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

Present :-

The Hon'ble Justice Moushumi Bhattacharya

AP 181 of 2023

with

AP 182 of 2023

Kobelco Construction Equipment India Private Limited

vs.

Lara Mining & Anr.

For the Petitioner	:	Mr. Swatatrup Banerjee, Adv. Mr. Sariful Haque, Adv. Mr. Hareram Singh, Adv. Ms. Shilpa Das, Adv.
For the Respondents	:	Mr. Anirban Ray, Adv. Mr. Varun Kothari, Adv. Ms. Anshumala Bansal, Adv.
Last Heard on	:	07.08.2023
Delivered on	:	11.08.2023

Moushumi Bhattacharya, J.

1. The Arbitration Petitions have been filed under section 9 of The Arbitration and Conciliation Act, 1996 for interim measures of protection. The facts are identical in both the matters and learned counsel appearing for the parties have relied on the same propositions of law. Hence both the Arbitration Petitions are being disposed of by this judgment.

2. The petitioner seeks an injunction on the respondent no 1 from dealing with or disposing of the assets under a Master Facility Agreement dated 19th January, 2020 and a Settlement Agreement dated 17th July, 2021. Prayer (i) of the application does not give the date of the Master Facility Agreement.

3. Learned counsel appearing for the petitioner submits that the respondent no. 1 is bound by the Master Facility Agreement dated 19th January, 2020 executed between SREI Equipment Finance Limited and the respondent no. 1 with regard to the financial assistance given by SREI to the respondent no. 1 of Rs. 6,72,60,000/-. Counsel submits that the respondent no. 1 paid 14 instalments out of 34 instalments under the agreement and hypothecated assets for the loan. The Master Facility Agreement was thereafter assigned by SREI to the petitioner in satisfaction of SREI's dues of Rs. 70,97,70,999/- to the petitioner. The assignment was made in the form of a "Settlement Agreement" executed between SREI and the petitioner on 17th July, 2021.

4. Learned counsel appearing for the respondent takes a point of maintainability of the application on the ground that the respondent no. 1 is not a party to the Settlement Agreement between the petitioner and SREI and that the petitioner cannot hence seek to invoke both the arbitration clauses contained in the Master Facility Agreement and the Settlement Agreement. Counsel submits that there is no privity of contract between the petitioner and the respondent no. 1 and thus there cannot be a composite reference. Counsel further submits that the petitioner has only been given the collection rights in respect of the receivables and disputes that the Master Facility Agreement had not been assigned in favour of the petitioner. It is further argued that the arbitration clause has to be specifically incorporated which has not been done in the present case. Counsel submits that a general reference to the Master Facility Agreement is not sufficient to incorporate the arbitration clause under section 7(5) of the 1996 Act.

5. Learned counsel for the petitioner relies on the definitions of "receivable", "security", "security documents" and "underlying agreement" of the Settlement Agreement to urge that the assignment was done under clause 9.7 of the Master Facility Agreement whereby SREI had the right at its discretion to transfer its rights, benefits and obligations under the Agreement to any person without notice to the borrower (the respondent no. 1) and that SREI had in any event sent an intimation to the respondent no. 1 about the assignment by a letter dated 17th July, 2021. Counsel submits that as signatory to the Master Facility Agreement, the respondent no. 1 had agreed to the assignment and further that the respondent no. 1 had paid 3

installments to the petitioner after execution of the Settlement Agreement. Counsel relies on these payments as implied consent on the part of the respondent no. 1 to the assignment of the agreement.

6. Before the Court proceeds to decide on the issue of maintainability, the following facts appear to be undisputed. The respondent no. 1 had availed of a loan from SREI Equipment Financial Limited for purchase of certain equipment by way of a Master Facility Agreement dated 19th January, 2020. Thereafter, the petitioner executed a Settlement Agreement with SREI on 17th July, 2021. The respondent no. 1 is not a party to the Settlement Agreement. The petitioner and SREI entered into the Settlement Agreement for the purpose of assignment of dues of SREI to the petitioner.

7. Clause 9.11 of the Master Facility Agreement contains a dispute resolution clause which is to be settled by arbitration. Clause 5 of the Settlement Agreement provides for arbitration of disputes and differences arising out of that Agreement. The petitioner has sought to make a composite reference of the arbitration clauses in both the agreements and an injunction on the respondents on the basis of the arbitration agreement.

8. The issue which is required to be decided is whether there is any arbitration agreement between the petitioner and the respondent no. 1 on the basis of which the petitioner can claim interim relief against the respondents. If not, the second issue would be whether a composite reference can be made for two separate arbitration agreements.

