

July, 2018



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INCORPORATION OF AN ARBITRATION CLAUSE

LEGAL INTELLIGENCE
SERIES
July, 2018



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IN THE MATTER OF

In the Supreme Court of India at New Delhi

M/s Elite Engineering and Construction (HYD.) Private Ltd. v. M/s Techtrans Construction India Private Ltd. (In Civil Appeal No. 2439 of 2018)

An arbitration clause contained in an independent document can also be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, even if there is no specific provision for arbitration. However, such a recourse can be adopted only 'if the reference is such as to make the arbitration clause in such document, a part of the contract.

FACTS

National Highway Authority of India (NHAI) under an agreement awarded a contract to M/s T.K. Toll Road Pvt. Ltd. for

undertaking design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway on BOT (Build Operate and Transfer) basis.



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T.K. Toll further awarded the work to M/s. Utility Energytech and Engineers Private Limited which in turn executed a construction agreement with M/s Techtrans Construction India Pvt. Ltd. i.e. the Respondent.

This agreement with the Respondent permitted the Respondent to sub-contract the structural work which was ultimately given to M/s. Elite Engineering and Construction (Hyd.) Private Limited i.e. the Appellant after it submitted its bid.

Certain disputes arose between the Appellant and the Respondent regarding the execution of the work.

The Appellant raised claims against the Respondent and filed a petition under Section 9 of Arbitration and Conciliation Act, 1996 with Principal Judge, Karur.

The Respondent denied the allegations and submitted that there was no arbitration agreement and therefore, the petition under section 9 was not maintainable.

During the pendency of this petition with Principal Judge, Karur, the Appellant also filed an application under Section 11(3) and

(5) of the Arbitration Act, before in the **Madras High Court** for the appointment of an Arbitrator

Meanwhile the Principal Judge, Karur allowed the petition of the Appellant under Section 9 of the Act.

ISSUE

Whether the reference to the Arbitration clause of a different document be considered a part and parcel of the contract and whether it would be considered as an arbitration agreement.

HIGH COURT'S OBSERVATIONS AND FINDINGS

RESPONDENT - The Respondent challenged the maintainability of the Appellant's application, under Section 11, in absence of any arbitration agreement executed between them.

APPELLANT - The Appellant argued that the contract between them and the

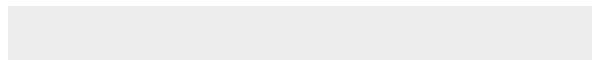


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Respondent had a clause which stated that *“all the special conditions of the contract, specifications etc. that relate to the works and qualities specified in the relevant agreement between the construction contractor and the employer are binding on the Respondent”*.

This implies that Clause 45(3) also applies on the Respondent and also, it was mentioned in the contract that for the items that are not mentioned in the agreement, the terms and conditions of the agreement between M/s T.K. Toll Road Pvt. Ltd. and M/s. Utility Energytech and Engineers Private Limited will be applicable.

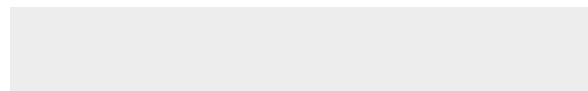
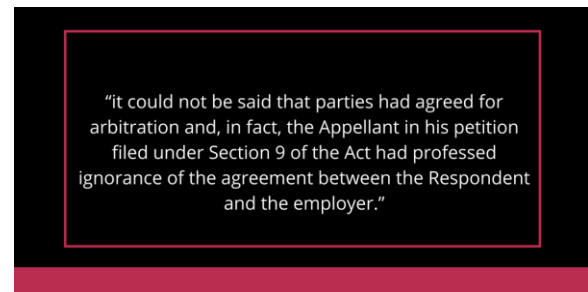
The Appellant placed reliance upon certain communications that took place between the parties before the Appellant invoked the legal remedy.



HIGH COURT - The Court mainly placed reliance on *M.R. Engineers and Contractors Private Limited v. SomDatt Builders Ltd (2009) 7 SCC 696* and while agreeing to the contention of the

Respondent, dismissed the petition of the Appellant.

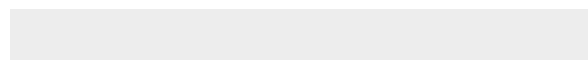
The Court held that:



SUPREME COURT

The Appellant challenged the order of the High Court in the Hon'ble Supreme Court.

The Supreme Court while dealing with the issue mainly focused on the **true intent and scope of Section 7 of the Arbitration Act.**



Section 7. Arbitration agreement.—

(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between



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them in respect of a defined legal relationship, whether contractual or not.

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(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.”

The Court reiterated the reliance upon ***M.R. Engineers and Contractors Private Limited v. SomDatt Builders Ltd (2009) 7 SCC 696*** and discussed upon sub-section 5 of Section 7 of the Arbitration Act.

“it could not be said that parties had agreed for arbitration and, in fact, the Appellant in his petition filed under Section 9 of the Act had professed ignorance of the agreement between the Respondent and the employer.”

The Court concluded with Para 37 of ***M.R. Engineers and Contractors Private Limited*** *supra* as under:

“37. In the present case the wording of the arbitration clause in the main contract between the PW Department and the contractor makes it clear that it cannot be applied to the sub-contract between the contractor and the sub-contractor. The arbitration clause in the main contract states that the disputes which are to be referred to the committee of three arbitrators under Clause 67.3 are disputes in regard to which the decision of the Engineer (“Engineer” refers to person appointed by the State of Kerala to act as Engineer for the purpose of the contract between the PW Department and the respondent) has not become final and binding pursuant to Clause 67.1 or disputes in regard to which amicable settlement has not been reached between the State of Kerala and the respondent within the period stated in Clause 67.2. Obviously neither Clause 67.1 nor 67.2 will apply as the question of “Engineer” issuing any decision in a dispute between the contractor and the sub-contractor, or any negotiations being held with the Engineer in regard to the disputes between the contractor and the subcontractor does not arise. The position



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would have been quite different if the arbitration clause had used the words “all disputes arising between the parties” or “all disputes arising under this contract”. Secondly, the arbitration clause contemplates a committee of three arbitrators, one each to be appointed by the State of Kerala and the respondent and the third (Chairman) to be nominated by the Director General, Road Development, Ministry of Surface Transport, Roads Wing, Government of India. There is no question of such nomination in the case of a dispute between the contractor and the sub-contractor.”

The Court concluded that, in this case the clause of agreement was not intended to make the arbitration clause as a part of the contract. Therefore, the appeal of the Appellant was dismissed.

RATIO

The sine qua non for incorporating an arbitration clause under a different contract into a separate contract is as below:

- (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.
- (4) 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.**



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(5) 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.**

(6) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions **including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference.** Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read

and understood the said terms and conditions.

(7) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), **the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.**

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thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.



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