

# RAJASTHAN HIGH COURT

Bhagwati Enterprises

Vs.

Raj. State Road Transport Corpn.

Arbitration Appln. No. 15 of 2005

(Shiv Kumar Sharma, J.)

22.05.2006

## ORDER

**Shiv Kumar Sharma, J.**

1. Invoking Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') the applicant seeks to appoint the sole arbitrator to adjudicate the disputes between applicant and non-applicants.
2. Contextual facts depict that non-applicant No. 1-Rajasthan State Road Transport Corporation (for short 'RSRTC') published notice inviting tenders (for short 'NIT') in the newspapers for appointment of 'sole licensee' for carrying business of transportation of general household and commercial items, parcels, couriers for its 49 depots through its entire fleet of 4000 buses plying on State and Inter-State routes. Pursuant to the NIT the applicant submitted its tender on January 25, 2005 which was adjudicated as responsive and highest and RSRTC accepted the offer vide letter dated January 31, 2005. In compliance of the acceptance order the applicant deposited required advance monthly premium. Thereafter vide work order dated February 22, 2005 the applicant was appointed as Sole-Licensee for transport of couriers, parcels, household, commercial goods for the entire fleet of buses owned by RSRTC. As per terms and conditions of the NIT the applicant on February 26, 2005 obtained from the Canara Bank, Navlakha Branch, Indore a Bank Guarantee of Rs. 40,00,716/- representing advance payment of premium for six months for and on behalf of applicant and in favor of RSRTC and submitted the same to RSRTC.
3. The grievance of the applicant is that RSRTC unilaterally altered the terms and conditions of NIT and appointment order to the prejudice of the applicant by putting

pressure and coercion on him to sign agreement showing condition Nos. 29 and 30 preventing the applicant from transportation of post/dak parcels of the Post and Telegraph Department and the State Government as well as stationery of RSRTC through buses and exclusively vest the same with RSRTC. The RSRTC also prevented the applicant from transportation of couriers, parcels, commercial or household goods through Suvidha Vahan. With a view to irreparably prejudice the interest of the applicant the RSRTC sent a format of agreement depriving the applicant of his legal legitimate right to provide his services as sole licensee to every one transportation of post/dak of Post and Telegraph Department and State Government exclusive of Suvidha Vahan (buses) for transportation of couriers, household and commercial goods, parcels etc. The applicant had no option but to sign the agreement on March 28, 2005 with the remarks that condition Nos. 29 and 30 are not acceptable to him. Vide order dated April 1, 2005 the RSRTC informed the applicant that the administration of RSRTC is not agreeable on deletion of condition Nos. 29 and 30 and directed the applicant to sign and execute the agreement in the earlier format once again. Thereafter without affording any opportunity of hearing the RSRTC vide order dated April 16, 2005 cancelled work order under purported exercise of power provided in Clause 4 of the NIT. The applicant thereafter on May 3, 2005 made a request to RSRTC for appointment of an independent and impartial Arbitrator. Since the Chairman of the RSRTC had no competence to act as an arbitrator, the applicant had suggested names for appointment of the sole arbitrator. The RSRTC, however, vide letter dated May 24, 2005 informed the applicant that as per Clause 29 of the tender document only the Chairman of RSRTC could be the sole arbitrator. In these circumstances, the application seeking appointment of sole arbitrator has been filed by the applicant.

4. In preliminary objections raised on behalf of RSRTC it is contended that the application seeking appointment of arbitrator is not maintainable because contract between the applicant-firm and RSRTC has not yet been concluded and no dispute can be alleged by the applicant in regard to the agreement. It is pleaded that one typed agreement was submitted by the applicant to RSRTC containing as many as 32 terms and conditions. One Sanjay Somani put his signatures on the agreement on March 28, 2005 and the same was signed by CMD, RSRTC on March, 29, 2005. Later on some hand written lines were forgedly inserted by the applicant mentioning therein that condition Nos. 29 and 30 were not acceptable. That made the agreement invalid and, therefore, the applicant was asked to submit fresh agreement vide letter dated April 1,

2005. Since fresh agreement was not executed the RSRTC under the compelling circumstances cancelled the work dated February 22, 2005. It is alternatively averred by the RSRTC that even as per Clause 29 of the terms and conditions of the NIT and Cl. No. 28 of the draft agreement only the Chairman of RSRTC could be the arbitrator.

