

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO. 204 OF 2017

Likproof India Private Limited

.. Applicant

Vs.

Kunal Corporation Pvt. Ltd.

.. Respondent

Mr.Vishwajit P. Sawant a/w. Mr.Nikhil Patil I/b P.M. Jadhav for applicant.

Mr.Karl Tamboly a/w. Mr.Anirudh Hariani, Mr.Soura Ghosh, Ms.Deeksha Jani and Mr. Maherasp P. Mistry I/b Hariani and Co. for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 7TH SEPTEMBER 2018

P.C.

1 This application is under Section 11 of the Arbitration and Conciliation Act, 1996 (The said Act).

2 Applicant has approached this Court on the admitted position that there is no standalone agreement in writing or an arbitration clause in an agreement signed between the parties but the agreement between the parties is reflected in the correspondence exchanged and the parties were ad-idem that the arbitration clause in another agreement is also incorporated in the agreement as could be culled from correspondences exchanged.

3 Applicant was issued a work order dated 12th November 2009 by one BMM Developers Private Limited (BMM). Clause 15 of the work order provided as under :-

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15. Any difference/dispute arising during the construction which cannot be settled amicably, will be resolved as per The Arbitration and Conciliation Act, 1996.

Applicant commenced the work as required under the work order and also received a sum of Rs.2.45 crores by way of mobilization advance.

4 Thereafter, applicant received a letter dated 23rd March 2010 from BMM by which applicant was informed by BMM that (i) BMM was awarded a contract for construction of the building on which applicant was working and it has been agreed between respondent and BMM that the construction of that building is cancelled and respondent had agreed to directly give contract to applicant on the same terms and conditions as per the work order granted by BMM to applicant, (ii) respondent shall allot a fresh work order to applicant on same terms and conditions as the existing work order, and (iii) applicant need not refund the advance to BMM but credit for the same will be granted by applicant to respondent in terms of the contract proposed to be granted by respondent to applicant. Applicant was requested to sign a duplicate of the said letter in token of its acceptance, which applicant did. This is the letter primarily on which applicant is relying. It will be helpful to reiterate the said letter which reads as under :-

“23rd March 2010

To,

Mr.Wahid Chowhan,

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Director,
Likproof India Private Limited
Cecil Court, Next to Regal Cinema,
M.Bhushan Road, Mumbai-400 001.

Sub : Transfer of work order allotted to Likproof India Private Limited from BMM Developers Private Limited in favour of Kunal Corporation Pvt. Ltd.

Dear Mr.Chowhan,

This is with reference to the work order allotted by BMM Developers Pvt. Ltd. ('BMM') to Likproof India Pvt. Ltd. (Likproof) on 12.11.2009 for the building Waterfront Tower at Colaba. Under the said work order, BMM has also granted Rs.2.45 crores (Rupees Two Crores Forty Five Lakhs only) to Likproof by way of 'mobilization advance' ('Advance').

We were awarded contract for construction of Waterfront Tower by the owners Kunal Corporation Private Limited ('Kunal'). It has been agreed mutually between Kunal and us that contract for construction of Waterfront Tower awarded to us is cancelled. However, Kunal has agreed to directly give contract to Likproof on the same terms and conditions as per the aforesaid work order granted to Likproof. Accordingly please note tht :

- * The aforesaid work order stands cancelled.
- * Kunal shall allot a fresh work order to Likproof on same terms as the existing work order.
- *Likproof shall not be required to refund advance to BMM, but credit for the same will be granted by Likproof to Kunal in terms of the contract proposed to be granted by Kunal to Likproof.

Kindly sign duplicate of this letter in token of your acceptance of contents of this letter.

Thanking You,

We confirm.

For BMM Developers Pvt. Ltd.
Sd/-
Director

For Likproof India Pvt. Ltd.
Sd/-
Director”

5 Subsequently, applicant carried out the work as per the work order dated 12th November 2009 and raised running account bills on respondent

