

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

COMMERCIAL ARBITRATION PETITION NO. 12 OF 2015

Khurana Constructions

...Petitioner

vs

IOT Infrastructure and Energy Services Ltd. & Anr.

...Respondents

Mr.Rohan Shah with Lopa Munim, Srisabari Rajan I/b. Rajesh Kothari & Co. for Petitioner.

Mr.L.M. Acharya with Anish Khandekar I/b. S.B. Lolage for Respondents.

CORAM : S.C.GUPTE, J.

DATE : 5 FEBRUARY 2019

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a sub-contract agreement between the Respondent-employer and the Petitioner-contractor. The facts of the case may be briefly noted as follows:-

3 Indian Oil Corporation Ltd. ('IOCL') had undertaken the work of construction of Motor Spirit Quality Up-gradation Unit ('MSQU') at its Gujarat Refinery. The work involved various items, including civil structure and underground piping work. This particular work was awarded by IOCL to the Respondent-Indian Oil Tanking Ltd. ('IOT'), which was a joint venture between IOCL and IOT Infrastructure and Energy Services Ltd. IOT floated tenders for offering this work on sub-contract basis. The

Petitioner-Khurana Constructions ('Khurana') submitted its offer to IOT. IOT accepted the offer and issued a Letter Of Intent (LOI) to Khurana for carrying out civil and underground piping work. A formal agreement dated 28 February 2005 was executed between IOT and Khurana. The parties separately agreed to what were known as special conditions of work relating to the sub-contract. The LOI, formal agreement and special conditions together form the sub-contract. The disputes between the parties arose out of this sub-contract. Khurana was the claimant, whereas IOT was the Respondent and counter-claimant.

4 The main controversy before the arbitral tribunal was whether or not the general conditions of contract ('GCC') forming part of the original bid package as between IOCL and IOT, formed an integral part of the sub-contract between Khurana and IOT. It was the case of IOT that GCC formed an integral part of the formal agreement along with its condition of an arbitrable claim having to be preceded by an appropriate notification by the contractor (in the present case, the sub-contractor, i.e. Khurana). It was claimed by IOT that only notified claims within the meaning of the relevant clause under the GCC (Clause 6.6.1.0) could go before an arbitral forum so far as the sub-contractor, i.e. Khurana, was concerned. It was submitted that since Claim Nos. 3 to 10 of Khurana were not notified within the meaning of Clause 6.6.1.0 of GCC, they were not arbitrable. This submission was accepted by the learned arbitrator and Khurana's claims were rejected on that basis. It is this rejection, which is challenged in the present petition.

5 At the heart of the controversy in the present matter lies the

question of arbitrability of claim Nos.3 to 10. According to the learned arbitrator, these claims were not arbitrable since they were not notified as required by clause 6.6.1.0; clause 9.0.1.0 of GCC provided for arbitration of disputes arising out of only notified claims. Before we deal with the arbitrator's award on this issue, it must be borne in mind that since the matter pertains to jurisdiction of the arbitrator, it is for this court to decide it finally. On merits of the controversy, there is no doubt that the particular clauses of GCC referred to above, if applicable, would rule out the arbitrability of these claims. But the real question is whether the particular clauses of GCC should be read into the sub-contract. The answer to this question turns on the correct meaning of the doctrine of incorporation generally, and the arbitration clause in particular. The doctrine of incorporation generally and the arbitration clause, in particular, as considered by our courts, makes it clear that a general reference to another contract is not sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. As the Supreme Court said in **M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited**¹, there must be special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the rule stated in **M.R. Engineers'** case is, as stated by the Supreme Court in **Inox Wind Ltd. vs. Thermocables Ltd.**², where a general reference to a consensual standard form is made; such general reference is sufficient to incorporate the arbitration clause contained in the referred form. Even there, it is a principle of law that when the document to which a general reference is made, contains an arbitration clause whose provisions are clearly inapt or

1 (2009) 7 SCC 696

2 (2018) 2 SCC 519

inapplicable with reference to any contract in question, it would suggest an inference that there was no intention to incorporate the arbitration clause from the referred document.

6 With these principles in mind, let us examine the arbitration clause in the present matter. In the first place, it is important to note that in the recitals to the sub-contract between IOT and Khurana (agreement dated 28 February 2005), the agreement between IOCL and IOT has been referred to simply as and by way of historical narration and nothing else. There is no suggestion of incorporation of that agreement in any of the recitals. So also, in the definition clause of the sub-contract, the documents forming IOT and IOCL contract, including specifications and conditions contained therein, are to be included in the expression 'agreement' "*unless the context otherwise requires*". Besides this qualification, the sub-contract advisedly uses the terms "this agreement" and "IOTL agreement" separately and in different contexts. Considering the particular provisions of the sub-contract, namely, clause 1 (Definitions & Interpretations), clause 2 (authority to construct), clause 8 (drawings), clause 19 (inspection of works), clause 26 (agreement to be subject to IOCL agreement and IOT operational parameters), clause 83 (procedure for arbitration) and clause 87 (reference to bid package), it clearly appears that the bid package of IOCL-IOT contract, including GCC, is relevant only to a limited extent, namely, to spell out the obligation of Khurana as a sub-contractor to ensure that IOT fulfills its obligations under IOCL agreement and is not in default thereof. These clauses also suggest that material provisions concerning drawings as well as inspection of works and making of claims and their submission to arbitration in the two agreements, i.e. (i) sub-contract

between IOT and Khurana and (ii) main agreement between IOCL and IOT, are clearly different. The provisions in the main IOCL-IOT agreement in these respects are clearly inapt and unworkable for measurement, final bill, claims by contractor, discharge of owner's liability as well as arbitration and alternative dispute resolution machinery for the sub-contract between IOT and Khurana. There is no 'engineer in-charge', who issues a completion certification, as far as the sub-contract work is concerned; there is no 'choosing by the owner', namely, IOCL, 'of the contractor'; no 'general manager' and compliance *vis-a-vis* 'duties of general manager' under the sub-contract between IOT and Khurana. Unlike the main agreement between IOCL and IOT which requires the contractor to cause measurements to be jointly taken with site engineer and final measurements to be taken pursuant to an application to engineer in-charge, there is no provision for joint measurements with site engineer and application to engineer in-charge for final measurements in the sub-contract. There is 'no relative final test' in the sub-contract. The relevant provisions in IOCL-IOT bid package concerning final bill, which also involve participation of these authorities including engineer in-charge of IOCL and the decision of such engineer in-charge on applicable items of schedule of rates, etc., are also clearly unworkable and inapposite so far as the sub-contract is concerned. There is no checking by engineer in-charge of any final bill drawn by the sub-contractor (i.e. Khurana) or certification of such final bill or submission of it for scrutiny or payment to the owner (i.e. IOCL). Notification of claims by contractor, which have to be raised in the context of the manner of submitting a final bill involving authorities such as site engineer and engineer in-charge as well as owner, are also accordingly inappropriate and inapposite as far as the sub-contract is

concerned. There is, accordingly, no warrant for incorporating these crucial provisions bearing on submission of final bill and making of claims only through notification in the sub-contract between IOT and Khurana. The provisions, thus, making it obligatory for any claim to be arbitrable to have been notified prior in point of time, thus, cannot be said to have been incorporated in the sub-contract.

7 The learned arbitrator appears to have laid much emphasis on clause 26 of the sub-contract. Clause 26 makes the sub-contract subject to IOCL agreement and provides for deemed substitution and replacement of the contractor under the agreement, namely, Khurana, in place of IOT. But such substitution/replacement is only *“to the extent of any liability or obligation of IOT under the IOCL agreement”*. The liability and obligations of the sub-contractor, thus, have to be on the lines of liability and obligations of IOT under IOCL agreement. In fulfilling such liability and obligations, the sub-contractor must see that IOT fulfills its obligations to IOCL under the main contract. That is the plain meaning of clause 26. It does not provide for any general incorporation of IOCL-IOT agreement or GCC forming part thereof including the arbitration clause.

8 Reliance of learned Counsel for the Respondent on the judgment of Delhi High Court in the matter of **Era Construction India Ltd. vs. Indian Oil Corporation Ltd.**³ and other cases on the same lines does not take his case any further. These judgments indicate and underline the importance of 'notification' under clauses similar to clause 6.6.1.0 of GCC in our case. These judgments have no bearing on whether, and if so, when,

3 OMP 104/06 Delhi High Court judgment dated 27.4.2012

and by what expedient, such clauses are to be included in another contract on the doctrine of incorporation.

9 The impugned award on claim nos. 3 to 10, thus, deserves to be set aside. The award indicates the arbitrator's failure to deal with the disputes concerning these claims on a wholly untenable ground. The arbitrator's construction of the sub-contract in this behalf is not reasonable, and his failure to exercise jurisdiction on such unreasonable interpretation clearly merits interference. The impugned award also disallows pre-reference interest to the Petitioner claimant without stating any reason for such disallowance. The award needs to be set aside even to that extent.

9 Accordingly, the arbitration petition is allowed by setting aside the impugned award dated 18 August 2014 so far as it relates to claim Nos.3 and 10 and also so far as it does not grant pre-reference interest to the Petitioner on Claim No.1.

(S.C. GUPTE, J.)