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

% Judgment reserved on : 31.01.2024
Judgment pronounced on: 27.02.2024

\+ **FAO (COMM) 261/2023 & CM APPL. 66526/2023**

M/S MAC ASSOCIATES ..... Appellant
Through: Mr Vikas Tomar and Mr Nimish Mishra, Advocates.

versus

PARVINDER SINGH ..... Respondent
Through: Mr Sunil Kumar, Mr Ankit Dixit, Mr Surender Kumar and Mr Hansraj, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

AMIT BANSAL, J.:

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') by the appellant challenging the impugned order dated 7th November, 2023 passed by the District Judge (Commercial Court)-03, South, Saket Delhi (hereinafter referred to as 'Commercial Court'), dismissing the application filed by the appellant/defendant under Section 8 of the Act in a suit for recovery filed by the respondent/plaintiff.

2. Briefly, the facts relevant for deciding the present appeal are as follows:

2.1 The Delhi Metro Rail Corporation (hereinafter referred to as 'DMRC') floated a tender for supply, re-location, installation, testing, commissioning and handing over of electrical, firefighting, hot water solar system works and relocation of Chimney and External Fire Ring Main Works (hereinafter referred to as 'electrical work') to be carried out at Nurses and Intern's Hostel at ILBS situated at D-1, Vasant Kunj, New Delhi.

2.2 The DMRC awarded the contract for the aforesaid electrical work to the appellant.

2.3 The respondent approached the appellant showing his interest in doing the said electrical work and submitted the quotation. Thereafter, the appellant allotted the said work to the respondent and a work order bearing no. MAC:DMRC-WO:2010-11:2071 dated 6th July, 2010 (hereinafter referred to as 'work order') was signed and executed between the parties. The said work order constitutes an agreement between the appellant and the respondent.

2.4 In terms of the aforesaid work order, the total cost of the work was agreed at Rs. 2,37,30,568/- after the rebate @ 13.5% and the said work was to be completed within 12 months.

3. It is the case of the appellant that the respondent failed to complete the aforesaid work on time.

4. On the other hand, the respondent contends that the work got delayed as the appellant did not perform its obligations on time. The respondent further states that due to the conduct of the appellant, the respondent also suffered losses. On 30th November, 2014, the respondent completed the

work to the satisfaction of the appellant and the DMRC. However, the appellant failed to clear the bills of the respondent, which led to filing of the suit of recovery for a sum of Rs. 53,01,812/-.

5. The appellant appeared in the said suit and filed an application under Section 8 of the Act to refer the dispute between the parties to arbitration. The respondent contested the said application by filing a reply thereto. The said application was dismissed vide the impugned order holding that there is no valid and binding arbitration agreement between the parties within the meaning of Section 7 of the Act and therefore, Section 8 of the Act is not applicable to the facts of the present case.

6. Impugning the aforesaid order, the present appeal has been filed by the appellant.

7. Counsel for the appellant submits that in terms of Clause 9 of the work order, the various clauses in the agreement between the appellant and the DMRC were incorporated in the contract between the appellant and the respondent. It is further submitted that the General Conditions of Contract (hereinafter referred to as 'GCC') issued by DMRC contained an arbitration clause in Clause 85, which would also apply to the agreement between the appellant and the respondent.

8. In support of his submissions, counsel for the appellant has placed reliance on the judgments of the Supreme Court in ***Inox Wind Limited* v. *Thermocables Limited***, (2018) 2 SCC 519 and ***Giriraj Garg* v. *Coal India Ltd & Ors.***, (2019) 2 SCC 192.

9. It is to be noted that both the aforesaid judgments were cited by the appellant before the Commercial Court, but were distinguished by the Commercial Court.

10. *Per contra*, counsel for the respondent submits that the respondent was not a party to the contract between the appellant and DMRC and therefore, cannot be subjected to the terms of the said contract. He defends the impugned order passed by the Commercial Court.

11. We have heard the learned counsels for the parties and perused the material placed on record.

12. At the outset, a reference may be made to Clause 9 of the aforesaid work order issued by the appellant to the respondent:

> "*9. The Contract is completely on back to back basis only. The specific and main points/clauses only has been mentioned in this order for your convenience and any omission on our part shall not absolve you from your responsibility of going through the various clauses in the contract agreement with DMRC including specifications, General and special conditions of the contract, as this is a back to back basis contract.*"

13. To appreciate the rival contentions, a reference may also be made to Section 7(5) of the Act that provides for incorporation of an arbitration clause by reference:

> "***Section 7. Arbitration agreement.***
> ....
> *(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.***"

14. The scope and ambit of Section 7(5) of the Act has been the subject matter of consideration before the Supreme Court on various occasions. In ***M.R. Engineers & Contractors (P) Ltd.* v. *Som Datt Builders Ltd.***, (2009) 7

SCC 696, the Supreme Court made a distinction between a '*mere reference to another document*' and '*incorporation of the terms and conditions of the said document in the contract*'. It was held that only when there is a specific incorporation of the terms and conditions of a document in the contract, the terms of the said document including the arbitration clause will apply to the contract. If there is only a general reference to a document in a contract, the document will not get incorporated into the contract in its entirety. The relevant observations of the Supreme Court in ***M.R. Engineers*** (supra) are set out below:

> "*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."*
>
> *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.

