

NBCC (India) Limited

v.

Zillion Infraprojects Pvt. Ltd.

(Civil Appeal Nos. 4417-4418 of 2024)

19 March 2024

[B.R. Gavai* and Sandeep Mehta, JJ.]

Issue for Consideration

When there is a general reference in the second contract to the terms and conditions of the first contract, whether the arbitration clause in the first contract would *ipso facto* be applicable to the second contract.

Headnotes

Arbitration & Conciliation Act, 1996 – The appellant issued an invitation for tender – Respondent submitted its techno bid- vide L.O.I. appellant awarded the contract to Respondent – Respondent approached High Court under Sec. 11(6) – High Court appointed sole arbitrator – Order of the High Court set aside

Held: General reference will not lead to incorporation of the arbitration clause – Reference to arbitration clause in another contract ought to be specific. [Paras 3 and 21-23]

Arbitration – When will an arbitration clause from a second contract be incorporated in the first contract

Held: Conscious acceptance of arbitration clause – Reference and incorporation are different – Reference does not *ipso fact* lead to incorporation. [Paras 12-13 and 21-23]

Arbitration & Conciliation Act, 1996 – Sec. 7(5) – Arbitration clause will not be incorporated by a general reference – Conscious Acceptance – In absence of specific reference, only execution/performance terms will apply – If no specific reference, arbitration clause will not apply – Reference not incorporation in the present case- General reference does not lead to incorporation.

The Appellant had issued an invitation for tender for “Construction of Weir with Allied Structures across river Damodar at DVC, CTPS, Chandrapura, Dist – Bokaro, Jharkhand in response whereeto, the

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Respondent submitted its Techno Commercial Bid. The contract for the construction of weir was awarded to the Respondent whereafter due to certain disputes, the Respondent issued a notice in terms of Clause 3.34 of Section III Volume II of the Tender Documents invoking arbitration and further seeking consent of the appellant for the appointment of a former Judge of a High Court, as Sole Arbitrator. The Respondent, while invoking the arbitration, had taken recourse to Clause 2 of the Letter of Intent (L.O.I.) issued by the Appellant while awarding the contract. Clause 2 stated thus: "All terms and conditions as contained in the tender issued by DVC to NBCC shall apply mutatis mutandis except where these have been expressly modified by NBCC." Since the Appellant did not respond to the notice, the Respondent approached the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. High Court allowed the petition preferred by the Respondent.

Held: A perusal of sub-section (5) of Section 7 of the Arbitration Act itself would reveal that before an arbitration clause could be read as a part of the contract, there must be a conscious acceptance of the arbitration clause from another document by the parties – It is thus clear that a reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document into the contract. [Paras 12 and 13]

While setting aside the order of the High Court, the Supreme Court held that a general reference to the terms and conditions of another contract would not have the effect of incorporating the arbitration clause – It is pertinent to note that clause 7.0 of the L.O.I. specifically uses the word "Only" before the words "be through civil courts having jurisdiction of Delhi alone" – When there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not *ipso facto* be applicable to the second contract unless there is specific mention/reference thereto – The present case is not a case of 'incorporation' but a case of 'reference' – As such, a general reference would not have the effect of incorporating the arbitration clause – Clause 7.0 of the L.O.I, which is also a part of the agreement, makes it amply clear that the redressal of the dispute between NBCC and respondent has to be only through civil courts having jurisdiction of Delhi alone – Delhi High Court has erred in allowing the application of the respondent. [Paras 21 to 24]

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Case Law Cited

Inox Wind Limited v. Thermocables Limited [2018] 1 SCR 86 : (2018) 2 SCC 519- Distinguished.

M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited (2009) 7 SCC 696- Relied on.

Duro Felguera, S.A. v. Gangavaram Port Limited [2017] 10 SCR 285 : (2017) 9 SCC 729; *Elite Engineering and Construction (Hyderabad) Private Limited represented by its Managing Director v. Techtrans Construction India Private Limited represented by its Managing Director* [2018] 4 SCR 585 : (2018) 4 SCC 281 – Referred to.

List of Acts

The Arbitration & Conciliation Act, 1996.

