

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.473 of 2019

The Indian Institute of Technology Madras,  
An academic and research Institute  
constitute under the Institutes of Technology Act, 1961  
Sardar Patel Road, Chennai-600 036  
Tamil Nadu  
rep. by the Dean (IC & SR) .. Petitioner

Vs.

M/s.Midway Services,  
rep. by its Sole Proprietor,  
Mr.Gurpreet Hurana,  
SCO 726, Miliap Road Central Town,  
Jalandhar Punjab-144 001. .. Respondent

\* \* \*

**Prayer :** Petition filed under Section 11(4) of the Arbitration and Conciliation Act, 1996, praying to appoint a Sole Arbitrator to resolve the disputes and differences arising between the parties under the Open Tender No.OEC/RAJ/07/2016, dated 02.09.2016 and the Purchaser Order No.OEC/RAJI/2016/1156/SPLX/825, dated 27.02.2017.

\* \* \*

For Petitioner : Ms.Hema Srinivasan

For Respondent : Mr.Ritesh Khatri

**ORDER**

The petitioner is the Indian Institute of Technology-Madras (in short, "IIT-M") and it invoked Section 11(4) of the Arbitration and Conciliation Act, 1996 (in short, "the Act") for appointment of a Sole Arbitrator to resolve the disputes and differences arising between the parties under the Open Tender No.OEC/RAJ/07/2016, dated 02.09.2016 and the Purchaser Order No.OEC/RAJI/2016/1156/SPLX/825, dated 27.02.2017. (in short, "PO").

2. Earlier, the same petitioner has invoked the jurisdiction of this Court by filing an application under Section 9 of the Act seeking a direction to the respondent to furnish security to the tune of Rs.1,42,09,690/-, which application, after contest, was dismissed by this Court on 12.02.2019. While dismissing the same, this Court had directed the petitioner to refer the matter to arbitration within a period of 30 days and once the notice is issued to refer the matter to Arbitrator, the respondent, on receipt of the same, immediately make its response and if both the parties agreed for an appointment of a Sole Arbitrator, the proceedings can go on with the appointment of a Sole Arbitrator, or otherwise, a Tribunal consisting of three Arbitrators, as set out / discussed in the said order can be constituted

immediately. Admittedly, there is no challenge to the said order and it attained finality.

3. After the dismissal of the said application on 12.02.2019, there was a notice issued by the learned counsel for the petitioner on 11.03.2019, which is a notice of appointment of an Arbitrator based on the PO dated 27.02.2017 issued in pursuance to the Open Tender dated 04.11.2016, wherein, the name of one Mr.K.D.Arcot, Member of the Indian Institute of Technical Arbitrators (IITA), was proposed to be appointed as the sole Arbitrator to resolve the disputes calling upon the respondent herein to confirm the same within a period of thirty days. On receipt of the said notice, a reply notice dated 01.04.2019 was sent by the learned counsel for the respondent vehemently denying the notice issued under Section 21 of the Act, firstly, alleging that there was no material breach, fraud or any overt act as alleged and secondly, denying the applicability of the arbitration clause. A rejoinder dated 19.04.2019 to the said reply was once again issued by the learned counsel for the petitioner stating that as the respondent had not agreed for appointment of a Sole Arbitrator, the Arbitral Tribunal comprising of a three Arbitrators in accordance with the arbitration agreement contained under Clause 21 of the Tender Document could be appointed.

