

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

+ O.M.P. 467/2003

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD.

..... Petitioner
Through Mr. Neeraj Kishan Kaul, Senior
Advocate with Ms. Ginny Jetley
Rautray and Ms. Supriya Jain,
Advocates

versus

ANTIA ELECTRICALS PVT. LTD. Respondent

Through: Mr. Naresh Markanda, Senior
Advocate with Mrs. Kamlesh
Mahajan, Advocate

AND

+ O.M.P. 480/2003

ANTIA ELECTRICALS PVT. LTD. Petitioner

Through: Mr. Naresh Markanda, Senior
Advocate with Mrs. Kamlesh
Mahajan, Advocate

versus

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD. & ORS.

..... Respondents
Through Mr. Neeraj Kishan Kaul, Senior
Advocate with Ms. Ginny Jetley
Rautray and Ms. Supriya Jain,
Advocates

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Date of Decision : 9th July, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J (ORAL)

1. One of the primary questions that arises for consideration in the present proceedings is whether the arbitration clause contained in the main contract executed between the principal employer and the contractor is incorporated by reference in the sub-contract executed between the contractor and the sub-contractor and if so, whether the said clause is inapt or inapplicable with reference to the sub-contract between the parties.

2. The relevant facts of these two cases are that on 28th September, 1982 a contract was executed between National Building Construction Corporation Ltd. (in short “NBCC”) and President of State Company for Contracts of Industrial Projects (in short “SCCIP”) by virtue of which NBCC was awarded work of construction of Industrial Buildings and Main Railway Stations of Baghdad for Iraqi Dinar (in short “ID”) 20861528.2. The relevant provisions of the aforesaid main contract are reproduced hereinbelow :-

“Tenth– In case of any dispute between the two contracting parties, the case will be forwarded to an Arbitration Committee to be formed as follows:-

- a) Both the parties have to appoint an arbitrator for each of them.*
- b) Both the arbitrators have to agree on one third arbitrator who will be the President of the Committee.*
- c) In case both the arbitrators cannot agree on the appointment of the 3rd arbitrator as the President of the Committee within a period of 14 days from the*

dates of their appointment, both the parties have the right to approach the competent court for appointment of the President as per procedures mentioned in the civil proceedings Law or as per any other procedure or Law or resolution relating to the Arbitration matters.

SPECIAL CONDITIONS OF CONTRACT

8.–The advance bills will be paid to 2nd Party at 75% in US Dollars and 25% in Iraqi Dinars. The US Dollar portion will be transferred to the bank fixed by the 2nd party. The rate of conversion per Iraqi Dinar is equal to US Dollars 3.377778.

GENERAL CONDITIONS OF CONTRACT

CLAUSE 17.

Governing Law:

17.0 The Contract shall be and shall be deemed to be an Iraqi Contract and shall be governed by and construed according to the Laws in force in Iraq and Iraqi Courts shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Contractor hereby submits himself to the jurisdiction of the Iraqi Courts for any such actions and proceedings.

***45.1-** If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor in connection with or arising out of the contract or the carrying out the Works (whether during the progress of the works or after their completion, and whether before or after the termination or abandonment of the Contract) it shall in the first place be referred to and settled by the Engineer, who within a period of (90) days after being requested by either party to do so shall give written notice of his decision to the Employer and the Contractor. Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until the completion of the work, and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence, whether he or the Employer requires Arbitration as hereinafter provided or not. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to Arbitration has been communicated to him by either the Employer or the Contractor within a period of (90) days from receipt of such notice the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer shall fail to give notice of his decision as aforesaid within a period of (90) days after being requested as aforesaid, or if either the*

Employer or the Contractor be dissatisfied with any such decision then and in any such case either the Employer or the Contractor may within (90) days after receiving notice of such decision or within (90) days after the expiration of the first named period of (90) days (as the case may be required that the matter or matter in dispute be referred to Arbitration as hereinafter provided.

The Employer and the Contractor shall each appoint an independent member to a Committee of Arbitration and the two members thus appointed shall agree upon a third member to act as a Chairman of the Committee. If agreement on the appointment of a Chairman cannot be reached within 14 days from the last date of the their appointment then the Employer or the Contractor shall each have the right to request a competent court to appoint the third member in accordance with proceedings provided in the Iraqi Code of Civil Procedures.

The Committee of Arbitration shall have full powers to open up review and revise any decision, opinion, direction, certificate or variation of the Engineer and neither party shall be limited in the proceedings before the Committee of Arbitration to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the Committee of Arbitrators on any matter whatsoever relevant to the dispute or difference referred to the Arbitrators as aforesaid.

The reference to arbitration may proceed notwithstanding that the Works shall not be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the Arbitration being conducted during the progress of the Works

***45.2-** The venue of Arbitration shall be in Iraq. The party requiring Arbitration shall pay the fees and other costs of Arbitration which shall be finally borne by the party against whom the Arbitration award shall be taken.”*

(emphasis supplied)

3. On 12th March, 1983, a separate sub-contract was executed between NBCC and Antia Electricals Pvt. Ltd. (in short “AEPL”) for electrification of the aforesaid railway stations for an amount of ID

631627.617. The relevant terms of the aforesaid sub-contract are reproduced hereinbelow :-

“1. MODE OF PAYMENT

The Corporation will pay to the Contractor all the sums against the electrical items contracted in lot 1,2,3 and 4 with the SCCIP less a discount of 21% which amounts to a total sum of ID 631627.617 (Iraqi Dinars SIX HUNDRED AND THIRTY ONE THOUSAND SIX HUNDRED AND TWENTY SEVEN AND FILS SIX HUNDRED AND SEVENTEEN ONLY)

The payment shall be released in the following manner to the Contractor;

- 1. 80% of the amount of actual work done shall be paid in US Dollars at a fixed rate of 1 ID = 3.377778 U.S. Dollars. The payment of US Dollar portion shall be made by remitting the amount directly by transfer to the bank account of the Contractor in the country designated by him.*
- 2. 20% of the amount of actual work done shall be paid in Iraqi Dinars. The payment of Iraqi Dinar's portion shall be made either by cheque or by remitting the due amount directly to the Contractor's bank account in Iraq as designated by the Contractor.”*

4.4.- Monthly progress running bills of for work done and technical fees shall be paid within one week of receipt of money from Clients.

