—Appointment of Engineer as arbitrator leaving it to the parties to raise all objections before the arbitrator u/s. 16—Correctness of—Held: Appointment of arbitrator calls for no interference—Since the question can be raised before the arbitrator u/s 16, it must be left to be decided by the arbitrator—Instant case not being governed by the principles in S.B.P. & Company's case, it would be appropriate to leave this in these proceedings.*

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Appellant invited tenders for construction work. Respondent no.1 submitted the tender and the appellant accepted the same. Tender form submitted by the respondent contained a clause for reference of dispute to the arbitrator. Appellant submitted the letter of acceptance and the date of commencing the work to be from the date of issuance of the letter. It further stipulated that the document containing the detailed terms and conditions of the contract was to be signed by the parties otherwise no payment would be made; and that the contract stood concluded with the issue of this communication. Respondent deposited earnest money. However, the parties did not sign the contract. Thereafter, appellant informed the respondent that it had decided not to get the work executed and called upon the respondent to

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take refund of the earnest money. Respondent issued notice invoking clause 25A of the tender conditions for appointment of arbitrator since the respondent had made arrangements for commencing the work and on cancellation it suffered losses. Appellant invoked clause 13 of the tender conditions that appellant could decide not to proceed with work and as such clause 25 A had

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no application. Respondent then filed an application under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator. Appellant accepted that the tender of the respondent had been accepted but was not liable to pay any damages in view of clause 13 of the tender. District Judge relying upon *Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd.*'s\* case appointed the Engineer as arbitrator in terms of the clause 25A of the tender conditions, leaving it to the parties to raise all objections before the arbitrator under section 16 of the Act. Appellant filed writ petition. High Court dismissed the writ petition holding that the appellant could raise objections before the arbitrator and interference with the order appointing an arbitrator was not called for. Hence the present appeal. A B

Appellant contended that contract as contemplated by the parties containing the detailed terms and conditions was not signed by the parties and in the circumstances there was no arbitration agreement justifying the appointment of an arbitrator; that a question whether there was an arbitration clause or not, had to be decided by the court even under the dispensation; and that there being no concluded contract, it was just and necessary to interfere with the order appointing the arbitrator. C D

Dismissing the appeal, the Court

HELD: 1.1. There is no reason to interfere with the appointment of an arbitrator. Liberty is given to the parties to raise all their contentions based on lack of jurisdiction of the arbitral tribunal before the arbitrator. E

[Para 12] [606-F]

1.2. The instant case is governed by the procedure that was available when *Konkan Railway Corporation Ltd. & Anr.*'s\* case held the field. That orders already made were not to be affected by the ratio of the decision in *S.B.P. & Company.*'s\*\* case. Therefore, the only question for decision is whether the fact that the parties have not signed the contract containing the detailed specifications as contemplated by the letter of acceptance would preclude the respondent from seeking an arbitration by falling back on clause 25A of the tender conditions. It is true that when parties during negotiations contemplate the execution of a formal agreement incorporating the terms of the bargain, so long as a formal agreement has not been entered into, it may be open to contend that there was no concluded contract between the parties. As against this, what is the position in a case where the tender submitted is accepted, its acceptance conveyed and the time for completing the work is stipulated to start from such acceptance, and the work was to commence on F G H

A the basis of that acceptance but no payment was to be made until a formal contract was signed, is the first question that arises in this case. In the circumstances, this is a question that must be left to be decided by the arbitrator, this is a question that must be left to be decided by the arbitrator, since in terms of S. 16 of the Act the question can be raised before the arbitrator. [Para 10] [605-F, G, H; 606-A, B]

