

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 23RD DAY OF OCTOBER, 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P.No.508 of 2018

In the matter of Section
11(5) and (6) of the
Arbitration and
Conciliation Act, 1996

and

In the matter of Contract
Agreement between Petro6
Engineering & Construction
Private Limited and
M/s. New Laxmi Engineering
& Trolley Works and

In the matter of
Arbitration

agreement contained in LOI
No.Petro6EC/2017/ONGC/5094/01
dated 20.01.2017

Petro6 Engineering & Construction
Private Limited,
a company having its registered
office at TVH Agnito Park,
2nd Floor, No.141, Rajiv Gandhi Salai (OMR),
Kandanchavady, Chennai -600 096
Represented by its Managing Director
Mr.A.Duraisamy

...Petitioner

-vs-

M/s. New Laxmi Engineering & Trolley Works
11th Main Pal Road, Sardarpura,
Jodhpur, Rajasthan
Represented by its proprietor
Mr.Hemant Sharma

...Respondent

Original Petition praying that this Hon'ble Court be pleased to appoint a Sole, independent and impartial Arbitrator to adjudicate and decide the disputes between the parties.

This Original Petition coming on this day before this court for hearing the court made the following order:-

The petitioner has filed the present petition Under Section 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint a sole arbitrator to adjudicate and decide the dispute between the petitioner and the respondent.

2. The respondent was appointed as a sub-contractor by the petitioner and was issued with a letter of intent dated 20.1.2017 bearing reference LOI No.Petro6EC/2017/ONGC/5094/001. The said letter of intent was issued by the petitioner pursuant to a contract awarded to the petitioner by Oil and Natural Gas Commission of India (ONGC) under a Tender process.

3. The said LOI was for design, engineering, supply and skid mounted living bunk houses and accessories as per the offer dated 1.7.2016 bearing reference Offer Q T N:-22 of the respondent.

4. In the LOI, it has been specified that the "General Conditions of Supply" of ONGC Tender Document No. V 14 TC 16008 will govern the said LOI. The said clause reads as under:

"This LOI is governed by the terms and conditions of ONGC vide their Tender document V14TC16908 "General Conditions of Supply" and as per their Terms & Conditions."

5. The petitioner submits that it has no dispute with ONGC. However, certain disputes have arisen between the petitioner and the respondent pursuant to which the petitioner issued notices including a notice invoking the arbitration clause as contained in the Tender Document of ONGC, under which the petitioner sub-contracted the supply of certain goods for ONGC from the respondent.

6. According to the petitioner the dispute between the petitioner and the respondent is arbitrable in view of the LOI which incorporates the General Conditions of Supply of ONGC in Tender Document.

7. The petitioner therefore submits that all disputes between the parties are required to be resolved by arbitration

pursuant to the provisions of the Arbitration and Conciliation Act, 1996.

8. There are seven Annexures. Annexure (I) to the Tender Document contains appendix 1 to 11. Annexure II to the Tender Document deals with "General Terms and Conditions" and has Appendix 1 to 4.

9. Clause No.33 in the Tender Document in Annexure-II to the General Terms and Conditions reads as under:

33. ARBITRATION (Applicable in case of supply orders/Contracts with firms, other than Public Sector Enterprises) (Not applicable in cases valuing less than Rs 5 lakhs)

Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the

arbitral tribunal.

2. The number of the arbitrators and the appointing authority will be as under:

Claim amount (Excluding claim for interest and counter claim, if any)	Number of Arbitrator	Appointing authority
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3. The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause, including the fees schedule provided herein. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause. 68 ONGC/MM/02/(68)

4. Parties agree that there will be no objection if the Arbitrator appointed holds equity shares of ONGC and/or is a retired officer of ONGC / any other PSU. However, neither party shall appoint its serving employee as arbitrator.

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12. The Arbitration shall be held at the place from where the contract has been awarded. However, parties to the contract can agree for a different place for the convenience of all concerned.

13. The Arbitrator(s) shall give reasoned and speaking award and it shall be final and binding on the parties.

14. Subject to the aforesaid conditions, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause."

10. The LOI specifically states that a detailed purchase order will be issued after signing up of the LOI. Copy of Purchase Order has not been filed. Be that as it may, parties have acted pursuant of the said LOI. The LOI also contains several clauses including special instruction and incorporates ONGC Tender under Serial No.2, viz., "Scope of Supply/Work" as extracted above.

11. The petitioner issued a legal notice dated 16.05.2018 and had demanded a sum of Rs.67,44,981/- in the form of liquidated damages deducted by ONGC on account of the alleged delay caused by the respondent.

