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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 09.07.2024

\+ ARB.P. 1416/2022

MURARI LAL AGARWAL .....Petitioner

Through: Mr. Susshil Daga, Mr. Anurag Kalavatiya, Mr. Chitransh Mathur, Ms. Parul Singhal, Advocates.

versus

KMC CONSTRUCTION LIMITED & ORS. .....Respondents

Through: Mr. Sidhant Dwibedi, Mr. Manoj Kumar, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The petitioner, by way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], seeks appointment of an arbitral tribunal in terms of Clause 67.3 of an agreement dated 05.10.2013.

2. The petitioner has arrayed three parties as respondents in these proceedings, namely – M/s KMC Construction Ltd. ["KMC"], Pink City Expressway Ltd. ["Pink City"] and ETA Star Infrastructure Ltd. ["ETA"].

3. At the very outset, Mr. Susshil Daga, learned counsel for the petitioner, states that he does not wish to press the petition, as far as Pink City is concerned, as Pink City is under liquidation. This is without prejudice to any rights available to the petitioner in law, to assert claims

against Pink City in the Corporate Insolvency Resolution Process proceedings.

4. Mr. Sidhant Dwibedi, learned counsel, has entered appearance on behalf of KMC, and submits that there is no arbitration agreement between the petitioner and KMC. Although ETA has not entered appearance, learned counsel for the petitioner submits that KMC and ETA would both be necessary parties in the proposed proceedings. I have, therefore, heard Mr. Daga and Mr. Dwibedi on the question of whether KMC is bound by the arbitration clause.

5. Mr. Daga submits that the arbitration clause is to be discerned from an agreement dated 05.10.2013, read with a further agreement dated 31.10.2013 which, read together, would render KMC also amenable to arbitration.

6. The first of these contracts, dated 05.10.2013, was admittedly between the petitioner and ETA alone. The contract concerns the balance work of six laning of Gurgaon-Kotputli-Jaipur section of National Highway-8. It recorded that Pink City had been appointed as the concessionaire by National Highways Authority of India ["NHAI"] for this work under a concession agreement dated 06.06.2008. Pink City, in turn, had appointed ETA as the Engineering, Procurement, Construction contractor. ETA awarded part of the work to a third party but, by the agreement dated 05.10.2013, decided to award the balance portion of the work to the petitioner herein.

7. For the present purposes, Clause 3 of the agreement dated 05.10.2013 is relevant, which reads as follows:

> "*3. The following document shall be deemed to be part and parcel of*

this Agreement:

a) The Letter of Intent;

b) The Tender/Bid and Appendix to Bid;

c) The Conditions of Particular Application (Part II);

d) The General Conditions of Contract (Part I);

e) The Technical Specifications including Supplementary Technical Specifications;

f) The Drawings; and

g) The Priced Bill of Quantities"

8. The arbitration agreement is contained in Part – II of the "Conditions of Particular Applications" ["COPA"], referred to in Clause 3 (c) of the agreement between the petitioner and ETA. The COPA, incorporated by way of this agreement, contained the conditions which were applicable to the parent contract between NHAI and Pink City. Clause 67.1 thereof provides as follows:

> *"Sub-Clause 67.1 Review Board: Disputes Substitute Clause 67.1 with the following Disputes Resolution mechanism:*
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> *If any dispute occurs between both the parties, the same shall in the first place be referred to the Engineer for his recommendation, who will give the decision within 28 days of receipt of such reference by him. However, if any of the party is not satisfied with the decision of the Engineer, then any dispute arising between the Employer and the Contractor in connection with, or arising out of the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation of other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instructions, determination, certificate or valuation of the Engineer, the matter in dispute shall, be referred by the objecting party to the other party for amicable settlement by sending Notice of Dispute with copy to the Engineer within 28 days after the expiry of the period of 28 days by which the Engineer was expected to give his recommendations.*
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> *Upon such reference, authorised persons of the Employer and the Contractor shall meet at the earliest in the presence of the Engineer in any event within 28 days of such reference to discuss and attempt to amicably resolve the dispute. If, the dispute is not resolved within 28*

days of such meeting, the dispute can be referred by any of the party to the Arbitral Tribunal in accordance with the provisions of Sub Clause 67.3. The party desirous of commencing arbitration in respect of any dispute shall send Notice for commencing arbitration to the other party within 28 days of receipt of decision of the amicable settlement or within 28 days after the expiry of period during which the decision of the amicable settlement was to be conveyed.

