IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI

HON'BLE Mr. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE

ARBITRATION APPLICATION No.26 of 2020

TBS India Telematic & Biomedical Services Private Limited, rep. by its Chief Executive Officer, Chelvadorai N. S/o. T.D. Nithyanandam, 5th Floor, Arden Fair, Opp: Benninganahalli Ring Road Flyover, Pai Layout, near Tin Factory, Old Madras Road, Bangalore, Karnataka – 560016, India.

… Applicant

Versus

Commissioner of Health and Family Welfare, represented by its Director, 2nd Floor, B-Block, Himagna Towers, D.No.189, LIC Colony Adda Road, Saipuram Colony, Road One Center, Gollapudi, Vijayawada Rural, Krishna District, Andhra Pradesh, India

… Respondent

Counsel for the applicant : Mr. Anish Dayal, Sr. Counsel assisted by Mr. P. Badrinath

Counsel for the respondent : Mr. P. Sudhakara Reddy, Additional Advocate General

JUDGMENT

Dt.08.07.2022

The applicant has preferred this application under Section 11(4) & 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Act of 1996") seeking to appoint an arbitrator in terms of the Manual for Procurement of Goods, 2017, to adjudicate the claims and settle the disputes between the parties arising out of the agreement dated 04.11.2015.

2. The Andhra Pradesh Medical Services Infrastructure Development Corporation issued tender No.7.1/APMSIDC/2015-16 dated 25.07.2015 for service and maintenance of biomedical assets and equipment within the State, followed by a Request for Proposal (RFP). The applicant being a

successful bidder, an agreement dated 04.11.2015 was entered between the applicant and the respondent for providing biomedical equipment maintenance, repair and other connected services in Andhra Pradesh. According to the applicant, RFP was duly signed, stamped and was intended to be the agreement, which listed various terms, conditions and obligations for both the parties. The applicant started providing services from November 2015 itself. However, in April 2018, the respondent started withholding payment of applicant's invoices and, thereafter, a public interest litigation being W.P. (PIL) No.126 of 2018 was filed before this Court, due to which payments were withheld, compelling the applicant to prefer W.P.No.33672 of 2018, wherein interim order was passed in its favour. When the interim order was not complied with, the applicant filed another writ petition, i.e. W.P.No.44442 of 2018, seeking compliance of the interim order dated 26.09.2018, in which an interim order was again passed on 14.03.2019. The respondent again failed to comply the order and issued notice dated 13.09.2019 for termination of agreement, against which applicant filed another writ petition, i.e. W.P.No.15939 of 2019.

3. It is the case of the applicant that the respondent, in its counter-affidavit filed in the above writ petition, stated that since the agreement between the parties did not have a provision for early termination of the agreement, they had relied upon the guidelines issued by the Government of India, i.e. Manual for Procurement of Goods, 2017 (for short, "the Manual"). This Court recorded the respondent's contention and in its interim order dated 13.12.2019, observed that there is no dispute with regard to the application of the Manual for procurement of

goods to the contract, as the same is admitted in the counter-affidavit. It was also stated by the respondent that due to certain allegations against the applicant, an enquiry is being conducted by the Anti-Corruption Bureau.

4. The applicant issued a communication dated 24.12.2019 in terms of Clause 9.9 of the Manual for a meeting to amicably resolve the dispute between the parties, which remained unanswered. On 09.01.2020, the respondent again issued a show-cause notice as to why the agreement should not be terminated. Thereafter, the applicant invoked Clause 9.9 of the Manual vide its communication dated 18.01.2020 captioned as "notice of arbitration". After eight months, i.e. on 21.09.2020, the respondent issued an interim reply couched as "Termination Order", terminating the agreement, at the same time rejecting the proposal for appointment of an arbitrator.

5. In the above background, the applicant contended that the respondent, having admitted in its counter-affidavit filed in the writ petition stated above, that Manual is applicable, it is bound by the arbitration clause contained in Clause 9.9 thereof and since there exists dispute and refusal on the part of the respondent for arbitration, application is preferred for appointment of an arbitrator.