There is admittedly not 1, but 2 arbitration agreements

9. The factual conspectus before the Court involves two agreements. The first is the Master Facility Agreement of 19th January, 2020 between SREI and the respondent no. 1 and the second is a Settlement Agreement between SREI and the petitioner dated 17th July, 2021. The common entity between these two agreements is SREI who is not a party to the present application. Both agreements have independent arbitration clauses. To put the arguments in perspective, the petitioner says that the two agreements are interlinked since the rights of SREI as the lender has flowed to the petitioner from the first to the second agreement. The petitioner in essence seeks to make out a case that SREI has assigned all rights to the petitioner from the first agreement where the petitioner is not a party and that the respondent no. 1 is bound by the second agreement where the respondent no. 1 is not a party.

10. Admittedly, the bridge between these two island-agreements is SREI who is "missing in action" in the present application.

11. Hence, there is no arbitration agreement between the petitioner and the respondent no. 1 which can form the basis of a section 9 application.

Can the petitioner make a composite reference?

12. The petitioner therefore seeks to make out a case for a composite reference on the strength of the two agreements being interlinked by reason of the petitioner stepping into the shoes of SREI in terms of the security and receivables forming the substance of the Master Facility Agreement executed between SREI and the respondent no. 1.

13. The fact of each of the parties before the Court being present in one of the two agreements (and absent from the other) makes it evident that there is no privity of contract between the petitioner and the respondent no. 1.

14. The statutory position under The Arbitration and Conciliation Act, 1996 does not support a fact-scenario as the present one where the petitioner seeks to make a reference in terms of an arbitration agreement where the entity intended to be bound by the reference is not a party to the arbitration agreement. This position was considered by the Supreme Court in *Duro Felguera, S.A. vs. Gangavaram Port Limited; (2017) 9 SCC 729* where it was held that there must be a specific incorporation of the arbitration clauses into the contract in a case involving several agreements between the parties. *Inox Wind Limited vs. Thermocables Limited; (2018) 2 SCC 519* referred to a decision of the High Court of Justice, Queen's Bench Division, Commercial Court in *Sea Trade Maritime Corpn. V. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. No. 2 (The Athena); 2006 EWHC 2530 (Comm)* which recognised the difference between the incorporation of an arbitration clause in a single contract case and a two-contract case. The Court explained that if the secondary document is between other parties or if only one of the parties to the contract in dispute is a party to an earlier contract to which a reference is made, then it would be a two-contract case. In such a case, a general reference to the earlier contract would not be sufficient to incorporate the arbitration clause.

The law with regard to incorporation of an arbitration clause by reference

15. Section 7(1) of the 1996 Act defines an "arbitration agreement" to mean 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 which may or may not be contractual in nature.

Section 7(2) clarifies that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Section 7(3) requires an arbitration agreement to be in writing while section 7(4) provides for the three circumstances where the requirement of section 7(3) would be satisfied, namely, that the arbitration agreement would be accepted as a written document.

Section 7(5), which is relevant for the present matter, lays down the statutory position with regard to incorporation of an arbitration clause by reference. Section 7(5) is set out below.

> *"Section 7(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. The legislative intent behind section 7(5) is aimed at ease of the arbitration process between parties who seek to be bound by an arbitration clause in another agreement but must act in terms of a later agreement which does not contain the arbitration clause. The 1996 Act recognises the problem and facilitates the transition. The arbitration clause is hence absent

from the "contract" referred to in section 7(5) while the "document" in section 7(5) contains the arbitration clause constituting the arbitration agreement between the parties. Section 7(5) intends to link the contract without the arbitration clause to the document containing the arbitration clause subject to the contract being in writing and the reference in the contract to the arbitration clause in the document makes the arbitration clause a part of the contract.

17. In other words, section 7(5) deals with a contract without an arbitration clause and the "document" with an arbitration clause. The idea is to incorporate the arbitration clause in the "document" to the "contract" by reference so that the arbitration clause is incorporated in the contract and becomes part thereof.

18. The above presumes that the reference to the contract is clear and reflects the intention of the parties to be bound by the arbitration clause which is to be incorporated into the contract. The incorporation of the arbitration clause into the contract (which does not contain the arbitration clause) would also have to be appropriate to the disputes under the contract to which the arbitration clause is incorporated and not result in repugnancy to the terms of the contract. Simply put, the incorporation must be harmonious and not lead to a conflict between the two agreements.