List of Keywords

Arbitration, Arbitration Agreement, *lis*, Letter of Intent (L.O.I), Invitation for tender, *Mutatis Mutandis*, *Res Integra*, *Ipso Facto*, Incorporation, Reference.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.4417-4418 of 2024

From the Judgment and Order dated 12.03.2021 and 09.04.2021 in ARBP No.44 of 2021 of the High Court of Delhi at New Delhi

Appearances for Parties

Gopal Shankarnarayan, Sr. Adv., Debarshi Bhadra, Ms. Jhanvi Dubey, Sunil Mund, Kiran Kumar Patra, Advs. for the Appellant.

Sumit Kumar, Ms. Kumari Supriya, Bharath Kumar, Ms. Sakshi Sharma, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Leave granted.
2. The present appeals challenge the interim order dated 12th March 2021 and final judgment & order dated 9th April 2021, passed by the

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learned Single Judge of the High Court of Delhi (hereinafter, “High Court”), in Arbitration Petition (Arb. P.) No. 44 of 2021, whereby the High Court *allowed* the application under Section 11(6) of the Arbitration & Conciliation Act 1996 (hereinafter referred to as, “the Arbitration Act”) and appointed the Sole Arbitrator to adjudicate the dispute between the parties to the present *lis*, arising from the Letter of Intent dated 4th December 2006.

3. Facts, *in brief*, giving rise to the present appeals are as follows:

- 3.1** The appellant, NBCC (India) Limited (Formerly known as National Buildings Construction Corporation Ltd.), is a Public Limited Company and Government of India undertaking, engaged in construction of power plants and other infrastructure projects on EPC and/or PMC basis.
- 3.2** The respondent, M/s Zillion Infraprojects Pvt. Ltd. (Formerly known as Durha Constructions Pvt. Ltd.), is a Private Limited Company, engaged in the construction and infrastructure sector.
- 3.3** The appellant issued an invitation for tender, being NIT No. 01-WEIR/06 dated 3rd November 2006, for “Construction of Weir with Allied Structures across river Damodar at DVC, CTPS, Chandrapura, Dist – Bokaro, Jharkhand – Package “A” (hereinafter referred to as, “Construction of the Weir”), containing *inter-alia*, the General Conditions of Contract, Special Conditions of Contract, Bill of Quantity, etc. (collectively referred to as, “Tender Documents”).
- 3.4** In response to the aforementioned tender, the Respondent submitted its Techno Commercial Bid on 16th November 2006.
- 3.5** On fulfilment of the tender criteria, vide Letter of Intent No. AGM/RAN/CTPS-AWARD/06/1660 dated 4th December 2006, the appellant awarded the contract for Construction of the Weir to the respondent for a total value of Rs. 19,08,46,612/-.
- 3.6** With the passage of time, certain disputes arose between the parties to the present *lis* & as a result, the respondent issued a notice dated 6th March 2020, in terms of Clause 3.34 of Section III Volume II of the Tender Documents (GCC),

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thereby invoking arbitration and further seeking consent of the appellant for the appointment of a former Judge of a High Court, as Sole Arbitrator.

- 3.7** The appellant did not respond to the aforementioned notice invoking arbitration, so the respondent filed an application at the High Court under Section 11(6) of the Arbitration Act.
- 3.8** Vide interim order dated 12th March 2021, the High Court *allowed* the Arbitration Petition and proposed the appointment of a former Judge of the High Court, as the Sole Arbitrator, to adjudicate the dispute between the parties.
- 3.9** Vide final judgment & order dated 9th April 2021, the High Court confirmed the proposed appointment of the former Judge of the Delhi High Court, as the Sole Arbitrator.
- 3.10** Aggrieved by the orders of the learned single judge of the High Court, the appellant filed the present appeals thereby challenging both the interim order and the final judgement & order.
- 3.11** This Court vide order dated 23rd July, 2021, issued notice and stay of further proceedings of the arbitration was granted.
- 4.** We have heard Shri Gopal Sankaranarayanan, learned Senior Counsel appearing on behalf of the appellant & Shri Sumit Kumar, learned counsel appearing on behalf of the respondent.
- 5.** Shri Gopal Sankaranarayanan, learned Senior Counsel appearing for the appellant submits that the High Court has grossly erred in invoking its power under Section 11(6) of the Arbitration Act. It is submitted that Clause 2.0 of the Letter of Intent dated 4th December 2006 (“L.O.I.” for short) though states that all terms and conditions as contained in the tender issued by the Damodar Valley Corporation (“DVC” for short) to the NBCC shall apply *mutatis mutandis*, it also makes it clear that where the terms and conditions have been expressly modified by the NBCC, the same would not be applicable. It is submitted that Clause 1.0 of the L.O.I. specifically states that various conditions, i.e., contractual, financial and technical mentioned in the documents contained therein shall be binding on the respondent for execution of works and they shall form part of the agreement. Clause 10.0 also states that the L.O.I. shall also form a part of the agreement.