5. I have pondered over the rival submissions and scanned the material on record as well as the case law placed for my perusal.

6. It is an admitted case of the parties that pursuant to the tenders floated by RSRTC the applicant submitted its tender which was adjudicated as responsive and highest and RSRTC accepted the offer vide letter dated January 31, 2005. Thereafter as directed by the RSRTC the applicant submitted a demand draft for Rs. 6,66,786/- as advance monthly premium. The RSRTC then issued work order on February 22, 2005 appointing the applicant as sole licensee for transport of couriers, parcels, household, commercial goods for entire fleet of buses owned by RSRTC. The applicant as per terms and conditions of NIT obtained Bank guarantee of Rs. 40,00,716/- representing advance payment of premium for six months for and on behalf of applicant and in favor of RSRTC and submitted the same to the RSRTC.

7. A bare perusal of condition No. 31 of NIT (Annexure P-2) demonstrates that after acceptance of offer by RSRTC, the institution whose proposal was accepted, shall have to execute an agreement, format of which shall be drawn by RSRTC in accordance with the terms and conditions of NIT. Condition No. 31 reads as under:-

8. It appears that RSRTC in the format of agreement added two new conditions bearing Nos. 29 and 30 which read thus:-

9. Evidently condition Nos. 29 and 30 prevent the applicant from transportation of post/dak parcels of the Post and Telegraph Department and the State Government as well as stationery of RSRTC through buses and exclusively vest the same in the RSRTC. The applicant is also prevented from transportation of couriers, parcels, commercial or household goods through Suvidha Vahan (buses). These conditions virtually preventing the applicant from carrying on his services as 'Sole-Licensee' and appear to be in clear contravention to the terms and conditions of the NIT and work order.

10. From the fact situation, the question arises: whether there emerged any concluded contract pursuant to which the parties are bound by the terms and conditions of the tender submitted to the RSRTC and for further performance?

11. As per Section 2(h) of the Indian Contract Act, 1872 (for short 'the Act') an agreement which is enforceable by law is a contract. In order to be a contract, there should be an agreement which is a bilateral transaction. Section 10 of the Act provides that all agreements are contract 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. A contract is thus a consensual act of the parties who are free to settle any terms they please. Intention of the parties to the contract is a matter of inference from their conduct. If a reasonable man would infer from the conduct that the party intended to contract in a particular way then he will be bound to make good his promise.

12. With reference to the exclusion of a further document in terms of the bargain between the parties, it was indicated by the Privy Council in *Currimbhoy and Co. Ltd. v. L. A. Creet* <sup>2</sup> that where the parties to the bargain contemplate the execution of a further contract merely as an expression of their desire as to the manner in which the transaction already agreed to will in fact go through, the non-execution of such a document will not affect the finality and the binding character of the contract already concluded between them.

13. Full Bench of Allahabad High Court had occasion to consider the concept of offer and acceptance in *Deep Chandra v. Ruknuddaula Shamsher Jang Nawab Mohammad Sajjad* <sup>3</sup> wherein it was observed that theory of offer and acceptance has received statutory recognition in India so that every transaction to be recognised as a contract, must, in its ultimate analysis, resolve itself into a proposal and its absolute and unqualified acceptance.

14. In *Muhammad Sultan v. Clive Insurance Co. Ltd.* <sup>4</sup> it was held that where by the absolute and unequivocal acceptance of an offer a binding contract has come into existence between the parties, the non- execution of a formal document cannot absolve the parties of their engagement.

15. In *India Meters Ltd. v. Punjab SEB* <sup>5</sup> on which reliance is placed by learned counsel for the RSRTC, pursuant to the NIT issued by Punjab State Electricity Board (PSEB) India Meters Ltd. (IML) offered to supply their standard meter and stipulated their own terms of payment and indicated that they would not furnish a Bank guarantee as demanded in the NIT. The PSEB thereafter sent a purchase order without making reference to the terms and conditions of payment and the inability to furnish Bank guarantee by IML. In Clause (20) of the purchase order it was, however, mentioned that the meters supplied by IML would be accepted subject to the furnishing of samples. IML in turn replied that samples had already been sent and fresh samples could not be insisted upon. The PSEB was asked to sent their acceptance on the basis of the terms laid down by IML. In reply the PSEB stated that exemption from Bank guarantee was not acceptable to them and called upon IML to send the samples again but the IML declined to submit Bank guarantee and the samples. Thereafter PSEB appointed Arbitrator before whom claim of Rs. 48,61,458/- for the alleged breach of contract was made. Considering the above facts their Lordships of the Supreme Court held the offer made by IML was subject to their own terms and conditions which were not accepted by PSEB. The terms and conditions for the supply of the meters as made by the PSEB were not accepted by IML at any time. There was no consensus ad idem and there was no completed contract and there was no arbitration agreement between the parties. Since there was no concluded contract the PSEB was not entitled to enforce the arbitration clause.

