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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 18th September, 2018
Pronounced on: 27th September, 2018

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ARB.P. 200/2017

SKYLINE ENGINEERING
CONTRACTS (I) PVT. LTD.

..... Petitioner

Through : Mr.Jeevesh Nagrath and
Mr.Chitvan Singhal, Advocates.

versus

CENTEX INTERNATIONAL PVT. LTD

..... Respondent

Through : Mr.M.K.Ghosh, Ms.Tina Garg,
Mr.Rohit Dutta and Mr.Mohinder
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner has filed the application under Section 11 (6) and Section 11 (8) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') for appointment of the arbitrator to adjudicate the claim of the applicant against the respondent on the following facts:

(a) the Architect of the Respondent, namely M/s. Pratap Parikh Associates, had issued a tender for the work of the Respondent along with the terms of the articles of the agreement and conditions of contract. The Applicant submitted its bid to the Architect of the Respondent at New Delhi;

(b) the Respondent accepted the bid and accordingly issued a work award letter dated 04.08.2010 in favour of the Applicant for Civil, Sanitary and Water

Supply and External Development Works for Construction of the weaving and processing unit of Respondent at 'Focal Point', Ludhiana, Punjab. The said letter of Award was received by the Applicant at New Delhi. The Applicant had also executed the articles of agreement and conditions of contract and submitted the original of the same to the Architect of the Respondent at the office of the Architect at New Delhi. The Letter of Award along with the conditions of contract together formed the contract between the parties;

(c) the Applicant carried out the works at the site of the Respondent and from time to time submitted its bills for payments. There was always a delay by the Respondent in making the payment of the amounts that were due to the Applicant. The works were completed by the Applicant in August, 2012 and the final bill was submitted on 05.11.2012. The Architect of the Respondent certified the bill of the Applicant for a payment of a sum of Rs.1,36,75,526/- and there was a previous balance of Rs.21,72,959/- to be paid by the Respondent to the Applicant under the certificate dated 18.09.2012. The Respondent was also obliged to pay a sum of Rs.15,37,315/- to the Applicant towards release of retention money. Thus, without even taking into consideration the claims of the Applicant, even as per the certificate of the Respondent's Architect, a total sum of Rs.1,73,85,799/- was/is due and payable by the Respondent to the Applicant. It is pertinent to mention that the Applicant did not agree with the deductions proposed by the Architect of the Respondent in its certificate dated 18.09.2012;

(d) on 01.02.2013, the Respondent forwarded an email dated 31.01.2013 written by the Respondent to its Architect, in which the Respondent had wrongly and falsely denied the dues of the Applicant and in fact,

had sought to wrongly and illegally and contrary to the terms of the agreement, proposed to debit a sum of RS.1,64,54,796/- on the Applicant. This was nothing but an attempt by the Respondent to create some dispute in order to delay the payments of the Applicant;

(e) the Conditions of contract forming part of the contract between the Applicant and the Respondent contains an arbitration agreement, which provides as under :-

"SETTLEMENT OF DISPUTE ARBITRATION:

All disputes and differences of any kind whatever arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the determination, abandonment or breach of the Contract) shall be referred to and settled by the Architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without appeal as stated in Clause No.43 but if either the Employer or the Contractor be dissatisfied with the decision of Architects or any matter, question or the dispute of any kind (except any of the accepted matters) or as to the with-holding by the Architects of any certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may within twenty eight days after receiving notice of such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which such written notice has been given and no other shall be and is hereby referred, to the Arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointment of a single arbitrator, to disagreement as of two Arbitrators both being Fellow of the Indian Institute of Architects, one of the appointed by each party, which Arbitrators shall before taking upon themselves the burden of Reference appoint an Umpire. The Arbitrator, the Arbitrators or the Umpire shall have power to open up, review and revise any certificate, opinion, decision, requisition, or notice save in regard to the excepted matters referred to in Clause No.43 and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been as aforesaid.

