
(2020) 02 DEL CK 0362

In the Delhi High Court

Case No : Arbitration Petition No. 591 Of 2019

Huawei Telecommunications (India) Co. Pvt Ltd

APPELLANT

Vs

Bharat Sanchar Nigam Limited (BSNL) & Anr

RESPONDENT

Date of Decision : 27-02-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 7(1), 7(5), 11, 11(6), 12(5)

Citation : (2020) 02 DEL CK 0362

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Jayant Mehta, Aditya Singhal, Sameer Agrawal, G.P. Nag

Final Decision : Dismissed

Judgement

Jyoti Singh, J

1. Present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Act) for appointment of a Sole Arbitrator to

adjudicate the disputes between the petitioner and both the respondents.

2. Petitioner is engaged in the business of designing, developing, manufacturing and marketing / sale of Telecommunications related products

worldwide to cater to the requirements of its purchasers. Respondent no.1 / BSNL provides Telecom services and network etc. and respondent no.2 /

Indian Telephone Industries Ltd. (hereinafter referred to as ITI) is a Public Sector Undertaking engaged in manufacturing a range of Telecom

products and solutions covering the spectrum of switching, transmission, access, and subscribers premises equipment.

3. BSNL invited bids for planning, installation and commissioning of GSM/UMTs based cellular mobile network with capacity of 9 Million to be rolled

out in different phases in different circles / Capital License Services areas of BSNL in South India, vide tender dated 22.03.2006. BSNL was required

to place 30% of its procurement orders upon ITI as per Government Guidelines.

4. Petitioner entered into an MOU with ITI on 17.07.2008 to explore business opportunities arising out of the above-mentioned tender and in terms of

Clause 2.1 and 2.2 of the MOU, all supplies, installation and commissioning for BSNL were to be done by the petitioner on back-to-back basis.

5. BSNL placed an Advance Purchase Order (APO) on 21.07.2008 upon ITI for supply and commissioning, etc. of 9 Million Lines 2G / 3G IMPCS

Combo Network in the South Zone. A Tripartite Agreement was entered into between the three parties on 16.10.2008. Under the said agreement, the

Performance Bank Guarantee (PBG) as required under the APO and Clause 79 of the SCC was accepted by BSNL from the petitioner. As per the

case of the petitioner, Clause 6 of the Agreement provided for direct dealing between the petitioner and BSNL.

6. For the purpose of payment, an Escrow Agreement was entered into between the petitioner, ITI and the Bank on 11.02.2009, with the consent of

BSNL and all payments were made directly into this account, by BSNL.

7. Various Purchase Orders were issued by BSNL in the name of ITI to be executed by the petitioner. Petitioner avers that it undertook and

commenced work under the Tender, but from the very beginning, execution of the project was delayed due to numerous hindrances attributable solely

to BSNL. This affected the ability of the petitioner to efficiently complete the work and increased the cost of the project manifold. However, in the

interest of the project and in good faith, petitioner cooperated with BSNL and finally commissioned the work in 2011.

8. Petitioner further avers in the petition that after successful completion of the work, to its shock, BSNL alleged that there was delay in delivery of

goods and services and unjustifiably levied maximum liquidated Damages totalling to Rs.144.6 Crores for different circles under Clause 16 of the GCC

and Clause 67 of Section-II of the Tender Documents.

9. Petitioner made several representations to BSNL to provide the basis of levy of Liquidated Damages and the reasons for withholding the payment.

Resort to the Right to Information Act requesting for various documents in this regard was unsuccessful. Various meetings were held with the BSNL

in this regard, but to no avail.

10. Petitioner finally invoked Arbitration by a notice dated 30.07.2019. Clause 20.1 which is the Arbitration Clause in the GCC reads as under :

Clause 20.1 - In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to the

matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD,

BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time

being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD,BSNL or by whatever designation such

an officer may be called (hereinafter referred to as the said officer), and if the CMD,BSNL or the said officer is unable or unwilling to act

as such, then to the sole arbitration of some other person appointed by the CMD,BSNL or the said officer. The agreement to appoint an

arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no objection to any such appointment on the

ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the

course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator

shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred,

being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL or the said officer shall appoint

another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed

from the stage at which it was left out by his predecessors.â??