6. Per contra, stand of the respondent in the counter-affidavit to the application is that the agreement was proposed to be for a period of five years together with performance bank guarantee for the same time period. Instead of submitting performance bank guarantee for a period of five years at Rs.11.47 crores, which is a mandatory requirement to

treat the agreement for a period of five years as contemplated in the RFP, the applicant paid bank guarantee of Rs.1.91 crore treating the agreement for one year only. The Government of Andhra Pradesh vide G.O.Rt.No.660 HM&FW(E2) Department dated 04.11.2015 issued permission for entering into agreement for a period of one year and there is no Government Order in existence for extending the period of agreement for one year to five years, as claimed by the applicant. It is also stated that criminal case is registered by the CID in FIR No.07 of 2021 into the affairs of the programme.

7. It is further stated in the counter-affidavit that Section 2 of RFP clearly provides that RFP is not an agreement and the parties to the RFP have to provide necessary information to the interested parties and that detailed terms specified in the draft agreement shall have overriding effect, to which the applicant has agreed that it will enter into an agreement in accordance with the draft provided to it. In substance, it has been stated that the so-called agreement dated 04.11.2015 is nothing but a judicial stamp receipt annexed to it bearing the signature of the then Commissioner and the service provider. However, the document is not in sync with the standard format used for agreement purposes as communicated by the APMSIDC to the Commissioner's Office dated 18.10.2015. In the official records, there is no document, which can be treated as agreement between the parties.

8. In respect of applicability of the Manual, it is stated that the same has been issued by the Government of India for procurement of goods generically, which is broad in nature and States have been given liberty to

design standard bidding documents and standard agreements depending upon their suitability.

9. For termination of agreement and invocation of jurisdiction under Section 11 of the Act of 1996 with the aid of the provisions in the Manual, it has been stated that in the absence of specified and agreed procedure for termination of agreement, aid of the provisions in the Manual has been taken, but that would not make the Manual as binding agreement between the parties. It is further stated that there was no *consensus ad idem* between the parties to introduce Clause 9.9 to form part of agreement (or) a new arbitration agreement, as such, there is no concluded agreement between the parties containing arbitration clause; neither there is any specific mention of Clause 9.9 of the Manual to be part of the agreement. Referring to the rejoinder filed by the applicant in W.P.No.15939 of 2019, it is stated in the counter-affidavit filed to the present application that the applicant itself has refused to treat the Manual as a tool to invoke termination clause. Therefore, the applicant cannot aprobate and reprobate. In its rejoinder in the writ petition, the applicant has clearly stated that the respondent (State of A.P.) is bound to adhere to the terms of agreement and cannot take aid of other document to suit its convenience and justify their act of termination of agreement.

10. It is highlighted in the counter-affidavit that the High Court in its order passed in W.P.No.15939 of 2019, has clearly held that the argument of Additional Advocate General with regard to invocation of arbitration clause need not be taken for discussion, as it is not within the scope of this application (writ petition) and there is no argument

extended by the petitioner's counsel regarding invocation of arbitration clause. Thus, it is submitted that the order passed in W.P.No.15939 of 2019 is not binding, because invocation of arbitration clause was not an issue before the writ court.

11. It is next contended that clause 9.9 of the Manual, does not satisfy the mandate of Sections 10 and 11 of the Indian Contract Act, 1872 and, as such, it cannot be treated as an arbitration agreement under Section 7 of the Act of 1996.

12. The respondent would contend that ACB enquiry ordered by the High Court in W.P. (PIL) No.126 of 2018 and registration of consequential FIR No.07 of 2021, prima facie, establishes commission of fraud by the applicant. Therefore, it is not a case where the matter should be referred to arbitration. Moreover, there being no arbitration clause in the agreement, provisions in the Manual cannot be resorted to for invoking arbitration. It is highlighted that High Court in W.P. (PIL) No.126 of 2018 observed in its order dated 31.07.2019 that the averments in the report, prima facie, disclose commission of cognizable offence, having regard to the nature of allegations made on reply of 12th respondent and in view of the law laid down by this Court, ACB authorities were directed to enquire into the allegations made in the complaint and proceed in accordance with law. This Court also observed that in the report submitted by the Director General, ACB, various irregularities have been mentioned, based on which the crime has been registered.

