OD-7

RVWO/38/2023
IA NO: GA/1/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

DHANSAR ENGINEERING COMPANY PRIVATE LIMITED
VS
EASTERN COALFIELDS LIMITED

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR
Date : 18th April, 2024.

Appearance:
Mrs. Amrita Panda, Adv.
Mr. Daipayan Basu Mallick, Adv.
Mr. Arkaprava Sen, Adv.
Mr. Sayantan Kar, Adv.
…for review applicant

Mr. Mainak Das, Adv.
Mrs. Priti Banerjee, Adv.
…for respondent

This is an application seeking review of an order dated 1 December, 2022 passed under section 11(6) of the Arbitration and Conciliation Act, 1996.

Briefly, the respondent published an e-tender *inter-alia* for hiring of heavy earth moving machinery and for, removal of coal at the Narayankuri, O.C. Patch of Kunustoria Area. Pursuant to the above, online bids were submitted by various entities where the applicant emerged as the successful bidder and was ultimately accepted. Thereafter, a letter of acceptance dated 31 March, 2017 was issued in favour of the applicant and, a work order dated 24 May, 2017 was also executed between the parties. Subsequently, an agreement dated 30 August 2017 was entered into by and between the

parties. The parties also entered into a Supplementary Work Order dated 8 February 2019.

It is alleged that despite repeated opportunities, the applicant failed to fulfill the conditions under the NIT. In such circumstances, the respondent was constrained to foreclose the work under the NIT which had been awarded to the applicant. During the interregnum, by a Circular dated 7 April 2017, Coal India Limited (CIL) of which the respondent is a subsidiary *inter alia* announced a change in the Internal Office Procedural Rules applicable to CIL whereby all its subsidiaries were directed to refer disputes and differences between CIL or its subsidiaries with private contractors to arbitration. In effect, the Circular introduced a policy to refer all disputes and differences to arbitration in case of parties other than government agencies to arbitration.

Clauses 2 and 5 of the Circular provides as follows:

> *For future contracts/work orders:*
>
> *2. It has been decided to incorporate a procedure for settlement of disputes/differences their arbitration for parties other than Govt. Agencies. When dispute/differences arises both the employer (department) and contractor shall first try to resolve the same amicably in sting system of in house mechanism for settlement of dispute/differences.*
>
> *The parties fail to resolve the dispute/differences, by such mutual consultation then deposit of the case, either the employer (department) or the contractor shall give not party to refer the matter to arbitration instead of directly approaching the Court.*
>
> *The parties fall however be entitled revoke arbitration clause only after exhausting the arbitration under clause 6 10 of MCEW, clause 13 of CC in chapter 6 of CMM clause 12 of the chapter 6 10 MM and clause 42 of CC in chapter 2 of CMM.*

In view of the above for settlement of dispute/differences through arbitration the last chapter 6 of CMM clause 12 of CC in chapter 2 of CMM is being amended as under.

Past/existing work order/contract:

5. With regards to disputes/differences cropping up in existing work order shall adopt procedure for settlement of the same through arbitration are aware that neither the CIL Manuals nor contract document at present contracts any arbitration, therefore dispute/differences cannot be referred to arbitration straight before referring the matter to arbitration, consent of the other party (contractor) for redressal of dispute/differences through arbitration. Once the contractor agrees to dispute/differences arising out of contractors through arbitration and agreement is execute between employer and contractor to referring the dispute Arbitration or a person appointed by competent authority of CII/CMD of Subsidies (as the case may be) the rest of the procedure shall be as per IN ARBITRATION AND CONCLUATION ACT 1996 as amended by AMENDMENT ACT of 2015 and also as per instruction incorporated in close of deputes through Arbitration.

In this background, the applicant had filed an application being AP 772 of 2022, for appointment of an Arbitrator. By an order dated 1 December, 2022, the application was dismissed on the ground that there was no valid arbitration clause between the parties. In a Special Leave Petition, assailing the order dated 1 December, 2022, the Hon'ble Supreme Court disposed of the same by granting liberty to the applicant to file an application for review. Hence, this application.

It is contended on behalf of the petitioner that, there is an error apparent on the face of the record in passing the order dated 1 December, 2022 inasmuch as the Court had relied on clause 5 of the Circular, instead of clause 2 which is the relevant and applicable clause. In this connection, the decision in *Mahanadi Coalfields Limited and Anr. Vs. Deepak Cables*

(India) Limited (2014) 11 SCC 148 is sought to be distinguished on the ground that in the facts of that case, the relevant clause was clause 5 of the Circular and not clause 2. In this case, the right to invoke the arbitration clause would be governed by clause 2 of the Circular, since it deals with *future contracts/work orders*. Since the contract is dated 1 August, 2017, the subsisting dispute resolution clause in the contract stood amended by the Circular. The Circular is binding and mandatory in nature. Thus, the arbitration clause stood incorporated by reference and the requirements of section 7 of the Arbitration and Conciliation Act, 1996 have been complied with. In this background, the order dated 1 December, 2022 is liable to be reviewed and set aside and an Arbitrator be appointed in terms thereof.

On behalf of the respondent it is contended, that there are no grounds to seek review under Order 47 Rule I of the Code of Civil Procedure 1908. An error apparent on the face of the record is one which is apparent and not an error which requires to be searched. A review is not an appeal in disguise whereby an erroneous decision is reheard or re-corrected but only lies in case of an apparent error. Accordingly, there are no grounds to entertain this application. In this connection, the respondent relies on the decisions in *Kamalesh Verma vs Mayawati & Ors (2013) 8 SCC 320* and *S. Madhusudan Reddy vs. V. Narayana Reddy 2022 SCC OnLine 1034*.