12. The notice also seeks to invoke Clause 10 (1) of the LOI and Clause 43 of Annexure II General Terms and Conditions of the Tender. Clause 10 (1) of the LOI reads as under:

10. SPECIAL INSTRUCTION:-

1.The Conjunction with petro6EC Purchase Order Instructions, M/s.New Laxmi Engineering & Trolly Works, shall refer ONGC Tender Document V14TC16008

and Appropriate action to be taken while execution of this order. In case of any clarification, should refer to Petro6EC.

13. Clause 43 of the General Terms and Conditions in Annexure II to Tender Document reads as under:-

"Consideration of representations on post contract issues submitted by the bidders to Independent External Monitors (IEMs)

(Applicable for all tenders valuing above Rs.1 Crore where IP is applicable)

The bidders may raise disputes / complaints, if any, either with the designated Competent Purchase Authority (CPA) in ONGC or with concerned Director of ONGC or directly with the IEM c/o Chief Vigilance Officer, ONGC, Jeevan Bharti, Tower-II, 124-Indira Chowk, Connaught Place, New Delhi-100 001.

However, Bidders should note that IEMs would consider only those representations on post contract issues wherein there is an alleged violation of provisions of IP. Hence, bidders should not refer those post contract issues to IEMs for resolution, for which dispute resolution mechanism has already been defined in the contract conditions. The post contract issues pertaining to alleged violation of provisions of IP, if any, should only be referred to IEMs."

14. According to the petitioner, Clause 43 of the General Terms and Conditions in Annexure-II of the Tender Document, allows the petitioner the right to invoke arbitration clause as is applicable in case of any disputes between the

petitioner and ONGC. According to the petitioner, only this Court has jurisdiction in view of clause 35 of the Annexure II to the Tender Document which reads as under:

"35.APPLICABLE LAW AND JURISDICTION

34.1. The supply order, including all matter connected with this supply order shall be governed by the Indian law both substantive and procedural, for the time being in force and shall be subject to the exclusive jurisdiction of Indian Courts at the place from where the purchase order has been placed.

34.2. Foreign companies, operating in India or entering into Joint Ventures in India, shall have to obey the law of land and there shall be no compromise or excuse for the ignorance of the Indian legal system in any way.

(Note though Heading is in Para 35, the relevant clause as numbered as 34.1 and 34.2)"

15. Heard, Mrr.Thriyambak J Kannan, learned counsel for the petitioner and Mr.J.M.Nirmal Roy Sanjeevi, learned counsel for the respondent.

16. The respondent has filed a counter denying the existence of a binding arbitration clause between the parties hereto and submitted that the dispute if any not arbitrable between the parties.

17. It is submitted that even in the revised agreement dated 21.04.2018 between the petitioner and the respondent, there is no reference to the arbitration clause.

18. The learned counsel for the respondent further submitted that the respondent filed a Civil Suit in C.O.No.125 of 2018 before the learned Additional District Court No.V, Jodhpur on 11.06.2018 to recover the dues from the petitioner.

19. In the aforesaid proceedings, the petitioner had filed a petition under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the case for arbitration. This was opposed by the respondent and the said application filed by the petitioner came to be dismissed on 26.07.2018 wherein it was held that no arbitration clause subsists between the petitioner and the respondent.

20. During the course of hearing, it was also mentioned that aggrieved by the said order, the petitioner has also filed an appeal before Hon'ble High Court, Rajasthan which on the date consideration of the present application is still pending.

21. The learned counsel for the petitioner also drew my attention through several decisions of Courts rendered in the context of incorporation of arbitration clause by reference.

22. The learned counsel for the petitioner relied on the following decisions:

(i) **Grouu Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corporation Ltd.**, (2006) 5 SCC 275

(ii) **Inox Wind Limited Vs. Thermocables Ltd.**, (2018) 2 SCC 519

(iii) **Duro Felguera, S.A. Vs. Gangavaram Port Limited** (2017) 9 SCC 729

(iv) **Coastal Marine Construction and Engineering Ltd., Vs. Garware-wall Ropes Ltd.**, (2018) SCC Online Bom 541

(v) **Chandarvarkar Sita Ratna Rao Vs. Ashalate S.Guram** (1986) 4 SCC 447

(vi) **State of Bihar and other Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and others** (2005) 9 SCC 129

(vii) **Satya Jain (dead) through LRS and others Vs. Anis Ahmed Rushdie (dead) through LRs and others** (2013) 3 SCC 131

(viii) **Transmission Corporation of Andhra Pradesh Limited and others Vs. GMR Vemagiri Power General Limited and another** (2018) 3 SCC 716

(ix) **Phuchand Exports Limited Vs. O.O.O. Patriod** (2011) 10 SCC 300

(x) **Rattiram and Ors. Vs. State of Madhya Pradesh**

(2012) 4 SCC 526

(xi) **Gaurave Chaturvedi and Ors. Vs. Mr.Girdhar Gopal Bajoria and Another** (2014) 2 MP LJ 395

23. The learned counsel for the respondent relied on the following decision:

(i) **Elite Engineering and Construction (Hyderabad) Private Limited Vs. Techtrans Construction Private Limited** (2018) 4 SCC 281

(ii) **M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited,** (2009) 7 SCC 696

24. In **Groupe Chimique Tunisien Sa Vs. Southern Petrochemicals Industries Corporation Ltd.,** (2006) 5 SCC 275, referred to by the learned counsel for the petitioner the Hon'ble Supreme Court held as follows:

"6. Whether there is an arbitration agreement or not, has to be decided with reference to the contract documents and not with reference to any contention raised before a court of law after the dispute has arisen. Reference to pleadings before the Jordanian Courts would have been relevant if the plea was that the arbitration agreement between the parties is contained in the exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other (as contemplated under [Section 7\(4\)\(c\)](#) of the Act).

7. The purchase orders placed by the respondent on the petitioner are the contracts between the parties and they are subject to FAI terms which contain the arbitration clause. Sub-Section (5) of [Section 7](#) specifically provides that where there is reference in a contract (in this case, the purchase order) to a document containing an arbitration clause (in this

case, the FAI terms), such reference constitutes an arbitration agreement, if the contract is in writing and the reference is such as to make that arbitration clause a part of the contract."

25. In **Inox Wind Limited Vs. Thermocables Ltd.**, (2018) 2 SCC 519, the Court culled out the following broad principle from **Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL** [2010] EWHC 29 (Comm):

"(1) A and B make a contract in which they incorporate standard terms. These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.

(2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties (3) A and B make a contract incorporating terms agreed between A (or B) and C. Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub contracts incorporating the terms of a main contract or sub-sub contracts incorporating the terms of a sub contract.

(4) A and B make a contract incorporating terms agreed between C and D. Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category."

26. Ultimately, the Court held that "in view of the development of law after the judgment in **M.R. Engineers'** case,

we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause.

27. In that case, the Purchase order mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The Court held that though general reference to an earlier contract was not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause.

28. In **Duro Felguera, S.A. Vs. Gangavaram Port Limited** (2017) 9 SCC 729, the Court held that "When reference is made to the priority of documents to have clarity in execution of the work, such general reference to Original Package No.4 Tender Document will not be sufficient to hold that the arbitration clause 20.6 in the Original Package No.4 TD is incorporated in the MoU.

29. Distinguishing various judgments, the Court held that the case in hand stands entirely on different footing. There all five different Packages as well as the Corporate Guarantee

had separate arbitration clauses and did not depend on the terms and conditions of the Original Package No.4 TD nor on the Memorandum of Understanding.

30. The concurring view of Hon'ble Mr. Justice Kurian Joseph in **Duro Felguera** referred to *supra* was followed in **Coastal Marine Construction and Engineering Ltd., Vs. Garware-wall Ropes Ltd.**, (2018) SCC Online Bom 541.

31. The judgments referred in **Chandarvarkar Sita Ratna Rao Vs. Ashalate S.Guram** (1986) 4 SCC 447 and **State of Bihar and other Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and others** (2005) 9 SCC 129 deal with interpretation of statutes.

32. The petitioner also sought to invoke the principle of "business efficacy" to read a term into an agreement so as to achieve the result or the consequence intended by the parties.

33. In this connection the learned counsel for the petitioner referred to the decisions in **Transmission Corporation of Andhra Pradesh Limited and others Vs. GMR Vemagiri Power General Limited and another** (2018) 3 SCC 716

and **Phuchand Exports Limited Vs. O.O.O. Patriod** (2011) 10 SCC 300.

34. Per contra, the learned counsel for the respondent relied on the decision of the Hon'ble Supreme Court in **Elite Engineering and Construction (Hyderabad) Private Limited Vs. Techtrans Construction India Private Ltd.**, (2018) 4 SCC 281. The Court reiterated and reaffirmed the view taken in **M.R. Engineers and Contractors Private Limited v. Som Dutt Builders Limited**, (2009) 7 SCC 696.

35. Before the Hon'ble Supreme Court it was argued that an arbitration clause was binding on the parties under Section 7(5) of the Act. In para 17, the Hon'ble Supreme Court observed as follows:

*"It was ultimately found that the intention of the parties was not to incorporate the main contract in its entirety into the sub-contract. Further, this Court held that the arbitration clause in the main contract was inapplicable to the contract between the parties as the main contract was between the Public Works Department, Government of Kerala and the contractor in which the arbitration clause contemplated appointment of a committee of three arbitrators, with one each to be appointed by the State of Kerala and the Respondent therein and the third to be nominated by the Director General Road Development, Ministry of Surface Transport Roads in Government of India. **Appointment of a committee of arbitrators with representatives of State of Kerala and the Government of India was totally irrelevant***

for the contract between the contractor and the sub-contractor."

36. The Hon'ble Supreme Court in **Elite Engineering and Construction (Hyderabad) Private Limited Vs. Techtrans Construction India Private Ltd.**, case held that the case squarely falls under [Section 7\(5\)](#) of the Act and there is an arbitration agreement between the parties as per clause 15 of the FAI terms.

37. However, the agreement was between the parties and FAI terms was also incorporated. In **M.R. Engineers and Contractors Private Limited v. Som Dutt Builders Limited**, (2009) 7 SCC 696, the Kerala High Court had rejected the application on the ground that the arbitration clause in the main contract was not incorporated by reference in the contract between the Appellant and Respondent therein.

38. In the appeal before the Hon'ble Supreme Court, the Appellant submitted that the case was squarely covered by Section 7 (5) of the Act and that the arbitration clause forms part of the main contract as it was incorporated by reference in the sub contract with the Respondent.

39. The learned counsel for the Petitioner counters the views expressed in **Elite Engineering and Construction** *supra* and states that it was passed on 23.02.2018 while the decision of the Hon'ble Supreme Court in **Inox Wind Limited Vs. Thermocables Ltd.**, (2018) 2 SCC 519 was passed on 05.01.2018 and the decision rendered in **Elite Engineering** *supra* ought to have followed its view in **Inox Wind Limited** case referred to *supra*.

40. Therefore, to that extent the decision of the Hon'ble Supreme Court in **Elite Engineering and Construction (Hyderabad) Private Limited Vs. Techtrans Construction India Private Ltd.**, (2018) 4 SCC 281 according to the learned counsel for the petitioner was incorrect.

40. I have considered the citations and submissions. The short point in this case is whether there is a valid and subsisting arbitration clause binding the respondent merely because the LOI states that "LOI is governed by the terms and condition of ONGC vide Tender Document No.V14 T c160088 "General conditions of supply" and as per their Terms and Conditions."

41. The law on the subject of reference by incorporation

is clear. However, the agreement has to be examined whether the parties really intended to incorporate the arbitration clause in the "**General Conditions Supply**" in the tender document of ONGC.

42. If there is incorporation of an arbitration clauses by reference, the Court has to simply appoint an arbitrator to complete the process as per the decision of the Hon'ble Supreme Court in **Duro Felguera, S.A. Vs. Gangavaram Port Limited** (2017) 9 SCC 729.

43. In the context of Section 45 of the Arbitration and Conciliation Act, 1996, the Hon'ble Supreme Court in **Chloro Controls India Pvt. Ltd., Vs. Seven Tent Water Purification Inc. and others** (2013) 1 SCC 641, held as follows:

"Sections 8 and Section 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act."

44. The Court further observed that "*Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well*

as the substantive contract underlying that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under [Section 45](#) of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England (Second Edn.)* by Sir Michael J. Mustill:

- "1. The claimant was in reality always a party to the contract, although not named in it.
2. The claimant has succeeded by operation of law to the rights of the named party.
3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

45. The Court held that "for example where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile.

46. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void, inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties.

47. Section 8 of the Arbitration and Conciliation Act, 1996 has been amended on par with Section 45 after 2015. The

language of Section 8 and Section 45 are pari-materia after amendment. The reasoning of the Court rendered in the context of Section 45 in the above case is relevant now under Section 8 as well.

48. In the present case, the Civil Court in Jodhpur has already held that there is no arbitration clause in a Section 8 application filed by the petitioner. A decision has been rendered on the subject and therefore there is a constructive *res-judicata*. Therefore, the petitioner cannot invoke the Jurisdiction of the Court under Section 11(6) of the Act as the things stands today.

49. The petitioner has also filed an appeal before the High Court in Rajasthan and is pursuing an appellate remedy against the said order. Therefore, existence or non existence of arbitration clause cannot decided here. The petitioner also cannot scuttle the appellate proceeding by seeking an appointment under Section 11(6) of the Act. If at all, the petitioner has to approach this Court subject to the outcome of the said appeal.

50. In view of the above, the present petition is liable to be dismissed at this stage with liberty to the petitioner

to approach this Court at a later stage if advised for appointment of an arbitrator subject to the outcome of the appellate proceedings that is pending before the Rajasthan High Court at the behest of the Petitioner. Accordingly, the above petition is dismissed. No costs.

Sd/-C.S.N.J

23.10.2018

//Certified to be a true copy//

Dated this the day of 2019.

JJ 22/02/2019

COURT OFFICER (O.S)

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