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It is submitted that the intention is amply clear from Clause 7.0 of the L.O.I., which states that the redressal of dispute between the NBCC and the respondent shall only be through civil courts having jurisdiction of Delhi alone. It further states that the laws applicable to the contract between the parties shall be the laws enforceable in India. It is submitted that merely on account of reference in the L.O.I. to the terms and conditions as contained in the tender issued by the DVC to the NBCC, Clause 3.34 of the Additional Terms & Conditions of Contract would not apply in view of specific modification as stated in Clause 2.0 of the L.O.I.

6. Learned Senior Counsel submits that a mere reference to the terms and conditions without there being an incorporation in the L.O.I. would not make the *lis* between the parties amenable to the arbitration proceedings. Relying on the judgment of this Court in the case of ***M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited***¹, he submits that unless the L.O.I. specifically provides for incorporation of the arbitration clause, a reference to the arbitration proceedings would not be permitted in view of the provisions of sub-section (5) of Section 7 of the Arbitration Act.
7. Shri Sumit Kumar, learned counsel appearing for the respondent, on the contrary, submits that there is a specific reference in Clause 2.0 of the L.O.I. to the terms and conditions in the tender issued by the DVC to the NBCC. He submits that the only modification is that under Clause 3.34 of the Additional Terms & Conditions of Contract, the jurisdiction is vested with the Court in the City of Kolkata only, whereas in the L.O.I. the jurisdiction would be vested in the civil courts having jurisdiction of Delhi alone. It is submitted that the learned single judge of the Delhi High Court has rightly considered this aspect and as such, no interference would be warranted in the impugned order.
8. Sub-section (5) of Section 7 of the Arbitration Act reads thus:

“7. Arbitration Agreement.-1).....

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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.”

9. The issue is no more *res integra*. The provisions of sub-section (5) of Section 7 of the Arbitration Act have been considered by this Court in the case of ***M.R. Engineers and Contractors Private Limited*** (supra). After considering the relevant passages from *Russell on Arbitration* and various English judgments, this Court held thus:

“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

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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.”

10. It could thus be seen that this Court has held that 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. It has been held that 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. It has further been held that 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

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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.

11. This Court further held that where the contract provides that the standard form of terms and conditions of an independent trade or professional institution 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. It has been held that 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. It has also been held that 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, the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.
12. A perusal of sub-section (5) of Section 7 of the Arbitration Act itself would reveal that it provides for a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties.
13. It is thus clear that a reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document into the contract.
14. The law laid down in the case of ***M.R. Engineers and Contractors Private Limited*** (supra) has been followed by this Court in the cases of [Duro Felguera, S.A. vs Gangavaram Port Limited](#)² and [Elite Engineering and Construction \(Hyderabad\) Private Limited represented by its Managing Director vs Techtrans Construction India Private Limited represented by its Managing Director](#)³.
15. No doubt that this Court in the case of [Inox Wind Limited vs Thermocables Limited](#)⁴ has distinguished the law laid down in the

2 [\[2017\] 10 SCR 285](#) : (2017) 9 SCC 729

3 [\[2018\] 4 SCR 585](#) : (2018) 4 SCC 281

4 [\[2018\] 1 SCR 86](#) : (2018) 2 SCC 519

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case of ***M.R. Engineers and Contractors Private Limited*** (supra). In the said case (i.e. ***Inox Wind Limited***), this Court has held 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. Though this Court in the case of ***Inox Wind Limited*** (supra) agrees with the judgment in the case of ***M.R. Engineers and Contractors Private Limited*** (supra), it holds that 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. In the said case (i.e. ***Inox Wind Limited***), this Court found that the purchase order was issued by the appellant therein in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The respondent therein by his letter had confirmed its acceptance. This Court found that the case before it was a case of a single-contract and not two-contract case and, therefore, held that the arbitration clause as mentioned in the terms and conditions would be applicable.