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for which payments were also made. Disputes arose between applicant and respondent and communications were exchanged. Shri Sawant submitted that in every communication, the understanding of the parties was even though a fresh work order was not signed or issued to applicant, the terms that governed the relationship between the parties is the work order dated 12th November 2009. Shri Sawant pointed out that even in the letter dated 2nd February 2016 from the advocates for respondent no.2, it is stated “.....without even completing the works as per the commercial terms set out in a work contract dated 12th November 2009 (“work contract”)”. Shri Sawant also pointed out to paragraphs 3(d), (f), (i), (h), (o) and paragraph 4 of the said letter dated 2nd February 2016 and submitted that the written agreement between the parties was the work contract. Shri Sawant also relied upon the subsequent communications from the advocates for respondent particularly Exh.'J', i.e., letter dated 17th March 2016, to submit that respondent accepted that the work contract dated 12th November 2009 that was entered into between applicant and BMM was the governing contract. Shri Sawant relied upon a judgment of the Apex Court in *M/s. Govind Rubber Ltd. Vs. M/s. Louids Dreyfus Commodities Asia P. Ltd.*¹ to submit that an agreement, even if not signed by the parties, can be spelt out from the correspondence exchanged between the parties and it is the duty of the Court to construe

¹ 2015(6) All MR 485 (S.C.)

correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. Shri Sawant submitted that it is necessary for the Court to find out from the correspondences as to whether parties were ad-idem to the terms of the contract.

6 It was also submitted by Shri Sawant that though the Apex Court in *M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited*² has summarized the scope and intent of Section 7(5) of the said Act and has held that a clear or specific communication incorporating the arbitration clause has to be there in the contract between the parties and an arbitration agreement is an agreement within an agreement, still when the correspondences indicate that the parties were ad-idem to the extent that even the arbitration clause is incorporated in the fresh relationship between the parties as reflected in the exchange of correspondence, the Court has to conclude that parties have agreed that the arbitration clause as stated in the work order dated 12th November 2009 also forms part of the agreement between applicant and respondent. Shri Sawant also submitted that in Exh.'J' to the petition, i.e., the reply dated 17th March 2016 to the notice to refer disputes to arbitration, respondent only took a stand that because applicant terminated the work order, dated 12th November 2009, the arbitration clause is not subsisting. Therefore,

2 (2009)7 SCC 696

respondent has also accepted that the parties had agreed that the arbitration clause in work order, dated 12th November 2009 forms part of the terms agreed upon between the parties.

7 Shri Tamboly, at the outset, submitted that the second limb of applicant's submission relying upon the communication dated 17th March 2016 from respondent's advocates, copy whereof is at Exh.'J' to the application, is not the basis on which applicant has approached this Court and therefore that submission, in any event, has to be rejected or not to be considered by this Court. Apart from that Shri Tamboly also pointed out that applicant's case in the application is that on 23rd March 2010, applicant has been informed by BMM that respondent and BMM have mutually agreed to transfer of contract of BMM and applicant to between applicant and respondent and respondent has agreed to continue the contract with applicant on the same terms as contained in the work order dated 12th November 2009. Shri Tamboly also brought to the attention of the Court paragraph 3(g) of the application, where applicant has stated that BMM further informed applicant that the work order dated 12th November 2009 stands cancelled and respondent will execute a fresh work order in favour of applicant.

8 Shri Tamboly also referred to paragraphs 4 and 5 of the affidavit in rejoinder dated 7th September 2018 filed by one Wahid Chowhan,
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Managing Director of applicant which also indicates that applicant has not approached this Court with the second limb of Shri Sawant's arguments and the entire basis on which applicant has approached is that the work order dated 12th November 2009 which contains arbitration clause has been accepted by respondent without any modification and has been acted upon.

9 On the first limb of Shri Sawant's submission that there was conscious acceptance of the work order etc., Shri Tamboly submitted that even if the Court proceeds on the basis that the relationship between the parties is governed by the terms in the work order dated 12th November 2009, still there is no conscious acceptance of the arbitration clause. Shri Tamboly submitted that there is no special reference or communication indicating a mutual intention that the arbitration clause in the work order, dated 12th November 2009 has been accepted to be binding between applicant and respondent. Shri Tamboly further submitted that when parties entered into a contract making a general reference to another contract, such general reference would not have the effect of incorporating the clause from the referred document into the contract between the parties. The arbitration clause can be incorporated only by a specific reference to the arbitration clause and applicant has not produced any document which indicates that the parties have had a common intention or

have consciously accepted the arbitration clause in the work order to be binding between applicant and respondent. Shri Tamboly relied upon *M.R. Engineers and Contractors Private Limited* (supra) in making these submissions.

10 I have heard both counsel and also considered the pleadings. The entire basis of applicant is that from the letter dated 23rd March 2010 read with work order and other communications, it can be spelt out that the relationship that governed was the work order dated 12th November 2009 which contained an arbitration clause and therefore, there is an arbitration agreement in writing between applicant and respondent. Admittedly, the agreement as per the applicant's case is, as recorded in the exchange of correspondence and there is no stand alone agreement in writing between the parties that has an arbitration clause let alone an arbitration agreement.