13. Mr. Anish Dayal, learned senior counsel appearing for the applicant, has strenuously urged that in the writ proceedings before this Court, the respondent has placed reliance on the provisions of the Manual

to justify the termination of the agreement; therefore, having admitted the applicability of the Manual which contains an arbitration clause, as such, the respondent cannot be allowed to aprobate and reprobate. The respondent cannot cherry-pick terms of the Manual by applying the provisions which suit it and deny those containing arbitration clause. According to him, pendency of a criminal case does not arrest the jurisdiction of the Court to appoint an arbitrator. It is also submitted that at this stage, the Court is only required to examine whether there exists an arbitration clause or not. After amendment in the Arbitration and Conciliation Act, 1996 by Arbitration and Conciliation (Amendment) Act, 2015, exercise of jurisdiction under sub-section (4), (5) or (6) of Section 11 would confine to the examination of existence of an arbitration agreement and nothing more, nothing less.

14. Learned senior counsel appearing for the appellant has referred to the following judgments rendered by the Hon'ble Supreme Court:

- ***Duro Felguera, SA v. Gangavaram Port Ltd.***[1]
- ***Mayavati Trading (P) Ltd. V. Pradyuat Deb Burman***[2]
- ***Garware Wall Ropes Ltd. V. Coastal Marine Constructions & Engg. Ltd.***[3]
- ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited***[4]
- ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited***[5]
- ***Food Corpn. of India v. Indian Council of Arbitration***[6]

[1] **(2017) 9 SCC 729**
[2] **(2019) 8 SCC 714**
[3] **(2019) 9 SCC 209**
[4] **(2020) 2 SCC 455**
[5] **(2011) 5 SCC 532**
[6] **(2003) 6 SCC 564**

- ***Swiss Timing Ltd. V. Commonwealth Games 2010 Organising Committee***[7]
- ***National Aluminium Co. Limited v. Subhash Infra Engineers Pvt. Ltd. and Ors.***[8]
- ***M/s. Deep Industries Limited v. ONGC & Anr.***[9]
- ***Ameet Lalchand Shah and Ors. V. Rishabh Enterprises and Ors.***[10]
- ***Avitel Post Studioz Limited and Ors. V. HSBC PI Holdings (Mauritius) Limited & Ors.***[11]
- ***A. Ayyasamy v. A. Paramasivam***[12]
- ***Rashid Raza v. Sadaf Akhtar***[13]
- ***Indu Eastern Province Projects Private Ltd. v. Telangana Housing Board***[14]
- ***Rajasthan State Industrial Development and Investment Corp v. Diamond and Gem Development***[15]
- ***New Bihari Biri Leaves v. State of Bihar***[16]

15. Per Contra, Mr. P. Sudhakara Reddy, learned Additional Advocate General, would argue that agreement pressed into service, itself, is shrouded in controversy and is almost non-existent and significantly the agreement having no arbitration clause, applicant's prayer for appointment of an arbitrator deserves to be dismissed at the threshold. According to him, provisions of the Manual cannot be relied upon to read an arbitration clause when there is none in the agreement between the parties. He would submit that when this Court has taken cognizance of

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[7] **(2014) 6 SCC 677**
[8] **2019 SCC OnLine SC 1091**
[9] **(2020) 15 SCC 706**
[10] **(2018) 15 SCC 678**
[11] **(2021) 4 SCC 713**
[12] **(2016) 10 SCC 386**
[13] **(2019) 8 SCC 710**
[14] **2020 SCC OnLine TS 893**
[15] **(2013) 5 SCC 470**
[16] **(1981) 1 SCC 537**

the serious fraud and irregularities committed by the applicant in executing the agreement and directed investigation by ACB based on which FIR has been lodged, an arbitrator cannot be appointed to resolve the dispute. Learned Additional Advocate General has referred to the law laid down by the Hon'ble Supreme Court in ***PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust and Anr.***[17], ***National Highways & Infrastructure Development Corpn. Ltd. v. BSCPL Infrastructure Ltd.***[18] and ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited***[19].

