

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No. 77 of 2024

**M/s Zillion Infraprojects Pvt Ltd
Vs
Bridge and Roof Co India Ltd**

With

AP No. 407 of 2022

**Zillion Infraprojects Pvt Ltd
VS
Bride and Roof Co (India) Ltd**

For the petitioner	:	Mr. Kishore Datta, Sr. Adv. Mr. Soumen Das, Adv. Mr. Altamash Alim, Adv. Ms. Promita Ghose, Adv.
For the respondent	:	Mr. Amitabh Shukla, Adv. Mr. Mohit Gupta, Adv. Mr. Prakash Ch. Pandey, Adv.
Hearing concluded on	:	27.06.2024
Judgment on	:	08.07.2024

Sabyasachi Bhattacharyya, J:-

1. Both the applications under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act") arise from arbitration clauses embodied in two similar contracts between the parties. The issues involved being the same, the matters are taken up together for hearing.

- 2.** Both the agreements are works contracts issued to the petitioner by the respondent Bridge and Roof Company (India) Limited (in short, “the B&R”). The principal contract was executed between Indian Oil Corporation of India Limited (IOCL) and the respondent in respect of work regarding mechanical equipments, erection and pending works by VGO-DHT Units of Paradwip Refinery Project of M/s. IOCL, Paradwip, Orissa. The work was sub-contracted to the petitioner. Disputes and differences having arisen between the petitioner and the respondent, the present applications have been filed.
- 3.** The relevant clause in both the works contracts is Clause 14.0.
- 4.** Learned senior counsel for the petitioner argues that the said Clause provides for resolution of disputes between the petitioner/sub-contractor and B&R. However, in case of the petitioner desires to refer the matter to arbitration, it has to approach B&R with such request substantiating its claim and only if B&R feels justified to initiate an arbitration, it will invoke the arbitration clause with M/s. IOCL. The decision of the Arbitrator will be final and binding on the petitioner/sub-contractor. The sub-contractor has to bear pro rata cost of the arbitration expenses in respect of its portion of the claim.
- 5.** Learned senior counsel highlights the inherent lopsidedness of the clause. Even if the petitioner seeks to raise a dispute by invoking the Arbitration clause, it has to approach B&R, despite the dispute being against B&R itself. In such case, the petitioner has to depend on the decision of B&R to invoke the arbitration clause. Even then, the petitioner cannot itself participate independently in the arbitral

proceedings but, on the other hand, would be bound by the award passed by the Arbitrator.

6. The other injustice implicit in the clause is that the petitioner is to bear its portion of expenses regarding its claim, without having any participation in the arbitral process.
7. It is argued that the said conditions of the arbitration clause are unreasonable and violative of Article 14 of the Constitution of India and ought to be set aside. It is argued that such question can be entered into by the Court while taking up an application under Section 11 of the 1996 Act and such challenge need not be restricted to applications under Article 226 of the Constitution. In support of such contention, learned senior counsel cites *Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*, reported at 2023 SCC OnLine SC 1422.
8. It is further argued that since the expression of intention to refer the disputes to arbitration finds place in the clause, the portion of the said clause which is violative of Article 14 of the Constitution ought to be struck down and the petitioner ought to be permitted to independently refer the matter to arbitration in disputes between the petitioner and the B&R.
9. For such proposition, the petitioner relies on *Jagdish Chander v. Ramesh Chander*, reported at (2007) 5 SCC 719, which lays down the well-settled principle of law that if arbitration is expressly or impliedly provided, the matter ought to be referred to arbitration.