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1.3. Considering that the pre *S.B.P. & Company's* case dispensation is dealt with, it is not necessary or proper to go into that question and decide the same in these proceedings. Same is the position regarding the scope of clause 13 of the tender and the clauses relied on by counsel for the appellant in his attempt to take the present claim out of clause 25A of the tender conditions. Therefore, it would be appropriate to leave this question, as also the other questions to be decided by the arbitrator rather than trying to answer them at this stage in view of the fact that this case is not governed by the principles recognized by *S.B.P. & Company's* case. [Para 10] [606-B, C]

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D 1.4. The arbitrator in the first instance, has to decide whether the existence of an arbitration agreement in terms of S.7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of clause 25A of the tender conditions in case it is found to be an agreement within the meaning of S.7 of the Act. Only on deciding these two aspects can the arbitrator go into the merits of the claim made by the respondent. But it is clarified that it does not mean, that he would treat these two aspects as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award.

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[Para 11] [606-D, E]

F *\*Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388, relied on.

*\*\*S.B.P. & Company v. Patel Engineering Ltd. & Anr.*, [2005] 8 SCC 618 and *Willington Associates Ltd. v. Kirit Meta*, [2000] 4 SCC 272, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2133 of 2007.

From the Judgment and Order dated 12.03.2005 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 4046 of 2005.

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Nidhesh Gupta, U.N. Shukla and S. Janani for the Appellants.

The Judgment of the Court was delivered by

**P.K. BALASUBRAMANYAN, J.** 1. Leave granted.

2. In spite of service of notice and in spite of repeated conveying of information about the posting of the petition for special leave to appeal for final disposal, the respondent has not chosen to appear. We think we have waited enough for the appearance of the respondent and no further indulgence is warranted. Heard counsel for the appellant.

3. The appellant invited tenders for construction of sheds near its Swimming Pool at an estimated cost of Rs.10.70 lakhs. Respondent No. 1 submitted its tender. The tender form submitted by the respondent contained the following clause:

*"Clause 25A.* (1) If any dispute or difference of any kind whatsoever shall arise between the vice-Chancellor M.D.U. Rohtak, and the contractor in connection with or arising out of the contract, or the execution of the work that is (i) whether before its commencement or during the progress of the work or after its completion, (ii) and whether before or after the termination, abandonment or breach of the contract it shall in the first instance be referred to for being settled by the Executive Engineer in charge of the work at the time and he shall within a period of sixty days after being requested in writing by the contractor to do so, convey his decision to the contractor, and subject to arbitration as herein after provided, such decision in respect of every matter so referred, shall be final and binding upon the contractor. In case the work is already in progress, the contractor will proceed with the execution of the work on the receipt of the decision of the Execution Engineer-in-charge as aforesaid, with all due diligence whether he or Vice-Chancellor, M.D.U., Rohtak requires arbitration as hereinafter provided or not. If the Executive Engineer, in-charge of the work has conveyed his decision to the contractor and no claim to arbitration has been filed with him by the contractor within a period of sixty days from the receipt of letter communicating the decision, the said decision shall be final and binding upon the contractor and will not be subject matter of arbitration at all. If the Executive Engineer in-charge of the work fails to convey his decision within a period of sixty days, after being requested, as aforesaid, the contractor may, within further sixty days of the expiry of first sixty days from the date on

A which request has been made to the Executive Engineer in-charge request the Vice-Chancellor, that the matter in dispute be referred to arbitration, as hereinafter provided.

B (2) All disputes or differences in respect of which the decision not final and conclusive shall at the request in writing of either party, made in communication sent through registered A.D. Post, be referred to the sole arbitration to Vice-Chancellor, M.D.U., Rohtak at the relevant time. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant or that he had to deal with the matters to which the contract relates and that in the course of his duties as a Government servant, he had expressed his views on all or any of the matters in dispute. The arbitrator to whom the matter is originally referred being transferred or vacating his office, his successor-in-office, as such shall be entitled to proceed with the reference from the stage at which it was left by his procedure.