4.7- All conditions mentioned in the Contract with the Clients by the Corporation shall be applicable to the Contractor on a back-to-back basis except for those mentioned in this agreement.”

(emphasis supplied)

4. On 19th January, 1987, the contract was completed to the satisfaction of the Iraqi client, SCCIP and on 24th November, 1988 the final bill was prepared. On 18th August, 1992, AEPL served a legal notice upon NBCC seeking release of balance payment. On 31st August, 1995 and 27th February, 1996, NBCC released RBI bonds of

Rs. 1.50 Crores and Rs. 42.10 lakhs to AEPL as payment for work done.

5. On 27th May, 1997, 24th June, 1997, 3rd July, 1997, 28th December, 1998 and 4th May, 1999, AEPL repeatedly requested NBCC to release the balance payment.

6. On 8th June, 1999 in a meeting held between officials of NBCC and AEPL, “NBCC assured AEPL that the matter would be resolved at the earliest as per the terms of the contract conditions”. However, on 16th March, 2000 and 26th May, 2000, NBCC rejected the claim of AEPL and denied its liability to make any further payment.

7. On 11th December, 2000, AEPL invoked the arbitration clause and appointed its nominee arbitrator. By this letter, AEPL called upon NBCC to appoint its nominee arbitrator. On 11th January, 2001, NBCC appointed its nominee arbitrator. Since during the arguments lot of emphasis was placed by all the counsel on the aforesaid two letters, the same are reproduced hereinbelow :-

A) Letter dated 11th December, 2000

*Antelec Ltd. 73, Jolly Maker Chambers No. II
(Antia Group of Companies) Nariman Point, Mumbai-400 021.*

Ref. No. AEPL/102-A/00/6086 December 11, 2000

*The Chairman-cum-Managing Director,
National Buildings Construction Corpn. Ltd.
NBCC House,
Lodhi House,
NEW DELHI-110 003*

Respected Sir,

*Sub: Contract pertaining to Electrification work related to
AI Qaim-Akashat Railway Project, Iraq.*

*From time to time we had been requesting your goodself
alongwith other officers of the Corporation for payment of the
balance dues. In the meeting held on 8.6.99 the parties had
agreed to settle the account and NBCC had assured us that
the matter would be resolved at the earliest. Thereafter, there
has been a lot of dilly-dallying on the part of NBCC which
has now convinced us that NBCC is in no mood to honour its
solemn commitments under the contract. In fact, vide letter
dated 6.10.2000 the DGM(Finance) has conveyed to us that
“Your claim is not tenable under contractual provisions”. In
that view of the matter, disputes having arisen between us are
required to be settled through arbitration as provided in the
contract. As per the agreement, the arbitral tribunal is to
consist of 3 members, one each to be appointed by us and
NBCC and the third arbitrator to be appointed by the said
two arbitrators.*

*We hereby nominate Mr. Justice (Retd.) P.K. Palli, C/o Sh.
A.V. Palli, 48 Lawyer’s Chambers, Supreme Court of India,
Tilak Marg, New Delhi-110 001 (Residence: H-33, Sarita
Vihar, New Delhi) as our nominee arbitrator and call upon
you to nominate your nominee arbitrator within a period of
30 days from today, failing which we shall be constrained to
proceed as per law.*

Thanking you,

*Yours faithfully,
For ANTIA ELECTRICALS PVT. LTD.*

*Sd/-
S.N. Antia
Director*

B) Letter dated 11th January, 2001

*No. Engg(CC)/Arbtrn/267/139
Date : 11th January, 2001*

In the matter of arbitration between:-

*M/s. Antia Electricals Pvt. Ltd.
New Delhi.*

...Claimant

AND

M/s. NBCC Limited

Regarding the disputes arisen out of the contract pertaining to electrification work related to construction of passenger Building, Engine shed and Sick Line Buildings at Kubaisa, Iraq-Agreement dated 3.8.1985.

Whereas disputes have arisen between the above noted parties in respect of the above cited works and whereas the disputes arising between the parties under the aforesaid contract are required to be referred to the Arbitration Committee, comprising of two arbitrators, to be appointed by both the parties one each, who in turn have to agree on one third arbitrator to be the President of the Committee.

AND WHEREAS the Claimant, vide their letter No. AEPL/182-A/00/6066 dated 11.12.2000 (copy enclosed), has intimated Shri Justice (Retd.) P.K. Palli, C/o Shri A.V. Palli, 48, Lawyer's Chambers, Supreme Court of India, Tilak Marg, New Delhi – 110 001 (Residence: H-33, Sarita Vihar, New Delhi) as their nominee Arbitrator.

Therefore, I, A.K. Sarkar, Chairman-cum-Managing Director, National Buildings Construction Corporation Limited, New Delhi in pursuance of the same, do hereby nominate Shri V.K. Anand, Director of NBCC, as the Respondent's nominee Arbitrator for deciding and making the reasoned award regarding the claims/disputes of the Claimant and also the counterclaims of the Respondent, if any.

Sd/-

(A.K. Sarkar)

Chairman-cum-Managing Director

8. Since NBCC raised a preliminary issue regarding jurisdiction of the Arbitral Tribunal, the Tribunal vide order dated 12th May, 2002 by a majority of 2:1 rejected the objections raised by NBCC. Some of the relevant observations of the Arbitral Tribunal are reproduced hereinbelow :-

37. The fundamental question is what was the intention of the parties. The intention of the parties is an essential element of the arbitral proceedings. The intention of the

parties in this case is clear. The parties wanted to submit the disputes to arbitration in India. This is clear from Clause Tenth which makes no reference to Iraqi laws or Iraqi procedure or Iraqi venue.

38. We are fortified in this conclusion of ours by the letter of the CMD who acting on clause Tenth referred the matter to the Arbitration Committee by appointing his nominee arbitrator. The clause Tenth was very much before him when wrote the letter dated 11.1.2001.

39. Russell says:

“The court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed, and seek to give effect to their intentions”. [p.28]

Inconsistent Clauses

40. Mustill & Boyd in Commercial Arbitration say:
“It may happen that the contractual documents contained two or more apparently inconsistent provisions as to arbitration. In such a situation, the court will usually try to save the submission to arbitration either by effecting a reconciliation between the clauses, or by construing one clause as applicable to the exclusion of the others.” [Commercial Arbitration 2nd ed. P.106].

41. Clause Tenth in our opinion must be held to be the arbitration agreement between the contractor and the sub-contractor to the exclusion of clause 45 which, as we have said, applies only to the contractor and the Iraqi party when the work is in progress in Iraq.

Intention of the parties

42. Counsel for the Corporation submitted that clause 45 is the real arbitration agreement in the back to back contract and not Clause Tenth.....

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52. There are four good reasons why we should prefer clause Tenth to Clause 45, firstly, it is later in point of time. Clause Tenth was inserted in the contract in 1982 while clause 45 was printed in 1980. Secondly, clause Tenth is typed while clause 45 is printed. It is settled law that where in the printed matter some alteration is desired by typing the typed matter supersedes the printed matter to that extent. [See Mool Chand Vs. Associated Agencies AIR 1942 Mad.

139; *Ratilal Vs. dalmia Cement AIR 1943 Bom. 229*]. Thirdly, clause 45 lands us in absurdities. Counsel suggests that the parties go to Iraq and find out two arbitrators—men well versed in Iraqi laws and procedure. They in turn will appoint a “Chairman”—again a man of Iraqi law. The Iraqi laws will be applied. The sittings will be in Iraq. Iraqi courts will have jurisdiction. Iraqi lawyers will have to be engaged. The award will be passed according to Iraqi laws. God knows how the award of a totalitarian country will be enforced in India.

53. Fourthly, clause 45 contemplates international arbitration when one party is a foreign national. Therefore, it makes provisions in favour of Iraqi laws. Clause Tenth deals with domestic arbitration where both parties are Indians. To apply clause 45 to a case where both parties are Indians is to fit somehow a square peg in a round hole.

54. Clause Tenth contemplates nothing of the kind. It is a straight forward arbitration agreement to which Indian substantive and procedural laws applies. Both parties are Indians and they intended arbitration to be governed by their own laws. That is what CMD thought. By virtue of the authority vested in him he appointed an Indian arbitrator. His letter dated 11.1.2001 is well worded. It seems to have been drafted by a lawyer. It uses the word “whereas” twice. “Whereas” means a recital of past events. It is a familiar term known to draftsman when he drafts deeds of indenture. It is a formal deed of reference. The recital speaks of past outstanding disputes and the need to resolve them by arbitration.

55. On the whole we are satisfied that we are on a firm ground when we vote in favour of clause Tenth. Clause 45 is impractical, impossible and its application will lead to absurd results and injustice. Absurdity in construction of contracts must always be avoided. We have to consider the consequences which will follow the adoption of clause 45. With regret we decline the invitation of Mr. Seth, learned counsel for NBCC, to hold our sittings in Iraq. The acceptance of clause 45 will expose the Tribunal to ridicule. It leads to results which are contrary to the legitimate objects of arbitration.

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59. In international commercial arbitration at least one of the parties is a national of any country other than India or a body corporate which is incorporated in any country other than India. [Section 2(f) of the Act]. To such an arbitration under section 28(b) the foreign law, for example Iraqi law, shall apply if so designated by the parties as applicable to the

substance of the dispute. Therefore, clause 45 applied to NBCC, an Indian corporate body when it entered into a contract with an Iraqi client. The parties agreed that the law applicable will be Iraqi law.

60. This is not the case here. Why should the arbitration be held on a foreign soil? Why should it be based in Iraq when parties are Indians? Why should Iraqi laws apply? The Act says Indian law shall apply to Indian arbitration. There is no satisfactory answer to these questions. Parties did not agree that a foreign legal system will govern them when after the completion of the work they have nothing to do with Iraq. We put clause 45 out of our way as wholly inapplicable to our case.

61. Clause 45 is a non-domestic agreement. Clause Tenth is a domestic agreement. Domestic is applicable while non-domestic has no application to this case.

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65. CMDs come and CMDs go. But NBCC goes on forever. It is a body corporate. It has a perpetual succession and a common seal. [See Section 34 of the Companies Act, 1956]. CMD acts in the name of NBCC. The referring order dated 11.1.2001 says:

“Therefore, I A.K. Sarkar, Chairman-cum-Managing Director, National Building Construction Corporation Ltd. New Delhi in pursuance of the same, do hereby nominate Shri V.K. Anand, Director of NBCC, as the Respondent’s nominee Arbitrator for deciding and making the reasoned award regarding the claims/disputes of the Claimant and also the counter claims of the Respondent, if any.”

