

## **Case Comment on:**

# **M.R Engineers Constructions Pvt. Ltd**

**Vs.**

# **Som Datta Builder**

Aaron S John<sup>1</sup>

## **Abstract**

For the distribution of coal, the Respondent released an electronic auction system. Through this e-auction system, the appellant received some orders. The Respondent provided the Appellant with sale instructions as a sequitur. The Appellant gave the Respondent an earnest money deposit following the scheme's terms and conditions. After that, there was a disagreement between the parties because the Appellant was unable to lift the booked quantity of coal within the allotted period, which the Respondent viewed as a breach of the conditions of the scheme.

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The arbitration clause in the scheme was used by the appellant, who requested that the respondent name an arbitrator following the arbitration clause. After the Respondent disobeyed it, the Appellant filed to the High Court for the appointment of an arbitrator. This application was denied because the sale orders did not contain an arbitration clause and the disputes relate to separate transactions made between the parties under the scheme. It was decided that despite the scheme's arbitration clause, none of the specific sale orders referred to the Scheme's terms and conditions applying to them. As a result, the arbitration clause cannot be referenced by another clause. However, Standard Terms and Conditions were included in the Sale Order. According to clause 7 of these Terms and Conditions, the selling orders would be governed by the Respondent's Guidelines, Circulars, Notices, and Instructions. By referencing the arbitration clause in the plan in the sale orders, the High Court did not deem this clause to be an incorporation of the arbitration clause. In the current procedures, the High Court's ruling is contested before the Supreme Court.

## **Procedural History**

Significant pronouncements have recently been made by the Supreme Court regarding the application of Section 7(5) of the

Arbitration and Conciliation Act 1996 and whether an intervention clause in a primary contract can be incorporated by reference into a subcontract when the subcontract states that it "will be done on the terms and conditions as appropriate to the fundamental contract." The Supreme Court discussed the appropriateness of the intervention proviso contained in the fundamental contract to the debates emerging concerning the subcontract in *MR Engineers and Contractors Pvt Ltd v. Som Datt Builders Ltd* and particular requirements for the consolidation of the discretion statement have been created.

## **Facts**

The appellant was involved in the task of putting together wind turbine generators (WTGs). The Respondent produced a variety of connectors, including links for wind turbines. Two buy requests for the supply of links for their WTGs, dated 13 December 2012 and 2 February 2013, were issued by the Appellant to the Respondent.

The buy request specified that the terms indicated in the buy request and the normal terms and conditions (T&C) attached to the buy request must be followed by the supply. The Terms and Conditions

stipulated that discussions must be resolved by a single mediator following the 1996 Arbitration and Conciliation Act concerning question goals (the Act).

The Appellant requested a substitute after finding missing things in the items provided by the Respondent, but it was turned down. So, on October 30, 2014, the Appellant published a notice proposing a sole authority following the common T&C. The Respondent did not respond to the notice, thus the Appellant under the watchful eye of the High Court decided to favor an application under section 11(6) of the Act. The claim was dismissed by the High Court because the appellant was unable to prove that a discretionary understanding existed.

The Litigant in the case was a sub-temporary employee of the Respondent, and the High Court relied on the Supreme Court's ruling in M R Engineers and Contractors Private Limited v. Som Datt Builders Limited (M R Engineers case). The Respondent-contractor awarded the Appellant a portion of the work that was connected to the "development of undertaking directorate building." The subcontract referred to the fact that it would be carried out following the terms and conditions applicable to the main contract. A disagreement between the groups led the appellant to request the

appointment of a judge under Section 11(6) of the 1996 Arbitration and Conciliation Act from the High Court.

The High Court of Kerala rejected the application because the arbitration clause in the main contract was not incorporated by reference in the agreement between the appellant and the respondent. The Supreme Court ruled that the intervention statement cannot be regarded as having been consolidated into the buy request because there is no exceptional reference to the assertion condition in the standard T&C.

## **Issues**

1. If a subcontract stated that it "must be carried out on the terms and conditions as applicable to the main contract," would an arbitration clause in the subcontract be incorporated by reference?
2. Can the arbitration agreement's definition provision mention the word "subcontract"?
3. Do the terms "another document in a contract" and "incorporation of another document in a contract, by reference" vary in any way?

## Rules

➤ Section 7(5) of the Arbitration & Conciliation Act, 1996. “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(1) of the Arbitration & Conciliation Act, 1996.