D In case the arbitration nominated by the Vice-Chancellor, M.D.U., Rohtak is unable to act as such for any reason, whatsoever the Vice-Chancellor, M.D.U., Rohtak shall be competent to appoint and nominate and other Superintending Engineer or Chief Engineer, as the case may be as arbitrator in his place and the Arbitrator so appointed shall be entitled to proceed with the reference.

E (3) It is also a term of this arbitration agreement that no person appointed by the Vice-Chancellor, M.D.U., Rohtak shall act as arbitrator and if for any reason that is not possible the matter shall not be referred to arbitration at all.

F In all cases where the aggregate amount awarded exceeds Rs.25,000/- the arbitrator must invariably give reason for his award in respect of each claim and counter claim separately.

G (4) The arbitrator shall award against each claim and dispute raised by either party including any counter claim individually and that any lump-sum award shall not be legally enforceable.

(5) The following matters shall not lie within the purview of arbitration:-

H (a) Any dispute relating to the levy of compensation as liquidated damages which has already been referred to the Superintending Engineer and is being heard or/and has been finally decided by the

Superintending Engineer in-charge of the work.

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(b) Any dispute in respect of substituted, altered, additional work/ committed work/defective work referred by contractor for the decision of the Superintending Engineer, in-charge of the work if it is being heard or has already been decided by the said Superintending Engineer.

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(c) Any dispute regarding the scope of the work or its execution or suspension or abandonment has been referred by the contractor for the decision of the Vice-Chancellor, M.D.U., Rohtak and has been so decided finally by the Vice-Chancellor, M.D.U., Rohtak .

(6) The independent claim of the party other than the one getting the arbitrator appointed, as also counter-claims of any party will be entertained by the arbitrator notwithstanding that the arbitrator had been appointed at the instance of the other party.

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(7) It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer in-charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings, be adjusted against the cost, if any, awarded by the arbitration against the claimant party and the balance after such adjustment in the absence of any such cost being awarded, the whole of the sum will be refunded to him within one month from the date of the awards:

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*Amount of claims*

*Rate of security deposit*

(i) For claim below

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Rs.10,000/-

2% of amount claimed

(ii) For claim of

Rs.10,000/- and

above and

5% of amount claimed

Below Rs.1,00,000/-

and above

7½ % of amount claimed

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The stamp fee due on the award shall be payable by the party as desired by the arbitrator and in the event of such party's default the stamp fee shall be recoverable from any other sum due to such party under this or any other contract.

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- A (8) The venue of the arbitrator shall be such place or places as may be fixed by the arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceeding.
- (9) Neither party shall be entitled to bring a claim for arbitration if appointed for such arbitrator has not been applied within six months.
- B (a) of the date of completing of the work as certified by the Executive Engineer in-charge, or
- (b) of the date of abandonment of the work, or
- C (c) of its non-commencement within 6 months from the date of abandonment or written orders to commence the work as applicable, or
- (e) of the completion of the work through any alternative agency or means after withdrawal of the work from the contractor in whole or in part and/or its recession, or
- D (f) of receiving an intimation from the Executive Engineer in-charge of the work that final payment due to or recovery from the contractor had been determined which he may acknowledge and/or receive. Whichever of (a) to (e) is the latest.
- E If the matter is not referred to arbitration within the period prescribed above, all the rights and claim of any party under the contractor shall be deemed to have been forfeited and absolutely barred by time even for civil litigation now with standing.
- F (10) It is also a term of this arbitration agreement that no question relating to this contract shall be brought before any civil court without first involving and completing the arbitration proceedings as above, if the scope of the arbitration specified herein covers issues that can be brought before the arbitrator i.e. any matter that can be referred to arbitration shall not be brought before a civil court. The pendency of arbitration proceedings shall not disentitle the Vice-Chancellor, M.D.U., Rohtak to terminate the contract and make alternative arrangements for the completion of the work.
- G (11) The arbitrator shall be deemed to have entered on the reference on the day he issues notices to the parties fixing the first date of hearing. The arbitrator may, from time to time, with the consent of the
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parties enlarge the initial time for making and publishing the award. A

(12) It is also a term of this arbitration agreement that subject to the stipulation herein mentioned, the arbitration proceedings shall be concluded in poor ordinance with the provisions of the Arbitration Act, 1940 or any other law in force for the time being."