10. Learned senior counsel appearing for the petitioner further argues that even if the petitioner consented to the arbitration clause, there can no waiver of fundamental rights embodied in Article 14.
11. The arbitration agreement, it is argued, does not comply with and falls foul of Section 7 of the 1996 Act as well as the Constitution of India and militates against the concept of party autonomy, which is inherent in arbitration.
12. The court, it is contended, has jurisdiction to sever the unconscionable part of the clause, retaining the intention to refer to arbitration.
13. As such, it is argued that the matter ought to be referred to arbitration and in view of lack of consensus between the parties in that regard, this Court ought to appoint an Arbitrator for such purpose under Section 11 of the 1996 Act.
14. Learned counsel for the respondent takes a preliminary objection in that the arbitration clause specifically bars reference to arbitration in respect of disputes exclusively between the petitioner/sub-contractor and the respondent (B&R). In view of such negative clause, the matter cannot be referred to arbitration, since the present dispute is between the petitioner and B&R, and IOCL is not involved at all.
15. The respondent, in such context, relies on *M.R. Engineers & Contractors Private Ltd. v. Som Datt Builders Ltd.*, reported at (2009) 7 SCC 696, where the applicability of Section 7(5) of the 1996 Act was considered and it was held that wording of the said sub-section makes it clear that mere reference to a document in a contract would not

have the effect of making the arbitration clause in that document a part of the contract. Thus, the GCC, SCC, technical specification, etc. between the IOCL and B&R cannot be looked into to find out an arbitration clause therein, as the petitioner is not a party in any of such documents. Section 7(5) requires a conscious acceptance of the arbitration clause from another document by the parties as a part of their contract. In the absence of the same, the petitioner cannot take advantage of the arbitration clause in the agreement between IOCL and B&R.

- 16.** A general reference to another contract would not suffice to import the arbitration clause in such contract between the parties to a different contract.
- 17.** In the case of *NBCC (India) Ltd. v. Zillion Infraprojects Pvt. Ltd.*, reported at 2024 SCC OnLine SC 323, the Supreme Court relied on the judgment of *M.R. Engineering (supra)* and set aside the order of the Delhi High Court whereby an Arbitrator was appointed for adjudication of disputes between NBCC and Zillion, the present petitioner. There, the Supreme Court was considering similar facts as in the present case. As such, the ratio of the said judgment is binding in the present case as well.
- 18.** In the instant case, there is only a general reference to GCC, SCC, technical specification, etc. issued by IOCL to the respondent in the contract between the parties. The arbitration clause contained in the GCC issued by IOCL is not incorporated in the agreement between the petitioner and the B&R. On the contrary, the conditions of this

particular agreement provide that the disputes between the parties herein shall not be referred to arbitration or to any similar Alternative Dispute Resolution forum.

19. It is next argued that the respondent is not relying on the restrictive part of Clause 14.0, which is the arbitration clause. Even if such part of Clause 14.0 is severed, the other part still remains which states that the disputes between the parties shall not be adjudicated through arbitration or similar disputes resolution system, which means that there cannot be a reference of such disputes to arbitration or to other similar Alternative Dispute Resolution forums. Thus, the proposition in *Lombardi Engineers Ltd. (supra)* does not apply. Hence, it is argued that the applications under Section 11 of the 1996 Act ought to be dismissed.
20. The moot question which falls for consideration in the present case is whether there is a valid arbitration clause in the agreement between the parties which covers the disputes raised by the petitioner.
21. For deciding such issue, the relevant arbitration clause in the agreement between the present parties is required to be gone into and is set out below:

“14.0 The Arbitration of disputes if any between IOCL & B&R will be final & binding upon the subcontractor. No dispute can be adjudicated separately through arbitration or any other similar forum for any disputes between subcontractor & B&R. However incase subcontractor desires B&R to raise certain disputes pertaining to its claim for reference to arbitration, the subcontractor shall approach B&R with such request substantiating its claim and incase B&R feels justified to initiate an arbitration (decision of concerned General Manager of B&R in this regard will be final & binding), the arbitration may be

invoked by B&R with M/s. IOCL and decision of the arbitrator will be final and binding upon the subcontractor for all disputes. However the subcontractor has to bear prorata cost of its portion of claim of arbitration expenses. The jurisdiction of Court, if situation so arises, in any circumstances shall be at Kolkata.

