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

% Judgment delivered on: 23.04.2024

\+ **FAO (COMM) 212/2023 & CM No.54229/2023**

**M/S ORAVEL STAYS PVT. LTD.** ..... Appellant

Versus

**NIKHIL BHALLA** ..... Respondent

**AND**

\+ **FAO (COMM) 243/2023**

**NIKHIL BHALLA** ..... Appellant

Versus

**M/S ORAVEL STAYS PVT. LTD.** ..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr. Nikilesh Ramachandran, Mr. Sagar Kumar Pradhan, Mr. Diptiman Acharyya, Mr. Shubham Seth & Mr. Anuj Panwar, Advs. as well as for respondent in FAO(COMM) No.243/2023.

For the Respondent : Mr. Dhruva Bhagat, Ms. Meenu Sethi & Mr. Aviral Chandra, Advs. as well as for appellant in FAO(COMM) No.243/2023.

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**
**HON'BLE MR JUSTICE RAVINDER DUDEJA**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. These are cross-appeals filed under Section 37(1)(a) of the Arbitration & Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 11.09.2023 (hereafter *the impugned order*)

passed by the learned Commercial Court rejecting the application filed by M/s. Oravel Stays Pvt. Ltd. (hereafter *OSPL*) under Section 8 of the A&C Act in CS(COMM) No.288/2020 captioned *Nikhil Bhalla v. M/s Oravel Stays Pvt. Ltd.*

2. The learned Commercial Court had accepted that an arbitration agreement existed between the parties in terms of Clause 14 of the terms and conditions (hereafter *the Terms and Conditions*) incorporated as a part of the Marketing and Operational Consulting Agreement (hereafter *the MOCA*) entered between the parties. However, the learned Commercial Court held that the said arbitration agreement (arbitration clause) covered only those disputes that concern the "construction", "interpretation" or "application" of any of the provisions of the MOCA. The learned Commercial Court reasoned that since, the dispute involved in the suit filed by the appellant, Mr Nikhil Bhalla (hereafter *NB*) concerned non-compliance of the terms of the MOCA, the arbitration agreement did not cover the said disputes.

3. OSPL has filed the present appeal [FAO(COMM) No.212/2023] being aggrieved by the impugned order to the extent that the learned Commercial Court had found that the arbitration agreement between the parties did not cover the dispute involved in CS(COMM) No.288/2020. NB has also appealed the impugned order [FAO(COMM) No.243/2023] being aggrieved by the finding that an arbitration agreement exists between the parties. According to NB, Clause 14 of the Terms and Conditions (the arbitration clause) could not be construed

as specifically incorporated in the MOCA. He claims that MOCA was accepted digitally. The link provided by OSPL for reference to the terms and conditions applicable to the MOCA did not lead to the said Terms and Conditions, which contained the said arbitration clause. He contends that the arbitration clause could not be read as a part of the MOCA, as there was no specific reference to the arbitration agreement in the MOCA, which was digitally signed by the parties.

## FACTUAL CONTEXT

4. The controversies involved in the present appeals arise in the following context.

5. OSPL, a company incorporated under the Companies Act, 2013, claims that by virtue of its experience in the hospitality industry, it *inter alia*, provides services to enable establishments engaged in the business of providing boarding and lodging, to grow their business. The owners of such establishments list their properties on OSPL's online platform and are able to offer their services to a wider set of customers. The customers are able to book accommodations/rooms provided by these establishments online.

6. NB operates a hotel in the name and style of "The Spruce Mansion" which is located at Kannyal Road, Simsa Village, Nasogi, Manali, Himachal Pradesh-175131 (hereafter *the Hotel*).

7. The parties entered into the MOCA on 27.07.2018 and digitally accepted the same. NB claims that the said agreement was novated

twice. The first agreement was entered on 16.09.2018 and thereafter, the parties entered into the MOCA digitally, on 28.11.2018.

8. By virtue of the MOCA, NB was allowed to list the Hotel on the online platform of OSPL and allow bookings to be made by customers though the platform. It is stated by NB that although there were minor alterations in the MOCA from the earlier version of the agreement dated 16.09.2018, however, the essence of the agreement remained the same.

9. NB submits that the MOCA was for a period of twelve months because as per the terms of the MOCA, OSPL was required to pay a minimum guarantee of remuneration every month. It was agreed between the parties that OSPL would be entitled to receive commission on the bookings made for the Hotel through its online platform.

10. It is NB's case in the suit for recovery [CS (COMM.) No.288/2020] instituted by him before the learned Commercial Court, that OSPL failed to pay the minimum guarantee amount and other incentives payable to NB under the MOCA. It sought recovery of arrears of a sum of ₹9,65,656/- along with future interest at the rate of 24% per annum from August, 2019 till realisation and damages to the tune of ₹4,00,000/-.

11. OSPL filed an application under Section 8 of the A&C Act praying that the parties be referred to arbitration. OSPL's claim regarding the existence of an arbitration agreement was founded on Clause 14 of the Terms and Conditions, which were published on

OSPL's website and was accessible through a hyperlink <https://www.oyorooms.com/terms>.

12. OSPL claims that in terms of Clause 15 of the MOCA, which was digitally accepted by NB, the Terms and Conditions which were published by OSPL on its website, were incorporated as a part of the MOCA.

13. As noted above, the learned Commercial Court rejected the said application on the ground that the arbitration agreement (Clause 14 of the Terms and Conditions) did not cover the dispute which relates to non-compliance of the terms and conditions of the MOCA. The learned Commercial Court held that the arbitration clause was confined to cover only those disputes that related to the construction, interpretation and application of the terms and conditions of the MOCA and did not extend to disputes relating to non-compliance of the obligations under the MOCA.

**RIVAL CONTENTIONS**

14. Mr. Nikilesh Ramachandran, learned counsel appearing on behalf of OSPL contended that the learned Commercial Court had erred in concluding that the disputes were not covered within the scope of the arbitration agreement (Clause 14 of the Terms and Conditions). He submitted that the learned Commercial Court had failed to appreciate that the expression 'application of the terms and conditions of the agreement' included, within its ambit, any dispute regarding its non-

compliance. He submitted that any dispute regarding failure to discharge any obligations under any clause of the MOCA would necessarily be covered under the scope of 'application' of the clause imposing such an obligation. He also submitted that Clause 14 of the Terms and Conditions uses three distinct expressions, namely "construction, interpretation and application". He contended that the learned Commercial Court had erred in interpreting the scope of the word 'application' as similar to the term 'interpretation'. He submitted that the dispute whether a clause was applicable would also include a dispute regarding the performance of the obligation under the said clause.

15. Mr. Dhruva Bhagat, learned counsel appearing on behalf of NB countered the aforesaid submissions. He submitted that NB was not aggrieved by the conclusion of the learned Commercial Court in rejecting OSPL's application moved under Section 8 of the A&C Act. He was aggrieved by the findings recorded in paragraphs nos. 14 and 15 of the impugned order to the effect that an arbitration agreement is contained in the MOCA, which was digitally signed by both the parties. He submitted that Clause 14 of the Terms and Conditions could not be read as incorporated into the MOCA by reference, as there was no specific reference to the arbitration clause. He referred to the decision of the Supreme Court in ***M.R. Engineers & Contractors Private Limited. v. Som Dutt Builders Limited.: (2009) 7 SCC 696*** and on the strength of the said decision submitted that incorporation of an

arbitration clause in an agreement could not be inferred by reference unless the agreement specifically mentioned the arbitration clause. He also referred to the decision of the Supreme Court in ***Inox Wind Limited. v. Thermocables Limited.: (2018) 2 SCC 519*** in support of this contention. He contended that since there was no specific reference to an arbitration clause contained in the Terms and Conditions published on the website, the same could not be considered as a part of the MOCA.

