A J.K. JAIN AND ORS.

v.

DELHI DEVELOPMENT AUTHORITY AND ORS.

SEPTEMBER 26, 1995

B [N.P. SINGH AND FAIZAN UDDIN, JJ.]

Arbitration Act, 1940:

S.2 (a)—Arbitration agreement—Tender documents submitted by Supplier—Clause 14 of the tender form provided for an Arbitration—Held, it C *should be deemed as part of agreement as the parties had agreed in the main agreement that the terms and conditions contained in the tender form shall be binding between them.*

The Respondent issued a notice inviting tenders for supply of steel D **bars of various diameters to the extent of 20,000 Metric Tonnes. The appellants obtained a tender form and submitted their offer. After negotiations, the tender was accepted for supply of only 10,000 Metric Tonnes of steel bars of various diameters, and a formal agreement was executed. Due to some disputes between the parties, the respondent rescinded and annulled the contract for the balance quantity to be supplied. The Engineer** E **Member of the respondent-authority, in exercise of powers under clause 14 of the agreement, appointed an Arbitrator.**

Appellants filed a petition before the High Court challenging the appointment of Arbitrator, and it was dismissed by a Single Judge. On F **appeal, Division Bench reversed that order.**

In appeal to this Court, it was contended that clause 14 should not be deemed to be a part of the agreement, since it was only part of the tender form issued to every contractor intending to supply materials to the respondent; that it just contained general rules for the guidance of the G **contractors; that the expression 'Tender Form' mentioned in the agreement did not refer to the form relating to 'tender and contract for supply of materials' which contained an arbitration clause.**

Dismissing the appeal, this Court

H **HELD : 1.1. Section 2(a) of the Arbitration 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. But when Section 2(a) while defining 'arbitration agreement' speaks about a written agreement to submit present or future differences to the arbitration, it is not necessary that it should also be signed by the parties like any formal agreement relating to a contract. [77-H, 78-A] A B

1.2. In the instant case, the arbitration clause has not been included in the agreement itself. But it shall be deemed to be part of the agreement because the agreement specifically says that the terms and conditions contained in the tender form shall be binding between the parties which obviously will include clause 14 of the tender form, according to which any dispute between the parties has to be referred to an arbitration. [79-B] C

1.3. The other special feature of the present case is that each page of the tender form which forms part of the agreement has been signed by the appellant, on behalf of the firm and the Executive Engineer on behalf of the respondent. A mere denial of the existence of the contract of arbitration by one party does not denude the arbitrator of jurisdiction. The Arbitrator gets jurisdiction to decide the disputes on basis of the agreement to refer such disputes and not by its acceptance or denial. The objection on behalf of the appellants, that there was no condition in the main agreement to refer the disputes to arbitration can be accepted only if it is held that the different terms and conditions mentioned in the tender form are not binding on the parties, because parties never agreed to those terms and conditions, while entering into a contract. But the fact about which there is no dispute, is that both the parties had signed the tender form in token of having accepted the terms and conditions mentioned therein including about reference of disputes, if any, to an arbitrator. They had also agreed in the main agreement, that the terms and conditions contained in the tender form shall be binding between the parties. In this background, it is difficult to comprehend that the appellants had never agreed to refer any dispute arising between the parties to an Arbitrator in terms of Clause 14 of the tender form. [79-C-F] D E F G

Jugal Kishore Rameshwar Das v. *Ms. Goolbai Hormusji,* AIR (1955) SC 812 = [1955] 2 SCR 857; *Banarsi Das* v. *Cane Commissioner,* AIR (1963) SC 1417 = [1963] 2 SCR 760 and *Union of India* v. *A.L. Rallia Ram,* AIR (1963) SC 1685 = [1964] 3 SCR 164, referred to. H

A *Commercial Arbitration* **by Mustill and Boyd, second edition page 105, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9107 of 1995.

B From the Judgment and Order dated 24.2.92 of the Delhi High Court in F.A.O. (OS) No. 77 of 1991.

G.L. Sanghi, Mahesh Agrawal, Atul Sharma, E.C. Agrawala, Anant Vijay Palli and Ms. Purnima Bhat for the Appellants.

C Arun Jaitley and V.B. Saharya for the Respondents.

The Judgment of the Court was delivered by

N.P. SINGH, J. Leave granted.

D The appellants have questioned the validity of the order, passed by the High Court, rejecting the claim of the appellants that there was no agreement between the appellants and the respondent - Delhi Development Authority (hereinafter referred to as 'the respondent') to refer the dispute between them to an Arbitrator.