Obviously, this tender form was signed on behalf of respondent No. 1 when it was submitted to the appellant. It was dated 12.09.2003. B

4. The tender so submitted by the respondent was accepted by the appellant. It was stated in the letter of acceptance, dated 22.11.2003, signed on behalf of the appellant: C

"As approved by the tender committee in its meeting held on 12.10.2003 and further approved by the competent authorities, the acceptance of your tender for the work cited as subject, is further conveyed to you on behalf of the Registrar, M.D.U., Rohtak at the rates contained in your tender dated 12.9.2003. *This is subject to the terms and conditions of the approved Detailed notice inviting tender (INIT) of the above works.*" D

(emphasis supplied)

The date of start of the work was indicated to be "from the date of issue of this letter." The time limit was fixed as four months. It contained a further stipulation: E

"You are requested to contact the SDE (C-1) M.D.U. Rohtak for taking the work in hand. The document containing the detailed terms and conditions of the contract are ready and you are requested to attend this office on any working day for signing the same. *No payment will be made to you unless you sign the contract agreement. The contract stands concluded with the issue of this communication.*" F

(emphasis supplied)

The respondent, admittedly deposited an earnest money of Rs. 10,700/-. G

5. It is the case of the appellant that the site was not demarcated. It is common case that a document containing detailed terms and conditions of the contract as envisaged by the acceptance letter was not signed by the parties. H



A In the letter dated 8.3.2004 the appellant informed the respondent that it had decided not to get the work executed. The letter also called upon the respondent to get the earnest money of Rs.10,700/- refunded.

B 6. The respondent issued a notice to the appellant invoking clause 25A of the tender conditions quoted above, calling upon the appellant to appoint an arbitrator in terms of that clause on a claim that on acceptance of his tender, the respondent had made arrangements for commencing the work, had put up sheds, had engaged labourers and had procured materials and on cancellation, losses have been incurred and the respondent was entitled to recover the same from the appellant. The appellant took the stand that under  
C clause 13 of the tender conditions, the appellant was entitled to decide not to proceed with the work and no claim, as made on the side of the respondent, was maintainable. Clause 25A had no application. The claims were also factually disputed.

D 7. In that context, respondent No. 1 invoked the jurisdiction of the District Court under Section 11 of the Arbitration and Reconciliation Act, 1996 (for short 'the Act') seeking the appointment of an arbitrator. After referring to the invitation for tenders, its submission of tender, and of its acceptance, the respondent also disclosed that no agreement was signed between the parties but asserted that the conditions mentioned in the tender form were made applicable. The respondent requested to the court to call upon the  
E appellant to produce the original tender form submitted by the respondent. The appellant accepted the fact that the tender of the respondent had been accepted. But the appellant was not liable to pay any damages in view of clause 13 of the tender conditions. No payment was to be made unless the contract agreement was signed. It also contended that the dispute that was  
F sought to be raised by the respondent was outside clause 25A of the tender conditions relied on by the respondent.

8. The District Judge, controlled as he then was, by the decision in *Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388, appointed the Superintending Engineer as arbitrator by  
G relying on clause 25A of the tender conditions, leaving it to the parties to raise all objections, including the objection to his jurisdiction, before the arbitrator in terms of Section 16 of the Act. Feeling dissatisfied, the appellant filed a writ petition before the High Court relying on the decision of this Court that since the order based on the application under Section 11 was an  
H administrative order, a writ petition was maintainable, by referring to *State of*

*Orissa and Ors v. Gokulananda Jena*, [2003] 6 SCC 465 AIR (2003) SC 4207. The High Court held that the objections sought to be raised could be raised by the appellant before the arbitrator and there was no reason for the High Court to interfere with the order appointing an arbitrator in the circumstances of the case. It is feeling aggrieved thereby that the appellant has come up with this appeal by special leave.