16. He also contended that in the present case clicking on the link, as provided in Clause 15 of the MOCA, did not lead to the Terms and Conditions. He submitted that the arbitration clause (Clause 14 of the Terms and Conditions) was contained in the terms and conditions relating to 'Channel Partners'. Thus, unless a party selected 'Channel Partner' from the menu that opened on clicking the link provided in Clause 15 of MOCA, he would not be taken to the site containing the Terms and Conditions. Thus, a party was not only required to press the hyperlink as provided in Clause 15 of the MOCA but was required to take an additional step of selecting 'Channel Partner' from the menu, which would then lead the party to the Terms and Conditions containing the arbitration clause. In the alternative, he submitted that the learned Commercial Court was correct in its conclusion that the scope of Clause 14 of the Terms and Conditions did not cover a dispute regarding non-compliance of the said terms and conditions. He submitted that there was no dispute as to the interpretation of the MOCA. The claim raised

in the suit was for recovery of the amounts, which were due and payable under the MOCA. Non-payment of the amounts due under the MOCA could not be considered as a dispute regarding application of any of the clauses of the MOCA.

**REASONS & CONCLUSION**

17. The first and foremost question to be addressed is whether the leaned Commercial Court had erred in proceeding on the basis that an arbitration agreement existed between the parties. There is no dispute that the parties had digitally entered into the MOCA and Clause 15 of the MOCA expressly provides that a party entering into the MOCA with OSPL also accepts the terms and conditions published on its website.

18. Clause 15 of the MOCA as digitally accepted by NB is set out below:

> "15. By agreeing to the terms and conditions of this Agreement, the Hotel also accepts the terms and conditions published on the website (https://www.oyorooms.com/terms) and any and all changes made therein from time to time. Further, this Agreement alongwith with the terms and conditions available on the Website shall constitute the entire agreement between the Hotel and OYO."

19. As is apparent from the above, the link to the website for accessing the Terms and Conditions was provided in the said clause. Thus, the MOCA expressly referred to the Terms and Conditions as published on OSPL's website and also set out the link to access the same. It is not disputed that the said link would lead a person clicking the same to OSPL's website. Further, OSPL had classified the terms

and conditions as applicable for different classes of persons, which included the 'Channel Partners'. There is no dispute that NB/the Hotel is a Channel Partner of OSPL. Thus, clearly, NB was required to consider the Terms and Conditions as applicable to the Channel Partners as incorporated as a part of MOCA. The said terms and conditions included an arbitration agreement embodied in Clause 14 of the Terms and conditions. It is thus, apparent that by virtue of Clause 15 of the MOCA, the Terms and Conditions, as applicable to Channel Partners, stood incorporated in the MOCA, by reference.

20. Section 7 of the A&C Act defines the term 'arbitration agreement'. Sub-section (5) of Section 7 of the A&C Act expressly provides that 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. Sub-sections (1) and (5) of Section 7 of the A&C Act are set out below:

> "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.
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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."

21. It is clear from the above that if the reference in a contract to a document is such as to make the arbitration clause as contained in the said document a part of the contract, the same would constitute an arbitration agreement. In the present case, the MOCA refers to the terms and conditions and expressly provides that "*by agreeing to the terms and conditions of this Agreement, the Hotel also accepts the terms and conditions published on the website ...Further this agreement along with the terms and conditions available on the Website shall constitute the entire agreement between the Hotel and OYO"*. There is no ambiguity in this clause. The Terms and Conditions published on the website are expressly incorporated as a part of the MOCA**.** Thus, Clause 14 of the Terms and Conditions would stand incorporated as a part of the MOCA. It is difficult to accept that reference to the Terms and Conditions as published was not such as to make those Terms and Conditions including the arbitration clause as a part of MOCA.

22. The decision of the Supreme Court in the case of ***M.R. Engineers & Contractors Private Limited v. Som Dutt Builders Limited*** (*supra*) is of little assistance to NB. In the said case, the Supreme Court had explained that there is a difference between reference to another document in a contract and incorporation by reference of another document in a contract. Whereas, the parties in the first case only adopt certain specific portions or parts of the referred documents for the purpose of the contract, in the second case the parties incorporate the referred document in entirety into their contract. In addition, the Court also provided certain instances of incorporation by reference and mere

reference, to explain the said difference. The relevant extract of the said decision is set out below:

> "**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.** 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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> **18.** On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another

> purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between *X* and *Y* provides that the terms of payment to *Y* will be as in the contract between *X* and *Z*, then only the terms of payment from the contract between *X* and *Z*, will be read as part of the contract between *X* and *Y*. The other terms, say relating to quantity or delivery cannot be looked into."

23. Applying the aforesaid test, it is clear that in the present case the entire Terms and Conditions, as published on the website, which included the arbitration agreement (Clause 14 of the Terms and Conditions) stood incorporated as a part of the MOCA.

24. In ***Inox Wind Limited. v. Thermocables Limited*** *(supra)* the Supreme Court followed to the principles as set out in the earlier decision in ***M.R. Engineers & Contractors Private Limited v. Som Dutt Builders Limited*** (*supra*). In the said case, the Supreme Court considered a purchase order that was issued by the appellant, which categorically mentioned that the supply would be as per the terms and conditions mentioned therein, and attached standard terms and conditions. The Supreme Court held that the purchase order was a single contract and the general reference to a standard form, even if the same was not by a trade association or a professional body, is sufficient for incorporation of an arbitration clause.

25. In the present case, there is only one contract between the parties – the MOCA. Clause 15 of the MOCA expressly incorporates the Terms

and Conditions published on the website. Clearly, the Terms and Conditions are a part of their agreement. Since the same includes an arbitration agreement (Clause 14 of the Terms and Conditions), the same would be binding on the parties.

26. The contention that the link mentioned in Clause 15 of the MOCA does not lead to the Terms and Conditions is also not persuasive. Admittedly, the link leads a person to OSPL's website, which provides links to terms and conditions as applicable to various parties including its 'Channel Partners'. There is no dispute that NB would be a Channel Partner of OSPL under the MOCA and was aware of the same at the material time. Merely because the site provides different terms and conditions as applicable to contracts with different categories of parties cannot lead to a conclusion that the relevant Terms and Conditions, which were published on the website accessed through the link provided under Clause 15 of the MOCA, were not incorporated in MOCA. It is also relevant to mention that although the aforesaid contention was advanced on behalf of NB, the grounds of appeal preferred by NB do not specifically allege that the relevant terms and conditions were not accessible through the link provided in Clause 15 of the MOCA**.**

27. The next question to be addressed is whether the dispute raised in the suit are an arbitrable dispute within the scope of Clause 14 of the Terms and Conditions as set out above.

28. Clause 14 of the Terms and Conditions, which is at the centre of the controversy in the present appeals, is set out below:

> "**14. JURISDICTION**
>
> If any dispute shall arise between the Parties hereto concerning the construction interpretation or application of any of the provisions of the Terms and Conditions, such dispute shall be referred to the arbitration of a single arbitrator to be appointed by the Parties. The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The arbitration shall be conducted in New Delhi.
>
> Any failure, delay or forbearance on the part of OYO in: (i) exercising any right, power or privilege under this Agreement; or (ii) enforcing terms of this Agreement, shall not operate as a waiver thereof, nor shall any single or partial exercise by OYO of any right, power or privilege preclude any other future exercise or enforcement thereof.
>
> The Parties hereto agree that each of the provisions contained in this Agreement shall be severable, and the unenforceability of one or more provisions of this Agreement shall not affect the enforceability of any other provision(s) or of the remainder of this Agreement.
>
> The courts in New Delhi shall have exclusive jurisdiction to settle any disputes between the Parties under this Agreement"

29. It is relevant to refer to the plaint filed by NB to address the aforesaid question. The plaint filed by NB clearly acknowledges that the parties had entered into a digital contract of a commercial nature on 27.07.2018. It is claimed that the said contract was novated on

16.09.2018. The said agreement was for a period of twelve months commencing from July, 2018 till July, 2019. It was stated that the contract was novated on 16.09.2018 and a fresh digital contract was executed between the parties. NB claims that thereafter on 28.11.2018 another commercial contract (the MOCA) was duly executed by the parties digitally whereby, the terms and conditions of the earlier agreement were novated. A different set of benchmark revenues was set up by OPSL and was duly accepted by NB.