Upon every or any such reference the cost of and incidental to the Reference an Award respectively shall be in the discretion of the Arbitrator or Arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between Attorney and client or as between party and party and shall

direct by whom and to whom and in what manner the same shall be borne and paid. The submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on parties. Such reference except as to the withholding by the Architects of any Certificate under Clause No.40 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works arising from any cause unless with the written consent of the Employer shall not withhold the payment of the Interim Certificates nor the Contractor except with the consent in writing of the Architects in any way delay the carrying out of the works by reason of any such matter, question or dispute being referred to Arbitration but shall proceed with the work with all due diligence and shall until the decision of the Arbitrator or Arbitrators or the Umpire be given abide by the decision of the Architects and no Award of the Arbitrator or his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the works. The Employer and the contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of Action under the Contract."

(f) the Applicant thereafter kept following up with the Architect of the Respondent for issuance of the final certificate and for resolving the issue pertaining to the debits wrongly and illegally proposed to be made by the Respondent, so that the matter could be proceeded further. Since no reply was forthcoming from the Architect of the Respondent, the Applicant invoked arbitration by its letter dated 20.01.2016, inter alia, also quantifying the claims against the Respondent;

(g) the letter dated 20.01.2016 was duly received by the Respondent. Despite this, the Respondent neither made the payment nor proceeded with the arbitration. In fact, no reply was given by the Respondent to the said letter dated 20.01.2016. The Respondent even did not deny the contents of the said letter. There was complete inaction / silence on the part of the Respondent;

- (h) the Applicant thereafter, in furtherance of the letter dated 20.01.2016, issued the letter dated 26.08.2016 nominating Mr. Abhijit Ray, Architect, and Fellow of Indian Institute of Architects to be appointed as the Sole Arbitrator for the adjudication of the claims of the Applicant;*
- (i) on 08.09.2016, Architect Mr. Abhijit Ray accepted his nomination as the arbitrator. On 27.09.2016, the Respondent replied for the first time to the letter dated 08.09.2016 and stated that it would be appointing its nominee arbitrator. However, till date no such nominee arbitrator has been appointed by the Respondent. Even though, the original contract is with the Respondent/ Architect of the Respondent, the Respondent mischievously demanded the copy of the arbitration agreement;*
- (j) on 21.01.2017, the Architect of the Respondent has replied to the arbitration notice dated 26.08.2016 and stated that the certificate issued by it was the full and final certificate and that it had requested the Respondent to discuss and settle the matter amicably with the Applicant. The architect of the Respondent requested the Applicant to reconsider the decision for initiation of arbitration. Thus, it is on 21.01.2017 that the Architect of the Respondent has for the first time confirmed that the certificate issued by it is the full and final certificate;*
- (k) the Respondent on receiving notices by the Applicant realized that the Respondent is liable to make the payment. In these circumstances, in order to arm-twist, harass and to pressurize the Applicant for giving up its claims against the Respondent, the Respondent fraudulently and dishonestly misused the 5 (five) undated Cheques, which were given by the Applicant only as a security, by putting the dates on those and presenting the same for payment. The*

said undated cheques were issued by the Applicant in the manner stated below as security only for the mobilization advance which amount already stood adjusted in the bills of the Applicant. Since, the said cheques had remained with the Respondent, the Respondent has misused the same in furtherance of Respondent's malafide, illegal, fraudulent and dishonest intention;

(l) the total value of the works under the Contract was Rs.11,12,47,919/-. In terms of clause 19(a), it was agreed by the Respondent that it would pay a sum equivalent to 10% of the contract value of Rs.1,11,24,791/- to the Applicant as mobilization advance, which was to be adjusted from the payments to be made by the Respondent to the Applicant under the running and final bill of the Applicant. To secure this re-payment the Applicant was required to, and had provided the cheques to the Respondent;

(m) the Respondent has dishonestly and fraudulently misused the said cheques by presenting them for payment. The Respondent had issued a notice dated 22.09.2016 in respect of the said cheques which were duly replied by the Applicant by a Reply dated 31.10.2016. The Applicant has on 23.02.2017 received the summons of two Complaints filed by the Respondent under Section 138 of the Negotiable Instruments Act. The summons were received by the Applicant after the date for appearance before the Court had passed. Along with the summons, no complaint was enclosed;

(n) the Applicant is entitled to payment of Rs.7,56,85,412/- (Rupees Seven Crores Fifty Six Lakhs Eighty Five Thousand Four Hundred and Twelve only) from Respondent as demanded by the Applicant in the letter dated 20.01.2016 between the

*parties which was not accepted by the Respondent;
and*

(o) the Respondent, despite receipt of notice of arbitration, has failed to appoint the arbitrator. The Respondent has thus forfeited its right to appoint its nominee arbitrator. Therefore, the present application is being filed for seeking appointment of the nominee arbitrator on behalf of the Respondent or in the alternative for the appointment of an independent sole arbitrator in terms of Section 11(6) and (8) of Act by this Court.

2. The respondent in its reply had denied the existence of the Arbitration Agreement and alleged that the only agreement which was entered into between the parties was the work order dated 10.03.2010 which governed the conduct of the parties during the course of the dealings. Secondly, it urged the claim is time barred.

3. The petitioner on the other hand, alleged that the final bill was submitted on 05.11.2012 and a dispute was raised by the respondent on 31.01.2013 which was communicated to the petitioner only on 01.02.2013 and hence the cause of action arose on 01.02.2013 and the arbitration admittedly was invoked on 20.01.2016 within the prescribed period of three years.

4. Secondly, it is argued by the petitioner there is a valid and binding Arbitration Agreement between the parties. The original agreement containing an arbitration clause was signed and submitted by the petitioner to the architect M/s Pratap Parikh Associates and that the architect of the respondent by his letter

dated 20.07.2017 confirmed the Agreement containing the arbitration clause was signed and submitted by the petitioner and it was similar to the contract executed by the respondent with M/s VKJ Builders & Contractors Pvt. Ltd. i.e. the second contractor for the project of the respondent.

5. M/s Pratap Parikh Associates forwarded the contract the respondent had with M/s VKJ Builders & Contractors Pvt. Ltd. It is alleged by the petitioner since the facts are against the interest of the respondent, the respondent has deliberately failed to file the said documents on record and hence an adverse inference is liable to be drawn.

6. The learned counsel for the petitioner also referred to a letter dated 20.04.2010 issued by the architect M/s Pratap Parikh Associates on behalf of the respondent, (the said letter was filed along with the reply by the respondent). The said document clearly make reference to the tender document. The tender document is nothing but the same contract which has been filed with the petition containing the Arbitration Agreement. It is also alleged the tender documents are even referred to in the letter of award dated 4th August, 2010. Hence the same may deem to be incorporated by reference as a part of the letter of award dated 04.08.2010 signed by the parties and hence there is a valid and binding arbitration agreement.

7. I may here refer to the affidavit given by Mr.Mihir Parikh partner of M/s Pratap Parikh Associates, a firm of architects, in compliance of the order dated 24.01.2018. The said affidavit says it was by the letter dated 20.04.2010, the contractors, including the applicant, were invited to purchase the tender documents for the work of the respondent. M/s Pratap Parikh Associates were using their standard terms of the articles of agreement and conditions of contract as a part of the tender document which was intended to be and was actually issued to the prospective bidders including the applicant in terms of letter dated 20.04.2010. The same were the standard terms as a part of the tender document issued to M/s VKJ Builders & Contractors Pvt. Ltd. , the copy whereof was annexed along with its letter dated 20.07.2017.

8. The affidavit further discloses the tender document was for civil and sanitary and water supply works for construction of main factory building for weaving and processing unit, R A ducts, electric substation, boiler house, ETP, UG Tank, road and drainage for the respondent at phase-VII, Focal Point, Ludhiana, Punjab.

9. Learned counsel for the petitioner then referred to the letter dated 04.08.2010 of the respondent wherein the reference number given was *tender No.SECIPL/TF/2911/2009-10/074 dated 10.05.2010*. The concluding part of this letter includes '*The conditions mentioned in this letter will supersede the conditions given elsewhere in the contract, when they are contrary to each*

other. The other conditions mentioned in the contract shall also apply till they are not contradicting with this letter.'

10. It is further alleged by the petitioner that it had issued a notice and had appointed Mr.Abhijit Ray, Architect as its arbitrator and informed the respondent but whereas the respondent vide its letter dated 27.09.2016 did not accept Mr.Abhijit Ray as their arbitrator and rather alleged that they shall be appointing their own arbitrator in due course of time and sought the said arbitrator to supply them with the copy of the agreement containing the arbitration clause and alleged that their place of arbitration shall be at Ludhiana. Hence on these grounds it is alleged by the petitioner that the arbitration clause as contained in the draft agreement duly executed by it accompanying with the condition of contract shall be applicable and be read in the letter dated 04.08.2010.

11. Since the learned counsel for the petitioner intends to avail of the arbitration by reference to another contract hence Section 7(5) of the Act would be relevant and it read as under :

“ Section 7(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.”

12. The petitioner referred to *M/s M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Limited* (2009) 7 SCC 696 which held as under:

“13.....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.

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.

24...

(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."

13. Further in *AIR Liquid North India Pvt. Ltd. vs. Inox Air Products Pvt. Ltd.* 2015 III AD (Delhi) 673 the Court held:

"11. Section 7(5) first requires that there must be a contract in writing. That contract must make reference to another document which contains an arbitration clause. The reference in the first contract must be "such as to make the arbitration clause part of the contract". Consequently, the wording of the clause making the reference is crucial. Does it merely refer to the other contract or does it make the arbitration clause in the other contract part of the first contract?

15. In light of the legal position explained by the Supreme Court there can be no manner of doubt that in the present case the Agreement makes not only a reference to the General Conditions but specifically states that the Agreement and General Conditions "constitute the entire agreement between the parties concerning its subject matter". In the present case, it is not plausible to exclude any portion of the General Conditions as not having been incorporated in the main Agreement. All clauses of the General Conditions, including the arbitration clause, concern the subject matter of supply of gas by the Seller to the Buyer. In fact, a dispute resolution clause cannot but be considered as concerning the subject matter of any contract."

14. The learned counsel for the petitioner also referred to *Unnissi (India) Private Limited vs. Post Graduate Institute of Medical Education and Research* (2009) 1 SCC 107 wherein the Court held:-

"15. Keeping the aforesaid principles, as quoted hereinabove, in the aforesaid decisions of this Court in kind, in fact what constitutes an arbitration agreement between the parties, we have to examine whether there exists an arbitration agreement between the parties or not in the facts and circumstances of the case. Let us, therefore, consider the gist of the facts involved in this case. A tender enquiry No.2PGI/OGI/2K/6281 dated 21.12.2000 for purchase of Pulse Oxymeters was floated by the PGI. It is an admitted position that the appellant submitted their tender vide their offer No.U IPL/331177/00-01 dated 15.2.2001. The tender of the appellant was accepted by the PGI vide their letter No.PGI/P-61/02/477/11936-51 dated 29.9.2002 for supplying 41 Pulse Oxymeters to their different departments. The tender documents itself contain an arbitration clause and by reason of acceptance of the tender of the appellant by the PGI, it must be held that there was a valid arbitration agreement between the parties. The appellant supplied 41 Pulse Oxymeters and the receipt thereof was duly acknowledged on behalf of the PGI on the delivery challans. The service/installation reports of the aforesaid machines were duly signed on behalf of the PGI. In the letters issued by the PGI, there was an apparent acknowledgement of supply of the aforesaid meters by the appellant and also reference to the aforementioned tender enquiry number."

15. Heard.

16. Though much has been said about Section 7(5) of the Act but if it is applicable in the present case. Firstly, the only agreement filed by the petitioner, duly signed is an Agreement dated 04.08.2010. Admittedly, it does not contain any arbitration clause and neither it contains any clause which may refer to an arbitration clause *incorporated* in some another agreement viz the Conditions of Contract, Tender etc as is alleged by the petitioner. Rather the proviso to the letter dated 04.08.2010 read as under :

“You are requested to forward 3 nos. of non-judicial stamp papers of Rs.100/- each and 20 nos. continuation sheets to our Architects M/s.Pratap Parikh Associates, to draw up, a formal agreement between us. In the meantime, you are requested to mobilize your manpower and material at site and take up the work in hand. Kindly send one signed copy of this agreement to us ASAP.”

17. The respondent has alleged the petitioner neither had filed non-judicial stamp papers of Rs.100/- each nor 20 numbers of continuation sheets to the Architect M/s Pratap Parikh Associates and hence a formal agreement was never entered into the parties.

18. Indisputably, neither the tender document nor the alleged Conditions of Contract has ever seen the light of the day. The agreement entered into by the respondent with M/s VKJ Builders and Contractors Pvt. Ltd., cannot be used in a dispute between the parties herein. The reference made to *Unnissi (India) Private Limited* (supra) would not help the petitioner since in the said case the tender of the applicant was accepted by the PGI vide its letter dated 29.09.2002 which itself contain an arbitration clause and it was only by reason of acceptance of the tender of the applicant by PGI, the Court held a valid arbitration agreement exist between the parties.

19. Thus, for reference of a dispute to arbitration, the existence of a valid and enforceable arbitration agreement is a condition precedent as held in *Bharat Rasiklal Ashra V. Gautam Rasiklal Ashra & Anr.* (2012) 2 SCC 144.

20. The Supreme Court in *Vimal Kishor Shah & Others vs Jayesh Dinesh Shah & Others* (2016) 8 SCC 788 noted:-

“17. A reading of the aforementioned sections in juxtaposition goes to show that in order to constitute a valid, binding and enforceable arbitration agreement, the requirements contained in Section 7 have to be satisfied strictly. These requirements, apart from others, are:

- (1) there has to be an agreement*
- (2) it has to be in writing*
- (3) parties must sign such agreement or in other words, the agreement must bear the signatures of the parties concerned, and*
- (4) such agreement must contain an arbitration clause.*

In other words, aforementioned four conditions are sine qua non for constituting a valid and enforceable arbitration agreement. Failure to satisfy any of the four conditions would render the arbitration agreement invalid and unenforceable and, in consequence, would result in dismissal of the application filed under Section 11 of the Act at its threshold.”

21. Further in *M. Dayanad Reddy vs A.P. Industrial Infrastructure Corporation Limited and Others* (1993) 3 SCC 137 the Court noted:-

“9.Hence, it cannot be held that after the signed agreement the parties had clearly intended to include arbitration clause in the standard specifications. In the absence of clear intention of both the parties, agreement for arbitration cannot and should not be inferred more so when the specific case of the respondents is that by mistake the clause relating to arbitration crept in the copy of agreement. In our view, the High Court was justified in holding that in the facts of the case, only the original agreement, and not the copy, was binding between the parties. Hence, no reference to arbitration could be made. In the aforesaid circumstances, no interference is called for in the instant appeal and the appeal therefore, fails and is dismissed without, however, my order as to costs.”

22. In *Elite Engineering and Construction (Hyderabad) Private Limited vs Techtrans Construction India Private Limited* (2018) 4 SCC 281 the Court noted:-

“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."

23. Thus a bare perusal of the law cited above if applied to the facts, one may note there is no original agreement filed by either party before this Court. *Secondly*, the tender document of M/s VKJ (*supra*) cannot be used by the petitioner herein. *Thirdly*, the work order/agreement dated 04.08.2010 do not make reference to an arbitration clause in any tender document or any alleged conditions of Contract. *Fourthly*, there is no proof if the stamp papers were ever purchased or an agreement as is alleged was ever actually entered into making Conditions of the Contract applicable.

24. The agreement dated 04.08.2010 between the parties though refer to some *tender No.SECIPL/TF/2911/2009-10/274 dated 10.05.2010* but it is nothing but a reference number of a letter dated 10.05.2010 the petitioner had sent to M/s Pratap Parikh Associates at the time of filing of the bid. Moreso, much reliance is though placed on an affidavit of M/s Pratap Parikh Associates but it only says they were using the standard terms of the Articles of Agreement and Conditions of Contract as a part of tender document which was intended to be and was actually issued to the prospective bidders, including the applicant and same were the standard terms as a part of the tender documents issued to M/s. VKJ (*supra*) but *admittedly* the affidavit does not show such agreement if was duly signed by both the parties or the respondent ever accepted such alleged tender document.

25. Though, the learned counsel for the petitioner relied upon *Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra & Anr.* (2012) 2 SCC 144 which is to the effect if serious allegations of fraud, forgery and fabrication are likely to involve recording of evidence or involve some delay in disposal, are not grounds for refusing to consider the existence of a valid arbitration agreement. This decision would not be applicable on the facts of this case as it presumes existence of an arbitration agreement in writing, though may be effected on account of allegations of fraud, forgery or fabrication and where in this case the very existence of such arbitration agreement is in dispute.

26. Hence, in the circumstances since the petition do not reveal of any arbitration agreement in *writing, duly signed* by both the parties and since the only agreement on record is of dated 04.08.2010 which neither *contains* any arbitration clause nor *reference* to any clause in some other agreement, so section 7(5) of the Act shall have no applicability and hence the petition fails and is dismissed.

27. No order as to costs.

YOGESH KHANNA, J

SEPTEMBER 27, 2018

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