9. Learned counsel for the appellant submitted that no contract as contemplated by the parties containing the detailed terms and conditions was signed by the parties and in the circumstances there was no arbitration agreement as understood in the Act justifying the appointment of an arbitrator. Counsel brought to our notice Section 7 of the Act. Counsel also referred to the fact that in the subsequent decision in *S.B.P. & Company v. Patel Engineering Ltd. & Anr.*, [2005] 8 SCC 618 this Court has overruled the decision in *Konkan Railway Corporation Ltd. & Anr.* (supra) and the ratio thereof is no more available to the respondent. Counsel also referred to the decision in *Willington Associates Ltd. v. Kirit Meta*, [2000] 4 SCC 272 to submit that a question whether there was an arbitration clause or not, had to be decided by the court even under the dispensation recognized by the earlier decision in *Konkan Railway Corporation Ltd. & Anr.* (supra). Counsel submitted that in view of the fact that a contract in writing had not come into existence by both the parties by affixing their signatures as contemplated by them, there was no concluded contract in the case on hand and it was just and necessary to interfere with the order appointing the arbitrator. As we have indicated earlier, the respondent has not chosen to appear before us to answer these contentions.

10. The present case is governed by the procedure that was available when *Konkan Railway Corporation Ltd. & Anr.* (supra) held the field. That orders already made were not to be affected by the ratio of the decision in *S.B.P. & Company* (supra) is clear from paragraph 46 of that decision wherein prior orders and proceedings have been saved. Therefore, the only question for decision is whether the fact that the parties have not signed the contract containing the detailed specifications as contemplated by the letter of acceptance would preclude the respondent from seeking an arbitration by falling back on clause 25A of the tender conditions quoted above. It is true that when parties during negotiations contemplate the execution of a formal agreement incorporating the terms of the bargain, so long as a formal agreement has not been entered into, it may be open to contend that there was no concluded contract between the parties. As against this, what is the position

A in a case where the tender submitted is accepted, its acceptance conveyed and the time for completing the work is stipulated to start from such acceptance, and the work was to commence on the basis of that acceptance but no payment was to be made until a formal contract was signed, is the first question that arises in this case. We think that in the circumstances, this is a question that must be left to be decided by the arbitrator, since in terms of  
B Section 16 of the Act the question can be raised before the arbitrator. Considering that we are dealing with the pre *S.B.P. & Company* (supra) dispensation, we do not think that it is necessary or proper for us to go into that question and decide the same in these proceedings. Same is the position  
C regarding the scope of clause 13 of the tender and the clauses relied on by counsel for the appellant in his attempt to take the present claim out of clause 25A of the tender conditions. We are, therefore, satisfied that it would be appropriate to leave this question, as also the other questions to be decided by the arbitrator rather than our trying to answer them at this stage in view of the fact that this case is not governed by the principles recognized by *S.B.P. & Company* (supra).  
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11. But we make it clear that the arbitrator, in the first instance, has to decide whether the existence of an arbitration agreement in terms of Section 7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of clause 25A of the tender conditions  
E in case it is found to be an agreement within the meaning of Section 7 of the Act. Only on deciding these two aspects can the arbitrator go into the merits of the claim made by the respondent. But we clarify that it does not mean, that he should treat these two aspects as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award.

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12. In this view of the matter, we see no reason to interfere with the appointment of an arbitrator. We dismiss this appeal giving liberty to the parties to raise all their contentions based on lack of jurisdiction of the arbitral tribunal before the arbitrator. The arbitrator will permit the appellant to amend or supplement the objections already filed by it if it is felt necessary by the  
G appellant. We make no order as to costs.