11. Petitioner informed BSNL that in terms of Section 12 (5) read with Seventh Schedule of the Act, CMD, BSNL in terms of the Arbitration Clause

was ineligible to act as a Sole Arbitrator or even to appoint another Arbitrator. BSNL replied to the invocation notice on 22.08.2019 but refused to

accede to the request made in the notice of invocation.

12. Learned counsel for the petitioner contends that the project was delayed on account of the hindrances caused by BSNL and yet Liquidated

Damages have been levied by it and payments of the petitioner have been withheld. Despite several representations neither the payments have been released nor even the basis for levying the Liquidated Damages has been provided. It is argued that since there is an Arbitration Clause, petitioner has a right to refer its disputes to Arbitration. It is contended, however, that in view of Section 12 (5) read with Seventh Schedule of the Act, CMD, BSNL is ineligible to appoint a Sole Arbitrator and thus, this Court should appoint an Arbitrator to adjudicate the disputes between the parties herein.

13. BSNL has filed a short reply opposing the present petition on the ground that there is no privity of contract between the petitioner and BSNL and in the absence of an Arbitration Agreement between the two, the present petition is not maintainable qua BSNL. Learned counsel for the BSNL submits that under the NIT dated 22.03.2006, the APO was placed upon ITI for supply and commissioning of the GSM Lines. For securing due performance of the Contract, ITI was required to furnish a PBG in favour of BSNL. On account of its inability to furnish the PBG, ITI had entered into an agreement with the petitioner for financial aid. BSNL on a suggestion by the ITI entered into a Tripartite Agreement with both, solely for the purpose of securing the PBG and no more.

14. Learned counsel further contends that the contract between BSNL and ITI contains Clause 27 which is an Arbitration Clause and the petitioner is not a party to the said Agreement. The Tripartite Agreement does not have any Arbitration Clause. Thus, it is not open for the petitioner to invoke arbitration against the BSNL in the present petition. It is also contended that the contract was awarded to ITI by the BSNL and the Liquidated Damages were imposed only on ITI vide its letter dated 21.01.2016 and not on the petitioner. Learned counsel thus prays that the petition be dismissed qua BSNL as it cannot be a party to any Arbitration, with the petitioner.

15. ITI has also filed a short reply wherein it has supported the stand of the petitioner. It is submitted that Bank Guarantee was furnished by the petitioner and all other obligations under the Project were to be fulfilled by the petitioner only. It was with due knowledge, consent and agreement with BSNL that the Project was to be performed by the petitioner. It is argued that BSNL and the petitioner were directly coordinating and dealing in day-to-day work and on all other major issues for execution of the project. After

completion of the project, BSNL wrongly alleged that there was delay in delivery of goods and services and unilaterally and illegally levied LD and withheld payments. BSNL has been commercially utilizing the network delivered by petitioner on one hand and is wrongly withholding its payment on the other hand. The argument is that it is the petitioner who is mainly the aggrieved party and since its representations for release of money were unsuccessful, it has rightly invoked the Arbitration Clause. In the reply, it is categorically stated by the ITI that it does not object to the matter being adjudicated upon by a neutral Arbitrator to be appointed by this Court.

16. The contention of the learned counsel for the petitioner primarily is that while the Mother Agreement pursuant to the tender of the BSNL was

executed between ITI and BSNL through a Purchase Order, but the actual work was sub-contracted to the petitioner and the ITI had placed several

Purchase Orders in the name of the petitioner. A Tripartite Agreement was entered into between the petitioner and both the respondents on

16.10.2008 under which the PBG, as required under terms of the principal Purchase Order and Clause 79 of the SCC, was accepted by BSNL,

directly from the petitioner thereby acknowledging petitioner as a sub-contractor for the complete project. Clause 6 of the said agreement provided for

direct dealing between the petitioner and respondent No. 1. It is also argued that for purpose of payment, an Escrow Agreement was entered into

between the petitioner and ITI and the Bank with the consent of BSNL and the payments were made directly into the said account by the BSNL.

17. It is next argued that even the delay in execution of the work was on account of BSNL which affected the ability of the petitioner to complete the

work in time, thereby increasing the cost of the project manifold. Petitioner, however, successfully commissioned the work in 2011, but the BSNL

started levelling allegation of delay on the part of the petitioner and even imposed Liquidated Damages, withholding the amounts due to the petitioner.

It is argued that the MOU dated 17.07.2008 entered into between the petitioner and the ITI, the Mother Agreement dated 21.07.2008 between the

BSNL and the ITI and the Tripartite Agreement dated 16.10.2008, are all intrinsically linked and were composite transactions and thus the reference

should be made to a Sole Arbitrator to decide the disputes between the petitioner and both the respondents. According to the petitioner, BSNL is a

necessary party without which the arbitration between the petitioner and ITI would be meaningless, as it is the BSNL which has to make payments

and it is the BSNL which has levied the liquidated damages. Thus, resort must be had to Clause 20.1 of the GCC in the tender documents and a Sole

Arbitrator be appointed. Reliance is placed on the judgment of Supreme Court in the case of Chloro Controls India Pvt. Ltd. v. Severn Trent Water

Purification Inc. and others 2013 1 SCC 641 for the proposition that where the various agreements constitute composite transactions, Court can refer

disputes to arbitration existing between signatory or non-signatory, if all ancillary agreements between them are relatable to principal agreement and

performance of one agreement is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without

performance of others or severed from the rest. The intention of the parties to refer all disputes between all parties to the Tribunal is one of the

determinative factors.

18. Reliance is also placed by the counsel for the petitioner on the judgment in the case of Ameet Lalchand Shah & Ors. Vs. Rishabh Enterprises &

Anr. 2018 15 SCC 678 and Mahanagar Telephone Nigam Ltd. vs. Canara Bank 2019 SCC OnLine SC 995 for the same proposition.

19. In the case of MTNL (supra), it is submitted, that Supreme Court held that a non-signatory can be bound by an Arbitration Agreement on the basis

of the "Group Companies" Doctrine, where conduct of the parties evidences, a clear intention of the parties to bind both the signatory as well as

a non-signatory. Supreme Court defined "composite transaction" to mean a transaction which is so interlinked in nature that the performance of

the agreement may not be feasible without the aid, execution, performance of the supplementary or ancillary agreement, for achieving the common

object, and collectively having a bearing on the dispute.

20. Learned counsel for the BSNL per contra relies on the judgment of the Supreme Court in the case of M.R. Engineers and Contractors Private

Limited vs. SOM Datt Builders Limited (2009) 7 SCC 696 to contend that the Court has clearly distinguished between a mother contract and another

contract with the sub-contractor. Supreme Court has held that even assuming that the Arbitration Clause from the main contract had been

incorporated into the sub-contract by reference, even then, the sub-contractor

cannot claim the benefit of the said clause. This is in view of the principal that when the document to which a general reference is made contains an Arbitration Clause, whose provisions are inapt or inapplicable with reference to the contract between the parties, it would be assumed or inferred that there was no intention to incorporate the Arbitration Clause from the referred document.

21. Counsel for the BSNL has also placed reliance on the judgment of the Supreme Court in the case of Deutsche Post Bank Home Finance Limited vs. Taduri Sridhar and Another 2011 11 SCC 375 for the proposition that the existence of an Arbitration Agreement between the parties to the petition under Section 11 and the existence of disputes to be referred to arbitration are conditions precedent for appointment of an Arbitrator.

22. As already mentioned above, ITI has supported the case of the petitioner and has argued that the Arbitrator be appointed by this Court for adjudication of disputes between all the three parties as the three agreements are intrinsically linked.

23. I have heard the learned counsels for the parties and examined their contentions.

24. The undisputed facts between the parties are that an Advance Purchase Order was placed by the BSNL on ITI for installation and commissioning of cellular mobile network. The said agreement contains an Arbitration Clause 20.1, which has already been extracted above.

25. It is equally undisputed that for execution of the said work, ITI in turn engaged the petitioner as a sub-contractor to carry out the work and both the parties entered into a Memorandum of Understanding (‘‘MOU’’) for the said purpose. The MOU contains a separate Arbitration Clause

which reads as under:-

‘‘20. ARBITRATION

a. Both Parties shall make best Efforts to settle any/all disputes amicably.

b. Any disputes I controversy /claim arising out of or relating to this MOU or the breach, termination or invalidity thereof, which cannot be

settled mutually shall be settled as per the provision of INTERNATIONAL CENTER FOR ALTERNATE DISPUTE RESOLUTION

ARBITRATION RULES 1996.’’