4. Once again the petitioner had suggested and nominated the name of Mr.K.D.Arcot, Member of the IITA, as the Arbitrator on their side and sought the respondent to nominate their Arbitrator and the selected/nominated Arbitrators jointly would appoint Presiding Arbitrator of the Arbitral Tribunal to resolve the disputes. Since there was no response from the respondent, the petitioner had invoked Section 11(4) of the Act. In this regard, it is relevant to advert to the order passed by this Court earlier in A.No.9842 of 2018, on 12.12.2019. Clause 21 of the Tender Document dated 02.09.2016 refers to the settlement of disputes and differences qua amicable settlement and if it fails, such disputes shall be settled by arbitration. In the event of any disputes with regard to the validity, breach of termination, etc., the parties have to attempt to resolve the same amicably, only on such failure or if no decision could be reached within 30 days, then the disputes shall be settled by arbitration in accordance with the Act. It is also admitted that if the parties agreed on a sole arbitrator, then the dispute may be referred to a sole Arbitrator, or otherwise, the Arbitral Tribunal consisting of three Arbitrators to be appointed as per Section 11(3) of the Act.

5. While contesting the application filed under Section 9 of the Act, the respondent has conceded that Clause 21 is applicable to both the parties and that the invocation of Section 9 application was premature before invoking the said settlement clause to resolve the disputes amicably between the parties. Admittedly, the agreement was cancelled by the petitioner during March 2018, however, there was no reference to any dispute by either of the parties to Arbitral Tribunal as per clause 21. In fact, the dispute between the parties being the one of technical issue, the same could be resolved only by a technical person, who could be a member of the Arbitral Tribunal or the sole Arbitrator. A plain reading of the order passed by this Court in the application filed under Section 9 of the Act makes it clear that it considered the fact that the respondent is bound by the Tender Document and also the arbitration clause set out therein. While so, the respondent had invited the attention of this Court to the PO dated 27.02.2017, which contain a separate set of conditions. Condition No.18 of the PO provides for dispute resolution, as per which, the dispute shall be settled in the Court of competent jurisdiction located within the city of Chennai in Tamil Nadu.

6. Learned counsel for the respondent, on the strength of condition No.18 of the PO, would submit that the said clause

supersedes the previous agreement in question. He once again represented that even Clause 21 of the Tender Document is to apply, the requisite condition of amicable resolution should have been complied with by the petitioner. Hence, he contended that the petitioner cannot demand for appointment of an Arbitrator. Learned counsel for the respondent only pointed that the petitioner had not complied with or moved ahead with the compliance of the condition contained in Clause 21 of the Arbitration Agreement, after the dismissal of the Section 9 application. It is further contended that Section 11(6) cannot be invoked directly on expiry of 30 days stated in Sub-section (4) of Section 11 of the Act by the petitioner for appointment of the Tribunal ignoring the procedure incorporated under Clause 21. The said argument of the learned counsel for the respondent cannot be sustained as it was categorically admitted before this Court on the earlier occasion that admitting the existence of an arbitration clause, it was contended that only the amicable settlement clause between the parties was not complied with, which was the procedure contemplated under Clause 21. The respondent also had not taken any steps to resolve the dispute amicably. The respondent seems to have invoked the jurisdiction clause within 30 days from the date of the order passed by this Court in A.No.8732 of 2019. Thereafter, there seems to be exchange of correspondence

between the parties.

7. The contention of the respondent that the terms and conditions contained in the tender conditions are superseded by the PO dated 27.02.2017 on the ground that the PO was case specific and was issued by a different agency containing the specific terms and conditions other than the terms and conditions of the Tender document. It is also argued that the Centre for IC & SR is an independent Section responsible for the promotion specifically co-ordinating and administrating all the sponsored and consultancy projected handled by the faculty of the petitioner. The team of technical heads of IC & SR cannot be independent entities because even in the Tender Document dated 02.09.2016, as per the terms of delivery clause contained in the tender, as it is clearly indicated that the item should be delivered to the IC & SR within the IIT-M Campus. Even in the letter dated 01.04.2019, the respondent has only stated that the petitioner had not approached them for amicable settlement as contemplated under Clause 21 of the Tender document. From the very reply it is clear that the respondent has admitted that for the resolution of disputes between the parties only Clause 21 of the Tender document is applicable and the conditions of the PO is only continuation of the same.

8. At this juncture, it is also useful to refer to Section 7(5) of the Act, which reads as follows :

"7. Arbitration Agreement -

\* \* \*

(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."