If any of the party fails to refer the Recommendations of the Engineer to the other party for Amicable settlement within 28 days of receipt of recommendation from the Engineer or if no decision of amicable settlement is conveyed by the Employer/Contractor to the other party and thereafter if, any of the party fails to refer the same dispute to the Arbitration Tribunal for commencing arbitration, then, no claim whatsoever shall be entertained by the other party and these claims shall not be within the purview of the Arbitral Tribunal and shall be considered as non-arbitral."

9. KMC entered into the picture only by way of a subsequent agreement dated 31.10.2013. The petitioner, KMC, Pink City and ETA were parties to this agreement, which records that work could not be completed in terms of the agreement between the petitioner and ETA. By way of the supplementary agreement, KMC was substituted as the "Employer" in place of ETA. Mr. Daga has drawn my attention to the following clauses of the agreement dated 31.10.2013[1]:

"M. All the Parties hereby confirm that they are entering into this Agreement out of their free consent and will and without any force, pressure, coercion or undue influence. It is further assured and confirmed by all the Parties that they will neither challenge the execution nor the contents of this Agreement.

N. The Parties further confirm that they understand and appreciate the fact that due to the ongoing nature of work, the Contract cannot be concluded and a fresh contract cannot be executed, thus, the Parties have mutually agreed to amend/modify the Contract with the Contractor by way of execution of this Agreement. It is further agreed between the Parties that KMC and the Contractor shall be free to enter into any financial arrangement mutually agreed between them and

[1] The "Contractor" referred to in this agreement is M/s Murari Lal Agarwal, and the "Contract" is the agreement dated 05.10.2013.

ESIL shall not raise any objection whatsoever in this regard.

O. In view of the aforesaid, both the Parties have mutually agreed to enter into this Agreement whereby KMC shall substitute ES1L as the Employer under the Contract and all terms and conditions for execution of the Works under the Contract shall-remain the same except for those modified herein based on the mutual agreement of both the Parties. However, it is hereby clarified that the objective of this Agreement is to amend the Contract to the effect of substitution of KMC as the Employer under the Contract along with making requisite amendments in the Contract as stipulated herein and this- does not amount to a new contract or novation of the earlier Contract in any manner whatsoever.[2]

xxxx xxxx xxxx

1. Purpose of the Agreement

The Parties have mutually agreed to enter into this Agreement whereby KMC shall substitute and step into the shoes of ESIL as the Employer under the Contract and all terms and conditions for execution of the Works under the Contract shall remain the same except those modified herein based on the mutual agreement of both the Parties. It is further agreed between the Parties that the Contractor shall execute the remaining/balance works under the Contract on the basis of the mutually agreed terms and conditions as mentioned under this Agreement read with the provisions of the Contract:

xxxx xxxx xxxx

13. Unless otherwise stated in this Agreement, all the terms and conditions of the Contract shall remain the same and shall be valid and binding on both the Parties. All the clauses of the Contract shall continue to be in full force and shall be applicable to this Agreement.

xxxx xxxx xxxx

19. Governing Law and Jurisdiction

This Agreement shall be construed, interpreted, and enforced pursuant to the laws of India and all disputes arising out this Agreement shall be subject to jurisdiction of the Court of Delhi, India alone."