- 22.** A perusal of the clause shows that there are primarily two components of the same. The first part, apart from lending finality to the decision of the Arbitrator, provides that any dispute between the sub-contractor/petitioner and the contractor/B&R is not to be adjudicated separately through arbitration or in other similar forum.
- 23.** The second component deals with issues pertaining to disputes between the contractor (B&R) and/or the sub-contractor (petitioner) on the one hand and M/s IOCL on the other.
- 24.** According to the second limb of the arbitration clause, in case the subcontractor desires B&R to raise a dispute pertaining to its claim for reference to arbitration, the sub-contractor shall approach B&R with such request. If the B&R feels it justified to initiate an arbitration on the said claim, regarding which the decision of the General Manager of B&R will be final, arbitration may be invoked by B&R with M/s IOCL, in which case the sub-contractor has to bear pro rata cost of its portion of the claim of arbitration expenses. The jurisdiction of the court has been fixed at Kolkata.
- 25.** Hence, there are two distinct sub-divisions in the clause. The first part deals with disputes arising between the subcontractor (petitioner) and the respondent/ B&R. Regarding such disputes, it is specifically provided that such dispute cannot be adjudicated through arbitration

or any similar forum. The obvious meaning of “similar” is any other Alternative Dispute Redressal forum.

26. Although in the succeeding sentence, being the second limb of the clause, it is not made clear as to whether the disputes sought to be raised by the sub-contractor pertaining to its claim has to be against IOCL or can be exclusively against B&R only, the rest of the provision, read harmoniously, leaves no manner of doubt that such dispute has to be against the IOCL. Otherwise, an absurdity would arise inasmuch as the subcontractor has to approach the respondent/contractor, the very entity against which the dispute is raised, for deciding even whether to initiate an arbitration proceeding. Further, in such event there would be no scope of the petitioner paying its portion of the arbitration expenses, as in such cases the entire dispute would be between the petitioner and the respondent/contractor and there would not be any occasion to calculate any pro rata portion of the petitioner’s costs. A cardinal rule of construction of documents is that any interpretation which leads to absurdity or unworkability is to be avoided. Since the provisions of the present arbitration clause can be read harmoniously without imputing any such absurdity, such harmonious construction is to be adopted by the court.

27. Hence, it is inevitable that the claim which is proposed by the petitioner to the respondent for being taken up in arbitration has to be a component of the primary dispute raised by the respondent against the IOCL where the petitioner may also have a say since it will also be affected, being bound by the arbitration between B&R and IOCL. In

such cases, the petitioner has to approach the respondent with the petitioner's claim against the IOCL, the respondent deciding whether to incorporate such component in its arbitration with IOCL or independently raise it with IOCL.

- 28.** The cardinal challenge by the petitioner is on the footing of violation of Article 14 of the Constitution. A perusal of the arbitration clause shows that it is segregable into two parts – the first part dealing with disputes between the petitioner and the respondent, which is non-arbitrable, and the second dealing with disputes between the B&R and the IOCL, in which case the petitioner can side with the B&R and seek to raise its sub-claim against the IOCL through the respondent, in the arbitral proceedings initiated between the respondent and the IOCL.
- 29.** It is evident that the second part is unjust and violative of party autonomy, since the petitioner would not, in such case, have any participation in the arbitral process with IOCL, although it has a stake in the outcome of the same. Moreover, the decision whether to take the claim of the petitioner to arbitration also lies within the exclusive discretion of the respondent, which is also unjust and lopsided. The petitioner, in such case, has to pay according to its portion of the claim but have no participation in the arbitration, which definitely is violative of Article 14 of the Constitution of India and ought to be struck down.
- 30.** However, as discussed above, the second limb being segregable, striking down the same does not affect the first limb which clearly

debars any exclusive dispute between the petitioner and the respondent from being referred to arbitration.

