IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 444 of 2023

And

AP 449 of 2023

M/s. Power Mech Projects Limited

VS

M/s. Bharat Heavy Electricals Limited

For the petitioner	:	Ms. Swati Dalmia, Adv. Ms. Sabarni Mukherjee, Adv.
For the respondent	:	Mr. Rohit Das, Adv. Ms. Kishwar Rahman, Adv. Ms. Sristi Roy, Adv. Mr. Preetam Majumdar, Adv. Ms. Divya Jyoti Tekriwal, Adv.
Last heard on	:	06.10.2023
Delivered on	:	17.10.2023

Moushumi Bhattacharya, J.

1. The two Arbitration Petitions filed in the Court are for appointment of an arbitrator. The parties are the same in both the Arbitration Petitions and the dispute arises out of the same contract executed between the parties. The petitioner prays that the same arbitrator may be appointed in both the petitions by reason of the fact that AP 444/2023 seeks appointment of a Sole Arbitrator in place and stead of the arbitrator whose mandate was terminated by an order passed by the Commercial Court at Rajarhat on 26.9.2022. The petitioner says that the arbitration in AP 444 / 2023 should resume from the stage at which the erstwhile arbitrator left the proceeding.

2. The second AP, namely AP 449/2023 seeks fresh appointment of a Sole Arbitrator to adjudicate on the disputes which have arisen between the parties after commencement of the arbitration proceeding in AP 444/2023. The petitioner relies on a letter dated 8.9.2022 by which the petitioner raised a list of claims on the respondent for services rendered by the petitioner under a Notice Inviting Tender dated 19.4.2014 issued by the respondent along with the respondent's Letter of Intent dated 21.8.2014 and the Work Order issued by the respondent to the petitioner on 17.11.2014. The respondent denied the claims by its letter of 28.10.2022 which led to the disputes between the parties. The petitioner invoked the arbitration agreement requesting appointment of a Sole Arbitrator by a notice issued under section 21 of the 1996 Act on 9.12.2022. The respondent did not reply to this notice.

3. Learned counsel appearing for the respondent Bharat Heavy Electricals Limited (BHEL) has taken two objections to the appointment of an arbitrator. The first is that the contract agreement dated 15.10.2015, which the petitioner has relied on, does not satisfy the test of incorporation by reference of the arbitration clause since there is no specific reference to the arbitration clause to demonstrate the intention of the parties with reference to the incorporation. Counsel submits that the tenders issued by BHEL are not standard form contracts but varies from case to case depending on the nature of the project and hence the exceptions to the rule of specific reference to the arbitration clause as laid down by the Supreme Court will not be applicable in the present case.

4. The second point raised to resist the applications centers around the alleged deficit stamping of the arbitration agreement. According to counsel, section 4 of the Indian Stamp Act, 1899 will not apply in the present case since there are several instruments in respect of the transactions in question each of which will have to be duly stamped. The requirement of the Full Bench decision of the Supreme Court in *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Ltd.; 2023 SCC OnLine 495* would be attracted since the NIT and the Work Order are unstamped documents.

5. Learned counsel appearing for the petitioner responds to the objection taken by BHEL by seeking recourse to the contents of the Contract Agreement dated 15.10.2015 and on the relevant provisions of the Indian Stamp Act,

1899. Counsel submits that the Contract Agreement is sufficiently stamped under the provisions of the 1899 Act and also specifically incorporates the arbitration clause by reference as contemplated under section 7(5) of the 1996 Act.

6. The two planks of objections taken on behalf of the respondent BHEL are being answered under separate heads in this judgment.

The case of the Respondent BHEL on the arbitration agreement being insufficiently-stamped

7. The disputes which have arisen between the parties in the two applications concern the following :

- BHEL's General Conditions of Contract contained in the NIT dated 19.4.2014
- BHEL's Letter of Intent dated 21.8.2014
- BHEL's Work Order dated 17.11.2014.

The parties entered into a Contract Agreement dated 15.10.2015 which is a duly-stamped document on a non-judicial stamp paper of Rs. 100/-. The petitioner agreed to execute the work of erection, testing and commissioning of a Boiler located at the respondent's thermal power plant in Bihar as per the terms and conditions contained in the NIT, LOI and the Work Order together with all other documents mentioned in Clause 16.0 of the Contract Agreement. The petitioner has been described as the contractor in the Contract Agreement

of 15.10.2015. The NIT, LOI and Work Order are parts of Clause 16.0, more specifically clauses 16.2, 16.18 and 16.20 of the Contract Agreement.