19. ***Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable****.*"

15. The findings in ***MR Engineers*** (supra) are summarized in paragraph 24, which is set out below:

"24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(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****.*

(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.

(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."

16. From a reading of the aforesaid paragraphs from ***MR Engineers*** (supra), the legal position that emerges is that for an arbitration clause existing in another document to be incorporated by reference, there has to be a clear intention of the parties to incorporate the arbitration clause in the contract. There has to be a specific reference to incorporate the arbitration clause in a contract. The only exception to the aforesaid position as provided in ***MR Engineers*** (supra) is where the contract provides that the standard form of terms and conditions of an independent trade or professional institution shall apply to the contract. In such contracts, the terms including the arbitration clause are deemed to be incorporated by a mere reference. It is also to be seen that the arbitration clause contained in another document is applicable to the dispute between the parties to the contract.

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

18. It was held in ***Inox Wind*** (supra) that in single-contract cases, a general reference is enough for incorporation of an arbitration clause from a standard form of the contract. It was further observed that no distinction can be drawn between the standard forms by recognized trade associations or professional institutions on one hand and the standard terms of one party on the other. Accordingly, the ratio of the judgment in ***M.R. Engineers*** (supra) was modified to the limited extent that the general reference to a consensual standard form of a contract of one party will be sufficient for incorporation of an arbitration clause. The relevant observations in ***Inox Wind*** (supra) are set out below:

> *"17. This Court in M.R. Engineers case [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] , which is discussed in detail supra, held the rule to be that an arbitration clause in an earlier contract cannot be incorporated by a general reference. The exception to the rule is a reference to a standard*

form of contract by a trade association or a professional institution in which case a general reference would be sufficient for incorporation of an arbitration clause. Reliance was placed by this Court on Russell on Arbitration, 23rd Edn. (2007). The development of law regarding incorporation after the judgment in M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] requires careful consideration. It has been held in Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] that a standard form of one party is also recognised as a "single contract" case. In the said case, it was also held that in single-contract cases general reference is enough for incorporation of an arbitration clause from a standard form of contract. There is no distinction that is drawn between standard forms by recognised trade associations or professional institutions on one hand and standard terms of one party on the other. Russell on Arbitration, 24th Edn. (2015) also takes note of Habas case [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] .

18. We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. *In M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration, 24th Edn. (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in M.R. Engineers case [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] .* ***We are in agreement with the judgment in M.R. Engineers case [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] with a modification that a general reference to a standard form***

> ***of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.***"

19. Applying the aforesaid principles, it was held in ***Inox*** (supra) that the standard terms and conditions attached to the purchase order constituted a 'single contract' and therefore, the same stood incorporated by way of reference, including the arbitration clause contained therein.

20. This issue came up again before the Supreme Court in ***Giriraj Garg*** (supra), once again relying upon the judgments in ***Habbas Sinai*** (supra) and ***Sea Trade*** (supra) and ***Russel on Arbitration***, ***23rd Edition (2007)***, the Supreme Court noted the distinction between a 'single-contract case' and a 'two-contract case'. The relevant observations are set out below:

> *"5.6. The question of incorporation of an arbitration clause from an earlier contract by general reference into a later contract, came up for consideration before the Queen's Bench Division in Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] . In this case, the Court followed the judgment in Sea Trade Maritime Corpn. [Sea Trade Maritime Corpn. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. (No. 2) (The 'Athena'), 2007 Bus LR D 5 : 2006 EWHC 2530 (Comm)] , and held that a general reference to a contract containing an arbitration clause is sufficient for incorporation from a standard form contract. The Court recognised the following broad categories in which the parties attempt to incorporate an arbitration clause: (Sometal SAL case [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] , Bus LR p. 886, para 13)*
>
> > *"(1) A and B make a contract in which they incorporate standard terms. These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.*
> >
> > *(2) A and B make a contract incorporating terms previously*

agreed between A and B in another contract or contracts to which they were both parties.

(3) ***A and B make a contract incorporating terms agreed between A (or B) and C. Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub-contracts incorporating the terms of a main contract or sub-sub-contracts incorporating the terms of a sub-contract.***

(4) A and B make a contract incorporating terms agreed between C and D. Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category."