It is also contended that the applicant cannot be allowed to take a different and inconsistent stand than what was taken in the earlier round of litigation. The applicant cannot be permitted to approbate and reprobate. Accordingly, this application is barred by the doctrine of estoppel. In this

connection, the respondent relies on the decisions in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. (2013) 5 SCC 470, Premlata v. Naseeb Bee (2022) 6 SCC 585.*

On merits, it is submitted that despite a Supplementary Work Order dated 07/08-02-2019 having been issued by the respondent in favour of the applicant, the applicant failed to complete the work under the NIT as awarded. Ultimately, after repeated opportunities, the respondent was constrained to foreclose the work under the NIT. In any event, in the absence of a valid arbitration clause there is no merit in this application and the same is liable to be dismissed. Accordingly, the ratio in *Mahanadi Coalfields Ltd & Anr. vs. IVRCL AMR Joint Venture, 2022 SCC Online SC 960* is applicable.

The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Such power should be exercised only within the limits of the statute dealing with the exercise of the power. An application for review cannot be treated as an appeal in disguise. It has been repeatedly reiterated that a Court of review has limited jurisdiction and it may allow review on three specific grounds namely; (i) discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order was made; (ii) mistake or error apparent on the face of the record; or (iii) for any other sufficient reason. [See *Kamlesh Verma vs. Mayawati & Ors. (2013) 8 SCC 320 paragraphs 14, 15, 16, 17, 18, 19 and 20.2 (ix)* and *S. Madhusudan*

Reddy vs. V. Narayana Reddy and Ors. (2022) SCC OnLine Sc 1034 paragraph 31].

The only ground for review is one of mistake or error apparent on the face of the record. Admittedly, the contract having been executed by the parties, post the Circular dated 7 April, 2017, clause 2 and not clause 5 of the Circular, is applicable in the present case. Thus, it is obvious that there is an apparent error in the order dated 1 December, 2022 which *ex facie* proceeds on the basis that, clause 5 of the Circular was the applicable clause. Hence, the review application is liable to be entertained.

Nevertheless, the question of there being a valid and binding arbitration agreement requires consideration.

Section 7 of the Act provides as follows:

> *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.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in—*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

(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 of the Act contemplates that an arbitration clause *may* be incorporated into a contract by *reference*. One of the essential requirements for a valid arbitration clause is the *intention* of the parties to opt for arbitration i.e. there must be *consensus ad idem*. The arbitration clause should disclose a determination and obligation on behalf of the parties to refer the disputes to arbitration. [*Jagdish Chander vs. Ramesh Chander (2007) 5 SCC 719*]. As such, if a written contract *refers* to a document then such a reference is a valid incorporation of the arbitration clause. The question of whether an arbitration clause contained in another document has been incorporated or not in the contract is a question of interpretation. In *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696,* it has been held as follows:

(i) An arbitration clause in another document is deemed incorporated into a contract by reference if the following conditions are fulfilled: (a) the contract should contain a clear reference to the documents containing the arbitration clause; (b) this reference should clearly indicate an intention to incorporate the arbitration clause into the contract; and (c) the arbitration clause should be appropriate, in that it 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 which makes 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 one contract can be incorporated into another contract (where such reference is made), only by a specific reference to the arbitration clause.

(iii) If the contracting parties decide that a contract is to be executed according to the terms of another contract, said reference only incorporates the provisions relating to execution alone. An arbitration

agreement contained in the other contract is not automatically incorporated. This goes in line with the principle of separability.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (e.g., the standard terms and conditions of a Trade Association or the Architects Association) will apply to the contract, such standard form terms, 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 shall form a part of their contract (as e.g. 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.

The Supreme Court in M. R. Engineers had also clarified as follows:

16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the Court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.

17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and all terms and conditions of the said document shall be read or treated as a part of the contract, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

> *18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.*

In summary, a reference to the document containing an arbitration clause which needs to be incorporated into another document must clearly indicate an intention to incorporate the arbitration clause from one document to another. Section 7(5) of the Act requires a conscious acceptance of the arbitration clause from another document by the parties as a part of their contract before such arbitration clause could be read into the contract. Incorporation of an arbitration clause in an existing contract requires both parties to mutually arrive at a further agreement to refer the disputes to arbitration. Mere communication of a decision to go to arbitration cannot be construed as an *arbitration agreement* between parties under section 7 of the Act *(Mahanadi Coalfields Ltd and Anr. Vs. IVRCL AMR Joint Venture, 2022 SCC Online SC 960).*

In the facts of this case, there is no *reference* to the Circular whereby the arbitration clause has been incorporated in the contract between the parties. It is true that the policy decision in terms of the Circular is to make arbitration a mechanism for dispute resolution both in cases of existing and future contracts. However, this necessarily requires a further document to be executed between the parties which *incorporates* the arbitration clause.

Any agreement or clause in an agreement requiring or contemplating further consent before a reference to arbitration is not an arbitration, but an agreement to enter into an arbitration agreement in the future which *per se* is not enforceable. An arbitration clause cannot be deemed to have been incorporated by way of a subsequent Circular, unless it is specifically referred to and included in the original agreement between the parties. Section 7(5) mandates a reference in a contract containing an arbitration clause. In the absence of any *mutual* intention to incorporate the arbitration clause from another document into the existing contract between the parties, there is no valid arbitration agreement. The Circular dated 7 April 2017 merely expresses a desire. The arbitration clause has not been incorporated in the contract. The applicant is not entitled to any reliefs as prayed for. For the above reasons, there is no merit in the contentions of the applicant.

With the above directions, RVW 38 of 2023 stands disposed of. However, there shall be no order as to costs.

(Ravi Krishan Kapur, J.)

SK.