16. The present case is a 'two-contract' case and not a 'single-contract' case.
17. It will be relevant to refer to Clause 3.34 of the Additional Terms & Conditions of Contract as contained in the tender issued by the DVC to the NBCC. Clause 3.34 reads thus:

"3.34 SETTLEMENT OF DISPUTES & ARBITRATION

Any dispute(s) or difference(s) arising out of or in connection with the contract shall to the extent possible be settled amicably between the owner and supplier/contractor.

In the event of any dispute or difference whatsoever arising under the contract or in connection therewith including any question relating to existence meaning and interpretation of the contract or any alleged breach thereof the same shall be referred to the sole arbitration of the Secretary, CEO of Damodar Valley Corporation, Kolkata-54 or to a person appointed by him for that purpose. The arbitration shall be conducted in accordance with the provisions of arbitration and conciliation law 1996 and the decision/judgment of Arbitrator shall be final and binding on both the parties.

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All suits arising out of this enquiry and subsequent purchase order, if any, are subject jurisdiction of court in the City of Kolkata only and no other door when resolution/settlement through mutual discussion and arbitration fails.”

18. No doubt that Clause 3.34 provides for a reference of the dispute to the sole arbitration of the Secretary, CEO of Damodar Valley Corporation, Kolkata-54 or to a person appointed by him for that purpose.
19. It will also be apposite to refer to Clauses 1.0, 2.0, 7.0 and 10.0 of the L.O.I., which read thus:
 - “1.0 The work shall be executed you on contractual, financial and technical conditions of contract as contained in the following documents which shall be applicable and binding on you for execution of works and shall form part of agreement with you as also mentioned in the above mentioned NIT-01/WEIR/06 dated November 3, 2006.
 - (a) Notice Inviting Tender
 - (b) General Conditions of Contract
 - (c) Special Conditions of Contract
 - (d) Bill of Quantity
 - 2.0 All terms and conditions as contained in the tender issued by DVC to NBCC shall apply *mutatis mutandis* except where these have been expressly modified by NBCC.
 - 7.0 The redressal of dispute between NBCC and you shall only be through civil courts having jurisdiction of Delhi alone. The laws applicable to this contract shall be the laws enforceable in India.
 - 10.0 This letter of intent shall also form a part of the agreement.
20. In view of Clause 1.0, the documents stated therein shall also form part of the agreement. In view of Clause 2.0, all terms and conditions as contained in the tender issued by the DVC to the NBCC shall apply *mutatis mutandis* except where these have been expressly modified

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by the NBCC. Clause 7.0 specifically provides that the redressal of dispute between the NBCC and the respondent shall only be through civil courts having jurisdiction of Delhi alone. Clause 10.0 further provides that the L.O.I. shall also form a part of the agreement.

21. It is thus clear that the intention between the parties is very clear. Clause 7.0 of the L.O.I. which also forms part of the agreement specifically provides that the redressal of the dispute between the NBCC and the respondent shall only be through civil courts having jurisdiction of Delhi alone. It is pertinent to note that Clause 7.0 of the L.O.I. specifically uses the word “only” before the words “be through civil courts having jurisdiction of Delhi alone”.
22. As already discussed herein above, when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not *ipso facto* be applicable to the second contract unless there is a specific mention/reference thereto.
23. We are of the considered view that the present case is not a case of ‘incorporation’ but a case of ‘reference’. As such, a general reference would not have the effect of incorporating the arbitration clause. In any case, Clause 7.0 of the L.O.I., which is also a part of the agreement, makes it amply clear that the redressal of the dispute between the NBCC and the respondent has to be ***only through civil courts having jurisdiction of Delhi alone.***
24. In that view of the matter, we find that the learned single judge of the Delhi High Court has erred in allowing the application of the respondent. The appeals are accordingly allowed. The impugned orders are quashed and set aside. There shall be no order as to costs.
25. Pending applications, if any, shall stand disposed of.

Headnotes prepared by:
Himanshu Rai, Hony. Associate Editor
(*Verified by:* Kanu Agrawal, Adv.)

Result of the case:
Appeals allowed.