Section 7(5) of the Act indicates that an arbitration clause contained in the main contract would get incorporated into the contract, when there is a clear reference to the document containing the arbitration clause made in the subsequent document. When PO dated 27.02.2017 is only in continuation to the main tender document, which contains arbitration clause, as a general reference, the respondent cannot rely on condition No.18 of the PO, when admittedly, the contract between the parties provides that the execution of the performance of the contract shall be in terms of the tender document and the same is also referred to in the PO and only the standard terms mentioned in the main contract will be applicable, unless otherwise the same is amended. In this regard, it is also relevant to mention that the PO containing Condition No.18, which refers to the court of competent jurisdiction to try any legal dispute is

inapplicable to the dispute between the parties.

9. In this regard, it is pertinent to point out that in the annexure to the PO, clause 4 refers to payment. Originally it was 50% advance amount and 20% payment on receipt of delivery and remaining 30% after satisfactory installation and completion of the functional test and trials, which was amended on 12.05.2017 as 90% payment after delivery and remaining 10% after training and installation.

10. Learned counsel for the petitioner also pressed into service the decision of the Hon'ble Supreme Court in **Inox Wind Ltd. V. Thermocables Ltd., 2018 (2) SCC 519**, wherein, in paragraph 14, the following categories cases, in which, the parties attempt to incorporate an arbitration clause were recognized by the Court, were incorporated as hereunder :

*"13. The dispute that arose in that case was whether general words mentioned above were capable of incorporating an arbitration clause. The difference in approach between cases in which the parties incorporate the terms of a contract between the other parties or between one of them with a third party on the one hand and those in which they incorporate the standard terms on the other hand, was noticed. The following broad categories in which the parties attempt to incorporate an arbitration clause were recognised by the Court, which are as follows: Habas Sinai Ve Tibbi*

*Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880,*

"(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."

14. In *Habas case*, Christopher Clarke, J. followed the ratio in *The Athena* [Sea Trade Maritime Corpn. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. No. 2, 2007 Bus LR D 5 and held that in single-contract cases (Categories 1 and 2), a general reference would be sufficient for incorporation of an arbitration clause from a standard form of contract. In cases falling under Categories 3 and 4 mentioned above which are two-contract cases, it was held that a stricter rule has to be followed by insisting on a specific reference to the arbitration clause from an earlier contract. Reliance placed on the judgment of Sir John Megaw in *Aughton Ltd. v. M.F. Kent*

*Services Ltd. (1991) 57 BLR 1 was repelled in the following terms:*

*"53. I do not regard myself as bound by the decisions of the Court of Appeal in Aughton Ltd. v. M.F. Kent Services Ltd. (1991) 57 BLR 1 and The Ethniki [AIG Europe (UK) Ltd. v. The Ethniki, (2000) 2 All ER 566 (CA)] to reach a different conclusion. Both were two-contract cases. Further the judgments of Sir John Megaw and Ralph Gibson, L.J. are, in part, in conflict so as to preclude either of them being binding authority even in a two-contract case. The agreement of Evans, L.J. with Sir John Megaw's "analysis of the authorities with regard to arbitration clauses and specifically with regard to the incorporation of charter party arbitration clauses into bills of lading" was obiter."*

*(emphasis supplied)*

11. Ultimately, the Hon'ble Apex Court in the aforesaid judgment in **Inox Wind Ltd. (cited supra)** held thus,

*"18. We are of the opinion that though general reference to an earlier contract is 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. In M.R. Engineers (2009) 7 SCC 696, this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. 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. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration, 24th Edn. (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition*

*relied upon by this Court in M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696. We are in agreement with the judgment in M.R. Engineers case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.*