16. In *UP Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd.* <sup>6</sup> the U.P. State Electricity Board had floated tenders for construction, supply and erection of mechanical equipment and construction work including consultancy services. U.P. Rajkiya Nirman Nigam (Nigam) an undertaking of State of U.P. had purchased tender documents from UPSEB. The Indure Pvt. Ltd. (IPL) approached Nigam for their joint participation to submit the tenders to UPSEB. Negotiations set afoot and ultimately draft agreement for signature was sent to IPL. The IPL sent a counter proposal deleting Clause (10) of the agreement suggested by Nigam. The tenders thereafter were submitted but before negotiating with the UPSEB, Nigam had withdrawn the tenders. The IPL then sent a notice nominating an arbitrator on its part and called upon Nigam to nominate its arbitrator. The Nigam disputed the existence of arbitration agreement and also asserted that no concluded contract existed between the parties. In this backdrop of the facts that the Apex Court indicated thus (para 16) :-

"16. 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."

17. In *M/s. Rickmers Verwaltung GmbH v. Indian Oil Corporation Ltd.* <sup>7</sup> it was held that where there was no concluded and binding contract between the parties, clause of charter party relating to arbitration had no existence in the eye of law.

18. Coming to the facts of the instant case as earlier noticed, the tender submitted by the applicant was accepted by the RSRTC and pursuant to the directions of RSRTC the applicant submitted a demand draft for Rs. 6,66,786/- as advance monthly premium. Thereafter RSRTC issued work order appointing the applicant as 'Sole-licensee' and as per terms and conditions of NIT furnished Bank guarantee of Rs. 40,00,716/- representing advance payment of premium for six months for and on behalf of applicant and in favor of RSRTC and submitted the same to RSRTC. In these circumstances to my mind concluded contract came into existence even though no formal contract was signed. I, therefore, find no merit in the first preliminary objection raised by learned counsel for the RSRTC.

19. That takes me to the second preliminary objection raised on behalf of the RSRTC, according to which Clause 29 of the terms and conditions of the NIT and Clause 28 of the draft agreement prohibit appointment of independent arbitrator. These clauses provide that only the Chairman of RSRTC could be the arbitrator. It is canvassed by learned counsel for the applicant that since the action of Chairman RSRTC itself was in question, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause.

20. In *Bihar State Mineral Development Corporation v. Encom Builders* <sup>8</sup> their Lordships of the Supreme Court indicated thus (Paras 17 and 18) :-

"17. There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic Tribunal. The said domestic Tribunal must be an impartial one. It is a well settled principle of law that a

person cannot be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.

18. Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial Tribunal."

(Underlining is mine)

21. Section 33(1) of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') provides that the Tribunal must act 'impartially.' An arbitrator must also appear impartial and if there are justifiable doubts as to his impartiality this will provide a ground for his removal by the Court under Section 24(1)(a) of 1996 Act or may mean that the award can be challenged.

22. In my opinion if Chairman RSRTC is appointed arbitrator, his order would be a nullity in terms of the principle that nobody can be judge of his own cause.

23. As a result of the above discussion, I allow the application and appoint Hon'ble Mrs. Justice Mohini Kapur (Retired) as arbitrator to resolve the disputes between the parties. Fees and other conditions shall be settled by the Arbitrator.

Application allowed.

Cases Referred.

1. Civil Original Suit No. 126/1982 (102/81)
2. (AIR 1933 PC 29)
3. Ali Khan (AIR 1951 All 93)
4. (AIR 1934 All 298)
5. (1993) 1 SCC 230
6. (1996) 2 SCC 667: (AIR 1996 SC 1373)
7. (AIR 1999 SC 504)
8. (2003) 7 SCC 418: (AIR 2003 SC 3688)