16. Although number of judgments have been cited to support the submission that at the stage of Section 11 proceedings, the Court is only required to look into the existence of an arbitration agreement before making reference, the law having been settled in this regard, I would refer to one of the latest judgments of the Hon'ble Supreme Court, i.e. ***Secunderabad Cantonment Board v. B. Ramachandraiah and Sons***[20], in which the Hon'ble Supreme Court has observed with reference to ***Duro Felguera*** (supra) that in an application under Section 11 of the Act of 1996, the Court should only look into existence of an arbitration agreement before making reference and that the earlier judgments of the Hon'ble Supreme Court in ***SBP & Co. v. Patel Engineering Ltd. and Anr.***[21] and ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.***[22] continued till the amendment was brought about in 2015 and the legislative policy under the Arbitration and

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[17] **(2018) 10 SCC 525**
[18] **(2019) 15 SCC 25**
[19] **(2020) 2 SCC 455**
[20] **2021 SCC OnLine SC 219**
[21] **(2005) 8 SCC 618**
[22] **(2009) 1 SCC 267**

Conciliation (Amendment) Act, 2015 is for the purpose of minimizing the Court's intervention at the state of appointing the arbitrator and this intention is incorporated in Section 11(6-A). The Hon'ble Supreme Court has held thus in paragraph 19:

> *"19. This Court went on to hold that limitation is not a jurisdictional issue but is an admissibility issue. It then referred to a recent judgment of this Court in Vidya Drolia v. Durga Trading Corpn., and stated as follows:*
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> > *"36. In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn., on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes". The prima facie review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.*
> >
> > *In paragraph 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engg.*
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> > *Para 144 reads as:*
> >
> > *"144. As observed earlier, Patel Engg. Ltd. explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an*

arbitrator. Mayavati Trading (P) Ltd. in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted."

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute.

Para 148 of the judgment reads as follows:

"'148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed

Premium Nafta Products Ltd., (Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.,) [2007 UKHL 40] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen."

In para 154.4, it has been concluded that

"154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

In para 244.4 it was concluded that:

"244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a

> *prima facie basis, as laid down above i.e. "**when in doubt, do refer**"."*
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> *"37. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. (supra).*
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> *It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."*

17. In ***Secunderabad Cantonment Board*** (supra), relevant part of which has been extracted above, the Hon'ble Supreme Court eventually dismissed the application under Section 11 of the Act of 1996, having found that the same is hopelessly barred by limitation.

18. In ***Vidya Drolia*** (supra), which has been referred in ***Secunderabad Cantonment Board*** (supra), the Hon'ble Supreme Court examined the issue as to exercise of jurisdiction under Section 11 of the Act of 1996, where arbitration clause is not in existence or the agreement itself is invalid or unenforceable. The Hon'ble Supreme Court held thus in paragraphs 146 and 153:

> *"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation*

(whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law."

"*153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary*

jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability."

19. In ***Garware Wall Ropes Ltd.*** (supra), the Hon'ble Supreme Court referred to its earlier judgment in the matter of ***United India Insurance Company Limited and Anr. v. Hyundai Engineering and Construction Company Limited and Ors.***, [(2018) 17 SCC 607], to hold thus in paragraph 29:

> *"29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., [(2018) 17 SCC 607] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case."*

(emphasis supplied)

20. The law is thus fairly settled that, to invoke Section 11 of the Act of 1996, there should exist an agreement containing arbitration clause to mean arbitration agreement, which, itself, as is now settled, is a separate agreement and secondly arbitration agreement should be valid and legal

and more importantly an arbitration clause that is contained in a sub-contract would not exist as a matter of law until the sub-contract is duly stamped, meaning thereby that the sub-contract is duly executed.