30. NB's claims that the MOCA was for a period of twelve months and OSPL had assured a benchmark monthly revenue. He claimed that OSPL was required to maintain the standards and was required to work *"in accordance with the terms and conditions of MOCA"*. NB claims that since the inception, he had followed all terms and conditions of the agreements entered into between the parties and OSPL has never raised an allegation that NB had defaulted in complying his obligations under any of the agreements.

31. NB alleges that OSPL failed *"to pay the minimum guarantee amount, incentives and other factors to the plaintiff despite receiving the services at his end to the fullest."* NB claims that OSPL had regularly assured him that the amount payable would be adjusted in future months but the said assurances were false and a part of the dilatory tactics on the part of OSPL. According to NB, OSPL had deliberately not complied with the terms and conditions of the MOCA despite various reminders. NB avers that he accepted bookings of the

Hotel rooms done by OSPL's online Travel Agents however, OSPL failed to pay NB's legal dues.

32. It is material to note that OSPL has not filed any written submissions or any statement of defence to contest the allegations raised by NB and therefore, the nature of OSPL's defence is not ascertainable with definite certainty. However, it would be apposite at this stage to proceed on the basis that OSPL would dispute the allegations or averments made in the plaint. This was so because if OSPL admits to the same, there would, in essence, be no dispute which would require any adjudication.

33. As stated above, NB's case is that OSPL is in breach of the terms and conditions of the MOCA and OSPL disputes the same.

34. NB claims that a sum of ₹9,65,656/- is payable by OSPL as arrears in terms of the MOCA. In addition, NB also claims a sum of Rs.4,00,000/- towards damages for not issuing the NOC which he claims he is entitled to and for not paying the arrears. NB also claims *pendente lite* and future interest at the rate of 24% per annum on the said amounts. Clearly, a contest to the said claims would involve the question whether the said amounts are payable in terms of the MOCA. Also, whether OSPL has breached the terms of the MOCA and if so, whether NB has suffered any damages on such account which he is entitled to recover. It is apparent from the above that the disputes would inevitably involve the question whether OSPL is obliged to pay the amounts as claimed in terms of the MOCA. This would involve the

question as to the applicability of any of the terms of the MOCA which NB claims has been breached by OSPL. The dispute whether OSPL is obliged to pay the amount, as claimed in terms of the Terms and Conditions, would also involve the question as to ascertaining the rights and obligations of the parties under the MOCA. This too, would involve the question as to construction and interpretation of the said agreement.

35. It is also relevant to note that in the first instance it is not necessary for this Court to speculate as to the nature of the disputes and whether the same would fall within the scope of the arbitration agreement in the first instance. Once a Court has come to the, *prima facie* conclusion that an arbitration agreement exists between the parties, the question whether the disputes involved are arbitrable under the said agreement is required to be examined by the Arbitral Tribunal in the first instance.

36. In ***Vidya Drolia & Ors. v. Durga Trading Corporation: (2021) 2 SCC 1***, the Supreme Court had explained that the scope of examination at the pre-referral stage – including under section 8 of the A&C Act – is a prima facie examination as to the existence of the arbitration agreement and/or arbitrable disputes. It is relevant to refer to the following extract from the said decision.

> "134**.** Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and

> pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in *Shin-Etsu Chemical Co. Ltd.* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in *Vimal Kishor Shah* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement."

37. It is only in cases where there is no doubt that disputes are not arbitrable, that the Courts would refrain from referring the parties to arbitration. In ***BSNL v. Nortel Networks (India) (P) Ltd: (2021) 5 SCC 738***, the Supreme Court observed as under:

> "47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

38. We are unable to accept that it is beyond the pale of any controversy that the disputes that are involved in the suit would fall outside the scope of the arbitration agreement.

39. In view of the above, the parties are referred to arbitration and suit filed by NB before the learned Commercial Court, being CS(COMM) No.288/2020, is terminated. It is clarified that all rights and contentions of the parties including the question as to the arbitrability of the disputes are reserved.

40. The appeals are disposed of in the aforesaid terms. Pending applications are also disposed of.

**VIBHU BAKHRU, J**

**RAVINDER DUDEJA, J**

**APRIL 23, 2024**
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