- 31.** The petitioner has argued that the arbitration clause does not comply with and falls foul of Section 7 of the 1996 Act. Section 2(1)(b) of the 1996 Act defines “arbitration agreement” to mean an agreement referred to in Section 7. Section 7 provides that an 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.
- 32.** In the present case, the arbitration clause, insofar as it relates to disputes between the petitioner/sub-contractor and the respondent/contractor is concerned, which is a defined legal relationship, provides in clear terms that no such dispute can be adjudicated separately through arbitration or any other similar forum. In view of the negative language used in the said provision, there is a clear bar to disputes between the petitioner and the respondent to be referred to arbitration.
- 33.** There is nothing in the other part of the said clause to create such right of reference of exclusive disputes between the petitioner and the respondent to arbitration. The rest of the clause deals with disputes against the IOCL. Such dispute may be solely between the respondent and the IOCL or might have some components of challenge by the petitioner as well. Clause 14.0, the arbitration clause in the agreement between the petitioner and the respondent, provides that in

case of such disputes between the respondent and the IOCL, the petitioner may add its own component, subject to the discretion of the respondent, in which case, the petitioner would not have participatory right but would be liable to pay its portion of the expenses.

- 34.** Hence, there is no violation of Section 7 of the 1996 Act, at least insofar as the petitioner and the respondent are concerned.
- 35.** Admittedly, the present dispute has arisen exclusively between the petitioner and the respondent, the IOCL having no part to play in it.
- 36.** Although the agreement between the petitioner and the respondent, in certain places, refers to the GCC, SCC, technical specification, drawings, addendums and other clauses to which the IOCL is also a party, there is no specific provision in the agreement between the present parties incorporating the arbitration clause therein in the contract between the present parties. As held in *NBCC (India) Ltd. (supra)*, Section 7(5) of the 1996 Act provides for a conscious acceptance of the arbitration clause from any 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.
- 37.** Section 7(5) stipulates that 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.
- 38.** In the present case, however, there is not a single sentence in the agreement between the petitioner and the respondent to indicate that the arbitration clause in the agreements between the IOCL and the

respondent have been made a part of the contract between the petitioner and the respondent.

39. Again, in *M.R. Engineers (supra)*, Section 7(5) was discussed and it was held in categorical terms that the arbitration clause from another contract can be incorporated into the contract only by specific reference to the arbitration clause in the other contract.
40. In the present case, such specific incorporation being absent, it cannot be said that the petitioner can take advantage of the arbitration clause in the agreements between the IOCL and the respondent.
41. The only clause relating to arbitration which is operative insofar as the petitioner is concerned, is Clause 14.0 in the agreement between the petitioner and the respondent which, in specific terms, debars any arbitration regarding disputes arising exclusively between the petitioner and the respondent.
42. The petitioner further alleges violation of Article 14 of the Constitution. The restriction to refer matters between the petitioners and respondent to arbitration merely restricts the forum to civil courts and other forums under general law, precluding any reference to arbitration or other Alternative Dispute Resolution forum. Clause 14.0 merely states in that regard that such disputes cannot be adjudicated through arbitration or any other “similar forum”, meaning thereby any other Alternative Dispute Resolution Forum, and does not take away the remedy of the petitioner under general law to move the civil court or any other forum, if available under any other law. Hence, it cannot

be said that the right of the petitioner to have access to justice has been curtailed in any manner.

43. Arbitration is a choice to be exercised on consensus by the parties. The petitioner entered into the contract with the respondent with open eyes and nothing prejudicial to the petitioner has been incorporated in the said agreement by precluding arbitration regarding disputes between the present parties which could be said to take away the party autonomy of the petitioner. The petitioner cannot selectively pick and choose particular terms of the agreement and shut its eyes or assail the others. The ground of unequal bargaining power is not applicable, since the petitioner took full advantage of the contract and did the work envisaged therein.
44. The petitioner places reliance on *Lombardi Engineering Ltd. (supra)* where it was held that the court, while considering an application under Section 11(6) of the said 1996 Act, can test the validity or reasonableness of the condition stipulated in the arbitration clause at the touch-stone or anvil of Article 14 of the Constitution.
45. Again, in *Jagdish Chander's* case, the Supreme Court observed that the court may sever and declare unenforceable a provision of the arbitration clause that is violative of law or fundamental rights.
46. In the present case, there are two clearly segregable parts of the arbitration clause. The first part deals with a specific bar to arbitration in respect of disputes arising exclusively between the petitioner and the respondent. On the other hand, the second limb of

the clause deals with disputes between the respondent and the IOCL where the petitioner may also stake a claim.

