

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(S.B.: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Civil Revision No. 274 of 2011

M/s Bright Drugs Industries Ltd.

Petitioner

Vs.

M/s Punjab Health System Corporation

Respondent

Shri Amit S. Agrawal learned counsel for the petitioner.
Shri Sanjay Patwa learned counsel for the respondent.

Whether approved for reporting :

ORDER

(Passed on 20th September, 2016)

1/ This revision petition under Section 115 of CPC is at the instance of the plaintiff in the suit challenging the order of trial court dated 31/10/2011 whereby respondent's application under Section 8 of Arbitration and Conciliation Act, 1996 has been allowed and parties have been directed to approach the Arbitrator for resolving the dispute.

2/ In brief the petitioner had filed the suit for recovery of money on the plea that the contract was awarded by respondent for supply of medicines to the petitioner and as per contract, the supplies were made but payments were not done.

3/ The respondent had filed an application under Section 8 of Arbitration and Conciliation Act, 1996 (for short the Arbitration Act, 1996) and initially the trial court vide order dated 13/2/2004 had dismissed the suit on the ground that remedy of arbitration is available, against which CR No. 91/2004 was filed before this court and by order dated 3rd August, 2010, the matter was remanded back

to the trial court to decide whether there was any arbitration agreement /clause in existence between the parties or not before taking any decision on the respondent's objection under Section 8 of the Act. Trial court thereafter has passed the impugned order dated 31/10/11 allowing the respondent's objection and directing the parties to approach the arbitrator as per Section 8 of the Act.

4/ Learned counsel for petitioner submits that no arbitration clause exists between the parties since the incorporation of the general conditions of contract was by way of reference without specifically incorporating the arbitration clause in the agreement. He has placed reliance upon judgment of Supreme court in the matter of **M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited, reported in (2009) 7 SCC 696** in this regard. Alternatively, he has submitted that petitioner is entitled for refund of the court fee in terms of Section 16 of Court Fees Act.

5/ Counsel for respondent has submitted that since the arbitration clause exists in general conditions of contract and same forms part of contract executed between the parties therefore, trial court has not committed any error in passing the impugned order.

6/ Having heard the learned counsel for parties and on perusal of the record it is noticed that the agreement was executed between the petitioner and respondent on 5th August 1998 and clause 2 of agreement reads as under:-

“2. The following documents shall be deemed to form and be read and construed as part of this agreement viz;

(a) the Bid form and the price schedule submitted by the bidder;

(b) the schedule of requirements.

(c) the Technical specifications.

(d) the General Conditions of contract.

(e) the special conditions of contracts; and

(f) the purchaser's notification of award.”

7/ The General Conditions of contract referred to in clause 2(d) of the contract between the parties contains the following clause

26.3(a) as arbitration clause which reads as under:

“In case of dispute or difference arising between the purchase and a domestic supplier relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the purchaser and the supplier. The third arbitrator shall be chosen by the two arbitrator appointed by the parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Medical Council of India.”

8/ The clause 1.1(a) of above General Conditions of contract defines contract and reads as under:-

“The contract” means the agreement entered into between the purchaser and the supplier, as recorded in the contract from signed by the parties including all the attachments and appendices thereto and all documents incorporated by reference therein.”

9/ The agreement entered into between the parties in the present case is covered under above definition.

10/ The contention of counsel for petitioner is that the agreement dated 5th August 1998 does not contain any arbitration clause, therefore, mere incorporating of general conditions of contract by reference in the agreement is not sufficient to hold that arbitration clause exists between the parties.

11/ Such a contention cannot be accepted because there is a distinction between the reference to another document in a contract and incorporation of another document in a contract by reference. In the former case by way of reference parties may intend to adopt only a part of the referred document whereas in the later case the parties

intend to incorporate the entire referred document in the agreement, therefore, the court has to examine if the parties intended to incorporate another document by reference. If the intention is clear that parties wanted to bodily lift the entire document and incorporate it in the agreement then all terms and condition of said document will form part of the agreement and in such a case, if the said document contains the arbitration clause then there will be incorporation by reference of arbitration clause also.

12/ In the present case the words “deemed to form and be read and construed as part of this agreement” mentioned in clause 2 of agreement dated 5th August 1998 leave no iota of doubt that parties intended to bodily lift and incorporate the general conditions of contract in the agreement. Hence the arbitration clause existing in the general conditions of contract is treated to be a part of the agreement executed between the parties.

13/ Counsel for the petitioner has mainly relied upon the judgment of the Supreme court in the matter of M.R. Engineers (supra) in support of his submission that arbitration clause does not exist. In the said judgment while considering the scope of Section 7(5), the Supreme court has held as under:

“24. The scope and intent of [section 7\(5\)](#) of the Act may therefore be summarized 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.

(iv) 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 & 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.

(v) 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 Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.”

14/ Since in the present case the General conditions of contract are standard form of term and conditions of the respondent/corporation therefore, the present case is covered by para 24(iv) and (v) of the above judgment and by virtue of clause 2 of the agreement dated 5/8/1998, also there was incorporation of the arbitration clause in the agreement by reference in terms of Section 7(5) of the Act.

15/ Since the arbitration clause exists therefore, no error has been committed by the trial court in reaching to the conclusion in this regard. After considering the relevant judgment on the point and nature of contract between the parties trial court has rightly held that provision of Section 8 of Act are attracted in the matter.

16/ It is settled position in law that where the arbitration agreement exists between the parties, the court is under an obligation to refer the parties to the arbitration in terms of the arbitration agreement (**See: Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleum reported in (2003) 6 SCC 503**). The said provision is peremptory in nature (**See: Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and others reported in (2007) 3 SCC 686**). Where the arbitration clause exists, court has a mandatory duty to refer the dispute arising between the contracting parties to arbitrator and civil court has no jurisdiction to continue with the suit once the application under Section 8 has been filed. (**See: Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleum reported in (2003) 6 SCC 503**). Once the application under Section 8 of Act is filed the approach of the Court should not be to see whether court still has jurisdiction but to see whether there is ouster of jurisdiction (**See: M/s Sundaram Finance Limited and another Vs. T. Thankam reported in AIR 2015 SC 1303**).

17/ In view of the above discussion it is held that since the arbitration clause exists between the parties and conditions enumerated in Section 8 of Act are satisfied therefore, trial court has not committed any error in directing the parties to approach the arbitrator for deciding the dispute.

18/ So far as the petitioner's grievance in respect of refund of court fee under Section 16 of Court Fees Act is concerned, no such

prayer seems to have been made before the trial court while passing the impugned order. Therefore, petitioner would be at liberty to file an appropriate application in accordance with law before the trial court and if such an application is filed the same will be considered and decided by trial court on its own merit.

Revision petition is accordingly dismissed.

(Prakash Shrivastava)
Judge

BDJ