21. In the case at hand, admittedly, there is no arbitration clause in the agreement signed between the parties. The RFP, which has been made part of the agreement as claimed by the applicant, clearly provides in Section 2 thereof that RFP is not an agreement and the parties to the RFP document have to provide necessary information to the interested parties. The RFP proposes a draft agreement to be signed by the parties with clear mention in Section 8 of the RFP that the parties have agreed to enter into an agreement in accordance with the draft that has been provided to the successful bidder with an undertaking not to seek any change in the draft. The RFP also provides in Section 3.3.1.8 that the contracting Authority will enter into an agreement with the Special Purpose Vehicle (SPV) incorporated by the selected bidder and the selected bidder shall be confirming party in the aforesaid agreement. However, the applicant who is the selected bidder has not formed any SPV and no agreement with the selected entity, i.e. SPV has ever been executed. In this view of the matter, there is force in the submission of the learned Additional Advocate General for the respondent that the present applicant has no locus to invoke Section 11 of the Act of 1996. In Section 3.4.3.5 of the RFP, it is again mentioned that agreement shall be executed with the SPV. Same clause finds place in the Appendices referring to Section 8 duly signed by the applicant, undertaking that it is understood that the selected bidder shall incorporate a Company under the Companies Act, 1956 (SPV) prior to execution of the agreement,

without seeking any changes in the draft agreement provided by the respondent.

22. Insofar as the applicability of the Manual is concerned, it is clearly provided in the Manual that the same is issued by the Central Government as generic guidelines, which have to be necessarily broad in nature. The Ministries/Departments are advised to supplement these manuals to suit local/specialized needs by issuing their own detailed Manuals (including customized formats); Standard Bidding Documents; Schedule of Procurement Powers and Checklists to serve practical instructions for their officers. Clause 1.3 of the Manual speaks about its applicability, which is reproduced hereunder for ready reference:

> *"1.3 Applicability of this Manual: The term 'goods' used in this manual includes all articles, material, commodity, livestock, medicines, furniture, fixtures, raw material, consumables, spare parts, instruments, machinery, equipment, industrial plants, vehicles, aircraft, ships, railway rolling stock, assemblies, subassemblies, accessories, a group of machines comprising an integrated production process or such other goods (but excludes books, publications, periodicals, and so on, for a library), or intangible products like software, technology transfer, licenses, patents or other intellectual properties procured or otherwise acquired by a Procuring Entity. Procurement of goods may include certain small work or some services, which are incidental or consequential to the supply of such goods, such as transportation, insurance, installation, commissioning, training and maintenance (Rule 143 of GFR 2017). What is unique about procurement of goods (as compared to services and works) is the ability to precisely describe the technical specification of the requirement. The 'Procurement Entities' who can benefit from this manual*

include Ministries, Departments, or a unit thereof, or an attached or subordinate offices/units; Central Public Sector Enterprises (CPSEs) or undertakings; any other body (including autonomous bodies) substantially owned or controlled by or receiving substantial financial assistance from the Central Government. These procurement guidelines would continue to apply if these procurement entities outsource the procurement process or bundle the procurement process with other contractual arrangements or utilise the services of procurement support agency or procurement agents to carry out the procurement on their behalf. But these procurement guidelines would not apply to procurements by these procuring entities for their own use (but not for purpose of trading/sale) from their subsidiary companies including Joint Ventures in which they have controlling share. However by a general or special notification, the Government may permit certain 'Procuring Entities' mentioned in sub-para above, considering unique conditions under which they operate, for all or certain categories of procurement, to adopt detailed approved guidelines for procurement, which may deviate in some aspects but conform with all other essential aspects of 'Procurement Guidelines'. This Manual is to be taken as generic guidelines, which have to be necessarily broad in nature. Subject to the observance of these generic guidelines, the initiation, authorization, procurement and execution of Goods Contracts undertaken by a particular Ministry or Department shall be regulated by detailed rules and orders contained in the respective Departmental regulations and by other special orders applicable to them. Ministries/Departments are advised to supplement these manuals to suit local/specialized needs, by issuing their own detailed Manuals (including customized formats); Standard Bidding Documents; Schedule of Procurement Powers and Checklists to serve as practical instructions for their officers

and to ensure completeness of examination of cases. Major Goods procuring Ministries/Departments like the Ministry of Defence, Ministry of Railways, Director General Supplies and Disposal (DGS&D) etc. have their own detailed guidelines tailored to unique individual requirements, e.g. Manuals or Procedure Orders. Many other Ministries/Departments as well as CPSEs also have their own Procurement Manuals. For these Procuring Entities, this Manual would serve as a generic reference."

