2018 INSC 192

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2439 OF 2018
(ARISING OUT OF SLP (CIVIL) NO. 29519 OF 2015)

M/S. ELITE ENGINEERING AND CONSTRUCTION (HYD.) PRIVATE LIMITED REP. BY ITS MANAGING DIRECTOR .....APPELLANT(S)

VERSUS

M/S. TECHTRANS CONSTRUCTION INDIA PRIVATE LIMITED REP. BY ITS MANAGING DIRECTOR .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

Leave granted.

2) National Highway Authority of India (NHAI) had entered into agreement dated July 19, 2007 (hereinafter referred to as the 'Concession Agreement') whereby it had awarded a contract to M/s. T.K. Toll Road Pvt. Ltd. (hereinafter referred to as the 'Concessionaire') for undertaking, *inter alia*, the design, engineering, financing, procurement, construction, operation and

maintenance of the Project Highway on Build Operate and Transfer (BOT) basis on the National Highway 67 connecting Coimbatore and Nagapattinam. The Concessionaire vide EPC agreement (Engineering, Procurement and Construction Agreement) dated January 31, 2008 awarded the said work on a fixed lump sum turnkey basis to M/s. Utility Energytech and Engineers Private Limited (hereinafter referred to as the 'EPC Contractor'). EPC Contractor, in turn, executed a Construction Agreement dated March 14, 2008 with the respondent herein (M/s. Techtrans Construction India Pvt. Ltd.) to execute the works as per terms and conditions entailed in that agreement. Clause 8 of that agreement permitted the respondent to sub-contract the structural work. Pursuant thereto, the respondent floated a tender for sub-contracting their work in which the appellant also submitted its bid and was ultimately awarded the said work by the respondent vide agreement dated July 29, 2009.

3) Some disputes arose between the appellant and the respondent in connection with the execution of the said work and the appellant vide its letter dated March 25, 2013 raised certain claims against the respondent. The appellant also filed Original Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') on the file of Principal

Judge, Karur. This petition was contested by the respondent who in its reply denied all the allegations raised by the appellant and also submitted that since there was no arbitration agreement between the parties, the petition under Section 9 of the Act was not maintainable. While this was pending, the appellant moved application under Section 11(3) and (5) of the Act for appointment of an arbitrator in the High Court of Judicature at Madras on January 28, 2014. Notice in this petition was issued by the High Court. In the meantime, on June 30, 2014, the Principal Judge, Karur allowed the petition of the appellant under Section 9 of the Act, but left open the issue of existence of arbitration agreement.

4) Insofar as the appellant's petition under Section 11 of the Act is concerned, it was contested by the respondent taking the objection to the maintainability of the petition on the ground of absence of any agreement. The High Court has vide impugned orders dated September 18, 2015 dismissed the said petition of the appellant upholding the contention of the respondent that there is no arbitration agreement between the parties and, therefore, remedy under the Act for appointment of arbitrator or constitution of Arbitral Tribunal is not available.

5) It may be clarified at this juncture that Agreement dated July 29,

2009 entered into between the appellant and the respondent does not contain any arbitration clause. There is no independent arbitration agreement between the parties either. However, case set up by the appellant was that this Agreement dated July 29, 2009 entered into between the parties, by implication, incorporates the arbitration agreement that is contained in the Agreement dated March 14, 2008 that was entered into between the EPC Contractor and the respondent.

6) Indubitably, clause 45 of the Agreement dated March 14, 2008 between EPC Contractor and the respondent contains procedure for resolution of disputes and sub-clause (3) thereof refers to arbitration procedure. In case of any dispute, as per clause 45.1, first attempt is for 'amicable resolution'. Thereafter, under clause 45.2, process of 'mediation' is to be resorted to and if that also fails then the 'arbitration procedure' is provided. Clause 45.3 and clause 45.4 read as under:

> "**45.3.Arbitration Procedure:**
>
> Subject to the provisions of Article 45.1 and 45.2, any dispute, which is not resolved by amicable resolution between the parties or by a reference to mediation, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. The Party requiring arbitration shall appoint an arbitrator in

writing, inform the other party about such appointment and call upon the other party to appoint its arbitrator. If within 15 days of receipt of such intimation the other party fails to appoint its arbitrator, the Party seeking appointment of arbitrator may take further steps in accordance with Arbitration Act.

45.4. Place of Arbitration:

The place of arbitration shall be Mumbai for all Disputes."

7) According to the appellant, this clause gets incorporated in the Agreement dated July 29, 2009 that was entered into between the respondent and the appellant, by virtue of following clauses in the said agreement:

"'2.Subcontractor hereby agrees, undertakes to execute the said value of work, and is responsible for the efficient and successful execution of the work and is to be completed as per the contract period specified in the contract document.

a........
b........

All the conditions and special conditions of contract, specifications (general and additional clauses relating to the works and quality specified in the relevant agreement between the Construction Contractor and the Employer are binding on the Subcontractor."

Annexure-I specifying the 'Terms and Conditions' Annexed thereto inter alia provides Clause - 9.10 as under:

"9.10. For items which are not mentioned in this Agreement Clauses, terms and conditions of Agreement between Contractor and EPC Concessionaire will be applicable."

8) It is, thus, argued by the learned counsel for the appellant that as per the aforesaid clause, when the appellant had agreed and undertaken to execute the work as per contract specified in the contract document and the said clause also specifically provided that all the special conditions of the contract, specifications etc. relating to the works and qualities specified in the relevant agreement between the construction contractor and the employer are binding on the respondent, the clause relating to arbitration agreement i.e. 45 entered into between EPC Contractor and the respondent also became applicable by incorporation. It was submitted that the aforesaid clause read with clause 9.10 of Annexure 1 which categorically mentions that in respect of items which are not mentioned in the Agreement clauses, terms and conditions of the Agreement between the Contractor and EPC Concessionaire will be applicable, would also lead to same result.

9) These very arguments were raised before the High Court. The appellant had also referred to certain communications addressed by it to the respondent before invoking legal remedy wherein it has stated that the parties had agreed for settlement of disputes in accordance with clause 45.3. The respondent, on the other hand, had drawn attention of the High Court to paragraph 23 of

the petition filed by the appellant under Section 9 of the Act wherein it had categorically stated that the appellant would be constrained to initiate legal proceedings against the respondent for recovery of amount by approaching the competent civil court. The High Court, thus, opined that from the communications only, it could not be said that parties had agreed for arbitration and, in fact, the appellant in his petition filed under Section 9 of the Act had professed ignorance of the agreement between the respondent and the employer. As it had gone to the extent of making an averment to the effect that 'the petitioner is totally kept in dark about the terms and conditions of the agreement till now'. The High Court thereafter construed clauses 2 and 9.10 of the Agreement that was entered into between the appellant and the respondent and came to the conclusion that those clauses never meant to incorporate arbitration agreement into the Agreement dated July 29, 2009 executed between the parties. On this aspect, discussion goes as follows:

> "18. On a careful perusal of the pleadings and documents as also submissions of the learned counsel for the parties, more specifically the reading of the clauses, this court is of the view that part of clause-2 of the agreement dated 29.07.2009 extracted aforesaid refers to only "works and quality specified in the relevant agreement between the construction contractor and the employer". All the conditions and the sub-conditions of contract are binding on the sub

> contractor/petitioner, but the unambiguous reference is only to "work and quality specified" without any refence to the arbitration clause. It is not a case of only absence of a reference to arbitration clause, but the reference being specific to the "work and quality specified." An expanded meaning cannot be given to this Clause. It is in this context that Clause-9.10 of Annexure-I specifying the terms and conditions has to be read. Once again, it refers to "Items" which are not mentioned in the agreement clauses where conditions of the earlier agreement would be applicable. Thus, this would refers to the items to be used.

10) The High Court also drew distinction between the reference to the another document and incorporation of another document in a contract by reference, which has been explained by this Court in ***M.R. Engineers and Contractors Private Limited*** v. ***Som Datt Builders Ltd.***[1] and held that, in the instant case, there was only a reference to another document with no intention to incorporate the arbitration clause thereof in a contract between the parties.

11) Questioning the aforesaid approach of the High Court, learned counsel for the appellant submitted that when the appellant was required to execute the work on the terms and conditions contained in the principal agreement, it was clear intention to incorporate all the terms including clause 45.3. Additionally, he referred to clause 8.7 of the agreement between the parties which stipulates as under:

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1 (2009) 7 SCC 696

> "8.7 Other terms related to Termination of work will be same as Agreement between EPC, Concessionaire and Construction contractor."