26. It is the admitted case of the petitioner that only to furnish the Performance Bank Guarantee for the contract in question, it entered into a Tripartite Agreement with the petitioner and BSNL.

27. The question that arises in the present case is whether the Arbitration Clause in the agreement between the BSNL and the ITI can be invoked by

the petitioner for a composite arbitration between the three parties. Answer to the question would depend on the question as to whether the

Arbitration Clause contained in the main Purchase Order between the principal employer and the contractor was incorporated by reference in the

contract between ITI and the petitioner with the extent to make it as part of the Contract.

28. Section 7 of the Act reads as under:-

â??7 Arbitration agreement. â?

(1) In this Part, â??arbitration agreementâ? 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 inâ?

(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.â??

29. It is no longer res integra that a mere reference of a document in another contract cannot make the Arbitration Clause in the first contract a part

of the second contract. The reference should be such that clearly reveals the intention of the parties to refer the disputes to Arbitration by invoking the

Arbitration Clause in the first contract. Section 7(5) of the Act clearly requires a categorical acceptance of the Arbitration Clause from one document

into the other. A paragraph from Russell on Arbitration is significant on this aspect and reads as under:-

“Reference to another document.” The terms of a contract may have to be ascertained by reference to more than one document.

Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem

encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by

applying the usual principles of construction and attempting to infer the parties' intentions by means of an objective assessment of the

evidence. This may make questions of incorporation irrelevant, if for example it is clear that the contractual documents in question are

entirely separate and no intention to incorporate the terms of one in the other can be established. However, the contractual document

defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration

agreement. If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration

provisions of that other document. This very commonly occurs when the principal contractual document refers to standard form terms

containing an arbitration agreement. However the standard form wording may not be apt for the contract in which the parties seek to

incorporate it, or the reference may be to another contract between parties at least one of whom is different. In these circumstances it may

be possible to argue that the purported incorporation of the arbitration agreement is ineffective. The draftsmen of the Arbitration Act, 1996

were asked to provide specific guidance on the issue, but they preferred to leave it to the court to decide whether there had been a valid

incorporation by reference.”

30. Supreme Court in the case of M.R. Engineers (supra) was analyzing a similar question where the PWD had entrusted the work under a contract

to the respondent which contained an Arbitration Clause. The respondent in turn had hired the appellant as a sub-contractor to execute the work.

Disputes arose between the parties and the appellant filed an application under Section 11 of the Act invoking the Arbitration Clause incorporated in

the main contract between the PWD and the respondent.

31. Supreme Court after analyzing Section 7(1) and Section 7 (5) of the Act, held as under:-

13. xxx xxx xxx

Having regard to Section 7(5) of the Act, even though the contract between the parties does not contain a provision for arbitration, an

arbitration clause contained in an independent document will be imported and engrafted in the contract between the parties, by reference to

such independent document in the contract, if the reference is such as to make the arbitration clause in such document, a part of the

contract.

14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an

arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the

intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an

arbitration clause from another document, merely on reference to such document in the contract, sub-section (5) would not contain the

significant later part which reads: "and the reference is such as to make that arbitration clause part of the contract", but would have

stopped with the first part which reads:

7. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is

in writing.

15. Section 7(5) therefore 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 as a part of the contract between the parties. But the Act does not contain any

indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference

incorporating an arbitration clause contained in such document into the contract. In the absence of such statutory guidelines, the normal rules of construction of contracts will have to be followed.

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. xxx xxx xxx

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.

19. Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable.

20. xxx xxx xxx

21. xxx xxx xxx

22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the

contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from

another document into the contract. The exception to the requirement of special reference is where the referred document is not another

contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such

standard terms and conditions for the benefit of the members or others who want to adopt the same.