*19. In the present case, the purchase order was issued by the appellant in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The respondent by his letter dated 15-12-2012 confirmed its acceptance of the terms and conditions mentioned in the purchase order except delivery period. The dispute arose after the delivery of the goods. No doubt, there is nothing forthcoming from the pleadings or the submissions made by the parties that the standard form attached to the purchase order is of a trade association or a professional body. However, the respondent was aware of the standard terms and conditions which were attached to the purchase order. The purchase order is a single contract and general reference to the standard form even if it is not by a trade association or a professional body is sufficient for incorporation of the arbitration clause."*

12. The above judgment of the Hon'ble Supreme Court was relied on in **Giriraj Garg V. Coal India Ltd. and Others, 2019 (5) SCC 192**, wherein, it was held as follows :

*"5.10 In the 1996 Act, the doctrine of incorporation by reference is provided in the statute itself under Section 7(5) of the Act. In M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696, this Court held that even though a*

contract between the parties did not contain a provision for arbitration, an arbitration clause contained in an independent document would be incorporated into the contract by reference, if the reference is such as to make the arbitration clause a part of the contract. The Court explained the doctrine of incorporation in the following words:

"24. The scope and intent of Section 7(5) may therefore be summarised 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 the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

(emphasis supplied)

5.11. This Court in *Inox Wind Ltd. v. Thermocables Ltd.* (2018) 2 SCC 519 while adopting the "single contract case" and "two contract case" principle laid down by *Habas [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010 EWHC 29 (Comm)]*, held that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form contract of one party, would be sufficient for incorporation of the arbitration clause. In this case, the Court expanded the application of this doctrine by holding that even a general reference to a standard form contract of one party, along with those of trade associations and professional bodies would be sufficient to incorporate the arbitration clause.

6. In the instant case, the learned Single Judge in the

*impugned order [Giriraj Garg v. Coal India Ltd., Arbitration Application No. 11 of 2016, order dated 18-5-2018/21-5-2018 (Jhar)] has erroneously taken the view that an arbitration clause would not stand incorporated in the individual sale orders entered into by Respondent 2 Coal Company and the appellant. The individual sale orders emanate out of the 2007 Scheme. The sale orders specifically state that they would be governed by the guidelines, circulars, office orders, notices, instructions, relevant law, etc. issued from time to time by Coal India Limited or Bharat Coking Coal Ltd., etc. As a consequence, the arbitration clause (i.e. Clause 11.12) in the 2007 Scheme would stand incorporated in the sale orders issued thereunder.*

*7. Clause 7 in the sale orders falls under the "single contract case" where the arbitration clause is contained in a standard form document i.e. the 2007 Scheme, to which there is a reference in the individual sale orders issued by Respondent 2 Coal Company.*

*7.1. The arbitration clause in the 2007 Scheme clearly states that :*

*"All disputes arising out of this scheme or in relation thereto in any form whatsoever shall be dealt exclusively by way of arbitration in terms of the Arbitration and Conciliation Act, 1996."*

*सत्यमेव जयते (emphasis supplied)*

*Russell in his commentary on arbitration [Russell on Arbitration (24th Edn., 2015, Sweet & Maxwell) p. 82, Paras 2-103.] has interpreted these words as follows:*

*"Disputes "in connection with", "in relation to", or "regarding" a contract. These words, which are frequently encountered and are to be given the same meaning, were at one time given a restricted interpretation, but are now well established as having a broad meaning ... They may also be sufficient to catch*

*disputes arising under another contract related to the contract containing the arbitration clause."*

*(emphasis supplied)*

7.2. In *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679, this Court observed that expressions such as "arising out of", or "in respect of", or "in connection with", or "in relation to", the contract are of the widest amplitude, and content. In *Doypack Systems (P) Ltd. v. Union of India* (1988) 2 SCC 299, this Court observed that expressions such as — "pertaining to", "in relation to" and "arising out of", are used in the expansive sense, and must be construed accordingly.

7.3. The words "in relation thereto" used in Clause 11.12 of the 2007 Scheme indicate that the clause would apply to all transactions which took place under the 2007 Scheme. This would include the sale transactions in the present case.

