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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION NO. 76 OF 2017**

Smart World Intel Solutions	...Petitioner
<i>Versus</i>	
Elite IT Services India Pvt Ltd	...Respondent

Mr Harinder Toor, *with Jaideep Khattar, Naren Nimbalkar & Arundathi Venkataramani, i/b Khaitan & Co., for the Petitioner.*
Mr Raghunandan Sharma, *i/b Nishant Kaushik, for the Respondents.*

CORAM: G.S. PATEL, J
DATED: 19th April 2017

PC:-

1. This is an Arbitration Petition under Section 9 of the Arbitration & Conciliation Act, 1996. What it seeks is monetary security against the Respondent (“**Elite**”). But to get to that stage, Mr Toor for the Petitioner has a rather large hurdle to cross — he establish that there is in fact an arbitration agreement between him and the Respondent that can be invoked in the first place.

2. The Petitioner is a partnership firm. It is an unregistered partnership firm and this perhaps explains Mr Toor’s anxiety to press this Petition. The Respondent company provides a variety of

software solutions and services. On 15th October 2014, the parties entered into a Memorandum of Understanding (“**MoU**”) since they both wished to collaborate to secure an order to provide what are called CBCRM services to MTNL and which were to be provided by TechMahindra Ltd (“**TechMahindra/TechM**”). The Respondent was under an arrangement between the parties entitled to a margin of 10%. A copy of the MoU is annexed to the Petition.¹ This envisaged that the MTNL contract awarded to TechMahindra would be serviced by the Petitioner and Respondents working in collaboration; and that while TechMahindra might look to the Respondent, it was the Petitioner which would provide the services to TechMahindra.

3. This was followed by a sub-contract Agreement dated 21st April 2015. A copy is annexed to the Petition.² This was between TechMahindra and the Respondent. It contains an arbitration clause and there is no dispute about this. This is Clause 14.10:

“14.10 Arbitration

If the parties are unable to resolve any dispute by amicable discussion between the senior executives of both Parties within thirty (30) Working Days of the giving of the dispute notice by either Party, the Party sending such notice may refer the Dispute to arbitration in accordance with the Arbitration and Conciliation Act, 1996 of India, by sending a written notice to the other (Arbitration Notice) and a Sole Arbitrator shall be appointed by mutual consent between the parties. If

1 Petition, Exhibit “A”, *pp.* 29-30.

2 Petition, Exhibit “B”, *pp.* 31-43.

Parties fail to consent on the appointment of the Arbitrator, then Arbitrator shall be appointed in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996. Seat of Arbitration shall be New Delhi. Governing language for the arbitration shall be English. The award in the arbitration will be final and binding.”

This is quite a distinct clause from clause 12 which provides for termination and has various sub-clauses.

4. The parties then entered into a Service Agreement dated 9th May 2015.³ This contain no separate arbitration clause. The Sub-Contract Agreement was amended on 31st May 2016 and extended till 30th June 2017.⁴ On 1st June 2016 the parties then entered into another Service Contract, and this is the one that lies at the heart of the dispute.⁵ There is no doubt that both parties have signed this. The contract was drawn up by the persons unfamiliar with the preparation of legal documents, as is obvious from the complete lack of any helpful paragraph numbering. The unnumbered second paragraph, if I might call it that, at page 50 is set out below. ‘SwiSol’ refers to the Petitioner before me, and ‘EISI’ to the Respondent.

“SwiSol shall be responsible for complete delivery of Services as per TechM Contract on back-to-back basis; this shall include all penalties, levies if applied by TechM as per contract between EISI and Tech Mahindra Ltd.

3 Petition, Exhibit “C”, *pp.* 44-48.

4 Petition, Exhibit “D”, *p.* 49.

5 Petition, Exhibit “E”, *pp.* 50-64.

This contract will be governed on the basis of following documents as Annexures to this contract:

1. Sub Contract Agreement (Between Tech Mahindra Ltd and EISI).
2. Amendment to Sub Contract Agreement (Made on 31st May 2016).
3. MTNL BSS Support Proposal (SOW and commercial with Tech Mahindra Ltd)."

5. Then there is another clause on the next page 51:

"And if SwiSol (including its agents, employees, consultants and subcontractors) not able to deliver the project on continued basis EISI has right to cancel the PO and terminate this contract, if such contract is terminated/cancelled by TechMahindra. In the event due to any reason TechM terminates the agreement with EISI then this contract between EISI and SwiSol will stand terminated and terms mentioned (including consequences of termination) in the Annexures will be applicable."

(Emphasis added)

6. These two clauses formed the entirety of Mr Toor's argument for the Petitioner. The argument is sequenced like this: (1) the arbitration clause 14.10 in the Elite-TechM Contract is part of the three documents referenced on the first page of the Service Contract of 1st June 2016 between the Petitioner and the Respondent; and (2), the termination of the Service Contract is on a corresponding back-to-back basis and says that should TechM

terminate its contract with Elite, then the contract between Elite and Petitioner would also stand terminated with all consequences including the consequences of termination in the Annexures.

