

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

**COMMERCIAL ARBITRATION APPLICATION NO.142 OF 2017**

H.K. Enterprises

....Applicant

Vs.

JSW Jaigarh Port Limited & Anr.

....Respondents

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Ms. Sultana V. Sonawane for applicant.

Mr. Rohaan Cama a/w. Mr. Vinod Kothari and Ms. Gauri Joshi I/b. M/s. Apex Law Partners for respondent no.1.

Mr. Sagar Sheth a/w. Mr. Anand Pai and Ms. Abshit Jain I/b. Adv. Rinku Smitesh Valanju for respondent no.2.

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**CORAM : K.R.SHRIRAM, J.**

**DATE : 31<sup>th</sup> AUGUST, 2018**

**P.C.:**

1                This application is filed under Section 11 of the Arbitration and Conciliation Act 1996 as amended.

2                The facts in brief are as under :

3                Respondent no.1 is a Port and respondent no.2 is an importer of coal. Respondent no.1 and respondent no.2 entered into an agreement dated 18<sup>th</sup> April 2016 whereby respondent no.1 and respondent no.2 agreed that respondent no.2 will import coal through respondent no.1. Various terms and conditions were entered into and clause 16 provides for the disputes between respondent no.1 and respondent no.2 to be referred to arbitration at Mumbai under Indian law. Applicant is an exporter of coal and respondent no.2 being the buyer/importer of coal entered into an

agreement dated 9<sup>th</sup> November 2016 whereby petitioner agreed to sell various quantities and quality of coal to respondent no.2 under the terms and conditions mentioned therein. This agreement also provided for reference of disputes to arbitration in accordance with the rules of International Chamber of Commerce at Singapore.

4           Applicant, respondent no.1 and respondent no.2 entered into a Tripartite Agreement dated 12<sup>th</sup> November 2016 whereby respondent no.1 agreed to deliver goods imported through respondent no.1's Port to respondent no.2 upon receiving a request letter from applicant or the designated banker. This was because and it is quite clear when we read all the three agreements together, applicant wanted to facilitate or assist respondent no.2 in obtaining LC facilities to pay applicant. Respondent no.1 would not be able to deliver the goods which would arrive by sea unless applicant, who is exporter, hands over the bills of lading to respondent no.2, respondent no.2 surrenders the bills of lading to the carrier's agent and carrier's agent issues delivery order directing respondent no.1 to deliver the goods to respondent no.2. Therefore, the purpose of the Tripartite Agreement dated 12<sup>th</sup> November 2016 was to obviate the need to surrender the bills of lading and for respondent no.1 to deliver the goods without insistence of surrender of bills of lading/delivery order. Otherwise if delivery is given without bills of lading or delivery order, the carrier, which carried

the coal into the port of respondent no.1 and respondent no.1 will be exposed to claim from applicant. It is for this reason, clause 8 of the Tripartite Agreement provided “..... no rights otherwise or claims of any nature in respect thereof shall inure to the confirming party/HKE under the said agreement and/or this Tripartite Agreement”. The confirming party/HKE is applicant. The said agreement is the first agreement dated 18<sup>th</sup> April 2016.

5 Ms. Sonawane, counsel for petitioner submitted that arbitration agreement is clause 16 of the agreement dated 18<sup>th</sup> April 2016. Ms. Sonawane relied upon clause 2 and clause 3 of the definitions and construction part of the Tripartite Agreement to submit that clause 16 of agreement dated 18<sup>th</sup> April 2016 is the agreement by incorporation. Clause 2 and clause 3 read as under :

*2. The parties agree and confirm that this Tri-partite agreement shall be construed as an addition to the Agreement and not in derogation in any manner thereof and to the extent stated herein shall amend and replace the same and the reference to the Agreement appearing herein or any documents to which the Parties are referred shall be deemed to mean the Agreement as modified or amended by or read with this Addendum. This Tri-partite agreement shall be an integral part of the Agreement and shall be co-terminus with the Agreement. Subject to the amendments herein all other terms and conditions of the said Agreement shall continue to be in effect and be binding upon the parties.*

*3. All Schedules and Annexure/(s) hereto shall form an integral part of this Tri-partite agreement and the Agreement.*

6 Ms. Sonawane submitted that clause 2 expressly provides that the Tripartite Agreement shall be an integral part of the first agreement

dated 18<sup>th</sup> April 2016 and all Schedules and Annextures of the Tripartite Agreement form an integral part of the Tripartite Agreement and therefore, clause 16 is the relevant clause.