19. The consensus in the case-law on incorporation by reference is also that the incorporation must not be in general or vague terms; *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited; (2009) 7 SCC 696.*

20. Russell on Arbitration (23rd Edn.) explains section 6(2) of the (English) Arbitration Act, 1996 which corresponds to section 7(5) as essentially ascertaining the terms of a contract by reference to more than one document. The issue is of applying the usual numbers of construction in order to infer the intention of the parties. A dispute may arise where the principal document refers to standard form containing an arbitration agreement which may not be appropriate for the contract in which the party seeks to incorporate the arbitration clause. Russell concludes that if the arbitration agreement is incorporated from a standard form contract, a general reference to those forms is sufficient whereas in the case of a non-standard form contract, a specific reference to the arbitration agreement is necessary; *Sea Trade Maritime Corpn. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. No. 2; 2006 EWHC 2530*.

21. Since the present application has been made by the petitioner for interim relief, section 9(1) of the 1996 Act becomes relevant to complete the enquiry into the statutory position.

What does section 9(1) of the Act say?

22. Section 9(1) which confers the power to grant interim measures on a Court on an appropriate application, is available only to a "party". The section permits only a party to apply to a Court for a wide spectrum of interim measures primarily to preserve the subject-matter of the arbitration agreement before the award is enforced under section 36 of the Act.

23. On a meaningful reading of sections 7(5), 2(1)(h) and 9(1) of the Act, only a party to the arbitration agreement, which clause was originally contained in the arbitration agreement or incorporated into a second document, can exercise the right to interim measures. This is in view of the fact that section 9 pre-supposes an underlying arbitration agreement and a party to that "arbitration agreement" applying to the Court for interim reliefs.

24. It is also relevant that an application under section 9 which involves a party to an arbitration agreement is different from an application under section 11 of the 1996 Act. Section 11, particularly sub-sections (5) and (6) thereunder also envisages a party giving the right to the Supreme Court or High Court to appoint an Arbitrator/s on its behalf. However, the dispute as to which arbitration agreement would form the subject matter of the claim / counter-claim in the arbitration can also be adjudicated by the arbitral tribunal in that case. A section 9 Court, on the other hand, presumes that there is an underlying arbitration agreement between the party who approaches the Court for interim relief and the party against whom the interim relief is sought. Unlike a Court in a section 11 application, it would rarely be a business of a section 9 Court to go about ascertaining which arbitration agreement will have precedence over the other for the Court to grant interim measures of protection.

25. Therefore, the entire issue of incorporation of the arbitration clause from the Settlement Agreement dated 17th July, 2021 to the agreement/Master Facility Agreement of 19th January, 2020 (or vice versa)

assumes relevance since SREI which is the only common "party" to both the agreements is not before the Court for seeking any relief under the two agreements or otherwise.

26. In the present case, the presumptive link between the petitioner, the respondent no. 1 and the Arbitration Agreement between them has snapped by the mix-up of parties.

The facts of the case – is there an incorporation of the arbitration clause by reference?

27. Clause 9.7 of the Master facility Agreement dated 19th January, 2020 authorises the company (SREI) to transfer all or any of its rights, benefits or obligations under this Agreement to any person without notice or permission from the Borrower. The "Borrower" in the Agreement is the respondent no. 1. The petitioner relies on Clause 9.3 (The Assignment Clause) to urge that Clause 9.3 was sufficient notice to the respondent no. 1 that SREI would assign its rights in favour of the petitioner with regard to the SREI's rights in the Master Facility Agreement. The petitioner's entire case is based on the assignment and consequently the respondent no. 1 being bound by the assignment of SREI's rights in favour of the petitioner which would also include the arbitration clause.

28. The difficulty in that logic is that this is not a case of the arbitration clause being present in one of the Agreements and absent in the other. Each of the Agreements has its own arbitration clause with an express intention to restrict the arbitration clause only to that Agreement. For instance, clause 9.11 of the first Master Facility Agreement makes it clear that the

disputes and differences between the parties to disagreements and interpretation of "the Agreement" shall be settled by arbitration. Similarly, the arbitration clause in the second / Settlement Agreement states that disputes, differences, construction, duties or liabilities of the parties arising out of or consequent to or in connection with "this agreement" shall be resolved by mutual discussions and thereafter arbitration.

29. Therefore, unlike most of the decisions cited where one or the other of the agreements did not contain the arbitration clause, the present case involves two arbitration clauses and the Court is being asked to hold that the arbitration clause of the first Agreement should be treated as being incorporated into the second Agreement by reference. The only guiding factor in a situation such as this is where the parties have clearly evinced their intention in the agreements to say that the second Agreement should incorporate the arbitration clause of the first Agreement with the petitioner and the respondent no. 1 being on the same page on this point.

