Giriraj Garg vs Coal India Ltd. on 15 February, 2019

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Author: Indu Malhotra

Bench: Indu Malhotra, Uday Umesh Lalit

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1695 OF 2019
(Arising out of SLP (Civil) No. 28693 of 2018)

Giriraj Garg …Appellant

Versus

Coal India Ltd. & Ors. …Respondents

JUDGMENT

INDU MALHOTRA, J.

Leave granted.

1. The present Civil Appeal arises out of an Order dated 21/18.05.2018 passed by a learned Single Judge of the Jharkhand High Court at Ranchi, in Arbitration Application No. 11 of 2016. The Appellant filed an Application u/S. 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "1996 Act") for appointment of an independent arbitrator to adjudicate the disputes that had arisen between the Petitioner and Respondent No. 2.

2. The factual matrix of the present case, briefly stated, is as under:

> 2.1. Respondent No. 1 issued the 2007 Scheme, whereby coal distribution would be conducted through e□Auction, with a view to provide access to coal for buyers, who

> were not able to source coal through the available institutional mechanism. This system would provide an equal opportunity to purchase coal through a single window service to all intending buyers, and facilitate country wide access to booking coal online for all sections of coal buyers, through a simple, transparent system.

Clause 11.12 of the 2007 Scheme contains an arbitration clause which reads as under "11.12 In the event of any dispute, Bidder/Buyer is necessarily required to represent in writing to the General Manager (Sales and Marketing) of the concerned Coal Company, who would deal with the same in a period of 1 month from such representation. Thereafter, if required the matter be determined by the Director In Charge of Marketing of the concerned Coal Company. Any interpretation of this Clause will be subject to clarification by CIL, which will be deemed as firm and final. All disputes arising out of this scheme or in relation thereto in any form whatsoever shall be dealt exclusively by way of arbitration in terms of the Arbitration and Conciliation Act, 1996. The arbitration shall be conducted at Kolkata at a place to be notified by CIL. The arbitrator shall be appointed by the Chairman and Managing Director, CIL upon written request in this behalf. The award rendered by the arbitrator shall be final and binding on the parties. (The place of arbitration and nomination of arbitrator be varied appropriately in view of the Coal Company involved).

(emphasis supplied) 2.2. From 2012 to 2015, the Appellant, being a registered buyer as per the Terms and Conditions of the 2007 Scheme, participated in the e Auction for purchase of coal for several sale orders issued under the 2007 Scheme.

2.3. The Appellant was declared successful with respect to various coal orders. Sale orders were issued in favour of the Appellant, pursuant to which he deposited the Earnest Money Deposit (hereinafter referred to as "EDM") and the coal value as per Clause 2.5 and 5.2 of the 2007 Scheme respectively. 2.4. As per Clause 7.2 of the 2007 Scheme, a period of 45 days was allowed to the Appellant from the date of issue of the delivery order, to lift the coal. The Appellant for certain reasons was unable to lift the booked quantity of coal.

2.5. Respondent No. 1 considered this to be a breach of the Terms and Conditions of the 2007 Scheme, and forfeited the EMD deposited by the Appellant under Clause 9.2 of the 2007 Scheme.

2.6. As a consequence, disputes arose between the parties. The Appellant served a Notice dated 21.03.2016 invoking the arbitration Clause 11.12 under the 2007 Scheme.

The Respondents failed to appoint an arbitrator as per Clause 11.12 of the 2007 Scheme. 2.7. The Appellant was therefore constrained to file an Application u/S. 11 before the Jharkhand High Court at Ranchi, for appointment of an independent arbitrator.

2.8. The learned Single Judge vide impugned Order dated 21/18.05.2018 rejected the Application on the ground that the disputes relate to different transactions entered into between the parties, under the 2007 Scheme. The sale orders did not contain an arbitration clause. It was held that even though the 2007 Scheme contains an arbitration clause, none of the individual sale orders make reference to the applicability of terms and conditions of the 2007 Scheme to the sale orders. Hence, the

arbitration clause could not be incorporated by reference.

3. Aggrieved by the aforesaid Order, the Appellant has filed the present Appeal.

We have heard learned Counsels Dr. Kedar Nath Tripathy, Mr. B. B. Pradhan, Mr. Susanta Kr. Muduti, and Mr. M. A. Aleem Majid for the Appellants and Mr. Anupam Lal Das, Mr. Anirudh Singh and Mr. Krishanu Barua for the Respondents and perused the documents on record.

3.1. A copy of a Sale Order issued by Respondent No. 2 was brought to our notice, which contains Standard Terms and Conditions at the end. Clause 7 of the Terms and Conditions state that the sale orders would be governed by the Guidelines, Circulars, Notices, and Instructions issued by Coal India Ltd., Bharat Coking Coal Ltd. etc. Clause 7 is set out hereinbelow for ready reference □"7. The sale order will be governed by guidelines – circulars – office orders – notices – instructions, relevant law etc. issued from time to time by Coal India Ltd., Bharat Coking Coal Ltd., State Govts., Central Govt. and other statutory bodies. This is also subject to any future escalation in prices and or levies/or duties□taxes etc. which may be imposed from time to time." (emphasis supplied)

4. The short question before this Court is whether the arbitration clause contained in the 2007 Scheme, would stand incorporated by reference in each of the sale orders.

4.1. The principle of incorporation by reference of an arbitration clause, from another document or contract is a well□established principle in arbitration jurisprudence.1 This principle has been followed by the courts in India, and has been given statutory recognition in sub□section (5) of Section 7 of the 1996 Act.

4.2. Section 7(5) states that the reference in a contract to a document containing an arbitration clause, constitutes a valid arbitration agreement, if the contract is in writing, and the reference is specifically made to incorporate the arbitration clause as a part of the contract.

1 Clements v. Devon Country Insurance Committee, [1918] 1 KB 94; Macleod Ross and Co. Ltd. v. Compagnie d' Assurances Generales L'Helvetia of St Gall, [1952] 1 All ER 331, 334 : [1952] 1 Lloyd's Rep 12 (CA).

4.3. The arbitration agreement need not necessarily be in the form of a clause in the substantive contract itself. It could be an independent agreement; or it could be incorporated by reference either from a parent agreement, or by reference to a standard form contract.

4.4. Section 7(5) of the 1996 Act, closely replicates Article 7(2)2 of the UNCITRAL Model Law as it stood prior to the 2006 amendment. Dr Peter Binder in his Commentary titled "International Commercial Arbitration and Conciliation in UCITRAL Model Law 2 Art. 7. Definition and form of arbitration agreement.— (1) 'Arbitration agreement' is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Jurisdictions" 3 has interpreted Article 7(2) to include incorporation by reference in the following words:

> "(d) Reference to a document containing an arbitration clause The third sentence of art. 7(2) is concerned with a contract containing a reference to a document that contains an arbitration clause. Provided that the main contract is in "writing" and that the reference "is such as to make that clause part of the contract", the arbitration agreement is valid. The necessity of including this provision arose from problems and divergent court decisions on this issue in the context of the New York Convention. The travaux explain that it is sufficient if the reference only refers to the document; specific mention of the arbitration clause therein is not necessary." (emphasis supplied) 4.5. Section 6(2) of the English Arbitration Act, 1996 is pari materia to Section 7(5) of the 1996 Act, and reads as under:
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> "6. Definition of arbitration agreement. (1).....
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> (2) The reference in an agreement to a written form of arbitration Clause or to a document containing an arbitration Clause constitutes an arbitration agreement if the reference is such as to make that Clause part of the agreement."

3 Dr. Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, (3rd Edn., 2010, Sweet & Maxwell) pg. 86, para 2□022 The Queen's Bench Division, Commercial Court in Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena4 held that the general words of incorporation of a standard form contract were enough to incorporate an arbitration clause.

