

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

MISCELLANEOUS CIVIL APPLICATION (ARBN) NO.408 OF 2020

N Kumar Projects & Infrastructure
Private Limited, A Company
incorporated under the Companies Act,
1956, Having its registered office, 1st
Floor, Poonam Chambers, Byramji Town,
Chhindwada Road, Nagpur. Through its
Director Archana D. Wani, Aged about
48 years, Occupation – Business, R/o
455, Saroj Villa, New Colony, Nagpur-01. ...**APPLICANT**

---VERSUS---

1. The Chairman,
Nagpur Improvement Trust, Sadar,
Nagpur.
2. The Superintending Engineer, Nagpur
Improvement Trust, Sadar, Nagpur. ... **NON-APPLICANTS**

Shri S.K. Mishra, Senior Advocate a/b Shri Kaustubh Deogade, Advocate for
the applicant.

Shri Anand Jaiswal, Senior Advocate a/b Shri Girish Kunte, Advocate for the
non-applicants.

CORAM : AMIT B. BORKAR, J.
RESERVED ON : JULY 15, 2022.
PRONOUNCED ON : JULY 20, 2022.

JUDGMENT :

1. **Rule.** Rule is made returnable forthwith. Heard finally by
consent of the parties.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "**the said Act**") for the appointment of an arbitrator in pursuance of an agreement dated 19.05.2014.

3. On 23.07.2002, an agreement between the non-applicants/Nagpur Improvement Trust (**NIT**) and one M/s Indo Pacific Software & Entertainment Ltd. (**IPSE**) was executed to implement the project to build, operate and transfer the multiplex, entertainment and shopping centre. The said agreement contains within it an arbitration agreement in clause 19.2. The arbitration clause reads as under:

"19.2 Arbitration

In the event of any controversy, claim or dispute between the parties in respect of this agreement, the proceedings of arbitration shall be held in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996 and the decision of the Arbitrator shall be final."

4. Thereafter, a modified agreement between NIT and IPSE was entered into, which was in addition to agreements executed between the NIT and IPSE. Said agreement was executed in view of the cancellation of multiplex as a part of the project and to

avoid a multiplicity of disputes between the parties. The effective date of the contract period under the said agreement was up to 30 years. Clause (21) of the said agreement reads as under:

“(21) It is declared by the parties that the claims & disputes existing as on date between the parties before the Hon’ble Arbitral Tribunal and the Courts of Law stand extinguished and shall be treated resolved on the execution of this modification in addition to the contract agreement executed on dated 23.07.2002 and registration of lease deed(s) of land/site as provided in this agreement. Accordingly the parties have simultaneously executed a Deed of Settlement and applications for disposal of their respective pending cases. For future disputes if any between the parties, clause 19 of the original agreement shall apply as it is.”

5. It is pertinent to note that clause (21) of the agreement made specific reference to arbitration clause 19 of the original agreement as under:

“In future dispute if any between the parties, clause 19 of the original agreement shall apply as it is.”

6. On 09.05.2014, NIT executed a lease deed in favour of the applicant. The said deed was consented to and confirmed by IPSE. The said agreement contains a clause (iii) that reads as under:

“(iii) That, parties shall bound by the terms and conditions

stipulated in the Agreement dated 23.07.2002 and modification (in contract agreement executed on dated 23.07.2002) agreement executed on dated 06.01.2012."

7. This clause (iii) referred to above is the subject matter of dispute between the parties. According to the applicant, by said clause, all terms and conditions stipulated in the agreement dated 23.07.2002 and 06.01.2012 are made part of the lease deed dated 09.05.2014. According to the applicant, therefore, the arbitration clause being part of the terms and conditions of both agreements dated 23.07.2002 and 06.01.2012 get attracted by the incorporation of both agreements.

8. *Per contra*, according to NIT, there is a general reference to the agreements dated 23.07.2002 and 06.01.2012, which is insufficient to incorporate the arbitration clause from both the agreements. According to them, there should be special reference indicating the intention of all parties to incorporate specific arbitration clauses from both the agreements. According to NIT, none of the agreements is in pursuance of the standard form of terms and conditions of NIT.

9. Shri Mishra learned Senior Advocate by relying on Apex Court's judgment in the case of **INOX Wind Limited Vs.**

Thermocables Limited¹ submitted that the Apex Court has clarified in paragraph 18 of the said judgment that a general reference to a standard form would be enough to incorporate the arbitration clause. According to him, the agreement entered between NIT, IPSE and the applicant dated 09.05.2014 is a standard form of agreement. According to him, the applicant was not a party to the first two contracts, i.e. agreements dated 23.07.2002 and 06.01.2012.

10. *Per contra*, Shri Jaiswal learned Senior Advocate on behalf of opponent placed reliance upon the judgments of Apex Court in the case of **M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited**² and **Elite Engineering and Construction Vs. Techtrans Construction India Private Limited**³ to urge that the Supreme Court has interpreted Section 7(5) of the said Act to mean that mere reference to a document would not have the effect of making an arbitration clause from that document a part of the contract. The Apex Court has further held that the reference to the document in the contract should be such that it shows the intention to incorporate the arbitration clause in

1 (2018) 2 SCC 519

2 (2009) 7 SCC 696

3 (2018) 4 SCC 281

the document into a contract. He submitted that the principle of law laid down in *MR Engineers*(supra) is not restricted to the facts of the said case. However, the said principle applies in a case where there is an agreement between the principal contractor and sub-contractor. According to him, the ratio laid down has universal application to interpret Section 7(5) of the said Act. According to him, the principle in **MR Engineers** (supra) has been explained in subsequent judgments in the case of **Elite Engineering** (supra) to interpret that Section 7(5) requires conscious acceptance of arbitration clause from another document by the parties as a part of their contract before such arbitration clause could be read as part of the contract between the parties.

11. In rejoinder, Shri Mishra learned Senior Advocate submitted that the case of **MR Engineers** (supra) arose out of the contract between the contractor and sub-contractor. The sub-contractor was not a party to the original arbitration clause; therefore, the ratio laid down in **MR Engineers** does not apply to the facts of the case.

12. The issue which arises for consideration of this Court is whether a mere reference to another document would by itself be

deemed to incorporate an arbitration clause in such earlier document without specific inclusion of arbitration clause in subsequent documents.

13. To answer the said question, it is relevant to note Section 7(1) and 7(5) of the said Act as under:

“7. Arbitration agreement. –

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(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.”

14. In the case of **Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd.**¹ the Apex Court was considering the case of incorporation by reference in the said case clause 11 of the said contract was as follows:

“Other terms and conditions as per FOSFA-20 contract terms”

15. Clause 9 of the said agreement provided as follows:

“All other terms and conditions for supply not specifically

¹ (1987) 1 SCC 615

shown and covered hereinafter shall be as per previous contract signed between us for earlier supply of HPS.”

16. The FOSFA-20 contract contains an arbitration clause which is as follows:

“Arbitration: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of the Oils, Seeds and Fats Association Limited, in force at the date of this contract and of which both the parties hereto shall be deemed to be cognizant.

Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute”

17. The Supreme Court, in the said case, held that the

arbitration agreement was not a term of supply as agreed. It was held that there was no necessity in law that every supply contract must have been an arbitration agreement. It was held that without a specific reference to the arbitration agreement or clause in the earlier supply order, there could be no incorporation by generalized reference to the earlier supply orders' terms and conditions in the second supply order.

18. In the case of **MR Engineers** (supra), in the context of the agreement entered into between the contractor and sub-contractor, the Apex Court was called upon to answer the issue as to whether the provision for arbitration contained in the contract between the principal employer and the contractor was incorporated by reference in the sub-contract between the contractor and the sub-contractor. The Apex Court, in the said context, observed that mere reference to a document would not have the effect of making an arbitration clause from an earlier document a part of the contract. The reference to the document in the contract should be such that it shows the intention to incorporate the arbitration clause contained in the document 'contract'. It is held that Section 7(5) requires conscious expression of the arbitration clause from another document before

such arbitration clause could be read as part of a contract between the parties. The Supreme Court summarized the scope and intent of Section 7(5) of the Act as under:

“24.The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled : (i) The contract should contain a clear reference to the documents containing an arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(iii) 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 the arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not

the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties”

19. The case **INOX Wind** (supra) arose out of a single contract, i.e. a purchase order issued by the manufacturer incorporating the terms mentioned in the order and 'standard terms and conditions attached thereto. The standard terms and conditions contained a clause pertaining to dispute resolution by an arbitrator in accordance with provisions of the said Act. In the

facts, the Supreme Court held that general reference to an earlier contract is not sufficient to interpret an arbitration clause as a later contract. However, the Supreme Court held that general reference to a standard form would be sufficient to incorporate the arbitration clause. Paragraph 19 of the said judgment makes it clear that the Apex Court was considering a single contract case, and the respondent was aware of standard terms and conditions attached to the purchase order. Therefore, the Apex Court expressed their agreement will be judgment in the case of **MR Engineer** (supra) with a modification a general reference to a standard form of contract by one party along with those of Trade Association and professional body will be sufficient to the arbitration clause.

20. It is, therefore, necessary in the facts of the present case to consider whether the agreement dated 09.05.2014 is a standard form of contract regularly executed by NIT. Neither in the notice issued under Section 11(4) nor in the present application under Section 11(6) the applicant has pleaded that the said agreement between the NIT, applicant and IPSE is the standard form of the contract entered into between the parties. Only during arguments that the applicant submitted that the agreement dated 09.05.2014

is the standard form of agreement, which is denied by the non-applicant. On conjoint consideration of agreements dated 23.07.2002, 06.01.2012 and 09.05.2014, it appears that the original agreement dated 23.07.2002 was, in principle, a build, operate and transfer agreement for the construction of multiplex. Due to the differences between the applicant and IPSE, a modified agreement was executed on 06.01.2012, in addition to an original agreement dated 23.07.2002, which contained specific references to the arbitration clause. By the agreement dated 09.05.2014, rights of IPSE conferred in the modified agreement dated 06.01.2012 were assigned to the applicant. Undisputedly, there is no specific clause in the agreement dated 09.05.2014 incorporating an arbitration clause contained in either agreement dated 23.07.2002 or 06.01.2012. It is well settled that an arbitration agreement is an agreement within an agreement. It is a dispute resolution mechanism agreed upon by the parties voluntarily. Therefore, the agreement should contain conscious intention/acceptance of the arbitration clause from an earlier document. A generalised reference to the earlier document does not satisfy the requirement of Section 7(5) of the said Act.

21. A similar issue came up for consideration before Single

Judge this Court in **Vishranti CHSL Vs. Tattva Corporation Pvt.**

Ltd.¹, wherein this Court, in paragraph 17, held as under:

“17. The rationale underlying the MR Engineers line of authority is self-evident. An arbitration agreement is an agreement within an agreement. Not every contract or agreement requires an arbitration clause or agreement. Many contracts go without. An arbitration agreement has nothing at all to do with the reciprocal obligations or their performance (as noted in Alimenta). It is a dispute resolution mechanism chosen by the parties. If, therefore, it is to be ‘carried forward’ to a later agreement which introduces a new contracting party, then the arbitral intent between the original party and the assignee of the other party must be made manifest. This can be done by having a separate arbitration agreement or by incorporating by specific reference the earlier arbitration agreement. The assignee cannot be ‘assumed’ to have consented to the arbitral agreement. Say there is a contract between A and B. It has been an arbitration agreement. With A’s consent, B assigns its rights and obligations to C. Now the contract is between A and C. In this later contract, there must be a specific reference to the arbitration clause in the agreement between A and B, for otherwise we can never know if C had agreed to arbitration as a dispute resolution mechanism. The intention to arbitrate is not manifested. This is, of course, subject to the specific exception MR Engineers carved out. Most importantly, a generalized reference to the previous contract (“all terms and conditions”, etc.) does not satisfy the requirement of Section 7 of the Arbitration Act that an arbitration agreement must be in writing. The

¹ 2020 SCC OnLine Bom 7618

reason it must be in writing – though the writing can take many forms – is precisely because an arbitration agreement is an agreement-within-an-agreement, never compulsory, unrelated to contractual performance and concerned only with an entirely optional alternative dispute resolution mechanism. This is why we say an arbitration is a creation of contract and an arbitrator is a creature of contract. If what is argued today is to be accepted, then apart from being wholly contrary to MR Engineers and the settled law, Section 7 might as well not exist.”

22. Shri Mishra learned Senior Advocate vehemently submitted that in the facts of the case before **MR Engineers**, a contract was entered into between contractor and sub-contractor. Therefore the said judgment does not apply to the facts of the present case where all parties have executed the agreement in question. I am unable to agree with the said submission in view of the authoritative proposition of law laid down by the Apex Court in the case of **MR Engineers**. In my opinion, the ratio laid down by the Apex Court interpreting Section 7(5) of the said Act applies in cases of multiple contracts. The applicant is unable to satisfy this Court the agreement dated 09.05.2014 is a standard form of contract, the judgment in the case INOX Wind (supra) would not apply to the applicant.

23. In view of the reasons stated above, I am of the opinion that the agreement dated 09.05.2014, in the absence of specific reference to the arbitration clause in the agreement dated 06.01.2012 or 23.07.2002, cannot be read by implication, particularly in view of the failure on the part of the applicant to satisfy that agreement dated 09.05.2014 is a standard form of contract.

24. The application is therefore **dismissed**. Rule discharged.

JUDGE

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