66. Therefore, if the action impugned is not outside the scope of his duties CMD’s order is binding on NBCC. He is no ordinary director. IN his own person he represents the company. His order has a sanctity and a legal validity. For years NBCC had “dillydallied” over the appointment of its arbitrator, Antia complained to CMD. Impressed by the justice of the complaint, CMD appointed his company’s nominee arbitrator. He only did his duty. What is wrong with it?

67. His order excludes the application of Iraqi law now sought to be introduced before us. On his view the Indian Law will apply. If this is so how can NBCC now argue to the contrary. His inclination in favour of the Indian Law is apparent from the fact that Mr. Anand, his nominee, was profoundly and happily ignorant of Iraqi Laws. If CMD’s

view had been in favour of Iraq he would have appointed an expert of Iraqi laws. It seems to us that both parties were clear in their minds that arbitration will be held in India according to the Indian Law. The truth is Iraqi Law is a red herring and non-issue.

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70. Clause 17 of the Contract on which Mr. Seth laid a good deal of stress has no application to the sub-contractor. Clause 17 says:

“The contract shall be deemed to be an Iraqi Contract and shall be governed by and construed according to the Laws in force in Iraq and Iraqi courts shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Contractor hereby submits himself to the jurisdiction of Iraqi Courts for any such actions and proceedings”.

71. The clause brings out two things clearly. One that it applies to the contractor who has entered into contract with the Iraqi State Company for Contracts and not to the sub-contractor. Two that the clause becomes dysfunctional after the work is over and the Indian Company, namely, NBCC, has left Iraq with all its tools and tackles.

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77. NBCC did construction work for the Iraqi Republic. They had their office, staff, employees there for conducting business. They left Iraq years ago. Iraqi courts have no jurisdiction over the parties now. If Iraqi Government today has a claim against NBCC they must follow their defendant to his place of residence. NBCC is a resident Indian Company. The aggrieved party must come to India. It is ridiculous to argue that Antia should go to Iraq to commence arbitration proceedings against NBCC where neither the contractor nor sub-contractor are stationed in Iraq.

78. The fundamental principle is that the court cannot entertain an action against a non-resident defendant who is absent in the foreign country. Physical presence is essential.

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80. Both in time and space the situation has completely changed. What was true is 1982 in Iraq is not true in 2002 in India. Iraqi laws were relevant in 1982. But the Iraqi system of law does not determine the choice of law once for all for every situation. Now the Iraqi laws are out of place. They no longer govern the present parties in India.

A Comparison

81. *It will be helpful if we compare and contrast clause Tenth with Clause 45. Clause 45 deals with International Commercial Arbitration. International Commercial Arbitration can take place in India or outside India. Under clause 2(1)(f)(iv) it is an International Commercial Arbitration as one of the parties is the government of a foreign country. Clause 45 says that Iraqi Law shall apply to the contract. Clause Tenth deals with domestic arbitration and applies internal law and not foreign law. Here both parties are Indian companies. Clause Tenth is a replica of Clause 45 minus the Iraqi Law and the foreign element. It has no foreign complexion. It has no geographical connection with Iraq. Clause 45 is part of an Iraqi contract while Clause Tenth is part of Indian Contract.*

82. *The distinction may be brought out thus:*

Clause	Nature of Contract	Nature of Arbitration Clause	Law Applicable
45	Iraqi Contract	International Arbitration	Iraqi Law
Tenth	Indian Contract	Domestic Arbitration	Indian Law

83. *Mr. Seth, learned counsel for NBCC, urges that we should harmonise the two clauses. It is no possible to do so because these clauses are separate and deal with different situations. By harmonizing the two we destroy the Tenth Clause, its separate identity and its distinctive Indian flavor. Carefully crafted it saves domestic arbitration for resolution of disputes between two Indian parties.*

Applicable Law

84. *Our conclusion is that the seat of arbitration shall be Delhi India in this case and the law applicable shall be Indian Law as both parties are Indians. It is not open to the parties to make a contract that Iraqi laws will apply to them and thereby oust the jurisdiction of the Indian Courts. Such an agreement under sections 23 and 28 of the Indian Contract Act is void and against public policy. An arbitration between two Indian parties based abroad and governed by Iraqi law is an unacceptable proposition propounded by counsel for NBCC. In short Clause 45 is repugnant to the contract between the contractor and the sub-contractor.”*

9. The aforesaid order of the Arbitral Tribunal was challenged by NBCC before this Court vide Civil Writ Petition No. 350/2002. The said writ petition was dismissed by this Court vide order dated 9th May, 2003. The relevant observations of learned Single Judge while dismissing the writ petition are reproduced hereinbelow :-

“There appears to be force in the contention of learned counsel for respondent no. 1. I am not inclined to believe that the Arbitrator was appointed by mistake. It is clear that the petitioner at the time of nominating its Arbitrator was conscious of the fact that it was the contract relating to Railway Project which was the subject matter of the dispute and wherein Arbitrator was to be appointed. Mistake, if at all is in mentioning the nomenclature of the contract and not in nominating the Arbitrator....

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I am therefore of the considered opinion that writ petition is not maintainable and the remedy of the petitioner is to challenge the findings on the aforesaid issues is to file an application under Section 34 of the Act only after final Award is rendered by the Arbitral Tribunal. Since I am holding this view and inclined to dismiss the present writ petition as not maintainable, I have refrained myself from expressing any opinion on the merits of the decision taken by the Arbitral Tribunal on the aforesaid preliminary issues lest it may affect one or the other side ultimately. The only thing which is required to be stated at this stage is that the Arbitral Tribunal by majority, while deciding the aforesaid issues against the petitioner and in favour of respondent no. 1 has discussed these issues in detail giving their reasons in support of the findings. Their order run into 29 pages. On the other hand dissenting order has also given detailed order running into 31 pages. As already pointed out above before me as well both the parties had made their respective submissions extensively. Since it is not the stage when it is to be decided as to whether there is a valid arbitration agreement between the parties or not as that issue is to be decided only after the final Award is rendered by the Arbitral Tribunal, no opinion thereon on these issues is expressed either way.