12) His submission was that when the terms related to termination of work contained in the Agreement between EPC, Concessionaire and the respondent were to govern their agreement as well, these would include settlement of disputes on termination of work through arbitration which was the term provided in the contract between the employer and the respondent. Relying upon the judgment in the case of ***Groupe Chimique Tunisien SA*** v. ***Southern Petrochemicals Industries Corpn. Ltd.***[2], he submitted that mere fact that appellant had mentioned about filing suit against the respondent in his petition under Section 9 of the Act would not enure to the benefit of the respondent who said so on account of mistaken understanding of law. Para 9 reads as under:

> "9. It is true that the petitioner had contended before the Jordanian court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on reconsidering the matter and taking legal advice, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not

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2 (2006) 5 SCC 275

> barred from changing his stand subsequently or estopped from seeking arbitration. [See *U.P. Rajkiya Nirman Nigam Ltd.* v. *Indure (P) Ltd.* [(1996) 2 SCC 667] where the contention based on estoppel was negatived while considering a reserve (*sic* reverse) situation [Ed.: Para 12] .]"

13) Mr. Ganguli, the learned senior counsel appearing for the respondent, on the other hand, submitted that clause 2 of the Agreement entered into between the appellant and the respondent clearly evinced that there was only a qualified incorporation of those terms and conditions of the contract between the employer and the respondent which related to the works and the quality. Insofar as clause 45 is concerned, there was no conscious acceptance thereof between the parties and that was the reason that even the respondent had no knowledge about the said clause and, therefore, he did not mention so even in his petition filed under Section 9 of the Act. He, therefore, submitted that the High Court has rightly relied upon ***M.R. Engineers and Contractors Private Limited*** case in dismissing the petition of the petitioner. He also placed reliance upon the judgments of this Court in ***Larsen & Toubro Limited*** v. ***Mohan Lal Harbans Lal Bhayana***[3] and ***Sharma and Associates Contractors Private Limited*** v. ***Progressive Constructions***

3 (2015) 2 SCC 461

Limited[4].

14) After considering the respective submissions, we are inclined to agree with the respondent and, therefore, do not find any fault with the impugned judgment of the High Court.

15) In ***M.R. Engineers and Contractors Private Limited*** case, this Court considered the true intent and scope of Section 7 of the Act which deals with 'arbitration agreement'. Relevant portion of Section 7 reads as under:

> "7. Arbitration agreement.—(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> xxx xxx xxx
>
> (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."

16) As per sub-section (5), an arbitration clause contained in an independent document can also be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, even if there is no specific provision for arbitration. However, the Court noted that such a recourse can

4 (2017) 5 SCC 743

be adopted only 'if the reference is such as to make the arbitration clause in such document, a part of the contract.' This interpretation to sub-section (5) of Section 7 was elaborated in the following manner:

> "14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an arbitration clause from another document, merely on reference to such document in the contract, sub-section (5) would not contain the significant later part which reads: "and the reference is such as to make that arbitration clause part of the contract", but would have stopped with the first part which reads:
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> > "7. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing…."
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> 15. Section 7(5) therefore requires a *conscious* acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties. But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference incorporating an arbitration clause contained in such document into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.
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> 16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the

> contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract."

17) After some further discussion on this aspect with reference to the existing case law as well as extracts from *Russell* on arbitration, the Court summed up the position as under:

> "24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:
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> (*i*) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:
>
> *(1)* the contract should contain a clear reference to the documents containing arbitration clause,
>
> *(2)* the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,
>
> *(3)* the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.
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> (*ii*) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

> (*iii*) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.
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> (*iv*) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.
>
> **(*v*) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”**

18) When we apply the aforesaid ratio, we find that the High Court has correctly held that, in the instant case, it was not intended to make the arbitration clause as a part of the contract between the appellant and the respondent. Clause 2 and clause 9.10 are given correct interpretation by the High Court and discussion in this behalf has already been extracted above. By these clauses,

only those conditions and sub-conditions of the contract, specification etc. which relate to the works and quality are incorporated. Clause 9.10 only talks of 'items' which are not mentioned in the contract and terms and conditions relating to the execution of those items are to be taken from the main contracts. Reference to clause 8.7 is also inconsequential. By this clause only, those terms contained in the main agreement which relate to 'terms of work' are incorporated. Procedure relating to 'termination' is altogether different from resolution of disputes. Dispute may arise even *de hors* the termination of the contract and is an altogether different aspect, not necessarily connected with the termination of work.

