NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5236 OF 2007

State of U.P. and others .....Appellants

Versus

M/s Combined Chemicals Company Private Limited .....Respondent

J U D G M E N T

G.S. Singhvi, J.

1. Whether letter dated 16.11.1985 issued by the Director of Industries, Uttar Pradesh (appellant No.2) conveying acceptance of the bid given by the respondent for supply of 200 metric tonnes Zinc Sulphate, Agriculture Grade, could be treated as an agreement executed by the parties, whether the respondent could invoke the arbitration clause contained in the tender document, whether the Arbitrator appointed by Civil Judge (Senior Division), Lucknow (hereinafter referred to as 'the trial Court') acted in violation of the rules of natural justice by declining the appellants' prayer for adjournment and whether

the award passed by the Arbitrator is vitiated by patent error of law are the questions which arise for consideration in this appeal filed by the State of U.P. and two others against the judgment of the Division Bench of the Allahabad High Court, which dismissed the appeal preferred by the appellants against the order passed by the trial Court making award of the Arbitrator rule of the Court.

2. By an advertisement dated 19.8.1985, appellant No.2 invited bids for supply of 2000 metric tonnes Zinc Sulphate of Agriculture Grade on quantity basis to meet the requirement of the Agriculture Department. Clause 16 of the tender form, which has bearing on this case, reads thus:

Tender Form:

"16. In the event of any dispute arising out of or concerning this Agreement (except as to any matters the decision of which is specifically provided for in this Agreement), the same shall be referred to the arbitration of an arbitrator nominated by the Director of Industries, Uttar Pradesh and an arbitrator nominated by the contractor, or in the case of the contractor or the said Director failing to nominate an arbitrator within the time fixed in the notice to be served on him by the said Director or the contractor, as the case may be by the arbitrator, nominated by the said Director or the contractor, or in case of disagreement between the said arbitrators to an umpire appointed by them and the decision of such arbitrators/arbitrator/umpire as the case may be, shall be final and binding on the parties. The arbitrators/arbitrator/umpire may from time to time with the consent of the parties enlarge the time for making and publishing the award."

3. The bid given by the respondent (Rs.5,451/- per metric tonne) was found to be the lowest. The purchase committee of the Directorate of Industries approved the same. Thereafter, appellant No.2 issued acceptance letter dated 16.11.1985 to the respondent for supply of 200 metric tonnes of Zinc Sulphate to the Directorate of Agriculture. The relevant portions of that letter are extracted below:

"ACCEPTANCE LETTER

From

Value: Rs.10,90,200/-
(Rupees Ten Lacs Ninety Thousand
Two Hundred only)

The Director of Industries,
Stores Purchase Department,
Uttar Pradesh, Kanpur.

To,

M/s. Combined Chemicals Pvt. Ltd.
15/1, 2 & 5, Industrial Estate
Vidisha-464002.

Ref. No. SPS/VII-T.NO.272(G)/85 Dated:

a) This office tender notice / enquiry No. 272(G)/85 dated 19.8.1985

b) Contractor's tender quotation No.A-4242/A80/4GP/ZS dated 08.08.1985

c) Indentor's Indent No. Dated

d) Designation and full address of the indentor Director of Agriculture, U.P.

e) If rate contract – All Government Department and quasi-Government Departments.

Dear Sir,

On behalf of the Governor of Uttar Pradesh, I accept your tender/quotation referred to above for the supply of stores as per details given in Schedule `A' hereafter subject to the terms and conditions specified in the tender notice/enquiry referred to above and in this acceptance letter.

2. The supply order shall be placed on you by the indenting officer/officers direct giving full instruction regarding dispatch, insurance of goods, name of consignee, destination, railway station, payment of bills, etc.

4. Period of Contract – Until the supply is satisfactorily completed in accordance with the aforesaid terms and conditions.

7. Inspection – For the purpose of this contract the consignee receipt shall be deemed as the inspection certificate unless an inspection is stipulated before dispatch. Ordinarily, the decision of the consignee or consignees as regards the acceptability or otherwise of the stores shall be final. Defective supplier shall have to be replaced at your cost.

10. Formal Agreement – If so required, the successful tenderer shall have to execute a formal agreement deed within the time fixed by the Director of Industries.

12. You are required to send a statement giving details of order placed on you and executed by you against this contract together with their value, within one month after the expiry of this contract.

14. In the case of rate of contract order shall be placed by the officer of various Government Department directly. In the case of quasi-Government Departments, such as Local Bodies and Municipal Boards, etc. the orders shall be placed this office.

Please acknowledge receipt.

Yours faithfully,
Sd/-
For and on behalf of the Governor.
Uttar Pradesh.

Accompaniment Forms.
No.475(I)/SPS VII-T.NO.272(G)/85 of dated 16.11.1985
Copy forwarded (1) Director of Agriculture, U.P., Lucknow.

(1) He will please place a supply order on the firm immediately giving detailed instructions regarding dispatch, insurance of goods, name of consignee, destination, railway station payment bills, etc. If the supply is not effected in time he will please report to this office immediately about the delay in supplies.

SCHEDULE `A'

Description	Unit	Price Per unit	Quantity No.	F.O.R.
SPECIFICATIONS.		For M.T. @Rs.5451/-	200 M.T.	

Destination.

(Rs. Five Thousand Four hundred and Fifty One only)

Qty. Two hundred Metric Tonnes only.

ZINC SULPHATE AGRICULTURE, GRADE
ISI Mark with IS: 8249-1976

- The price shall remain firm till the supply is completed satisfactorily. <u>This contract shall exclusively be governed by the terms and conditions mentioned in the Acceptance letter, Tender Form and the Agreement Forms</u>. No other condition shall be acceptable.

- Agreement form must be received to this office within 15 days from the date of issue of this Acceptance Letter.

- <u>The contract is being made for and on behalf of the Governor of U.P</u>."

(emphasis supplied)

4. The respondent deposited the security money and dispatched a signed agreement to the Directorate of Agriculture for completion of

other formalities. It also sent letters to appellant No.3 for issue of supply order, but the latter did not respond apparently because the lowest rate of Rs.4,500 per metric tonne quoted in response to another tender notice issued by appellant No.2 for supply of Zinc Sulphate on rate contract basis was substantially less than the rate quoted by the respondent and, therefore, the purchase committee decided to postpone implementation of the acceptance letter dated 16.11.1985.

5. When the respondent learnt about the aforesaid decision, it served a notice upon the appellants and then filed a petition under Section 20 of the Arbitration Act, 1940 (for short, 'the Act') for appointment of an Arbitrator to decide the dispute relating to supply of 200 metric tonnes of Zinc Sulphate. The same was registered as Regular Suit No. 244/1998. In the written statement filed on behalf of the appellants, it was pleaded that the petition was not maintainable because no contract had been executed between the parties and no order for supply of the goods was placed with the respondent because the other firm had quoted much lower rate.

6. By an order dated 28.3.1989, the trial Court overruled the objections raised on behalf of the appellants and held that a contract was indeed executed between the parties for supply of Zinc Sulphate. The

trial Court then referred to clause 16 of the tender form and directed the parties to propose name of their respective Arbitrator within 20 days with the rider that if they fail to do so, then the Court will appoint an Arbitrator.

7. The appellants did not nominate the Arbitrator. Therefore, by an order dated 20.5.1989, the trial Court appointed Shri Dipak Seth, Advocate as an Arbitrator.

8. The Arbitrator fixed 6.8.1989 for preliminary hearing but no one appeared on behalf of the appellants. The respondent filed statement of claim for award of compensation to the tune of Rs.42,92,015.90 along with cost of Rs.25,000/-. The details of the claim lodged by the respondent are reproduced below:

"A. The Respondents agreed to purchase goods @ Rs.5,451/- per metric tonne against production cost of 1985 at Rs.4,674/- per tonne. The production cost diminished to Rs.2,895/- per tonne, consequently, the Respondents by breaking contract put the claimant to a direct loss of Rs.5,11,200.00.

B. The price quoted by the claimant at Rs.5,451/- per tonne to the Respondents but on account of price variation in the market, where price slumped from Rs.6,200/- to Rs.3,900/- per tonne. The respondents, therefore, inflicted loss at Rs.2,300/- per tonne by breaking the contract. The claimant entitled to rs.4,60,000/- on that account.

C. That the claimant's tender in question to the respondents was it's first major transaction after unit establishments and in view of pretended urgency, stipulation and regarding immediate supplies etc. the claimants

procured raw material, engaged workmen to utilize full capacity of the unit by availing maximum drawing powers against working facilities. Total quantity required under the agreement was produced under explicit intimation to the respondents.

The on account of respondent's failure to accept delivery and consequent non-payment of agreed price, the claimant had to incur the following direct losses namely:-

(a)	Amount of interest to M.P. Financial Corporation from 01.10.85 to 20.09.89 on its loan worth Rs.29,50,000/- @ 12.5% per annum.	Rs.11,06.250/-
(b)	Amount of interest paid to the State Bank of Indore @ 16.5% per annum quarterly rest.	Rs. 7,26,750/-
(c)	Staff workmen of the claimant remained idle for the period 01.10.85 to 30.9.1988 when the Unit was declared sick and financial institution agreed to nurse but the claimant had to pay salary and wages amounting to Rs.4,23,075.90. Consequently, the respondents are liable to compensate the claimant.	

D. That on account of business completely during 01.10.85 to 30.09.88, the claimant also suffered loss of direct profit much loss at Rs.777.00 per tonne of install capacity and still could utilize 60% the said capacity. The respondents are, therefore, liable to compensate to the extent of rs.9,79,020.00.

E. That the claimant are to pay interest to M.P. Financial Corporation and State Bank of Indore at the rate not less than 12% per annum compoundable quarterly, therefore, till the respondents actually pay the above said sums, the said respondents are liable to compensate to the extent of amounts claimant may suffer on these accounts.

The claimant, therefore, prays for the following reliefs against the respondents jointly, severally or in alternative:

(A) That by an award, the claimant be declared entitled to recover and receive Rs.42,92,015/- towards and on account of compensation for loss suffered due to breach of contract and the respondents, jointly, severally or in alternative be directed to pay the same within a time fixed for the purpose.

(B) Rs.25,000/- be awarded towards costs of these proceedings and,

(C) The respondents be directed to compensate the claimants in lieu of the amounts realized by the MPFC and State Bank of Indore till date of actual payment in full of the amount claimed above."

9. On 1.10.1981, Shri B.K. Bajpai, Accountant in the office of the Director of Agriculture, appeared before the Arbitrator and sought 15 days' time to intimate the fate of the appeal filed against order dated 28.3.1989, which was pending before the High Court. On the next date of hearing i.e., 1.11.1989, Shri Irshad Hussain appeared on behalf of the Director of Agriculture and made a request for adjournment on the ground that appellant Nos. 1 and 2 were intending to file an application for stay of proceedings pending before the Arbitrator. However, no stay order appears to have been passed by the High Court in the pending appeal. Therefore, the Arbitrator passed an ex parte award dated 17.11.1989 and allowed the respondent's claim to the extent of Rs.23,44,200/- with interest at the rate of 6% per annum from the date of the award till the date of payment. Soon thereafter, the respondent filed Regular Suit No.537 of 1989 for making the award rule of the Court.

The appellants filed objections and reiterated their plea that no contract had been executed between the parties. They also pleaded that the Arbitrator had committed an error by refusing to adjourn the matter ignoring that the appeal filed against order dated 28.3.1989 was pending before the High Court. The trial Court rejected the objections and passed order dated 25.11.2004 whereby the award of the Arbitrator was made rule of the Court.

10. When First Appeal No. 165/1989 filed by the appellants against the first order of the trial Court was taken up for hearing, it was brought to the notice of the High Court that the Arbitrator has already pronounced the award. After taking cognizance of this fact, the Division Bench of the High Court dismissed the appeal as infructuous with liberty to the parties to challenge the award on any legally permissible ground.

11. The appellants challenged trial Court's order dated 25.11.2004 in First Appeal No.533 of 2005. While admitting the appeal, the High Court stayed execution of the award subject to the condition of deposit of Rs.10 lacs. Accordingly, the appellants deposited the amount, which was withdrawn by the respondent.

12. By the impugned judgment, the High Court finally dismissed by the appeal. The appellants' objection to the appointment of the Arbitrator on the ground that no contract had been executed between the parties was overruled by the High Court by relying upon the judgments of this Court in **Union of India and others v. N.K. Private Ltd. and another** (1973) 3 SCC 388, **Sardar Sucha Singh v. Union of India** (1987) Supp. SCC 127 and **J.K. Jain and others v. Delhi Development Authority and others** (1995) 6 SCC 571. The High Court also rejected the appellants' plea that refusal of the Arbitrator to adjourn the proceedings to await the result of the first appeal filed against order dated 28.3.1989 amounted to violation of the rules of natural justice and held that in the absence of a stay by the High Court, the Arbitrator was entitled to proceed with the matter and the appellants did not have any legitimate cause to abstain from the arbitration proceedings.

13. Smt. Shobha Dikshit, learned senior counsel appearing for the appellants referred to various clauses of the tender form and acceptance letter dated 16.11.1985 and argued that no contract can be said to have come into existence between the parties because the agreement was not signed as per the requirement of Article 299 of the Constitution and the High Court committed serious error by treating the acceptance letter as a contract. Learned senior counsel pointed out that an agreement was

required to be executed and signed by the parties in the proforma prescribed for the purpose, but no such agreement was either executed or signed and, therefore, the conclusion recorded by the trial Court and the High Court that a contract had been executed between the parties is legally unsustainable. Mrs. Dikshit further argued that the award of the Arbitrator is vitiated because it is totally devoid of reasons and the Courts below committed serious error by refusing to annul the same. Mrs. Dikshit referred to the award of the Arbitrator to show that after reproducing the claim made by the respondent and making a bald reference to the affidavit filed on its behalf, the Arbitrator straightaway accepted the claim to the extent of Rs.23,44,200/- and submitted that such award cannot be treated as an award in the eye of law. In support of her arguments, the learned senior counsel relied upon the judgments of this Court in **Punjab SEB v. Punjab Pre-Stressed Concrete Works** (2002) 9 SCC 740 and **Dresser Rand S.A. v. Bindal Agro Chem Ltd.** (2006) 1 SCC 751.

14. Shri Rishi Agarwalla, learned counsel appearing for the respondent argued that a contract will be deemed to have been executed between the State Government and the respondent because the acceptance letter was issued in the name of the Governor. Learned counsel submitted that once the acceptance of the tender was

communicated, the contract became complete and the respondent was entitled to invoke the arbitration clause. In support of his argument, the learned counsel relied upon the judgments in **Sardar Sucha Singh v. Union of India** (supra), **Smita Conductors Ltd. v. Euro Alloys Ltd.** (2001) 7 SCC 728, **Nimet Resources Inc. v. Essar Steels Ltd.** (2000) 7 SCC 497 and **UNISSI (India) (P) Ltd. v. Post Graduate Institute of Medical Education and Research** (2009) 1 SCC 107.

15. We have given our serious thought to the respective arguments. A reading of letter dated 16.11.1985 shows that the same was issued for and on behalf of the Governor of Uttar Pradesh. In the opening paragraph of the letter, appellant No.2 indicated that the bid given by the respondent was being accepted on behalf of the Governor of Uttar Pradesh. At the end of that letter and Schedule `A' appended thereto, it was clearly mentioned that the contract was being made for and on behalf of the Governor of Uttar Pradesh. The contents of paragraphs 4, 7, 12 and 14 show that the appellant Nos. 1 and 2 had awarded a contract to the respondent for supply of 200 metric tones Zinc Sulphate of Agriculture Grade for a total price of Rs.10,95,200/- and the terms and conditions mentioned in the acceptance letter, tender form and the agreement forms were treated as part of the contract. The schedule of supply was also indicated in the acceptance letter. Clause 10 of the