10. Learned counsel for the parties join issue as to whether, by virtue of these provisions, the arbitration clause contained in the COPA, stands incorporated in the agreement dated 31.10.2013.

[2] Recitals of agreement dated 31.10.2013.

11. The relevant statutory provision is Section 7(5) of the Act, which is reproduced as below:

> *"Section 7. Arbitration agreement.*
>
> *xxxx xxxx xxxx*
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> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

12. The question of whether an arbitration clause contained in one contract, stands incorporated by reference into a subsequent contract has been considered in several decisions of the Supreme Court and this Court. The principal authority, upon which learned counsel for both sides sought to rely, is the judgment of the Supreme Court in *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd*[3]. The Court summarised the position, thus:

> *"17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.*
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> *xxxx xxxx xxxx*
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> *20. The following passages from Russell on Arbitration throw considerable light on the position while dealing with Section 6(2) of*

[3] (2009) 7 SCC 696.

the (English) Arbitration Act, 1996 corresponding to Section 7(5) of the Indian Act. (See pp. 52-55, 23rd Edn.):

> *"Reference to another document.—The terms of a contract may have to be ascertained by reference to more than one document. Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the evidence. This may make questions of incorporation irrelevant, if for example it is clear that the contractual documents in question are entirely separate and no intention to incorporate the terms of one in the other can be established. However, the contractual document defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration agreement. If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration provisions of that other document. This very commonly occurs when the principal contractual document refers to standard form terms containing an arbitration agreement. However the standard form wording may not be apt for the contract in which the parties seek to incorporate it, or the reference may be to another contract between parties at least one of whom is different. In these circumstances it may be possible to argue that the purported incorporation of the arbitration agreement is ineffective. The draftsmen of the Arbitration Act, 1996 were asked to provide specific guidance on the issue, but they preferred to leave it to the court to decide whether there had been a valid incorporation by reference. (Para 2.044)*
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> ***Subject to drawing a distinction between incorporation of an arbitration agreement contained in a document setting out standard form terms and one contained in some other contract between different parties, judicial thinking seems to have favoured the approach of SirJohn Megaw in Aughton, namely, that general words of incorporation are not sufficient. Rather, particular reference to the arbitration clause needs to be made to comply with Section 6 of the Arbitration Act, 1996, unless special circumstances exist.*** *(Para 2.047)*

> *Reference to standard form terms.—If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms including the arbitration clause." (Para 2.048)*
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> *xxxx* *xxxx* *xxxx*
>
> *22.* ***A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.***[4]***"***

13. *M.R. Engineers*[5] has been followed in the judgment of the Supreme Court in *Elite Engineering and Construction (Hyd.) Private Limited v. Techtrans Construction India (P) Ltd.*[6] and *Giriraj Garg v. Coal India Ltd. and Others*[7].

14. A recent judgment of the Division Bench of this Court, in *Mac Associates v. Parvinder Singh*[8], is also instructive. The Division Bench held as follows:

> *"16. From a reading of the aforesaid paragraphs from MR Engineers (supra), the legal position that emerges is that* ***for an arbitration clause existing in another document to be incorporated by reference, there has to be a clear intention of the parties to incorporate the arbitration clause in the contract. There has to be a specific reference to incorporate the arbitration clause in a contract. The only exception to the aforesaid position as provided in MR Engineers (supra) is where the contract provides that the standard***

[4] Emphasis supplied.
[5] Supra (note 3)
[6] (2018) 4 SCC 281.
[7] (2019) 5 SCC 192.
[8] 2024 SCC OnLine Del 1313

form of terms and conditions of an independent trade or professional institution shall apply to the contract. *In such contracts, the terms including the arbitration clause are deemed to be incorporated by a mere reference. It is also to be seen that the arbitration clause contained in another document is applicable to the dispute between the parties to the contract.*