23. xxx xxx xxx

24. The scope and intent of Section 7(5) of the Act 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.

32. Supreme Court clearly held that an Arbitration Clause in another document would get incorporated into a contract by reference, if the contract contains a clear reference to the documents containing the Arbitration Clause and such reference clearly indicates an intent to incorporate the Arbitration Clause into the contract. It further held that where a contract provides that execution of that contract shall be in terms of another contract, even then the terms of the referred contract in regard to performance alone will apply and not the Arbitration Agreement, unless there is a special reference to the Arbitration Clause. Significantly it was held that an Arbitration Clause though an integral part of a contract is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to carrying out of the contract. The Court also dealt elaborately with the aspect that when the document to which a general reference is made, contains an Arbitration Clause whose provisions are clearly inapt or inappropriate, with reference to the contract between the parties it would be assumed or inferred that there was no intent to incorporate the Arbitration Clause from the referred document. The Court analyzed the clause in the said case. The Arbitration Clause in the main contract stated that the disputes that are to be referred to the Committee of three arbitrators would be in regard to the decision of the Engineer appointed by the State of Kerala to act as an Engineer for the contract between the PWD and the respondent. Obviously, the said clause will not apply to the disputes between the contractor and the sub-contractor. The Arbitration Agreement was thus, tailor-made to meet the requirements of the principal contract.

33. Recently, a Co-ordinate Bench of this Court while dealing with an almost similar issue in the case of Libra Automotives Private Limited vs. BMW India Private Limited and Another 2019 SCC OnLine Del 9073. It has been held that the Court while exercising its power under Section 11 of the Act cannot recast the terms of the contract and direct the parties to go for a composite arbitration, contrary to the procedure prescribed under the Arbitration Clause, provided in distinct Arbitration Agreements. The fundamental feature of an Arbitration Agreement is that there is an understanding

between the parties to adopt alternate mechanism for adjudication of their future disputes. A Court while deciding an application under Section 11 (6)

of the Act has to give effect to the procedure prescribed in the agreement and the inbuilt mechanism agreed between them. Parties were conscious of

the terms of the agreement they were settling between them while drawing out the Arbitration Agreement and must be bound by the said terms.

Relevant para reads as under:-

23. The Court while exercising its power under Section 11 of the Act, cannot recast the terms of the Contract and direct the parties to go

for a composite arbitration contrary to the procedure prescribed under the arbitration clause provided in distinct arbitration agreements.

The overlapping of the issues does not mean that the arbitration proceedings under the two respective contracts cannot commence and

continue independently. Fundamental feature of an arbitration agreement is that there is an understanding between the parties to adopt

alternate mechanism for the adjudication of the future disputes that arise between them. The law does not prescribe any standard form of

arbitration agreement and the parties are free to agree upon a procedure and designate the private forum where the parties would like to

go in case the disputes and differences arise between them. Thus, there is to be consensus ad-idem between the parties regarding the choice

of the forum. The Supreme Court in certain judgments, has held that in certain exceptional circumstances the Court has a power to make an

appointment of the Arbitrator, notwithstanding the choice of the specified forum agreed between the parties. However, at the first instance,

the effort of the Court would be to ensure that the parties adhere to the choice of the Arbitrator or to the mechanism for constituting the

Arbitral Tribunal as envisaged by the Arbitration Agreement. It is also noteworthy that, the Supreme Court in *Indian Oil Corporation Ltd. v.*

Raja Transport Pvt. Ltd., (2009) 8 SCC 520, *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, *Northern Eastern Railway v.*

Triple Engineering, (2014) 9 SCC 288 and *Union of India v. BESCO*, (2017) 14 SCC 187 : AIR 2017 SC 1628, has expressed the opinion

that where an application under Section 11(6) of the Act is filed, the procedure for appointment of an arbitrator prescribed in the

agreement, be given effect to and the Court ought not to appoint an independent arbitrator without resorting to the inbuilt mechanism as

agreed between the parties. Parties were conscious of the terms of the agreement and they willingly and consciously agreed for the arbitral

procedure envisaged under the agreement without any reservation. Petitioner is now suggesting that the agreed choice of forum should be

ignored and that part of the Agreements should be severed and further Respondent should tow its line and agree to the Arbitral Tribunal

contrary to what has been provided in the Contracts. This cannot be permitted and thus the relief claimed in the present petition for

appointment of a common arbitrator cannot be granted. There is no merit in the present petition and the same is dismissed.â??