47. Thus, the segregation is complete in the clause between the disputes arising exclusively between the petitioner and the respondent and those arising between the IOCL and the one hand and the respondent and, in certain cases the petitioner, on the other.
48. Insofar as the first part is concerned, there is a specific bar to arbitration. The petitioner tends to argue that if there is an intention of the parties to refer matters to arbitration, the same has to be honoured unless the provision is totally unworkable.
49. In the present case, there is no dichotomy or unworkability, nor is there any absurdity or violation of Article 14 of the Constitution of India insofar as the portion of the arbitration clause dealing with disputes between the petitioner and the respondent is concerned. The clause clearly provides a bar to reference of such disputes to arbitration. Thus, the intention to refer to arbitration of disputes arising exclusively between the petitioner and the respondent, which a *sine qua non* for such reference in the first place, is completely absent in the said clause. It is not for the Court, sitting in jurisdiction under Section 11 of the 1996 Act, to modify the contract and carve out such right for the parties where the parties themselves choose not to confer upon themselves the same.
50. Hence, Clause 14.0 does not, in any manner, clothe the petitioner or the respondent with any right to refer the disputes which arise *inter se* between them to arbitration.

- 51.** However, insofar as the other part of the said clause is concerned, the same imposes unreasonable fetters on the petitioner in respect of disputes with the IOCL. In such cases, the petitioner is given a right to raise the issue with the respondent and join in an arbitration initiated by the respondent against the IOCL.
- 52.** There are two components of such provision which militate against Article 14 of the Constitution. First, the petitioner is not allowed to participate in the proceedings, although mandated to bear the expenses regarding its portion of the claim. Secondly, even the reference of the dispute to the adjudicatory forum is left entirely to the discretion of the respondent, thereby denuding the petitioner of its independent right to raise a dispute before the appropriate adjudicatory authority. Such curtailment of right tantamounts to contravention of the right to access to justice, which is a fundamental component of the right to equality enshrined in Article 14 of the Constitution.
- 53.** Hence, such second limb of the arbitration clause, being violative of Article 14 of the Constitution of India, is hereby struck down insofar as the petitioner is concerned. The effect of such striking down is that the petitioner will be at liberty to raise any dispute against the IOCL alone or against the IOCL as well as the respondent, if the petitioner so chooses, before the competent civil court having jurisdiction and/or any other authority if vested with such adjudicatory power under any other statute. However, there is no scope of the petitioner joining in an arbitration proceeding between the respondent and the IOCL, since

the petitioner is not a party to the other agreements between the IOCL and the respondent which contemplate arbitration between them.

54. Thus, in view of the above discussions, this Court comes to the following conclusions:

- (i) Disputes arising out of or in respect of the agreement between the petitioner and the respondent exclusively are not amenable to arbitration due to the specific bar in the arbitration clause.
- (ii) In the event the petitioner has a dispute against IOCL where the respondent may or may not be a party, it will be open to the petitioner to ignore the arbitration clause, that is, Clause 14.0 and the restrictions imposed therein and to independently file a legal action before the competent civil court and/or any other authority, if vested with such power under any other statute than the Arbitration and Conciliation Act, 1996.
- (iii) As a result, the petitioner is not entitled to invoke the arbitration clause in the present dispute, which arises exclusively between the petitioner and the respondent, in view of the specific bar in Clause 14.0 of the agreement between the parties.
- (iv) However, the petitioner will be at liberty to file a regular civil suit before the competent civil court and/or move any other forum if the petitioner has such right under any other statute than the Arbitration and Conciliation Act, 1996.

55. In view of the above, there is no occasion for this Court to appoint an Arbitrator in respect of the present dispute. As such, the applications

under Section 11 of the Arbitration and Conciliation Act, 1996 are not maintainable in law.

- 56.** Hence, AP-COM No. 77 of 2024 and AP No. 407 of 2022 are dismissed on contest without any order as to costs, leaving it open for the petitioner to approach the competent civil court or any other statutory forum with the disputes raised by the petitioner with the respondent.
- 57.** There will be no order as to costs.
- 58.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)