❖ “(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 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 which provide a record of the agreement; or (c) an exchange of statements of claim and defense 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 6 of the Arbitration & Conciliation Act 1996. “Administrative assistance.—To facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person”

➤ Section 11 of the Arbitration & Conciliation Act, 1996 “Appointment of arbitrators. —

1. A person of any nationality may be an arbitrator unless otherwise agreed by the parties.
2. Subject to subsection (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
3. Failing any agreement referred to in subsection (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
4. If the appointment procedure in sub-section (3) applies and—

- a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
  - b. the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by <sup>1</sup>[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];
5. Failing any agreement referred to in subsection (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by <sup>1</sup>[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].
6. Where under an appointment procedure agreed upon by the parties,—
- a. a party fails to act as required under that procedure; or
  - b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
  - c. a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request <sup>1</sup>[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary



measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

7. [(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree, or order of any Court, confine to the examination of the existence of an arbitration agreement.

8. (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

9. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to <sup>3</sup>[the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision].

10. The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

- a. any qualifications required for the arbitrator by the agreement of the parties; and
- b. the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]

11. In the case of appointment of a sole or third arbitrator in international commercial arbitration, [the Supreme Court or the person or institution designated by that Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

12. The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5), or sub-section (6), to it.]

13. Where more than one request has been made under subsection (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, <sup>7</sup>[different High Courts or their designates, the High Court or its designate to whom the request has been first made] under the relevant sub-section shall alone be competent to decide on the request.

(a) Where the matters referred to in subsection (4), (5), (6), (7), (8) and sub-section (10) arise in

international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

14. (b) Where the matters referred to in subsection (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to the Supreme Court or, as the case may be, the High Court in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.]

15. An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavor shall be made to dispose of the matter within sixty days from the date of service of notice on the opposite party.

16. For the determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

- Section 10 of the Indian Contract Act, 1872 “What agreements are contracts - All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or the presence of witnesses, or any law relating to the registration of documents.”
- Section 13 of the Indian Contract Act, 1872 “Consent’ defined- Two or more persons said to consent when they agree upon the same thing in the same sense. Two or more persons are said to consent when they agree upon the same thing in the same sense.”

## **Analysis**

J. Raveendran suggested utilizing the Arbitration Act's Section 7(5), which states that "the reference in a consent to a file containing a mediation articulation includes a statement which is recorded as a

printed version and the reference seems to be, for example, to make that watchfulness arrangement some part of the understanding." According to the Court's interpretation of the phrase ", for instance, to make that intercession part of the understanding," a single reference is insufficient. The Court decided that the normal report improvement standards would satisfy this request without the need for any specific legislative directives.

The language of the merger condition serves as the primary indicator of this desire. The Court observed that agreements occasionally fully merge other contracts, tracing the route of "the substantial number of terms and conditions... " or "this agreement will be governed by the policies of... ", etc. Declaration justification is sometimes included as well. In any scenario, where the combining clause implies a specific portion of another understanding, it is assumed that the intervention explanation was not intended to be combined. This proved to be crucial in the situation given that the combining condition used the phrase "this sub-contract will be finished... The Court cited the usage of the word "did" as evidence that the social gatherings wanted to limit discussion to matters of execution and execution and that it could not, therefore, extend to arrangements outside of this hover, such as security stores and intercession explanations.

The Court's distinction between "standard structure contracts" and other contracts is the most important recommendation in this case. Based on concepts from Russell on Arbitration, it was decided that the generic reference may work if the dispute is related to a typical type of "exchange affiliations or administrative foundations" conditions. The assumption is that groups who accept the terms and conditions of such recognized affiliations and organizations are likely aware of the existence of the intervention proviso, especially given how frequently these terms and conditions are disseminated.

This submission's essential argument to reject the joining contention serves as the focus for another important legitimate argument that the intervention statement, once fused, must remain consistent with the agreement into which it is fused. The decision-makers in this case were to be chosen by various "Government Departments," which may or may not have any influence on an agreement to which the Government was not a party.

## **Conclusion**

With this ruling, the supreme court has chosen a business strategy and expanded the scope of reference to an assertion provision based

on the understanding and expectations of the crowds. An important step towards the elective question aims instrument is the rigorous application of the criteria for explicit reference to an assertion provision in all varieties of a multi-record contract. The main lesson to be learned from this decision is that corporate goals provisions should come first. Additionally, to ensure the identifiable proof, legitimacy, and enforceability of the claim condition, unambiguous writing is essential. The decision in the MR Engineers case was made by a seat of two judges, thus it would also be relevant to note that if the current decision differs from the MR Engineers case, it should have been referenced to a larger seat for a more authoritative decision on these issues.