17. The scope and ambit of Section 7(5) of the Act was again considered by the Supreme Court in Inox Wind (2018) 2 SCC 519. After taking note of the judgments of the Queen's Bench Division in Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 EWHC 29 (Comm), Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. No. 2, (The Athena), 2006 EWHC 2530 (Comm) and Russell on Arbitration, 23rd Edition (2007), the Supreme Court made a distinction between the 'single-contract case' and 'two-contract case'. ***A single contract case is where the parties seek incorporation of standard form of contract of one of the parties. In contrast, if a reference is made to another document, which is between other parties or if only one of the parties to the contract in question is a party, then it would be a two-contract case.***

21. The legal position that emerges from the aforesaid judgments in Inox (supra) and Giriraj Garg (supra) is that in a 'two-contract case', a specific reference to the arbitration clause contained in an earlier contract is required for its incorporation in the main contract between the parties. However, in a 'single-contract case', a general reference to the standard form contract will have the effect of incorporating the arbitration clause in the main contract.

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23. In the present case, admittedly, at least one of the parties in the main contract and the work order are different. The main contract was between the DMRC and the appellant and the work order was between the appellant and the respondent. Therefore, applying the principles elucidated in the judgments in Inox (supra) and Giriraj Garg (supra), this would be a 'two-contract case' and the arbitration clause cannot be incorporated in the work order by a general reference to the main contract between the appellant and the DMRC. Both in Inox (supra) and Giriraj (supra), the Supreme Court was seized of a 'single-contract case', wherein the general reference to the arbitration clause had the effect of incorporating the same in the contract. Therefore, the aforesaid judgments would not be applicable to the facts and circumstances of the present case.

24. In terms of the judgment in MR Engineers (supra), in our considered view, the aforesaid arbitration clause cannot be incorporated in the work order as Clause 9 of the work order does not reflect a clear intention of the parties to incorporate the arbitration

> *clause contained in the GCC into the contract between the appellant and the respondent. Clause 9 states that the present contract/work order between the appellant and the respondent is on a back-to-back basis with the main contract between the appellant and DMRC. It only casts a responsibility on the respondent of going through the various clauses in the main contract with DMRC, including the GCC. However, it falls short of incorporating the terms of the said contract into the present contract.* ***There is no specific reference to the arbitration clause in GCC in Clause 9 of the work order. To incorporate the arbitration clause contained in the GCC, there has to be a specific reference in the work order.[9]"***

15. Applying these principles, I notice that the present case is very similar on facts to the judgment in *Mac Associates*[10]. This is also a "two-contract case", rather than a "single contract case", where the arbitration clause stands incorporated by reference to standard terms and conditions. In the present case, respondent No. 1/KMC is party only to the agreement dated 31.10.2013, which does not contain an express arbitration clause. It also does not include any specific reference to incorporation of the arbitration clause. If the array of parties in both agreements is not identical, the judgments cited above make it very clear that express reference to the arbitration clause is required, in order to infer consent of the new party to such a method of dispute resolution.

16. Mr. Daga's reliance upon Clause 13 of the agreement dated 31.10.2013 is misconceived. All the terms and conditions of the contract dated 05.10.2013 were to remain valid and binding upon the parties to the agreement dated 31.10.2013, "*unless otherwise stated in this agreement*". Firstly, this clause also does not contain an express reference to the arbitration clause. Secondly, a contrary intention is indicated by Clause

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[9] Emphasis supplied.
[10] Supra (note 8)

19, wherein it has been stated that disputes under the agreement would be subject to the "*jurisdiction of Courts in Delhi, India alone*". I am unable to accept Mr. Daga's submission that the reference to "all terms and conditions" is sufficient for this purpose.

17. For the aforesaid reasons, I find that there is no binding arbitration agreement, as far as disputes between the petitioner and KMC are concerned.

18. The petition is, therefore, dismissed, leaving it open to the petitioner to take alternative remedies in respect of its claims.

PRATEEK JALAN, J

JULY 9, 2024
"Bhupi/kb"/