8. The respondent's contention that the NIT and Work Order are required to be separately stamped would be belied by section 4 of the Indian Stamp Act, 1899. Section 4 is applicable where there are several instruments used in a single transaction of sale, mortgage and settlement and requires only the principal instrument to be chargeable with the prescribed stamp duty in Schedule I. The said section is however limited to sale, mortgage or settlement. The Contract Agreement on the other hand does not fall within any of these three categories which would hence make section 4 of the Indian Stamp Act, inapplicable to the present case.

9. Moreover, section 35 of the Indian Stamp Act requires instruments to be sufficiently stamped for the purpose of its admissibility in evidence. Proviso (c) to section 35 deals with a situation where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and if any one of the letters is properly stamped the contract or agreement shall be deemed to be duly stamped. Therefore, proviso (c) to section 35 must harmoniously be read with section 4 and construed in a manner which would not make the former otiose. Proviso (c) to section 35 of the Indian Stamp Act is somewhat akin to section 7(5) of The Arbitration and Conciliation Act, 1996, where the duly stamped agreement in the former and the arbitration agreement in the latter are saved by the respective statutes. Proviso (c) to section 35 of the Indian

Stamp Act, 1899 relieves the parties from the statutory obligation of stamping each and every letter or document forming part of the correspondence where one of the letters is properly stamped.

10. Proviso (c) to section 35 was also considered by the Full Bench of the Supreme Court in *N.N. Global* in the context of section 7 of The Arbitration and Conciliation Act, 1996 and the Supreme Court upheld the applicability of proviso (c) to section 35 in cases where the contract or an agreement is formed through multiple documents, letters or correspondence exchanged between the parties. The intention behind this provision has to be read into the sequence of agreements in the present case where the subsequent Contract Agreement of 15.10.2015 embraces the earlier three documents forming part of the transaction between the parties, namely, the NIT of 19.4.2014, LOI of 21.8.2014 and the Work Order of 17.11.2014. The Contract Agreement is properly stamped as per clause 2.28.1 of the GCC annexed to the NIT which states that the value of non-judicial stamp paper for the contract agreement shall not be less than Rs. 100/- unless otherwise required under the relevant statutes. The Contract Agreement has been executed on a non-judicial stamp paper of Rs. 100/-.

11. Therefore proviso (c) to section 35 must be applied to the factual context in the present case and be answered in favour of the petitioner.

<u>The case of the respondent that the arbitration agreement is not incorporated in the Contract Agreement by way of reference.</u>

What is the law with regard to incorporation by reference?

12. Section 7(1) of The Arbitration and Conciliation Act, 1996 defines the "arbitration agreement" as 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, regardless of whether the relationship is contractual or not. Sub-section (1) of section 7 qualifies an arbitration agreement even where the arbitration agreement is not a part of a document which forms the crux of a proceeding before the Court or where the parties to the arbitration agreement or any of them seek to rely on subsequent acts or conduct of the parties in the form of correspondence to establish that an arbitration agreement exists between the parties. Section 7(3) requires the arbitration agreement to be in writing and section 7(4) clarifies the situations where the arbitration agreement shall be deemed to be in writing and includes a document signed by the parties, exchange of letters and other negotiations including through electronic means or by exchange of pleadings in the arbitration.

13. Section 7(5) embodies the law with regard to reference by incorporation. Section 7(5) requires that the later contract must refer to the document containing an arbitration clause constituting an arbitration agreement if the later contract is in writing and the reference encompasses the arbitration clause as part of the contract. The law with regard to reference by incorporation was explained by the Supreme Court in *M.R. Engineers and*

Contractors Private Limited vs. Som Datt Builders Limited; (2009) 7 SCC 696 where the Supreme Court summarised the position in paragraph 24 of the Report making a distinction between a general reference to another contract which would be insufficient for the purpose of incorporating the arbitration clause through the referred document into the contract. The Supreme Court placed emphasis on the parties' intention to incorporate the arbitration clause into the contract as indicated in the later contract. The Supreme Court also clarified the position with regard to a contract containing standard form terms and conditions of trade where the inclusion of any provision for arbitration in such standard form terms and conditions shall be deemed to be incorporated by reference.

14. The respondent BHEL seeks to argue that the Contract Agreement will not fall within the "standard terms and conditions" instances laid down in *M.R. Engineers* since the contracts entered into by BHEL are not standard form contracts but varies from case to case depending on the nature of the project. However, contrary to such submission, it is clear from the form and content of the Contract Agreement that it is not a bespoke agreement peculiar to the contract. Further, whether an agreement is a standard form agreement or not would entirely depend on the agreement itself and no standardised formula can be applied to determine the same. It is not possible for a referral Court to test the form or nature of the agreement and come to a finding whether the agreement is unique to the parties or contains standard terms and conditions; it is also beyond the jurisdiction of the referral Court to get into this exercise.