4.6. 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 SAL5. In this case, the Court followed the judgment in the case of Sea Trade Maritime Corporation (supra), and held that a general reference to a contract containing an arbitration clause is sufficient for incorporation from a standard form of contract. The Court recognized the following broad categories in which the parties attempt to incorporate an arbitration clause:

> " (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 4 [2006] EWHC 2530 (Comm) 5 [2010] EWHC 29 (Comm) in another document to which reference is made; or terms embodied in the Rules of an organization 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. " In Habas (supra) 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 (supra) has recently been affirmed by the Queen's Bench Division in SEA2011 Inc. v. ICT Ltd.6 4.7. Russell in his commentary on arbitration7 has commented on the single and two contract cases, and reference to standard form terms, in the following passage, which is instructive :

> " Reference to standard form terms, single and two□contract cases. If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice. This is because the parties can be expected to be more familiar with those standard terms, including the arbitration clause. In Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd., (The "Athena") No. 2 the Court drew a distinction between what is described as a "two contract case", that is where the arbitration Clause is contained in a secondary document which is a contract to which at least one party is different 6 [2018] EWHC 520 (Comm) 7 Russell on Arbitration (24th Edn. ,2015, Sweet & Maxwell) pp. 52 – 54, para 2□049 from the parties to the contract in question, and "a single contract case" where the arbitration Clause is in standard terms to be found in another document. Relying on dictum of Bingham LJ in Federal Bulk Carries Inc v.

C. Itoh & Co. Ltd. (The "Federal Bulker"), Langley J stated that:

> "In principle, English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a

> well-known market. The principle, as the dictum makes clear, does not distinguish between a term which is an arbitration Clause and one which addresses other issues. In contrast, and for the very reason that it concerns other parties, a "stricter rule" is applied in charterparty/bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant terms. Further, as the authorities illustrate, the terms of an arbitration Clause may require adjustment if they are to be made to apply to the parties to a different contract."

The Court therefore reinforced the distinction between incorporation by reference of standard form terms and of the terms of a different contract, and concluded that in a single contract case general words of incorporation are sufficient, whereas by its nature a two contract case may require specific reference to the other contract, unless the secondary document is stated to be based on standard form terms containing an arbitration agreement. In that case, presumably specific reference to the arbitration Clause would not be needed. As discussed below, this approach has been endorsed in subsequent cases, albeit drawing a slightly different but "material" distinction between incorporation of the terms of a separate contract – standard or otherwise – made between the same parties which are treated as "single contract" cases, even where there is in fact more than one contract; and those where the terms to be incorporated are contained in a contract between one or more different parties which are treated as the "two contract" cases.

Extension of the single contract cases. Recently, the courts appear to have extended the "single contract" principle applicable to standard form contracts, where general words of incorporation will suffice, to other types of contract where the same rationale can be said to apply. Thus, if the document sought to be incorporated is a bespoke contract between the same parties, the courts have accepted this as a "single contract" case where general words of incorporation will suffice, even though the other contract is not on standard terms and constitutes an entirely separate agreement. The rationale for this approach is that the parties have already contracted on the terms said to be incorporated and are therefore even more likely to be familiar with the term relied on than a party resisting incorporation of a standard term. Put another way, if general words of incorporation are sufficient for the latter, they should be even more so for the former. The courts also appear to have accepted as a "single contract" case a situation where the contract referred to is between one of the parties to the original contract and a third party, where the contracts as a whole "were entered into in the context of a single commercial relationship." (emphasis supplied) 4.8. An early case in Indian arbitration on the doctrine of incorporation by reference under the Arbitration Act, 1940 (hereinafter referred to as the "1940 Act"), was Alimenta SA v. National Agriculture Co-op Marketing Federation of India Ltd. 8 Though there was no specific provision on an arbitration agreement being based on the doctrine of incorporation by reference in the 1940 Act, this Court recognized it to be applicable in Indian law. In this case, this Court held that the arbitration clause of an earlier contract could be incorporated by reference into a later contract, provided it is not repugnant to, or inconsistent with the terms of the contract in which it is incorporated.