This writ petition is accordingly devoid of any merit and is, therefore, dismissed.”

(emphasis supplied)

10. In the meantime, NBCC's nominee arbitrator resigned. On 31st January, 2003, on an application being filed by AEPL, this Court directed NBCC to appoint an arbitrator failing which Ms. Sharda Aggarwal, a retired Judge of this Court would stand appointed as a substitute arbitrator.

11. On 15th September, 2003, the Arbitral Tribunal rendered a unanimous Award by virtue of which it directed NBCC to pay to AEPL a sum of Rs. 55,41,000/- with interest at the rate of 10% from the date of Award till the date of payment.

12. Mr. Neeraj Kishan Kaul, learned senior counsel and Ms. Ginny Jetley Rautray, learned counsel for NBCC submitted that there was no arbitration clause in the sub-contract executed between the parties. According to them, arbitration clause is a collateral term of the contract independent of and distinct from its substantive term. They submitted that an arbitration clause must be incorporated in the sub-contract by a specific reference. They also submitted that the arbitration clause contained in the main contract executed between NBCC and SCCIP was tailor made to meet the requirement of the contract between them and was wholly inapt and inapplicable in the context of disputes between NBCC and AEPL. In this connection, they relied upon a judgment of the Supreme Court in ***M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd., 2009 (7) SCC 696*** wherein it has been held that “*an arbitration clause though an integral part of the*

contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to 'carrying out' of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the main contract relating to the execution of the work as contrasted from the dispute resolution, we are of the view that the arbitration clause in the main contract did not form part of the sub-contract between the parties.....This is in view of the principle that when the document to which a general reference is made, contains an arbitration clause whose provisions are clearly inapt or inapplicable with reference to the contract between the parties, it would be assumed or inferred that there was no intention to incorporate the arbitration clause from the referred document.”

13. Assuming without admitting, that the sub-contract contained an arbitration clause, Mr. Kaul and Ms. Rautray submitted that there could not be a partial incorporation of the main contract. According to them, if all provisions of the main contract were deemed to have been incorporated in the sub-contract executed between NBCC and AEPL, then the applicable law would be Iraqi law and the venue for arbitration would be Iraq and, consequently, the Award would be liable to be set aside.

14. Mr. Kaul and Ms. Rautray next submitted that AEPL's claims were barred by limitation as the final bill had been prepared on 24th November, 1988 whereas the arbitration clause had been invoked only in December, 2000. They further submitted that AEPL could not take advantage of Section 18 of the Limitation Act, 1963 as there was no acknowledgment in writing of AEPL's claims by NBCC within the period of limitation.

15. They lastly submitted that the claim for payment of foreign currency was not maintainable in view of AEPL itself having overdrawn the local currency component during the currency of the contract. In this connection, they relied upon Clause 8 of the main contract and Clause 1 of the sub-contract as well as letters exchanged between the parties.

16. On the contrary, Mr. Naresh Markanda, learned senior counsel for AEPL submitted that the arbitration clause stood incorporated in the sub-contract executed between the parties in view of the specific language of Clause 4.7 of the sub-contract. In this connection, Mr. Mrakanda referred to Section 7(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") which reads as under:-

7. Arbitration agreement.-

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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.

17. Mr. Markanda further submitted that even if the sub-contract did not contain an arbitration clause, by virtue of Section 7(4)(b) of Act, 1996 the said clause came into existence by way of exchange of letters between the parties. He placed reliance upon the letters dated 11th December, 2000 and 11th January, 2001 whereby both the parties had appointed their nominee arbitrators. In this connection, he relied upon a judgment of Orissa High Court in ***Indiana Conveyors Ltd. Vs. Indian Rare Earths Ltd., 2007 (4) Arb.L.R. 40 (Orissa)*** wherein it has been held as under :-

“13. It is well settled that in order to become an arbitration agreement it is not required that in the agreement between the parties the word 'arbitration' should be mentioned. In the instant case, Clause 12(3) has been set out hereinabove. If we recount the facts of the case, it transpires that invoking the said clause, the Petitioner had written a letter dated 23.5.2002 to the Opposite Party asking for settlement of the disputes and differences. A reminder was also sent on 18.6.2002. A reply to that effect was sent to the Petitioner not by the Chief General Manager, OSCOM, but by the General Manager, OSCOM. Thereafter, the Petitioner received on 16.10.2002 a reply dated 10.10.2002 in which there is a clear stand taken by the Head of OSCOM, who is the Chief General Manager that the matter may be referred to arbitration. That was one of the options given to the Petitioner. The Petitioner immediately on 17.10.2002 agreed to the proposal for referring the matter to the arbitration in accordance with the said Act of 1996 and proposed the venue to be in Mumbai. Thereafter the Petitioner sent another communication dated 21.4.2003 further reiterating the proposal for referring the dispute under the said work order to arbitration and the Petitioner suggested the name of Justice Mrs. K.K. Baam (Retd.) as the sole Arbitrator and requested the Opposite Party to confirm the same within thirty days. The Opposite Party vide its letter dated 13.5.2003 replied by saying that the suggestion of appointing Justice Mrs. K.K. Baam as the sole Arbitrator is not acceptable to it. In the aforesaid sequence of events, this Court is of the opinion that there is provision for arbitration in Clause 12.3 and the Opposite Party has admitted the existence of the same by its letter dated 10.10.2002.”