34. Applying the above said principles of law, it is clear that the Arbitration Agreement between one contract cannot be incorporated into another

contract, unless there is a clear intention of the parties to do so while entering into a second agreement. The facts of the present case in my view are

even on a lower pedestal than the cases referred to above, as in the present case the petitioner while entering into an MOU with ITI had specifically

incorporated a separate Arbitration Clause to govern the sub-contract, which has been extracted above. The in-built mechanism for reference of the

dispute arising between the parties was also mentioned therein, namely, to refer the disputes through International Center for Alternate Dispute

Resolution. No part of the MOU even remotely indicates that there was any reference of the Arbitration Clause mentioned in the main Purchase

Order in the MOU. Petitioner and ITI had agreed on the disputes and the mechanism with respect thereto that was to be adopted in the future. On the

other hand, Clause 20 of the GCC provided a different mechanism of referring the disputes, whereby appointment of the Sole Arbitrator was

envisaged by the CMD of BSNL, as well as the disputes that were intended to be referred.

35. In so far as the reliance by the petitioner on the judgment of the Supreme Court in the case of Chloro (supra) is concerned, in the opinion of this

Court, the said judgment would not inure to the benefit of the petitioner. What the Supreme Court held in the said case was that where the

performance of the Mother Agreement is intrinsically linked with the performance of the ancillary agreement and the two are incapable of being

severed or preformed without each other, the disputes can be referred for composite arbitration and a non-signatory to an Arbitration Agreement would be bound.

36. Petitioner has relied upon paras 73 and 74 of the said judgment for the proposition that if the agreements are intrinsically linked and the transactions are incapable of being severed then the non-signatory or a third party involved in the agreements can be made a party to the arbitration. It is important to mention here that the Supreme Court in the said case was dealing with transactions between the Group Companies and the question was whether an Arbitration Agreement entered into by a Company, being one of the Group Companies, can bind its non-signatory affiliates or sister or parent concerns. This is evident from reading para 71 of the judgment. In para 72, Supreme Court in the context of para 71 observed that it is doctrine of Group of Companies which has evolved the principle of a non-signatory party being subjected to arbitration provided these transactions were intrinsically linked and there was an intention to bind both the signatory as well as the non-signatory parties. Relevant paras of the judgment are extracted herein under:-

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the group of companies doctrine. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words,

intention of the parties is a very significant feature which must be established before the scope of arbitration can be said to include

the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases.

The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct

commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a

composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the

supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the

court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed

and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-

discussed.

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-

signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite

irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to

successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court

would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple

agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance

of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance

of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is

one of the determinative factors.

37. In the present case, the parties involved are neither Group of Companies nor affiliates or sister or parent concerns of each other and thus the said judgment would not help the petitioner. ITI had entered into a contract with the BSNL for installation and commissioning of the cellular network. In order to execute the work, it had sub contracted with the petitioner and since it did not have the requisite financial resources, it had entered into a Tripartite Agreement whereby the petitioner had furnished the Performance Bank Guarantee for securing the performance of the contract. Clearly, the petitioner and ITI had incorporated an Arbitration Clause in their MOU for any disputes that may arise between the two parties in the future.

38. The present case is thus clearly covered by the judgment of the Supreme Court in the case of M.R. Engineers (supra). There is no reference in the MOU which indicates any intent to incorporate the Arbitration Clause in the Mother Purchase Order. BSNL is not a party to the MOU which has an Arbitration Clause between petitioner and ITI only.

39. It is also significant to mention that the Arbitration Clauses are different in the two contracts and clearly the intention of the parties was neither to incorporate the Arbitration Clause of the Purchase Order into the MOU and nor was their any intent to enter into a composite arbitration. As held by the Co-Ordinate Bench in Libra Automotives Private Limited (supra), this Court under Section 11(6) of the Act cannot incorporate an Arbitration Clause for the parties nor rewrite its terms. BSNL is thus right in his contention that no arbitration can be invoked against BSNL with regard to the present Purchase Order.

40. In so far as the ITI is concerned, the petitioner is entitled to prefer its claims against the ITI as there is clearly an Arbitration Clause between the parties. From the list of documents, however, placed on record by the petitioner, it cannot be said that the petitioner has invoked arbitration against the ITI. The only notice of invocation that has been placed on record is dated 30.07.2019 and which is against the BSNL. The petitioner cannot therefore seek appointment of an Arbitrator in the present petition even against ITI.

41. In view of the above, the present petition deserves to be dismissed. Petitioner is, however, at liberty to take steps for invocation of arbitration against the ITI, if it so desires in accordance with law and is also at liberty to exercise its rights and take recourse to other remedies that may be

available to it in law against BSNL.

42. Petition is dismissed with the aforesaid directions.