11 It is true that the settled position in law is that an agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. For that the Court has to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties which could create a binding arbitration agreement. An arbitration agreement is an agreement within an agreement. Even if the Court comes to a conclusion from the correspondence exchanged that there was a binding agreement between SKT

the parties, still whether there was a mutual intention to incorporate the arbitration clause also, as it is a separate agreement within the agreement, has to be considered. Judicial thinking seems to have favoured the approach that general words of incorporation are not sufficient. Rather particular reference to the arbitration clause needs to be made. There should be a special reference indicating a mutual communication to incorporate the arbitration clause from another document 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 A and B provides that the terms of payment to B will be as in the contract between A and C, then only the terms of payment from the contract between A and C, will be read as part of the contract between A and B. The other terms, say relating to quantity or delivery cannot be looked into. Sub-section 5 of Section 7 of the said Act makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable. I find

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support for this in *M.R. Engineers and Contractors Private Limited (supra)*

where paragraphs 14 to 22, 24 and 33 read as under :-

"14 The wording of Sec. 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 :

"The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing."

15 Section 7(5) 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.*

19 *Sub-section (5) of Section 7 merely reiterates these well settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable.*

20 *The following passages from Russell on Arbitration throws considerable light on the position while dealing with Section 6(2) of (English) Arbitration Act, 1996 corresponding to Sec.7(5) of the Indian Act (23rd Edition, see pages 52-55):*

"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 seek 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. "

"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 exit." [Para : 2.047]

"Reference to standard form terms. 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." [Para : 2.048]

21 After referring to the view of Sir John Megaw, in *Aughton Ltd. v. M.F. Kent Services Ltd.* [1991 (57) BLR 1] that specific words were necessary to incorporate an arbitration clause and that the reference in a sub-contract to another contract's terms and conditions would not suffice to incorporate the arbitration clause into the sub-contract, followed in *Barrett & Son (Brickwork) Ltd. v. Henry Boot Nanagement Ltd.* [1995 CILL 1026, *Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.* [1998 (2) Lloyds' Rep.439) and *Anonymous Greek Co of General Insurances (The "Ethniki") v. AIG Europe (UK)* [2002 (2) All ER 566]

and Sea Trade Maritime Corp. v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Athena") No.2 - [2006] EWHC 2530, Russell concludes:

"The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary."

22 A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of a Trade Associations or Regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same.

23

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.”

...

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.”

12 The letter dated 23rd May 2010 from BMM to applicant has been accepted by applicant and states that respondent had agreed to directly give contract to applicant on the same terms as per the work order dated 12th November 2009 granted to applicant. It also states that the work order dated 12th November 2009 has been cancelled and respondent shall allot a SKT

fresh work order to applicant on the same terms as the existing work order. Though correspondence exchanged between the parties would indicate that the parties agreed that applicant would continue to work as per the work order dated 12th November 2009, none of the correspondence indicate that the parties were ad-idem or consciously accepted that the arbitration clause in the work order dated 12th September 2009 also forms a part of the agreement between applicant and respondent. There is no reference to arbitration clause at all in any of the communications relied upon by applicant to prove that the relationship between the parties or the terms of contract between the parties is as reflected in the work order dated 12th November 2009. I cannot accept the fact that the parties were ad-idem and consciously accepted that arbitration clause was also accepted or parties had entered into arbitration agreement. In fact, in a communication dated 9th October 2015, copy whereof is at Exh.'G' to the further affidavit in reply of respondent, applicant has stated *"We are carrying out the work on your verbal work order, but are still awaiting a written work order..."*

13 In view of these facts and circumstances, I am unable to come to a conclusion that there was a meeting of mind between the parties to enter into an arbitration agreement between the parties.

14 Improvised submissions of Shri Sawant which does not find mention in the pleadings that in the reply to the notice of referring disputes to SKT

arbitration, respondent not having denied the existence of an arbitration clause only because the work order has been terminated but not having taken a stand that there was no arbitration clause at all and hence respondent had accepted that there was an arbitration agreement, cannot be accepted. This is because it is not their case in the application. Secondly, whether the parties had consciously agreed referring disputes to arbitration and there was an arbitration agreement has to be found in the agreement or spelt from the correspondence which evidences an agreement and not from a reply to notice to refer disputes to arbitration.

15 As stated earlier, none of the documents indicate that parties consciously intended that dispute between them shall be referred to arbitration.

16 Application dismissed.

(K.R. SHRIRAM, J.)

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Kamlesh
Talekar

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signed by
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