18. Mr. Markanda contended that NBCC's argument that Iraqi law was the governing law and that Iraq was the venue of arbitration, was devoid of merits. He submitted that though Clause 45 of General Conditions of Contract (in short "GCC") contained an arbitration clause, the said clause stood superseded by Clause 10 of the main contract. In this connection, he relied upon the reasoning contained in the majority Arbitral Tribunal's order dated 13th May, 2002 which has already been reproduced hereinabove. He also pointed out that as Clause 10 was a typed clause, it would prevail over Clause 45 which was a printed clause in the GCC. In this context, he drew attention of this Court to a judgment of the Supreme Court in ***M.K. Abraham and Co. Vs. State of Kerala and Anr., 2009 (7) SCC 636*** wherein it has been held as under:-

"10. If a contract consists of a printed form with cyclostyled amendments, typed additions and deletions and handwritten corrections, an endeavour shall be made to give effect to all the provisions. However, in the event of apparent or irreconcilable inconsistency, the following rules of construction will normally apply:-

(i) The cyclostyled amendments will prevail over the printed terms;

(ii) The type-written additions will prevail over the printed terms and cyclostyled amendments;

(iii) Hand written corrections will prevail over the printed terms, cyclostyled amendments and typed written additions."

19. Mr. Markanda also submitted that it is well settled rule of law that all laws are territorial in operation. He submitted that in the present case both the parties are Indians, as both NBCC and AEPL had been incorporated in India. In this connection, he relied upon a judgment of Supreme Court in ***TDM Infrastructure Private Limited Vs. UE Development India Private Limited, 2008 (14) SCC 271*** wherein it has been held that *“Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.”*

20. In the alternative, Mr. Markanda submitted that subjecting Indian parties to Iraqi laws would amount to doing ‘violence’ to the terms of the contract. According to him, in the facts and circumstances of the present case the Court must effectuate the intention of the parties by implying a term that Indian law would be the governing law. In this connection, he placed reliance upon ***Chitty on Contracts, 29th Edition*** wherein it has been stated as under :-

13-004. Intention of parties. In many cases, however, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation

in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.

13-005. Efficacy to contract. *A term will be implied if it is necessary, in the business sense, to give efficacy to the contract. The general principle of law was thus stated by Bowen L.J. in the Moorcock:*

“Now, an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side, and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.”

In this situation, although there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work.

21. In this connection, he also relied upon Section 28(1)(a) of Act, 1996 which reads as under :-

“28. Rules applicable to substance of dispute.- (1) *Where the place of arbitration is situate in India,--*

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

22. Mr. Markanda denied that AEPL's claims were barred by limitation. According to him, parties were regularly corresponding with each other with regard to the outstanding dues and at no point of time NBCC had denied AEPL's entitlement to the claims. He stated that the claims were rejected by NBCC for the first time in 2000 and immediately thereafter AEPL had invoked the arbitration clause. He pointed out that in the year 1995-1996 NBCC had released RBI bonds to AEPL amounting to, nearly, Rs. 1.92 Crores in part settlement of the outstanding dues. He also pointed out that at least till June 1999 negotiations were taking place between the parties in a bid to resolve the disputes amicably. According to him, as disputes between the parties arose only by way of rejection of AEPL's claims in May and October, 2000, its claims were not barred by limitation.

23. Mr. Markanda lastly submitted that even though AEPL had overdrawn the local currency, it was not NBCC's case that the sub-contract which dealt with ratio of currency, had ever been amended or novated. He pointed out that there was no evidence that the NBCC had overdrawn the local currency from its Iraqi principal due to AEPL's request.

24. In rejoinder, Ms. Rautray reiterated that there was no arbitration clause in the sub-contract. In this connection, she placed reliance upon certain passages of *Russell on Arbitration, 23rd Edition*. The relevant passages are reproduced hereinbelow :-

“2-044 Reference to another document. *The terms of a contract may have to be ascertained by reference to more than one document. Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by applying the usual principles of construction and attempting to infer the parties’ intentions by means of an objective assessment of the evidence. This may make questions of incorporation irrelevant if for example it is clear that the contractual documents in question are entirely separate and no intention to incorporate the terms of one in the other can be established. However, the contractual document defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration agreement. If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration provisions of that other document. This very commonly occurs when the principal contractual document refers to standard form terms containing an arbitration agreement. However the standard form wording may not be apt for the contract in which the parties seeks to incorporate it, or the reference may be to another contract between parties at least one of whom is different. In these circumstances it may be possible to argue that the purported incorporation of the arbitration agreement is ineffective. The draftsmen of the Arbitration Act 1996 were asked to provide specific guidance on the issue but they preferred to leave it to the court to decide whether there had been a valid incorporation by reference.*

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2-047 Development of the case law. *Sir John Megaw’s view in Aughton followed the approach previously adopted in Thomas & Co. v. Portsea SS Co. Ltd., and a number of cases both before and after the 1996 Act have adopted the same approach. In Barrett & Son (Brickwork) Ltd. v. Henry Boot Management Ltd. Llyod J. relied on both Sir John Megaw’s approach in Aughton and the dicta of Lord Diplock in Bremer Vulcan v. South India Shipping to support the conclusion that if a contract is to be incorporated into another contract there must be express reference to it in that other contract. Hicks J. on the other hand concluded in Roche Products Ltd v Freeman Process Systems Ltd that he should give effect to the intentions of the contracting parties even if that was expressed as a general reference to a document to be incorporated. He saw no justification for a rule which artificially restricts the intention of the parties by requiring them to use particular forms of words to achieve incorporation.*

Subject to drawing a distinction between incorporation of an arbitration agreement contained in a document setting out standard form terms and one contained in some other contract between different parties, judicial thinking seems to have favoured the approach of Sir John Megaw in Aughton, namely that general words of incorporation are not sufficient. Rather, particular reference to the arbitration clause needs to be made to comply with s. 6 of the Arbitration Act 1996, unless special circumstances exist. This was the view taken by Judge Raymond Jack Q.C. following a review of the relevant authorities in Trygg Hansa Insurance Co Ltd. v Equitas Ltd. and it was supported and confirmed by Evans L.J. in Anonymous Greek Co of General Insurances, (The “Ethniki”) v AIG Europe (UK).