5.7. In Habas [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] a distinction was made between a "single contract case" and a "two contract case". ***A "single contract case" is one where the arbitration clause is contained in a standard form contract to which there is a general reference in the contract between the parties. On the other hand, where the arbitration clause is contained in an earlier contract/some other contract, and a reference is made to incorporate it in the contract between the parties, it is a "two contract case". The Court held that incorporation by general reference in a single contract case is valid. However, in a "two contract case", where reference is made to an arbitration clause in a separate contract, the reference must be specific to the arbitration clause.*** *The judgment in Habas [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)] has recently been affirmed by the Queen's Bench Division in SEA 2011 Inc. v. ICT Ltd. [SEA 2011 Inc. v. ICT Ltd., 2018 EWHC 520 (Comm)]"*

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

22. In ***Giriraj Garg*** (supra), the arbitration clause (Clause 11.2) was contained in a standard form document, i.e, the 2007 scheme, to which there was a reference in the individual sale orders. Since the parties to the main contract were same as in the individual sale orders, the Supreme Court held that this would be a 'single-contract case'. Therefore, the arbitration clause contained in the 2007 scheme would stand incorporated in the individual sale orders.

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

24. In terms of the judgment in ***MR Engineers*** (supra), in our considered view, the aforesaid arbitration clause cannot be incorporated in the work order as Clause 9 of the work order does not reflect a clear intention of the parties to incorporate the arbitration clause contained in the GCC into the contract between the appellant and the respondent. Clause 9 states that the present contract/work order between the appellant and the respondent is on a

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

25. At this stage, a reference may be made to Clause 85 of the GCC, which contained the arbitration clause, the relevant portions of the said clause are set out below:

> *"**85.0 SETTLEMENT OF DISPUTES AND ARBITRATION***
>
> *85.1* ***Dispute to be referred to and settled by Engineer at the first place***
>
> ***Should any dispute or difference of any kind whatsoever arise between the Employer and the Contractor, touching, in connection with, or arising out of the Contract, or subject matter thereof, or the execution of Works, whether, during the progress of Works or after their completion and whether before or after termination, abandonment or breach of Contract, it should, in the first place, subject to the provision under Sub-clause 80.4 be referred to and settled by the Engineer, who shall, within a period of sixty days after being requested in writing by either party to do so, give written notice of his decision to the Employer and the Contractor.*** *The Engineer while considering the matters of dispute referred to him, shall be competent to call for any records, vouchers, information and enforce the attendance of the parties either in person or through authorised representatives, to sort out or clarify any issue, resolve the differences and to assist him to decide the matters referred to him. Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Employer and by the Contractor, who shall proceed with the execution of Works with all due diligence irrespective of*

whether any of the parties goes in or desires to go in for arbitration. ***If the Engineer has given written notice of his decision to the Employer and the Contractor and no intimation of reference of any claim to arbitration has been sent to him by either the Employer or the Contractor within a period of sixty days from receipt of such notice, the said decision of the Engineer shall remain final and binding upon the Employer and the Contractor and the same shall be deemed to have been accepted by them. The Employer or the Contractor shall not seek any arbitration thereafter.***

85.2 ***Referring of dispute for arbitration***

If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of sixty days after being requested as aforesaid or if either the Employer or the Contractor be dissatisfied with any such decision of the Engineer, only then shall the matter in dispute be referred to arbitration as herein provided.

85.3 ***Dispute due for arbitration***

Disputes or differences shall be due for arbitration only if all the conditions in Sub-clauses 85.1 and 85.2 are fulfilled."

26. A perusal of the aforesaid arbitration clause reveals that a dispute arising between the Employer and the Contractor would in the first instance, be referred to and settled by the 'Engineer'. In terms of Clause 1(b) of the GCC, 'Engineer' means a person appointed from time to time by the DMRC for the purposes of the contract with the Contractor (appellant). Only in the event that the Engineer fails to give his decision within a period of 60 days or if either the Employer or the Contractor are dissatisfied with the decision of the Engineer, the matter would be referred to arbitration.

27. Clause 85.3 specifically provides that the disputes shall be referred to arbitration only upon fulfilment of the conditions stipulated in sub-clauses 85.1 and 85.2.

28. In our considered view, the aforesaid arbitration clause was inherently inapplicable to the contract between the appellant and the respondent. The dispute between the appellant and the respondent was in relation to a sub-contract between the appellant and the respondent. Clause 85 of the contract between the appellant and DMRC envisaged a dispute arising between the DMRC and the appellant and therefore, there is a reference to 'Engineer', who is an officer of the DMRC in terms of Clause 1(b) of the GCC. In fact, it is the case of the respondent in the plaint that he approached DMRC in the last week of December, 2016 but they refused to entertain the respondent, stating that he was the sub-contractor of the appellant.

29. In view of the aforesaid discussion, we are of the view that the arbitration clause contained in the GCC between the appellant and DMRC cannot be incorporated in the work order. Accordingly, the application filed on behalf of the appellant under Section 8 of the Act seeking a reference to arbitration is misconceived.

30. There is no infirmity in the impugned order passed by the Commercial Court.

31. The appeal is dismissed.

AMIT BANSAL, J.
(JUDGE)

RAJIV SHAKDHER, J.
(JUDGE)

FEBRUARY 27, 2024
at