E The appellant No. 4 - M/s Jain Rolling Mills is a registered partnership firm and the appellant No. 1 (hereinafter referred to as 'the appellant') is the Managing Partner. The respondent issued a Notice inviting tenders for supply of steel bars of various diameters to the extent of 20,000 Mt. Tonnes. The appellant obtained a tender from the said respondent on F 16.11.1982. The tender was submitted alongwith a covering letter dated 18.11.1982. After negotiations, the tender was accepted only for supply of 10,000 Mt. Tonnes of steel bars of various diameters. A formal agreement was executed. Thereafter some dispute arose between the parties and it appears that the respondent vide its letter dated 23.10.1984 rescinded and annulled the contract for the balance quantity of 3512.285 tonnes. The G Engineer Member of the authority in purported exercise of the powers under clause 14 of the agreement, appointed an Arbitrator to make an Award relating to the disputes between the appellant and the respondent. An Original Miscellaneous Petition was filed before the Delhi High Court on behalf of the appellants challenging the appointment of an Arbitrator H on the ground that appellants were not party to any Arbitration Agree-

ment. That petition was dismissed by a learned single Judge. On appeal being filed the Division Bench came to the conclusion that in view of Clause 14 of the agreement any dispute between the parties had to be referred to an Arbitrator to be appointed by the respondent. In the agreement which was entered into between the appellants and the respondent it was stated:-

> WHEREAS the Contractor has submitted tender for the work "Supplying and stocking of Cold Twisted deformed Steel Bars Conforming to IS: 1786-1979 of various dias at any D.D.A. Stores in Delhi/New Delhi" and the same has been accepted by the Authority on the terms and condition contained in the tender forms and conditions attached herewith in the letter of acceptance dated the 27.12.82.
>
> NOW THIS DEED WITNESS AS UNDER:
>
> That the terms and conditions contained in the tender form and conditions of the contract attached to this deed, and also the letter of acceptance dated the 27.12.82 shall be binding between the parties.

To that very agreement, the tender form with the heading 'Tender and Contract for supply of materials' was enclosed. The tender form has an endorsement" issued to M/s Jain Rolling Mills", signed by the Executive Engineer, Housing Division, on 16.11.1982. Appellant has signed the agreement aforesaid and the different pages of the tender form on behalf of appellant No.4, the firm. The Executive Engineer has signed on behalf of the respondent. Paragraph 14 of the said tender form contains the arbitration clause, saying that 'except where otherwise provided in the contract all question and disputes relating to the meaning of the specifications, designs, drawings and instructions, hereinbefore mentioned and as to the quality of workmanship or materials used on the work or to any other question, claim, right matter or thing whatsoever, in any way arising out of or relating to the contract, designs drawings specification, estimates instruction orders or these conditions or otherwise concerning the works or the executions on failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer Member, DDA at the time of dispute.....'

A The stand of the appellants is that the said clause shall not be deemed to be a part of the agreement, inasmuch as it is only part of the tender form which is issued to every contractor intending to supply materials to the respondent. It is just general rules for the guidance of the contractors. It may be pointed out that the notice inviting tenders clearly B stated 'Contract documents consisting of the detailed plans, complete specifications, the schedule of quantities of the various classes of work to be done and *the set of conditions of contract to be complied with the person whose tenders may be accepted will also be found printed in the form of tenders,* can be seen/purchased at the Divisional office between the hours of 11 A.M. and 4 P.M. every day, except on Sundays and Public Holidays' C (emphasis supplied). From the notice inviting tenders it is apparent, that to whomsoever the contract was to be allotted, the conditions in the printed form of tender had to be complied with. It appears because of the aforesaid condition mentioned in the notice inviting tenders, at the time of the execution of the agreement, the appellant, the Managing Partner, on behalf D of the firm signed each page of the said form of tender including the last page. On behalf of the respondent, it has been signed by the Executive Engineer and the form of tender has been attached to the agreement referred to above. In the agreement it has been clearly stated that the terms and conditions contained in the tender form and the conditions of the contract attached to the said deed and also the letter of acceptance dated E 27.12.1982 shall be binding between the parties. The effect of the aforesaid agreement shall be that the tender form and conditions of the contract attached to the said deed to agreement including the letter of acceptance dated 27.12.1982 shall be deemed to be the part of the agreement between the appellants and the respondent including that in event of dispute in F respect of any claim, right or matter or thing whatsoever in any way arising out of or relating to the contract shall be referred to the sole arbitration of the person appointed by the Engineer Member of the respondent.