7           Mr. Cama, counsel for respondent no.1 made the following submissions :

(a) tripartite agreement does not incorporate the first agreement dated 18<sup>th</sup> April 2016 and the second agreement dated 9<sup>th</sup> November 2016 because what the Tripartite Agreement states is that the Tripartite Agreement shall be an integral part of the agreement dated 18<sup>th</sup> April 2016 and does not state that the agreement dated 18<sup>th</sup> April 2016 is incorporated in the Tripartite Agreement and therefore, there cannot be any arbitration clause;

(b) assuming that the agreement dated 18<sup>th</sup> April 2016 forms an integral part of the Tripartite Agreement, still under that agreement, parties to the arbitration agreement can only be respondent no.1 and respondent no.2. Clause 16 of the agreement dated 18<sup>th</sup> April 2016 expressly provides “parties to this agreement .... if parties fail to settle the disputes .... from the date of raising the disputes by either party .....”. The said agreement defines “respondent no.1 and respondent no.2 individually are referred to as the party and collectively referred to as the parties”. Applicant does not come into the picture at all. Therefore, even if we take applicant's case and

conclude that applicant is a party to the said agreement, still the arbitration agreement is only between respondent no.1 and respondent no.2 and not applicant;

(c) as per clause 6 and clause 8 of the amendments of Tripartite Agreement, there cannot be any claim against respondent no.1 and therefore, the question of referring any dispute to arbitration against respondent no.1 does not arise. Clause 6 and clause 8 read as under :

*6. Subject to above, the Confirming Party shall have no rights, claims or interest against JSW Jaigarh and JSW Jaigarh shall not be responsible to the Confirming Party.*

*8. HKE/Confirming Party has been induced as a pro-forma party to this Tri-partite agreement with a view to ratify the said Agreement and to elucidate the Cargo Handling arrangement and no rights otherwise or claims of any nature in respect thereof shall inure to the Confirming Party/HKE under the said Agreement and/or this Tri-partite Agreement.*

(d) under clause 3 of the definitions and construction of the Tripartite Agreement, both the agreement dated 18<sup>th</sup> April 2016 and agreement dated 9<sup>th</sup> November 2016, if one accepts applicant's case, form part of the Tripartite Agreement. In that case, the agreement dated 18<sup>th</sup> April 2016 provides for arbitration in accordance with Indian law in Mumbai whereas the agreement dated 9<sup>th</sup> November 2016 provides for arbitration under the rules of ICC in Singapore and perhaps the law of Singapore may apply. Mr. Cama submitted that therefore, there is no way to arrive at a conclusion as to which arbitration clause will prevail and the

consequences thereon should be that there was no arbitration agreement between the parties.

(e) Mr. Cama relied upon a judgment of the Apex Court in *M.R. Engineers & Contractors Pvt. V/s. Som Datt Builders Ltd.*<sup>1</sup> to submit that 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, the Court has to conclude that the arbitration clause in the main contract did not form part of the sub-contract. Mr. Cama added that the Tripartite Agreement only stated that the Tripartite Agreement shall be an integral part of the agreement.

Mr. Sheth, counsel for respondent no.2 adopted the submissions of Mr. Cama.

8 I have heard the parties and also considered the agreements annexed to the petition. Section 11(6A) of the Arbitration and Conciliation Act 1996 reads as under :

*(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*

Therefore, this Court has to confine to the examination of the existence of an arbitration agreement.

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1. 2009 (7) SCC 696

9 Admittedly the Tripartite Agreement does not have an arbitration clause. Applicant's case is that there is an arbitration clause by incorporation. The Apex Court in *M.R. Engineers (supra)* has held that 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. It will be useful to reproduce paragraph 24 and 33 of the said judgment and the same read as under :

*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.

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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.

10           The Tripartite Agreement does not have a specific reference to arbitration clause in the agreement dated 18<sup>th</sup> April 2016 or 9<sup>th</sup> November 2016. This will be even if one accepts applicant's case that there is an incorporation of both or either of the two contracts into the Tripartite Agreement. Secondly, even if we take applicant's case further and accept that there is incorporation of the both agreements in the Tripartite Agreement, still there is an inconsistency between the two arbitration clauses, one provides for arbitration in Mumbai under Indian law and the

other provides for arbitration in Singapore under the ICC rules of arbitration.

11 Ms. Sonawane submitted that the arbitration clause, that will be applicable, is clause 16 in the agreement dated 18<sup>th</sup> April 2016. Even there the problem that applicant faces is that the arbitration clause provides for agreement to refer disputes to arbitration is only between the parties to the agreement and parties is defined as respondent no.1 and respondent no.2. There is no clause anywhere provided to introduce applicant also within the meaning of “parties”.

12 In the circumstances, having considered all these points, in my view, there is no arbitration agreement between the parties.

13 Application dismissed.

Gauri  
Amit  
Gaekwad  
Digitally  
signed by  
Gauri Amit  
Gaekwad  
Date:  
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(K.R. SHRIRAM, J.)