terms and conditions embodied in the acceptance letter did speak of formal agreement, but the same was to be executed only if required. Undisputedly, the respondent completed all the formalities inasmuch as it deposited the security money and dispatched a duly signed agreement to the Directorate of Agriculture, which was to take the supply of Zinc Sulphate, and also sent letters for placing the supply order. Thus, a contract had come into existence between the parties and the fact that the Director of Agriculture did not sign the formal agreement sent by the respondent cannot lead to an inference that the contract had not been executed. This view is consistent with the plain language of Section 5 of the Sale of Goods Act, 1930, sub-section (1) whereof lays down that a contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. That sub-section further lays down that the contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. Sub-section (2) of Section 5 lays down that subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

16. In this case, the bid given by the respondent amounted to an offer to sell goods i.e., Zinc Sulphate of Agriculture Grade at the rate of Rs.5,451/- per metric tonne, which was duly accepted by the competent authority by issuing letter dated 16.11.1985. Therefore, the argument of Mrs. Dikshit that contract had not been executed between the parties merits rejection. The judgment of this Court in **Dresser Rand S.A. v. Bindal Agro Chem Ltd.** (supra) on which reliance has been placed by Mrs. Dikshit is distinguishable. The factual matrix of that case show that the respondent had sent a telex to the appellant asking it whether it would be interested in supplying various equipments including synthesis gas compressors, process air compressors, refrigeration compressors and CO_2 compressors for fertilizer project. By another fax dated 5.4.1991, the respondent asked the appellant to send quotation to be followed by a formal bid for synthesis gas compressors and CO_2 compressors. The representatives of the two parties met and discussed the technical details in regard to performance of the synthesis gas compressors. Thereafter, the appellant gave its comments/modifications to the terms and conditions of the respondent. In June 1991, further negotiations and discussions took place between the parties. At that stage, the respondent gave two letters to the appellant which were described as "letters of intent" issued on the letterhead of K.G. Khosla Compressors Ltd. These letters also contained terms relating to price, manner of making payment

of price, opening of letter of guarantee, date for delivery and consequences of not opening letter of credit by the stipulated date. On receipt of the letters of intent, the appellant is said to have made inquiry as to why the same were issued in the name of K.G. Khosla Compressors Ltd. After getting explanation from the respondent, the appellant's representative counter signed the same. However, the respondent neither placed any purchase order nor issued confirmation that the letters of intent were issued in the name of K.G. Khosla Compressors Ltd. on its behalf. In December 1991, the respondent informed the appellant that it was not possible to accept the synthesis gas compressors turbine manufactured by the latter. After further correspondence, the appellant indicated its intention to refer the disputes relating to agreement to the International Chamber of Commerce, Paris. Thereupon, the respondent filed suit in the Delhi High Court for grant of a declaration that there was no arbitration agreement between the parties. The respondent also applied for injunction. K.G. Khosla Compressors Ltd. also filed similar suit. A learned Single Judge of the High Court allowed the applications for temporary injunction filed by the respondent and K.G. Khosla Compressors Ltd. The Division Bench of the High Court dismissed the appeals filed by the appellant. While considering the question whether there was an arbitration agreement

between the appellant and the respondent, this Court extensively referred to the contents of the letters of intent and observed:

"Clause 'C' of letters of intent provides that the purchase order shall be subject to the "General Conditions of Purchase" included in the inquiry, as amended by dr's comments thereto, Revision 4 dated 10-6-1991. Therefore, the General Conditions of Purchase which contains the arbitration clause, are not made a part of the letters of intent nor are the letters of intent made subject to the General Conditions of Purchase. The letters of intent merely provide that if and when the purchase order is placed, the purchase order will be subject to the General Conditions of Purchase, as modified by Revision 4. Therefore, the point of time at which the General Conditions of Purchase will become applicable, is the point when the purchase order is placed and not earlier. Consequently, clause 27.4.2 of the General Conditions of Purchase containing the arbitration clause would become applicable and available to the parties only when the purchase order was placed and not earlier. The term "purchase order" has a specific meaning and connotation. The purchase order is the "agreement entered into between bindal and the prospective supplier as recorded in the purchase order form (prepared in the form of Attachment VII to the General Conditions of Purchase) signed by the parties, including all attachments and annexures thereto and all documents incorporated by reference therein together with any subsequent modifications thereof in writing". Admittedly, no such purchase order was placed by either bindal or anyone authorised by bindal. It is also evident from clause I of the letters of intent that the purchase order was to be issued simultaneously with the letter of credit. Clause M made it clear that the letters of intent were being issued subject to necessary approvals being given by the authorities of the Indian Government. These provisions clearly indicate that the letters of intent were only a step leading to purchase orders and were not, by themselves, purchase orders. Therefore, issue of the letters of intent by kgk, assuming that it was done on behalf of bindal, did not mean that the General Conditions of Purchase which contains the provision for arbitration became a part of the letters of intent or became enforceable.

It is now well settled that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. This Court while considering the nature of a letter of intent, observed thus in Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd.: (SCC p. 408, para 7)

"The letter of intent merely expressed an intention to enter into a contract. … There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not."

It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. Chitty on Contracts (para 2.115 in Vol. 1, 28th Edn.) observes that where parties to a transaction exchanged letters of intent, the terms of such letters may, of course, negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to the courts to hold that the parties are bound by the document; and the courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. Be that as it may."

17. A carful reading of the above noted judgment shows that the letters of intent issued on behalf of the respondent were never intended to be treated as a binding contract between the parties. There was no indication in the letters of intent about acceptance of the offer made by the appellant. Therefore, this Court held that no agreement was executed between the parties for purchase of the goods.

18. Reverting to the present case, we find that the bid given by the respondent was unequivocally accepted by the competent authority and the letter of acceptance was issued for and on behalf of the Governor by treating it to be a contract. Thus, there was substantial compliance of Article 299 of the Constitution. The execution of formal agreement was optional and was not *sine qua non* for supply of the goods by the respondent. In our view, if the acceptance letter is read along with other documents in the light of the conduct of the parties, it becomes clear that an agreement was executed between the competent authority and the respondent.

19. The next point which merits consideration is whether the arbitration clause contained in the tender form was a part of the contract and the respondent could invoke the same for determination of the damages allegedly suffered by it on account of failure of appellant No.3 to place order for supply of Zinc Sulphate. In this context, it is necessary to bear in mind that tender of the respondent was accepted by the competent authority subject to the terms and conditions specified in the tender notice and the acceptance letter. In the schedule appended to the acceptance letter, it was clearly mentioned that the price shall remain

firm till the completion of supply and the contract will be exclusively governed by the terms and conditions mentioned in the acceptance letter, tender form and the agreement forms. This shows that the terms and conditions mentioned in the tender form were treated as part of the contract for supply of 200 metric tonnes Zinc Sulphate by the respondent to appellant No.3. Clause 16 of the tender form provided for reference of any dispute arising out of or concerning the agreement to the arbitration of an Arbitrator nominated by appellant No.2 and an Arbitrator nominated by the respondent. Therefore, the respondent was entitled to invoke the arbitration clause and the trial Court did not commit any jurisdictional error by entertaining the petition filed by the respondent under Section 20 of the Act.

In **Smita Conductors Ltd. v. Euro Alloys Ltd.** (supra), this Court referred to Article II Part 2 of the New York Convention, which is *pari materia* to Section 7 of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') and observed:

"What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by Para 2 of Article II. If we break down Para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (*1*) in a contract containing an arbitration clause signed by the parties, (*2*) an arbitration agreement signed by the parties, (*3*) an arbitral clause in a contract contained in exchange of letters or telegrams, and (*4*) an arbitral agreement contained in exchange of letters or telegrams. If an

arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."

In **Nimet Resources Inc. v. Essar Steels Ltd.** (supra), the Court observed as under:

"If the contract is in writing and the reference is made to a document containing arbitration clause as part of the transaction [, which] would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence of the arbitration agreement is in challenge, the proper course for the parties is to thrash out such question under Section 16 of the Act and not under Section 11 of the Act.

A somewhat similar question was considered in **UNISSI (India) (P) Ltd. v. Post Graduate Institute of Medical Education and Research** (supra). The facts of that case were that in response to the tender floated by the respondent for purchase of pulse oxymeters, the appellant gave its bid. The respondent accepted the bid and placed the purchase orders. The appellants supplied the equipments, which were accepted by the respondent sometime in January 2001. After two years, technical committee of the respondent disapproved the purchase and installation of the equipments. The appellant filed an application under Section 11(4)(a) of the 1996 Act for issue of a direction to the respondent to appoint an Arbitrator. The Additional District Judge, Chandigarh held that the question of appointing an Arbitrator under the 1996 Act does not arise because no agreement had been executed

between the parties. This Court entertained the appeal, set aside the order of the Additional District Judge and observed:

"Keeping the aforesaid principles, as quoted hereinabove, in the aforesaid decisions of this Court in mind, in fact what constitutes an arbitration agreement between the parties, we have to examine whether there exists an arbitration agreement between the parties or not in the facts and circumstances of the case. Let us, therefore, consider the gist of the facts involved in this case. Tender Enquiry No. 2PGI/OGL/2K/6281 dated 21-12-2000 for purchase of pulse oxymeters was floated by PGI. It is an admitted position that the appellant submitted their tender vide their Offer No. UIPL/331177/00-01 dated 15-1-2001. The tender of the appellant was accepted by PGI vide their Letter No. PGI/P-61/02/477/11936-51 dated 29-9-2002 for supplying forty-one pulse oxymeters to their different departments. The tender documents themselves contain an arbitration clause and by reason of acceptance of the tender of the appellant by PGI, it must be held that there was a valid arbitration agreement between the parties. The appellant supplied forty-one pulse oxymeters and the receipt thereof was duly acknowledged on behalf of PGI on the delivery challans. The service/ installation reports of the aforesaid machines were duly signed on behalf of PGI. In the letters issued by PGI, there was an apparent acknowledgment of supply of the aforesaid meters by the appellant and also reference to the aforementioned tender enquiry number.

In view of the aforesaid facts and the correspondences between the parties, particularly the tender offer made by the appellant dated 15-1-2001 and supply order of PGI dated 29-9-2002, and, in our view, to constitute an arbitration agreement between the parties and the action taken on behalf of the appellant and in view of Section 7 of the Act and considering the principles laid down by the aforesaid two decisions of this Court, as noted hereinearlier, we are of the view that the arbitration agreement did exist and therefore the matter should be referred to an arbitrator for decision."

20. We shall now consider the remaining issues. The appellants' case is that the Arbitrator acted in violation of the rules of natural justice inasmuch as he refused the prayer for adjournment despite the fact that

the appeal filed against the trial Court's order dated 28.3.1989 was pending before the High Court. Another point made by the appellants is that even though the award passed by the Arbitrator was vitiated by patent error of law, the trial Court overruled the objections filed on their behalf and the High Court casually approved the judgment of the trial Court.

21. It is borne out from the record that at one stage, the Arbitrator accepted the request made by the representative of appellant No.3 and adjourned the proceedings on the premise that the appeal filed against order dated 28.3.1989 was pending before the High Court. However, as the appellants could not persuade the High Court to stay the operation of order dated 28.3.1989, the Arbitrator had every reason to proceed with the matter and pass the award. Since the appellants did not bother to participate in the arbitration proceedings despite the fact that the High Court did not grant stay, they are to blame themselves for the ex parte award. In any case, the appellants cannot complain that they were denied reasonable opportunity of hearing.