7. There is one final document of relevance, and that is the termination notice of 9th June 2016 from Elite.⁶ Mr Toor references this only to show that it was by referencing the back-to-back arrangement that Elite terminated the Petitioner's services.

8. The principal decision that Mr Toor relies on, and quite understandably so, is of the Supreme Court in *MR Engineers & Contractors Pvt Ltd v Som Datt Builders Ltd*,⁷ and it is easy to see why. There, too, as in this case there were three players: a Government body, the Public Works Department ("PWD"), a contractor and a sub-contractor. The contract was for construction of a road. The contract between the PWD and its contractor, the respondent in the SLP, had an arbitration clause. The sub-contract between the respondent and the appellant (the respondent's its sub-contractor) sought to incorporate the terms of the principal contract between the PWD and the respondent. This the appellant tried to invoke by saying that the governing arbitration clause as between the PWD and the respondent would also apply as between the appellant and the respondent. The Supreme Court was thus concerned with a situation involving incorporation of arbitration agreements or arbitration agreements by reference or by literal incorporation. In paragraphs 15 to 18, the Supreme Court said this:

⁶ Petition, Exhibit "J", pp. 74-80.

⁷ (2009) 7 SCC 696.

“15. Section 7(5) therefore requires a *conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties.* But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference incorporating an arbitration clause contained in such document into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.

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.**

17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or

that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.”

(Emphasis added)

9. The Supreme Court also referenced Section 7 of the Arbitration & Conciliation Act, which reads thus:

“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.”

10. In paragraph 24, the Supreme Court culled out the principles in the following terms:

“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 :

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause

from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & 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.”

(Emphasis added)

11. On this basis Mr Toor submits that the arbitration clause between TechM and the Respondent must be made applicable and must operate for the disputes between the Petitioner and the Respondent.

12. I do not think it is possible to accept this, and there are two reasons for it. Mr Toor is partly correct in reading *MR Engineers* as he does but I believe his cause is not as well-served as he claims because the Supreme Court clearly required specific — that is to say, not implicit or tangential — reference to an arbitration clause in another contract, and that this clause should be appropriate. In this context, it would be very fruitful to read certain other paragraphs as well; notably paragraphs 33 and 36:

“33. 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 execution of the work as contrasted from 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.”

36. Even assuming that the arbitration clause from the main contract had been incorporated into the sub-contract by reference, we are of the view that the

Appellant could not have claimed the benefit of the arbitration clause. This is in view of the principle that 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. This appears to me to fortify and reaffirm the earlier ruling in paragraph 24 that: (i) that where an arbitration clause is sought to be incorporated by reference it should be specially mentioned; and (ii) that reference must be such that can lead to an appropriate, or in the words of the Supreme Court, a provision that is not inapt or inapplicable with reference to the contract. In other words, the Supreme Court did not suggest that every arbitration clause that is referenced would irrespective of its appropriateness be incorporated willy-nilly into a specific contract which made a reference to it.

14. In the present case, the reason not to accept Mr Toor’s submission is plain and it is obvious from paragraph 14 of the principal contract in the first place. This clause requires the contracting parties (TechM and Elite) to first resolve disputes by amicable discussion as a condition precedent and parties may go to arbitration only if this fails. What Mr Toor’s submission amounts to is that merely because of a ‘hidden’ reference — one that is only implicit and indirect — to the principal Elite-TechM contract’s arbitration clause in the 1st June 2016 Service Contract, a wholly new arbitration agreement between the Petitioner and the Respondent should be imputed or implied; and it matters not that

the Elite-TechM contract's wording is inapt or inappropriate to the present disputes. In other words, the Court should simply assume the existence of a binding arbitration agreement though there is nothing to suggest this in the manner required by the Supreme Court.

15. The second reason not to accept Mr Toor's argument is that in the incorporation clause itself, the specific reference is to the *termination* clause. That is clause 12 of the contract between TechM and Elite. There is no specific reference to the arbitration clause 14.

16. The Arbitration Petition must be dismissed. There is, therefore, no question of granting any interim relief.

17. This is a Petition in the Commercial Division. Following the amendment to Section 35 of the Code of Civil Procedure 1908 brought about by the Commercial Courts, Commercial Division & Commercial Appellate Division of the High Courts Act 2015 and in particular Section 35(2) the unsuccessful party would have to pay the costs of the successful party, and even actual costs. The proviso to Section 35(2) requires that I should give reasons for *not* awarding costs. The reason I do not award costs is only this: the Petitioner does not seem to me to have a readily available alternate remedy in the form of a civil suit only for want of extant registration. Further, this was a very closely tied contract at every level. The result may be that the Petitioner finds itself without legitimate recourse. That is unfortunate and I should not readily find myself adding to the Petitioner's woes by imposing costs. Hence, no order as to costs.

18. I also make it clear that despite these observations should the Petitioner find itself able to maintain an appropriate civil proceeding, it will be entitled to do so and this order dismissing this Arbitration Petition will not come in its way. That proceeding will have to be decided on its own merits and I will leave all contentions open for that purpose.

(G. S. PATEL, J.)