7.4. In view of the above discussion, the view taken by the learned Single Judge is erroneous, and is hereby set aside. The appeal is allowed."

*(emphasis supplied in original)*

13. The Hon'ble Apex Court observed, *inter alia*, that the expression "in relation to" incorporated in the clause of the 2007 Scheme of the said case is of the widest amplitude, and content. Similarly, Clause 21 also refers to the expression "any dispute, controversy or claim arising out of or **in connection with** this PO ....". When indisputably, the dispute, that is, arising out of the PO, which is in connection with the tender document, it will not fair on the part of the respondent to dispute the arbitration clause contained

therein and to rely on the conditions contained in the PO alone.

14. In view of the above discussions, Mr.K.D.Arcot, shall continue to be the nominee of the petitioner. The respondent is directed to nominate its choice of Arbitrator within a period of 30 days from the date of receipt of a copy of this order and both the nominated Arbitrators would appoint the Presiding Officer within a period of 30 days from thereon.

15. The Arbitrational Tribunal may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules. The appointment of the Arbitrators will be subject to the disclosure and declaration made, as per the Sixth Schedule to the Arbitration and Conciliation Act, 1996 coupled with the amendments made therein.

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16. This Original Petition is ordered accordingly, leaving the parties to bear their own costs.

04.10.2019

Index : Yes / No

Internet : Yes

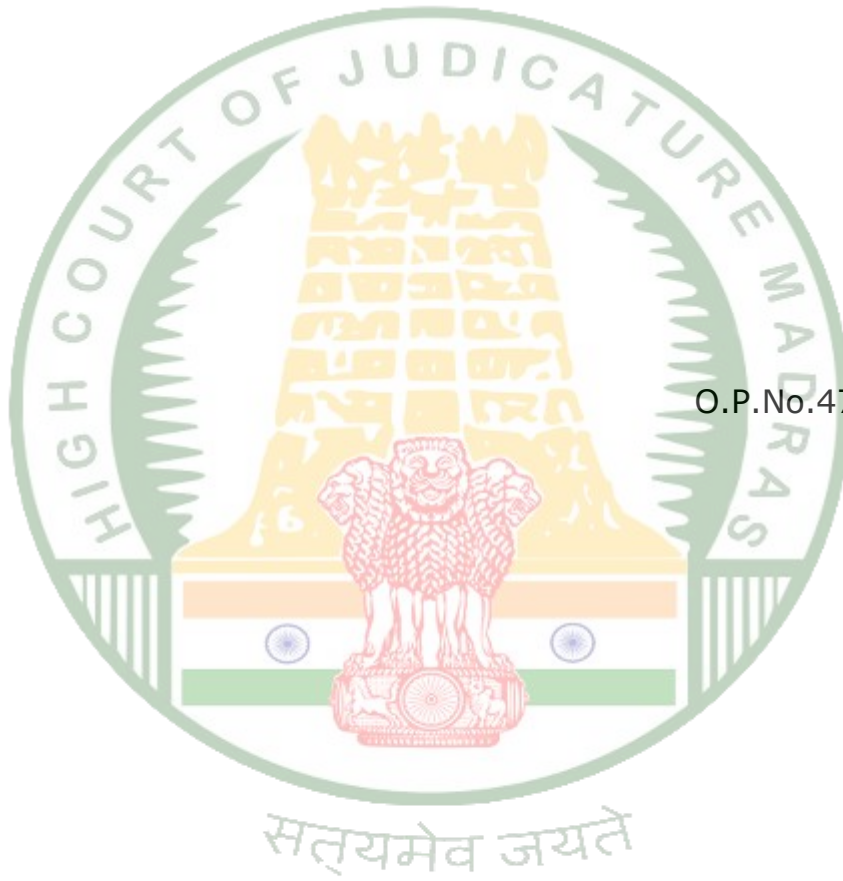
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**PUSHPA SATHYANARAYANA, J.**

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