

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 202 of 2014 (O&M)

Date of Decision: 31.07.2015

Vikram Walia

..Petitioner

versus

SD College Educational Society, Barnala and others

..Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.

Present : Mr. Jatinder Kumar Kamboj, Advocate, for the petitioner.
Mr. Tushar Sharma, Advocate, for the respondents.

S.J.VAZIFDAR A.C.J. (Oral)

This is an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of sole Arbitrator to adjudicate upon the disputes and differences between the parties.

2. The parties had entered into an agreement dated 17.10.2011 under which the petitioner was to construct a building on behalf of the respondents. The agreement is admitted. The relevant clause relating to arbitration reads as under:-

“In case of any dispute the matter shall be decided by the Arbitrator and the name of the Arbitrator will be mutually decided.”

3. The parties entered into another agreement contained in a letter dated 26.04.2012 addressed by the petitioner to the respondents. This was also a construction agreement and relevant part of the same reads as under:-

“As per your verbal orders, we had started the above subjected work on the same rates, terms and conditions and specifications for the work of construction of Pharmacy Block at S.D.College, Barnala (Punjab) except the rates of few new extra items to be executed in this building given below as these items are not the part of the agreement of Construction of Pharmacy Block at S.D. College, Barnala.

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4. Other terms and conditions and specifications will be same as per agreement for the work of construction of Pharmacy Block at SD College, Barnala.”(emphasis supplied).

4. The petitioner actually ought to have filed a separate petition. However, that is a mere technicality. The two agreements will be treated separately and I intend appointing an Arbitrator although the same arbitrator, in respect of each of the agreements. The only contention is that the second agreement does not contain an arbitration clause. I have already set out the relevant parts of the second agreement which makes not only the rates and specifications of the first agreement applicable but also the terms and conditions thereof. The intention of the parties quite obviously was to incorporate all the terms and conditions of the first agreement into the second agreement. It is obvious that the words ‘*terms and conditions*’ were added to clarify that not merely the rates and specifications of the first agreement but all the terms and conditions thereof were incorporated into the second agreement. The judgment of the Supreme Court in *M.R.Engineers and Contractors v. Som Datt Builders Ltd. 2009(7) Supreme Court Cases 696* infact supports the petitioner’s submission that the arbitration clause in the first agreement stood incorporated by reference in the second agreement. Paragraphs 12 to 14 of the aforesaid judgment read as under:-

“12. The question that arises for consideration is whether the provision for arbitration contained in the contract between the principal employer and the contractor, was incorporated by reference in the sub-contract between the contractor and the sub-contractor.

13. Section 7 of the Act defines “arbitration agreement”. Sub-sections (1) and (5) of Section 7, relevant for our purpose, are extracted below:

“7. Arbitration agreement.—(1) In this Part, ‘arbitration agreement’ means 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.

(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.” (emphasis supplied)

Having regard to Section 7(5) of the Act, even though the contract between the parties does not contain a provision for arbitration, an arbitration clause contained in an independent document will be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, if the reference is such as to make the arbitration clause in such document, a part of the contract.

14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The 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. If the legislative intent was to import an arbitration clause from another document, merely on reference to such document in the contract, sub-section (5) would not contain the significant later part which reads: “and the reference is such as to make that arbitration clause part of the contract”, but would have stopped with the first part which reads:

“7. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing....”

5. In the circumstances, the petition is disposed of by appointing Mr. R.K.Tyagi, Additional District & Sessions Judge (Retd.), # No.2, Lakhi Colony, Barnala, Punjab, as the sole Arbitrator to adjudicate upon the disputes and differences between the parties in respect of both the agreements/contracts. It is clarified that although the Arbitrator is the same, the Arbitrator shall treat both these references separately and pass separate awards. Parties have agreed that the venue of Arbitration would be at Barnala, Punjab.

A copy of this order be sent to the Arbitrator.

31.07.2015
ravinder

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE