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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 498/2021

JOHNSON CONTROLS-HITACHI AIR CONDITIONING
INDIA LTD

..... Petitioner

Through Mr. Praveen Mahajan, Adv.

versus

MAHAMAYA INFRASTRUCTURE PRIVATE LIMITED

..... Respondent

Through Mr. Adab Singh Kapoor & Mr.
Sameer Chaudhary, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

02.02.2022

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(By Video Conference on account of COVID-19)

1. The court is, in the present case, faced with a piquant situation in which various documents have been executed between the parties, containing arbitration clauses, each of which points in a direction to different from the others.

2. The way forward, in such a situation, is shown by the judgment of the Supreme Court in *Balasore Alloys Ltd. v. Medima Llc*¹, para 11 of which reads thus:

“11. At this stage, it is necessary for us to refer to the decision rendered in *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*² wherein this Court was confronted with the issue of there being two different arbitration clauses in

¹ (2020) 9 SCC 136

² (1999) 5 SCC 651



two related agreements between the same parties. This Court while dealing with the same had harmonised both the clauses and had on reconciliation held that the parties should get the disputes resolved under the main agreement. In that context it was held as hereunder: (SCC pp. 667-68, para 30)

“30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to “other matters” “connected” with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration Clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This Clause 39 no doubt does not refer to any named arbitrators. So far as Clause 5 of the Interior Design agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said Clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in Clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in Clause 5 of the Interior Design agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design agreement, — (that there are disputes arising under the main agreement and the Interior Design agreement is not in dispute) — it is the general arbitration Clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated Clause 39 in the main agreement and Clause 5 in the Interior Design



agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design agreement. A case containing two agreements with arbitration clauses arose before this Court in *Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co*³. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the “sole repository” of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and “later purchases”, other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, Clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.”

3. A brief overview of the dispute is necessary, to apply the law laid down in *Balasore Alloys*¹.

4. The respondent owns the “Taj Gateway Resort”, situated at Shimla, licensed to the Taj Group for running a Hotel for providing hospitality services. The respondent desired to install heating, ventilation and air conditioning in the said property, for which it approached the petitioner. The petitioner was awarded the contract for

³ (1977) 4 SCC 367



providing the said services *vide* letter of award dated 3rd August, 2015. The total value of the contract was ₹ 2,25,32,698/- and the value of the equipment required to be installed was ₹ 78,12,008/-. Additionally, imported items were also required to be supplied under the contract.

5. The contract between the parties includes General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). Clause 1.33 of the GCC defines “tender documents” in the following terms:

“1.33 Tender Documents:

“Tender Documents” shall means and include the Contractor’s Tender Form. The Proforma of Bank Guaranty for Performance Bond, the Proforma of Bank Guaranty against mobilisation Advance, and Notice Inviting Tender, Tender Form and Contract Agreement Draft, General Conditions of Contract, Special Conditions of Contract, Works Technical Specifications, Bill of Quantities with detailed Specifications, Environmental, Health & Safety (SHE) Plan, Preliminary Project Execution Schedule, Drawing- Site Location, Drawings for Works.”

6. Clause 38A of the GCC reads thus:

“38A. AMBIGUITIES/DISCREPANCIES IN TENDER:

In case of ambiguities or discrepancies in the interpretation of the Contract Documents or error, omission or contradiction therein or in any of them, the CONTRACTOR shall, prior to commencing the relative work, apply in writing to the Project Manager who shall thereupon issue to the Contractor instructions and clarifications which shall be in writing and shall be final and binding upon the Contractor thereon and in such event, such instructions etc shall form part of the Contract Documents, and shall be read as though the said instructions are and were at all times incorporated therein.

In such an event, the provisions in the separate contract



documents concerning or governing the same aspect precedence shall be given to the provisions contained in the documents mentioned below in the order in which they are set out below :-

- i. The Agreement
- ii. The Letter of Acceptance (LOI/LOA)
- iii. The Letter of Negotiations
- iv. The Bill of Quantities
- v. The Specifications.
- vi. The Tender Drawings.
- vii. Schedule of Fiscal Aspects
- viii. The Special Conditions of Contract.
- ix. The General Conditions of Contract.

A variation or amendment issued after the execution of the formal contract shall take precedence over the formal contract and all other Contract Documents.”

7. Clearly, Clause 38A accords an order of precedence among the documents executed between the parties, according to which “the Agreement” would have precedence over the Letter of Acceptance (LOA), which, in turn, would have precedence over the SCC which, again, would have precedence over the GCC.

8. The fact that the SCC has precedence over the GCC is also reflected in Clause 1 of the SCC, which reads thus:

“1. GENERAL:

The Special Conditions of Contract are an extension of and



are to be read in conjunction with the General Conditions of Contract Should there be any contradictory requirements in the two, the requirement as per the Special Conditions of Contract shall prevail”

9. The LOA came to be issued by the respondent to the petitioner on 3rd August, 2015 which contained, *inter alia*, the following Clauses:

“All Terms & Conditions as stated in the GCC and SCC of the Tender and as per reference of our discussions/correspondence will remain same, in-force and unchanged

XXX

XXX

XXX

Arbitration

Any dispute arising howsoever in connection with this contract, the parties shall attempt in the first instance to resolve such dispute by friendly consultations. In the event of failure to resolve the disputes by such friendly consultations, the same shall be settled by Arbitration by a single Arbitrator to be appointed by Client

All disputes are subject to New Delhi jurisdiction only.”

10. The SCC, which also forms part of the tender document according to Clause 1.33 of the GCC (reproduced supra), contains the following arbitration Clause:

“46.0 Settlement of Disputes & 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 progresses 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 after hearing the disputing parties. The Architects shall state their decisions with reasons, therefore. Such decisions may be in the form of



a final certificate or otherwise. The decisions of the Architects with respect to any or all of the following matters shall be final and without appeal:

- a) The variation or modifications of the design.
- b) The quality or quantity of works or the addition or omission or substitution of any work.
- c) Any discrepancy in the drawings and/or specifications and schedule of quantities.
- d) The removal and/or re-execution of any works executed by the Contractor
- e) The dismissal from the works of any persons re-employed thereupon.
- f) The opening up for inspection of any work covered up.
- g) The amending and making good of any defects under defects liability period.
- h) Acceptability of materials, equipment and workmanship.
- i) Materials, labour, tools, equipment and workmanship necessary for the proper execution of work.
- j) Assignment and sub-letting.
- k) Delay and extension of work.
- l) Termination of contract by the Owner.

But if either the Owner or the Contractor be dissatisfied with the decision of the Architects on any matter, question or dispute of any kind except the matters listed, then and in any such case, either party (the Owner 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 which are in dispute or difference



of 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 or Institution of Engineers (India), to be agreed upon and appointed by both the parties or In the case of disagreement as to the appointment of a single Arbitrator to the arbitration of two Architects or Institution of Engineers (India), one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden or reference appoint an Umpire, who must also be a fellow of one of the above referred institutions.

The Arbitrator, the Arbitrators or the Umpire shall have the power to open up, review and revise any certificate, opinion, decision, requisition or notice pertaining to the matters referred to them, and to determine the same by his/their award. Upon every or any such references the cost of and incidental to the reference and award respectively shall be at the discretion of the Arbitrator or Arbitrators or Umpire who may determine the amount thereof or direct the same to be taxes as between Attorney and Client or as between party and party, and shall direct by who and to whom and in what manner the same shall be borne and paid. The award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on the parties.”

11. After the LOA had been issued, according to Mr. Kapoor, learned Counsel for the respondent, the parties entered into a contract agreement dated 17th December, 2015. Though the contract agreement has been placed on record as Annexure R-2 to the reply filed by the respondent to the present petition, it is unsigned and undated.

12. Mr. Mahajan, learned Counsel for the petitioner, disputes the very execution of this document. In any event, *prima facie*, the contract agreement annexed as Annexure R-2 to the reply of the respondent cannot be taken stock of by this Court, especially in view of the limited jurisdiction that it exercises in the present proceedings,



circumscribed by Section 11(6A) of the 1996 Act, read with the judgment of the Supreme Court in *Vidya Drolia v Durga Trading Corporation*⁴.

13. Mr. Kapoor's contention is that, even as per the priority sequence envisaged by Clause 38A of the GCC, the "Agreement" would have priority over the LOA. Having so submitted, Mr. Kapoor draws my attention to Clause 4 of the "Agreement" dated 17th December, 2015, which reads as under:

"That subject to what is specifically recorded herein and in the various communications and minutes of meetings, culminating into the execution of this Contract Agreement, the following documents and the communications exchanged between the parties as are mentioned hereunder form part of and shall accordingly be read and construed as part of this Contract Agreement as amended.

- (i) Notice Inviting Tender dated 11th March 2015.
- (ii) Tender Form
- (iii) Contract Agreement and General Conditions.
- (iv) Special Conditions.
- (v) Technical Specifications.
- (vi) Priced Bill of Quantities.
- (vii) Tender Drawings.
- (viii) Contractor's tender bid submitted, dated 04th April 2015.
- (ix) Letter of Acceptance LOA Ref: LOA/04/220715.

⁴ (2021) 2 SCC 1



(x) Work order dated 3rd August, 2015 issued by M/s. MAHAMAYA INFRASTRUCTURE PVT LTD.” LOA Ref: LOA/04/220715.

14. Mr. Kapoor relies on Clause 4 to contend that the Agreement was executed after the LOA, as the LOA finds reference in sub-clause (ix) of Clause 4 of the Agreement.

15. Even if this were so, and even if the Agreement were to be treated as meriting cognizance, Clause 4 of the agreement, for reasons which would become presently apparent, does not really advance resolution of the issue in controversy in the present case.

16. Mr. Kapoor has invited my attention, in conjunction with Clause 4, to Clause 1.33 of the GCC, which already stands reproduced hereinabove. He points out, quite correctly, that the GCC and the SCC are part of the “Tender Documents” within the meaning of Clause 1.33 of the GCC.

17. Mr. Kapoor also places reliance on Clause 11 of the Agreement, which reads thus:

“11. That all disputes arising out of or in any way connected with this Contract Agreement shall be resolved through the arbitration as mentioned in the Tender Documents and that the same shall be deemed to have arisen in New Delhi and the courts at New Delhi alone shall have the Jurisdiction to determine the same,”

18. Mr Kapoor submits that, once Clause 1 of the SCC accorded precedence to the SCC over the GCC, the arbitration clause in the



SCC would have to prevail over the arbitration clause in the LOA.

19. The grievance of the petitioner, against the respondent, as set out in the petition, is that the respondent defaulted in making payments to the petitioner against the work contracted to it. The claim of the petitioner against the respondent is set out, in para 7.20 of the petition, as amounting to ₹ 1,10,78,551/- along with interest @ 12 per cent per annum from the date of invoice.

20. *Balasore Alloys Ltd¹* advises that where there are different agreements executed between the parties, containing different arbitration clauses, the court has to examine the nature of the disputes between the parties to ascertain which arbitration clause would apply. That exercise, however, when conducted in the present case, really does not assist a resolution of the competing arbitration clauses, as the contract between the parties includes the LOA, the GCC and the SCC. It is obviously one integrated transaction, especially as Clause 38A of the GCC references the LOA and the LOA, in turn, references the GCC and the SCC.

21. Seen thus, the Court would be required to accord precedence, on the basis of the covenants in the LOA, the GCC and the SCC, between the arbitration clause which is in the LOA and that which is in the SCC, as the two clauses are mutually contradictory and cannot exist side by side. They are also, by their very nature, incapable of being harmonised, as the arbitration clause in LOA envisages arbitration by a single arbitrator, to be appointed by the respondent,



whereas the arbitration clause in the SCC envisages arbitration by a panel of Architects and Engineers.

22. Mr. Kapoor has also emphasised the fact that, as the disputes in the present case involves issues which would be within the skill area of an Engineer or an Architect, it would be appropriate that the arbitration abide by the arbitration clause in the SCC rather than that of the LOA.

23. Though the court is willing to accord due deference to Mr. Kapoor's submission that, the dispute being technical in nature, the arbitrator should be someone with engineering or architectural knowledge, that cannot be a basis to decide which arbitration clause, i.e. the arbitration clause in the LOA or that in the SCC, would prevail.

24. Clause 38A of the GCC clearly states that the LOA would have precedence over the SCC, which, in turn, would have precedence over the GCC. Once, therefore, there is an arbitration clause in the LOA, there is no question of resorting to the arbitration clause in the SCC. Clause 1 of the SCC cannot assist the respondent, as it merely accords precedence to the SCC over the GCC, and makes no reference to the LOA. Among the LOA, the SCC and the GCC, therefore, it is quite clear that, by operation of Clause 38A of the GCC, the LOA would have pre-eminent preference.

25. Apropos Clause 11 of the Agreement (assuming the Agreement to be at all enforceable in law), the said clause merely states that the



arbitration clause in the “Tender Documents would apply”.

26. The tender documents include both the GCC and the SCC. Clause 38A of the GCC, at the cost of repetition, accords pre-eminence of the LOA over the SCC. As such, even if one were to go by Clause 11 of the agreement, the arbitration clause in the LOA would have to be accorded preference.

27. The arbitration clause in the LOA envisages arbitration by a single arbitrator to be appointed by the respondent.

28. Mr. Kapoor acknowledges, quite fairly, that this clause would be incapable of enforcement in view of Section 12 (5) of the 1996 Act, read with the judgments of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Pvt. Ltd.*⁵, *Bharat Broadband Network Limited v. United Telecoms Ltd.*⁶ and *TRF Limited v. Energo Engineering Projects Ltd.*⁷, which invalidate any clause which confers authority, to one of the parties to the contract, to appoint the arbitrator. In such a case, the decisions are unanimous in requiring the court to appoint the arbitrator.

29. As such, as the arbitration Clause in the LOA would, in my opinion, prevail and, as an arbitrator cannot be appointed in accordance with the said clause, in view of Section 12 (5) of the 1996 Act and the law laid down in *Perkins Eastman Architects DPC*⁵ and the other decisions cited *supra*, the court would have to appoint the

⁵ 2019 SCC Online SC 1517

⁶ 3 (2019) 5 SCC 755



arbitrator.

30. As such, the court refers the disputes to the Delhi International Arbitration Centre (DIAC) to appoint an arbitrator to arbitrate on the disputes between the parties.

31. The DIAC is requested to appoint an arbitrator who has knowledge of architecture or engineering issues.

32. The arbitrator would also be at liberty to seek expert advice in accordance with the provisions in that regard as contained in the 1996 Act.

33. The arbitration would be conducted under the aegis of the DIAC and would abide by its rules and regulations.

34. The arbitrator would be entitled to charge fees in accordance with the Schedule of Fees maintained by the DIAC.

35. The petition stands disposed of in the aforesaid terms, with no order as to costs.

C. HARI SHANKAR, J

FEBRUARY 2, 2022/dsn

⁷ (2017) 8 SCC 377