19) In ***Alimenta S.A.*** v. ***National Agricultural Coop. Mktg. Federation of India Ltd.***[5], the question was as to whether the arbitration clause in Fosfa-20 was incorporated in the first contract by way of clause 11 and in the second contract by virtue of clause 9. The Court held that while the arbitration clause was incorporated in the first contract, the same was not incorporated in the second contract. How the matter has to be looked into, for determining the same, was discussed in the following manner:

5 (1987) 1 SCC 615

“*13*. … There is a good deal of difference between Clause 9 of this contract and Clause 11 of the first contract. Clause 11 has been couched in general words, but Clause 9 refers to all other terms and conditions for supply. The High Court has taken the view that by Clause 9 the terms and conditions of the first contract which had bearing on the supply of HPS were incorporated into the second contract, and the *term about arbitration not being incidental to supply of goods, could not be held to have been lifted as well from the first contract into the second one*.

14. It is, however, contended on behalf of the appellant that the High Court was wrong in its view that a term about arbitration is not a term of supply of goods. We do not think that the contention is sound. It has been rightly pointed out by the High Court that the *normal incidents of terms and conditions of supply are those which are connected with supply, such as, its mode and process, time factor, inspection and approval, if any, reliability for transit, incidental expenses, etc*. We are unable to accept the contention of the appellant that an arbitration clause is a term of supply. There is no proposition of law that when a contract is entered into for supply of goods, the arbitration clause must form part of such a contract. The parties may choose some other method for the purpose of resolving any dispute that may arise between them. But in such a contract the incidents of supply generally form part of the terms and conditions of the contract. The first contract includes the terms and conditions of supply and as Clause 9 refers to these terms and conditions of supply, it is difficult to hold that the arbitration clause is also referred to and, as such, incorporated into the second contract. *When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause. In the present case, Clause 9 specifically refers to the terms and conditions of supply of the first contract and, accordingly, only those terms and conditions are incorporated into the second contract and not the arbitration clause*. The High Court has taken the correct view in respect of the second contract also.”

(emphasis supplied)

20) This judgment is noted in ***M.R. Engineers and Contractors Private Limited*** case as well and in the facts of ***M.R. Engineers and Contractors Private Limited***, the Court held that there was no incorporation of arbitration clause. Following discussion throws light to decide the issue in this case as well:

> "37. In the present case the wording of the arbitration clause in the main contract between the PW Department and the contractor makes it clear that it cannot be applied to the sub-contract between the contractor and the sub-contractor. The arbitration clause in the main contract states that the disputes which are to be referred to the committee of three arbitrators under Clause 67.3 are disputes in regard to which the decision of the Engineer ("Engineer" refers to person appointed by the State of Kerala to act as Engineer for the purpose of the contract between the PW Department and the respondent) has not become final and binding pursuant to Clause 67.1 or disputes in regard to which amicable settlement has not been reached between the State of Kerala and the respondent within the period stated in Clause 67.2. Obviously neither Clause 67.1 nor 67.2 will apply as the question of "Engineer" issuing any decision in a dispute between the contractor and the sub-contractor, or any negotiations being held with the Engineer in regard to the disputes between the contractor and the sub-contractor does not arise. **The position would have been quite different if the arbitration clause had used the words "all disputes arising between the parties" or "all disputes arising under this contract". Secondly, the arbitration clause contemplates a committee of three arbitrators, one each to be appointed by the State of Kerala and the respondent and the third (Chairman) to be nominated by the Director General, Road Development, Ministry of Surface Transport, Roads Wing, Government of India. There is no question of such nomination in the case of a dispute between the contractor and the sub-contractor.**"

21) In view of the aforesaid, the appeal stands dismissed.

...J.
(A.K. SIKRI)

...J.
(ASHOK BHUSHAN)

NEW DELHI;
FEBRUARY 23, 2018.