The learned counsel appearing for the appellants submitted that the G expression 'Tender Form' mentioned in the agreement does not refer to the aforesaid form relating to 'tender and contract for supply of materials' in which there is an arbitration clause, rather it refers to form No.9 which had been filled up by the appellants saying that they had submitted their tender for supply to the respondent, materials described therein within time specified 'subject to the conditions of the contract'. Towards the end H of that form under heading 'Specification and Additional Conditions'

details of the steel bars to be supplied and that ISI test certificate in original to be given along with each consignment etc. have been mentioned. A

On the direction being given by Court the original agreement alongwith all documents attached thereto were producted on behalf of the respondent. The form of tender in which clause 14 contains condition regarding referring the disputes to the arbitration, as well as the form No. 9 on which reliance has been placed on behalf of the appellants are attached to the agreement and as such both shall be deemed to be the part of the agreement. These documents have been signed on behalf of the appellants and the respondent. In the agreement, a clear and specific statement has been made that the terms and conditions contained in the tender form shall be binding between the parties, which shall include the condition in clause 14 thereof, to refer any dispute to an arbitrator to be appointed by the Engineer Member of the respondent. B C

It is true that there must be an arbitration agreement, to confer jurisdiction on the Arbitrator to hear and decide the dispute. Where there is no such agreement there is an initial want of jurisdiction. That is why it has been impressed by Courts that one of the essential ingredients of submission to arbitration is that the parties should agree that the dispute should be determined by an Arbitrator. Where there is an arbitration clause in a contract, it amounts to two contracts into one, one relating to the execution of the work entrusted in the manner prescribed and the other how to resolve the dispute in event any such dispute arises in respect of the said contract. Whenever one party to the dispute asserts that there is an arbitration agreement by which the parties had agreed to refer the dispute to an Arbitrator which is disputed and challenged by the other party to the agreement, it has to be examined and determined. To constitute "an arbitration agreement" it is not necessary that there should be a formal agreement or that the terms should all be contained in one document. All that is necessary that from documents it must appear that parties had agreed to submit present or future differences to arbitration. D E F G

Section 2 (a) of the Arbitration 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. But when Section 2 (a) while defining 'arbitration agreement' speaks about a written agreement to submit present or future differences to the arbitration, it is H

A not necessary that it should also be signed by the parties like any formal agreement relating to a contract. In the case of *Jugal Kishore Rameshwardas* v. *Mrs. Goolbai Hormusji,* AIR (1955) SC 812 = [1955] 2 SCR 857, it was said:

> B "But it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties, and that it is sufficient if the terms, are reduced to writing and the agreement of the parties thereto is established."

It was said in the case of *Banarsi Das* v. *Cane Commissioner,* AIR (1963) C SC 1417 = [1963] 2 SCR 760:

> "It may be pointed out that the arbitration clause in the agreement was enforceable if agreed to, even without the signature of the appellant as it is a settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by D the parties and it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established."

In the case of *Union of India* v. *A.L. Rallia Ram,* AIR (1963) SC 1685 = [1964] 3 SCR 164, it was said:

E

> "A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite : it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties. There must F be an agreement to submit present or future differences to arbitration, this agreement must be in writing, and must be accepted by the parties. "

In *Commercial Arbitration* by Mustill and Boyd, second edition at G page 105, it has been stated:

> ".....the parties need not set out the terms of their arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of clause or to a set of trade terms which themselves include provisions requir- H ing disputes to be submitted to arbitration. Nor need the contract

itself be contained in a single document." A

As already pointed out above, so far the present case is concerned, the arbitration clause has not been included in the agreement itself. But it shall be deemed to be part of the agreement because the agreement specifically says that the terms and conditions contained in the tender form shall be binding between the parties which obviously will include clause 14 B of the tender form, which admittedly requires any dispute between the parties to be referred to an arbitration. The other special feature of the present case is that each page of the tender form which forms part of the agreement has been signed by the appellant, on behalf of the firm and the Executive Engineers on behalf of the respondent. A mere denial of the C existence of the contract of arbitration by one party does not denude the arbitrator of jurisdiction. The Arbitrator gets jurisdiction to decide the disputes on basis of the agreement to refer such disputes and not by its acceptance or denial. The objection on behalf of the appellants, that there was no condition in the main agreement to refer the disputes to arbitration can be accepted only if it is held that the different terms and conditions D mentioned in the tender form are not binding on the parties, because parties never agreed to those terms and conditions, while entering into a contract. But the fact about which there is no dispute, is that both the parties had signed the tender form in token of having accepted the terms and conditions mentioned therein including about reference of disputes, if E any, to an Arbitrator. They had also agreed in the main agreement, that the terms and conditions contained in the tender form shall be binding between the parties. In this background, it is difficult for us to comprehend as to how it can be held that the appellants had never agreed to refer any dispute arising between the parties to an Arbitrator in terms of Clause 14 F of the tender form.

In the result, the appeal fails and is dismissed. There shall be no order as to costs.

G.N. Appeal dismissed.