22. However, we find merit in the submission of learned senior counsel appearing for the appellants that the award of the Arbitrator

was vitiated by an error apparent and reasons assigned by the trial Court and the High Court for refusing to annul the same are legally unsustainable. A reading of the award shows that after adverting to the claim made by the respondent and the proceedings held by him on various dates, the Arbitrator referred to the affidavit of Shri A.K. Saigal, Managing Director of the respondent and passed the award without assigning any reason whatsoever and without even recording a finding that the respondent had suffered loss/damages on account of the failure of appellant No.3 to place supply order in furtherance of the acceptance letter dated 16.11.1985. The casual manner in which the Arbitrator decided the dispute is evident from paragraph 10 of the Award, which is extracted below:

"10. I have heard the learned counsel for the claimant and the representatives of the opposite party no.3 at length and carefully perused the records and I am of the certain opinion that the claimant is entitled to receive Rs.23,56,500/- from the opposite parties No.1 and 2 which said amount also comprises of Rs.12,300/- as cost of these proceedings details whereof are given hereunder:-

AWARD

The claim of the claimant is allowed to the extent of Rs.23,44,200/- with interest thereon at the rate of 6% per annum with effect from the date of this award till the date of payment or the decree which is earlier.

The claimant is also awarded Rs.12,300/- being the cost of this arbitration as per details given below:-

(a)	Cost of non-judicial stamp for award	Rs. 6,500/-
(b)	Arbitration fee paid by the claimant	Rs. 2,800/-
(c)	Typing and office expenses for arbitration paid by the claimant	Rs. 500/-
(d)	Cost awarded to the claimant on account of counsels fee	Rs. 2,500/-
	Total	Rs.12,300/-"

23. In our view, the Arbitrator was duty bound to examine the tenability of the claim made by the respondent under different heads and decide the same by assigning some reasons, howsoever briefly. His failure to do so constituted a valid ground for setting aside the award and the trial Court committed a serious error by making the award rule of the Court. Unfortunately, the High Court also overlooked this lacuna in the award and approved the judgment of the trial Court. In **Raipur Development Authority and others v. M/s. Chokhamal Contractors and others** (1989) 2 SCC 721 (this was a case under the Arbitration Act, 1940), a Constitution Bench of this Court considered the question whether the Arbitrator is required to give reasons and held as under:

"…. We do appreciate the contention, urged on behalf of the parties who contend that it should be made obligatory on the part of the arbitrator to give reasons for the award, that there is no justification to leave the small area covered by the law of arbitration out of the general rule that the decision of every judicial and quasi-judicial body should be

supported by reasons. But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes.

... The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable — except in the limited way allowed by the statute — non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest — if not as a compulsion of law — ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured."

The same view was reiterated in **Tamil Nadu Electricity Board v. Bridge Tunnel Constructions** (1997) 4 SCC 121 and **Punjab SEB v. Punjab Pre-Stressed Concrete Works** (supra). In the second judgment, the Court referred to some of the earlier judgments and observed:

"After hearing counsel on both sides, we are of the view that the award is liable to be set aside because when it is a non-speaking one, it is not known whether any part of the award made by the arbitrator related to Claim I. In our view, the price of the poles was firm and not liable to be increased. The fact that the delivery schedule was changed cannot be a ground to get over the clause prohibiting increase in the price of the poles. Once Claim I is not tenable, the award has to be set aside inasmuch as it is not possible to say that the award did not relate to Claim I. This is a sufficient reason for setting aside the award and remitting the matter back to the arbitrator."

24. In the result, the appeal is partly allowed. The impugned judgment as also judgment dated 25.11.2004 of the trial Court are set aside and the award of the Arbitrator is quashed. The Arbitrator shall now decide the dispute afresh after giving reasonable opportunity of hearing to the parties which shall necessarily include an opportunity to adduce oral and documentary evidence.

25. If the Arbitrator who passed award dated 17.11.1989 is not available, then the parties may move the trial Court, which shall give an opportunity to them to nominate their respective arbitrators within a specified time. If the parties fail to nominate their arbitrators, then the Court may appoint an arbitrator who shall pass an award after giving opportunity to the parties in terms of the preceding paragraph.

……J.

[G.S. Singhvi]

……..J.
[Chandramauli Kr. Prasad]

New Delhi
January 04, 2011.