15. In *Giriraj Garg vs. Coal India Limited; (2019) 5 SCC 192*, the Supreme Court considered *M.R. Engineers* and held that the test of incorporation by reference would be satisfied in a single contract case where the arbitration clause is contained in a standard form document to which there is reference in the individual sale orders. In that case, the individual sale orders issued by the respondent no. 2 specifically stated that they would be governed by the guidelines and circulars issued by the Coal India Limited / Bharat Coking Coal Ltd. The Supreme Court accordingly found that the arbitration clause in the 2007 scheme stood incorporated in the sale orders issued by the respondent no. 2. Since the "2007 Scheme" is actually the form under which the e-auction for coal distribution was to be issued, the facts in *Giriraj* stand on all fours with those of the present case.

How do the facts of this case fit into the *Giriraj Garg* template?

16. The Contract Agreement dated 15.10.2015 makes specific reference to BHEL's notice inviting tender dated 19.4.2014 and BHEL's Work Order dated 17.11.2014 in clause 16.2 and 16.20 of the Contract Agreement, respectively. Clause 16.0 states "*The following documents ……. and others, if any, shall also form part of the contract agreement.*"

17. Clause 2.21.1 of the General Conditions of Contract annexed to the notice inviting tender contains the arbitration clause. Similarly, clause 66.1 of the Work Order contains the arbitration clause; both the arbitration clauses are identical. Therefore, there cannot be any doubt that the arbitration

agreements, identical in content, have been incorporated in the Contract Agreement by reference.

18. In the present case, the Contract Agreement dated 15.10.2015 makes specific references to and includes the NIT, the LOI as well as the Work Order, two of which contain the arbitration clause. Hence, the Contract Agreement comes within the description of a "single contract" – as was the case in *Giriraj Garg* encompassing all the transactions between the parties including the arbitration agreements.

19. It is therefore not a vague or desultory reference to the arbitration agreements but evincing a clear intention of the parties to bodily-lift the arbitration agreements in the NIT and Work Order and incorporate them lock-stock-and barrel into the Contract Agreement by reference. After all, the object of section 7(5) of the 1996 Act is to preserve the intention of the parties to arbitrate on the disputes and differences which have arisen between them and carry such intention forward to subsequent documents which do not contain the arbitration clause. Section 7(5) looks to a seamless transition where the later contract becomes the arbitration agreement with a merging of the intention to arbitrate. This Court accordingly is of the view that the respondent's contention is contrary to the Contract Agreement itself besides the other points discussed above. The second objection is also rejected.

20. The Contract Agreement is also between the petitioner and respondent without any obfuscation caused by any third party. BHEL's resistance to act in

terms of the arbitration agreement or be bound by it is contrary to its intention to arbitrate as contained in the NIT and the Work Order as referred to in the Contract Agreement. BHEL's attempt to wriggle out of the arbitration agreement by resorting to fine print arguments is also contrary to its stand before the Commercial Court at Rajarhat as reflected in that order dated 26.9.2022 where BHEL had agreed that the dispute between the parties are a subject matter of the arbitration as contained in clause 2.21.1 of the GCC annexed to the NIT.

21. *Elite Engineering and Construction (Hyderabad) Private Limited vs. Techtrans Construction India Private Limited; (2018) 4 SCC 281* relied on by the respondent does not apply to the present facts since the reference in that case was restrictive and made applicable only to selected clauses. In the present case, the reference in the Contract Agreement embraces the NIT and the Work Order in their entirety without any restriction. Hence, both the NIT and the Work Order are pulled-in with their respective arbitration clauses and snugly fitted into the Contract Agreement. The reference by incorporation is thus complete.

22. This Court is persuaded in view of the above reasons to allow the prayer in both the applications for appointment of a Sole Arbitrator. The prayer made on behalf of the petitioner for appointment of one arbitrator for deciding the disputes in both the applications is found to be reasonable since the earlier arbitrator's mandate appointed in AP 444/2023 was terminated by the order of

the learned Commercial Court at Rajarhat on 26.9.2022. Admittedly, the disputes between the parties arise out of the same Contract Document/s. Hence, appointing two arbitrators for the same dispute between the same two parties may result in conflicting decisions apart from wastage of resources. This can easily be avoided if a single arbitrator is appointed to decide the claims in both the applications.

23. AP 444 and 449 of 2023 are accordingly disposed of by appointing Mr. S. Muralidhar, former Chief Justice of the Orissa High Court, to act as the learned arbitrator for resolving the disputes and differences between the parties. This judgment and order shall be communicated to the learned arbitrator within 3 days from the date of this judgment and the learned arbitrator shall communicate his consent to the Registrar Original Side of this Court within 3 weeks from the date of such communication in accordance with the prescribed format under the 1996 Act and the Schedules thereto. The petitioner shall also communicate the particulars of the contact person of the petitioner to the learned Arbitrator.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)