30. This would clearly be a matter of a harmonious construction of the two documents. The only indication that the respondent no. 1 was intended to be brought within the purview of the first / Master Facility Agreement is Schedule I to the Settlement Agreement (between the petitioner and SREI) which contains the name of the respondent no. 1 in the list of debtors. The other places clause 2 of the Settlement Agreement which provides for notice for payment on the debtors and giving the petitioner the right to the Receivables and payments from debtors. The petitioner has also been given the collection rights for all future Receivables from the debtors. As stated

above, the respondent no. 1 features in the list of debtors in the Schedule I to the Settlement Agreement.

31. The other significant facts which is relevant to the construction of the documents is a notice given by SREI to the respondent no. 1 on 17.7.2021 putting the latter on notice that the petitioner would now have the right to the Receivables which was part of the Master Facility Agreement. The respondent no. 1 acted in terms of this letter and paid three installments to the petitioner. Although, the petitioner heavily relies on these payments, clause 2 of the Settlement Agreement indicates that these payments were made by the respondent no. 1 on a "notice for payments" with regard to the future receivables which were assigned by SREI to Kobelco. The form with regard to the "notice for payments" matches word-for-word with the Notice issued by SREI to the respondent no. 1 on 17th July, 2021. Clause 2.2 of the Settlement Agreement clearly mentions that the petitioner / Kobelco shall be entitled to receive the receivables from the debtors of SREI on and from the date of service of the notice of payments. The definition of "notice for payments" in clause 1.1 of the Settlement Agreement also makes it clear that the Notice would be issued by SREI to the debtors from time to time in accordance with the Settlement Agreement specifying details of the Receivables payable by the debtors.

32. Hence, a careful reading of the Settlement Agreement executed between the petitioner and SREI on 17th July, 2021 makes it clear that SREI gave the petitioner only the collection rights with respect to the receivables. The Settlement Agreement does not provide for assignment of the Master

Facility Agreement of 19th January, 2020 or incorporation of the arbitration clause in the Master Facility Agreement to the Settlement Agreement by reference or otherwise or at all. To repeat, there is no special reference indicating a mutual intention on the part of the petitioner, SREI and the respondent no. 1 to incorporate the arbitration clause from the Master Facility Agreement to the Settlement Agreement. A general reference to the Master Facility Agreement is not sufficient to incorporate the arbitration clause.

33. To make matters worse or rather more complicated, the petitioner has sought for an injunction on the respondents under both the Master Facility Agreement as well as the Settlement Agreement. There is no clear indication in the pleadings or in the submissions made as to which direction the incorporation by reference will travel, i.e., whether from the Master Facility Agreement → Settlement Agreement or the other way around. The non-commonality of parties makes such a composite reference impossible in the eye of law.

34. The petitioner's case for interim relief must therefore fail in the absence of a definitive contractual relationship between the petitioner and the respondent no. 1 containing an arbitration clause and further the absence of an unambiguous intention expressed by the petitioner and the respondent no. 1 to incorporate the arbitration clause from one of the agreements to the other. In the absence of either of the aforesaid, this Court is unable to find a basis for grant of interim relief.

35. The case law on the subject of incorporation by reference is a matter which is entirely fact – based as also the construction of the Agreements to assess the intention of the parties. In *Chloro Controls India Private Limited v Severn Trent Water Purification Inc. ; (2013) 1 SCC 641*, the Supreme Court came to a finding that the transaction was a composite transaction between the parties where even a non-signatory could be subjected to arbitration but in exceptional cases and exceptional cases would be where the performance of the mother agreement may not be feasible without the performance of the supplementary and ancillary agreements for achieving a common object. Similarly, in *Ameet Lalchand Shah vs Rishabh Enterprises; (2018) 15 SCC 678*, the Supreme Court found that although there were several agreements involving different parties, all the agreements related to a single commercial project. The decision of the Co-ordinate Bench in *Tantia Constructions Limited vs. Mather and Platt Pumps Limited in AP No. 72 of 2023*, the Court found that the agreements in question and the components of the dispute were intrinsically linked with one another. Thus, whether the rights of the parties would flow from one agreement to the other and the arbitration clause would likewise be incorporated from one to the other agreement is entirely a matter of construction of what the parties intended as expressed in the agreements in question.

36. The reasons stated in the above discussion persuades this Court to reject the prayer for interim relief. AP 181 of 2023 and AP 182 of 2023 are accordingly dismissed without any order as to costs.

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

(**Moushumi Bhattacharya, J.**)