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2-049 When Specific reference required. *In Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, (The “Athena”) No. 2 the court referred in particular to the stricter approach which requires specific reference to the arbitration agreement as being applicable in charterparty/bills of lading cases. It has also been applied in other areas, notably reinsurance contracts and construction contracts. In principle however the rationale for requiring specific words of incorporation, notably the absence of knowledge of the terms of another contract between different parties and the need for adjustment of the terms as written, is not limited to those situations. It is suggested therefore that the same approach would apply generally in two contract cases even outside those particular fields.”*

25. Having heard the parties at length, I am of the view that this Court in Section 34 jurisdiction under Act 1996, cannot sit in appeal over the views of the Arbitral Tribunal by re-examining and re-assessing the material on record. This Court cannot substitute its own evaluation on findings of law or fact to come to the conclusion that the Arbitral Tribunal acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrators are the sole judge of the quality as well as the quantity of evidence and it

will not be for this Court to take upon itself the task of being a judge on the evidence before the Arbitral Tribunal. However, as held by the Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi, (2008) 13 SCC 80* an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

26. Insofar as NBCC's objection on merit that AEPL having itself overdrawn the local currency component cannot now raise this claim is concerned, I am of the view that the same is not maintainable since it touches upon the merit of the dispute before the Arbitral Tribunal. It is well settled that this Court does not sit in appeal over the verdict of the Arbitral Tribunal. [Refer *Delhi Development Authority Vs. R.S. Sharma and Company* (supra); *State of Rajasthan & Ors. Vs. Basant Nahata, (2005) 12 SCC 77*]; and *Sudarsan Trading Co. Vs. Government of Kerala and Anr., (1989) 2 SCC 38*].

27. Moreover, the Arbitral Tribunal in the present instance has interpreted clauses of the contract, which interpretation, according to me, is a plausible one. Clause 1 of the sub-contract provides that payments are to be made in foreign and local currency in the ratio of 80:20. Undoubtedly, AEPL had overdrawn the local currency component during the execution of the sub-contract but, as pointed out by Mr. Markanda, Clause 1 of the sub-contract was not amended and,

consequently, the final ratio of payment was to be maintained in accordance with the contract.

28. In fact, the letters of NBCC dated 11th January, 1986 (Annexure C-3) and 27th February, 1986 (Annexure C-6) provide a complete answer to the argument advanced by NBCC. In Annexure C-3, NBCC had stated *“Please refer to your above letter and we are to inform you that mode of payment of currency ratio (i.e. FC &LC) shall be as per terms and conditions of agreement”*, and once again in Annexure C-6, NBCC stated *“We wish to inform you that mode of payments shall be regulated as per Clause-1 of the agreement, i.e. 80% of the amount of actual work done shall be paid to you in US dollars and balance 20% of the contract amount of actual work done shall be paid to you in Iraqi Dinars.”*

29. As far as the plea of limitation is concerned, undoubtedly, the Supreme Court and this Court have repeatedly held that provisions of Limitation Act, 1963 apply to arbitration and period of limitation for commencement of arbitration runs from the date on which had there been no arbitration clause, the cause of action would have accrued. In fact, the cause of action has been held to accrue when the claimant become entitled to raise the question, that means, when the claimant acquires right to require arbitration. (Refer to ***Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, AIR 1994 SC 1615, J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. & Anr.,***

(2008) 2 SCC 444 and National Hydroelectric Power Corp. Ltd. Vs. M/s. Karam Chand Thapar and Bros (CS) Ltd. & Anr., MANU/DE/0431/2010.)

30. But the Supreme Court in *Hari Shankar Singhania & Ors. Vs. Gaur Hari Singhania & Ors., 2006 (4) SCC 658; Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd., (2007) 4 SCC 599* and this Court in *M/s. Hilltop Travels Vs. M/s. Convergys India Services Pvt. Ltd., Arb. P. 406/2009, decided on 4th May, 2010* has also held that where negotiations are taking place between the parties by way of various letters written by both the parties, the right to apply would accrue only when the claim is rejected. In *Shree Ram Mills Ltd.* (supra), the Supreme Court has held as under :-

“30. Once we have come to the conclusion that the learned designated Judge was right in holding that there was a live issue, the question of limitation automatically gets resolved. This Court in Hari Shanker Singhania case held that till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result the clock of limitation does not start ticking. This Court observed: (SCC pp. 667-68. Para 24)

“24. Where a settlement with or without conciliation is not possible then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues. The learned Judges of the High Court, in our view have erred in dismissing the appellants’ appeal and affirming the findings of the learned Single Judge to the effect that the application made by the appellants under Section 20 of the Act, 1940 asking for reference was beyond time under

Article 137 of the Limitation Act. As already noticed, the correspondence between the parties, in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties.”

These observations would clearly suggest that were the negotiations were still on, there would be no question of starting of the limitation period.”