"For procurements financed by Loans/Grants extended by International Agencies: The Articles of Agreement with the International Agencies, like the World Bank, Asian Development Bank etc. stipulate specific procurement procedures to be followed by the borrowers. The procurement procedures, as finalized and incorporated in the Agreements after consideration and approval of the Ministry of Finance are to be followed accordingly."

23. Clause 9.8 of the Manual prescribes guidelines for breach of contract, remedies and termination. Clause 9.9 and Clause 9.9.1, which provide for Dispute Resolution and Arbitration Clause, respectively, are reproduced hereunder:

"9.9 Dispute Resolution: Normally, there should not be any scope for dispute between the purchaser and supplier after entering into a mutually agreed valid contract. However, due to various unforeseen reasons, problems may arise during the progress of the contract leading to a disagreement between the purchaser and supplier. Therefore, the conditions governing the contract should contain suitable provisions for settlement of such disputes or differences binding on both parties. The mode of settlement of such disputes/differences should be through arbitration. However, when a dispute/difference arises, both

the purchaser and supplier should first try to resolve it amicably by mutual consultation. If the parties fail to resolve the dispute within 21 (Twenty-One) days, then, depending on the position of the case, either the purchaser or supplier should give notice to the other party of its intention to commence arbitration. When the contract is with a domestic supplier, the applicable arbitration procedure shall be as per the Indian Arbitration and Conciliation Act, 1996. While processing a case for dispute resolution/litigation/arbitration, the Procuring Entity is to take legal advice, at appropriate stages."

"9.9.1 Arbitration Clause: If an amicable settlement is not forthcoming, recourse may be taken to the settlement of disputes through arbitration as per the Arbitration and Conciliation Act 1996. For this purpose, when the contract is with a domestic supplier, a standard arbitration clause may be included in the SBD indicating the arbitration procedure to be followed. The venue of arbitration should be the place from where the contract has been issued."

24. A bare reading of the clause 9.9 of the Manual would make it clear that it is only a suggestion in the Manual that the conditions governing the contract should contain suitable provisions for settlement of such disputes or differences binding on both the parties and the mode of settlement of such disputes should be through arbitration. However, this, by itself, shall not amount to an arbitration clause. Since the law is well settled that an arbitration clause by itself is a separate agreement different than the main agreement between the parties, there cannot be an implied arbitration agreement in some other document, which is not signed by the parties. Apart from the fact that the Manual is only a guideline framed by the Central Government, it remains a fact that this document has never been executed as an agreement between the

parties. Therefore, clause 9.9 in the Manual suggesting settlement of dispute by arbitration would not amount to execution of arbitration agreement between the parties. Since in ***Garware Wall Ropes Ltd.*** (supra), it has been held that arbitration clause that is contained in the sub-contract would not exist as a matter of law until the sub-contract is duly stamped, it is also to be held logically that an arbitration clause in a sub-contract or in a separate document, which the parties have placed reliance subsequently in judicial proceedings, shall not exist as a matter of law or as a matter of fact until the sub-contract or the separate document is duly executed between the parties. This Court, thus, finds that there is no agreement between the parties so as to construe that an arbitration agreement exists between the parties in terms of Section 7 of the Act of 1996. Therefore, this application under Section 11(4) & 11(6) preferred by the applicant for appointment of an arbitrator, deserves to be, and is hereby, dismissed. No costs. Pending miscellaneous applications, if any, shall stand closed.

Sd/-

PRASHANT KUMAR MISHRA, CJ

MRR