4.9. In the 1996 Act, the doctrine of incorporation by reference is provided in the statue itself under Section 7(5) of the Act. In M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.,9 this Court held that even though a contract between the parties did not contain a provision for

arbitration, an arbitration clause contained in an independent document would be incorporated into the contract by reference, if the reference is such as to make the arbitration clause a 8 (1987) 1 SCC 615 : AIR 1987 SC 643 : 84 (2000) DLT 494. 9 (2009) 7 SCC 696 : 2009 (3) Arb LR 1 (SC) : 2009 (9) SCALE 298. part of the contract. The court explained the doctrine of incorporation in the following words – "24. The scope and intent of Section 7(5) 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 :
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> (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.
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> (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.
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> (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.
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> (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 & 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.
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> (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 Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties." (emphasis supplied) 4.10. This Court in Inox Wind Ltd. v. Thermocables Ltd.10 while adopting the 'single contract case' and 'two□ contract case' principle laid down by Habas (supra), held 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 contract of one party, would be sufficient for incorporation of the arbitration clause. In

10 (2018) 2 SCC 519 this case, the Court expanded the application of this doctrine by holding that even a general reference to a standard form contract of one party, along with those of trade associations, and professional bodies would be sufficient to incorporate the arbitration clause.

5. In the instant case, the learned Single Judge in the impugned Order has erroneously taken the view that an arbitration clause would not stand incorporated in the individual sale orders entered into by the Respondent No. 2 – Coal Company and the Appellant. The individual sale orders emanate out of the 2007 Scheme. The sale orders specifically state that they would be governed by the guidelines, circulars, office orders, notices, instructions, relevant law etc. issued from time to time by Coal India Limited or Bharat Coking Coal Limited etc. As a consequence, the arbitration clause (i.e. Clause 11.12) in the 2007 Scheme would stand incorporated in the sale orders issued thereunder.

Clause 7 in the sale orders falls under the 'single contract case' where the arbitration clause is contained in a standard form document i.e. the 2007 Scheme, to which there is a reference in the individual sale orders issued by Respondent No. 2 – the Coal Company. 5.1. The arbitration clause in the 2007 Scheme clearly states that :

> "All disputes arising out of this scheme or in relation thereto in any form whatsoever shall be dealt exclusively by way of arbitration in terms of the Arbitration and Conciliation Act, 1996." (emphasis supplied) Russell in his commentary on arbitration 11 has interpreted these words as follows :
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> "Disputes "in connection with", "in relation to", or "regarding" a contract.
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> These words, which are frequently encountered and are to be given the same meaning, were at one time given a restricted interpretation, but are now well established as having a broad meaning.....They may also be sufficient to catch disputes arising under another contract related to the contract containing the arbitration clause." (emphasis supplied) In Renusagar Power Co. Ltd. v. General Electric Company and Anr.,12 this Court observed that expressions such as "arising out of", or "in respect of", or "in connection with", or "in relation to", the contract are of the widest amplitude, and content.
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> 11 Russell on Arbitration (24th Edn. ,2015, Sweet & Maxwell) pg. 82, para 2□103 12 [1985]1SCR432 In Doypack Systems Pvt. Ltd. v. Union of India and Ors.,13 this Court observed that expressions such as – "pertaining to", "in relation to" and "arising out of", are used in the expansive sense, and must be construed accordingly.

The words “in relation thereto” used in Clause 11.12 of the 2007 Scheme indicate that the clause would apply to all transactions which took place under the 2007 Scheme. This would include the sale transactions in the present case.

5.2. In view of the above discussion, the view taken by the learned Single Judge is erroneous, and is hereby set□aside. The appeal is allowed.

6. At the conclusion of the hearing, the parties consensually agreed to appoint Mr. Justice Pranab Kumar Chattopadhyay (Retired Judge of the Calcutta High Court; Address: P□29/3, Jotish Roy Road, Kolkata – 700053) as Sole Arbitrator to adjudicate the disputes which have arisen between the Appellant and Respondent No. 2, under the 2007 Scheme.

13 1988 (36) ELT 201 (SC) The appointment of Mr. Justice Chattopadhyay will be subject to the disclosure and declaration made, as per the Sixth Schedule to the Arbitration and Conciliation Act, 1996 (as amended by the 2015 Amendment Act).

The proceedings will be conducted in Kolkata. Ordered accordingly.

.....J. (UDAY UMESH LALIT) .....J. (INDU MALHOTRA) New Delhi, February 15, 2019.