31. According to Shri Salve, learned counsel appearing on behalf of the appellants the clock had started ticking against the respondents in relation to the agreement dated 27-4-1994 and they could have had only three years period for filing a suit as per Article 137 of the Limitation Act and as such the claim made with reference to that agreement cannot be arbitrable now in the year 2005. We do not agree. It is for this reason alone that we have given the complete history of the negotiations in between the parties. The things do not seem to have settled even by 19-1-2005 but that would be for the Arbitral Tribunal to decide. We only observe, at this stage, that the claim of the respondent cannot be said to have become dead firstly because of the settlement or because of lapse of limitation. What is the effect of MoU dated 19-1-2005; was the respondent justified in repudiating the said MoU; and what is the effect of repudiation thereof on the earlier agreement dated 27-4-1994 would be for the Arbitral Tribunal to decide. In *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.* this Court had clearly held in para 10 that the Arbitral Tribunal can also go into the question of limitation for the claims in between the parties. We have discussed this subject only to hold that since the issue in between the parties is still alive, there would be no question of stifling the arbitration proceedings by holding that the issue has become dead by limitation. We leave the question of limitation also upon the Arbitral Tribunal to decide.”

31. In the present case, keeping in view the correspondence exchanged between the parties, in particular, the Minutes of Meeting held on 8th June, 1999 wherein it was finally recorded that “M/s. NBCC informed that within a week’s time, they shall be in a position to inform AEPL regarding the modality and schedule of payment against the above outstanding dues and shall endeavour their best to settle the

issues”, I am of the opinion that the disputes arose only on rejection of claims by NBCC in May and October, 2000 and as the arbitration clause was invoked immediately thereafter, the claims of AEPL cannot be said to be barred by limitation.

32. However, I agree with learned counsel for NBCC that just because NBCC appointed an arbitrator does not mean that they have lost the right to challenge existence, validity or jurisdiction of the Arbitral Tribunal. In fact, Sub-section 2 of Section 16 states as under:-

“16. Competence of arbitral tribunal to rule on its jurisdictional. -

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(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.”

33. In my opinion, the test to determine whether an arbitration clause contained in the main contract stands incorporated by reference in the sub-contract has been clearly spelt out by the Supreme Court in ***M.R. Engineers and Contractors Pvt. Ltd.*** (supra). In fact, the test has been stipulated after considering the above referred passages in *Russell on Arbitration*. The Supreme Court in the said case summarised the test as under :-

“16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the

second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.

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

- (i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled : (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, (iii) 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 & 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 Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

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32. The work order (sub-contract), relevant portions of which have been extracted in para 5 above, shows that the intention of the parties was not to incorporate the main contract (between the PW Department and respondent) in entirety into the sub contract. The use of the words "This sub-contract shall be carried out on the terms and conditions as applicable to main contract" in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work, were adopted as a part of the sub-contract between respondent and appellant, and not the parts of the main contract which did not relate to execution of the work, as for example the terms relating to payment of security deposit, mobilization advance, the itemised rates for work done, payment, penalties for breach etc., or the provision for dispute resolution by arbitration.

34. In the present case, the incorporation clause did not only refer to certain terms and conditions relating to execution of work. In fact, Clause 4.7 of the sub-contract clearly stipulates that all conditions mentioned in the main contract shall be applicable to the sub-contract on a back-to-back basis except for those specifically excluded in the sub-contract. Consequently, I am of the opinion that there was not only a reference to the main contract in the sub-contract but the reference

shows that the arbitration clause in the main contract was intended to be incorporated in the sub-contract.

35. However, in my view, there cannot be partial incorporation of the terms of the main contract executed between the parties. Consequently, Clause 10 of the main contract has to be read harmoniously with Clauses 17 and 45 of the GCC. In my opinion, the Arbitral Tribunal has erred in law in holding that Clauses 17 and 45 of the GCC were inapplicable to the sub-contract. The Arbitral Tribunal being a creature of the contract cannot hold certain terms of the contract as inapplicable or void. Moreover, as in the present case there is no irreconcilable inconsistency in clauses between Clauses 10 and 45, there is no question of applicability of the rule of construction as laid down by the Supreme Court in *M.K. Abraham and Co.* (supra).

36. Further, Mr. Markanda's reference to passages *Chitty on Contracts, 29th Edition* is untenable in law as no Court can imply any term in a Court where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them. Moreover, the term sought to be implied by Mr. Markanda is clearly contrary to the terms explicitly provided in the contract executed between the parties.

37. Mr. Markanda's reliance upon Section 28(1)(a) of Act, 1996 is also misconceived on facts as the said Section only applies where the venue of arbitration is in India. Since in the present case Clause 45 of

GCC clearly stipulates that the venue of arbitration shall be Iraq, Section 28(1)(a) of Act, 1996 can offer no assistance to AEPL.

38. I am further of the opinion that the arbitration clause in the main contract is neither inapt nor inapplicable to the sub-contract. For instance, if during the execution of the contract principal employer raised a dispute on account of defective work done by the sub-contractor, then not only would the arbitration be held between SCCIP and NBCC in Iraq according to Iraqi law but NBCC could also initiate arbitration proceedings against AEPL. If in this scenario, arbitration between NBCC and AEPL is directed to be held in India, according to Indian law, it is quite possible that the two arbitral tribunals on similar disputes would reach a different conclusion. The above illustration would also show that Clauses 17 and 45 of GCC are of importance and are applicable. In fact, the Supreme Court in *National Thermal Power Corporation Vs. The Singer Company and others*, AIR 1993 SC 998 has held as under:-

“13.....The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract.

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19. Proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract.”

39. Admittedly, in the present case the impugned Award is contrary to Clauses 17 and 45 of the contract executed between the parties as the Arbitral Tribunal did not apply the applicable law. Consequently, the impugned Award is set aside.

40. With the aforesaid observations, petition filed by NBCC is allowed while petition filed by AEPL is dismissed. However, parties shall bear their own costs.

MANMOHAN,J

JULY 09, 2010

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