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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 22nd February, 2019*
Judgment pronounced on : 14 November, 2019

+ **FAO(OS) (COMM) 195/2017**
GLENCORE INTERNATIONAL AG Appellant

Through Mr. Rajiv Nayyar, Sr. Advocate with
Mr. Sumeet Lall, Mr. Sidhant Kapoor
and Mr. Nikhil Lal, Advocates

versus

M/S SHREE GANESH METALS & ANR Respondents

Through Mr. V.K. Garg, Sr. Advocate with
Karunesh Tandon and Mr. Awanya
Madhusudan, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. The present appeal has been filed by the appellant under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 50(1)(a) of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") for setting aside the impugned order dated 02.11.2017 passed by a learned Single Judge of this Court in an application being I.A. 4550/2017 filed under Section 45 of the Act seeking mandatory reference of respondent no.1 to arbitration.

2. The necessary facts required to be noticed for disposal of this appeal, are as under: -
3. The appellant herein is a company incorporated under the laws of Switzerland and is engaged in the business of commodity trading and mining whereas respondent No.1 is one of the highest producers of zinc alloys in India with its office at Kalaamb, Himachal Pradesh.
4. Respondent No.1 purchased zinc metal from the appellant for the first time in 2011. In relation to this transaction, the parties executed an agreement dated 20.04.2011 being contract no.061-11-13375-S (first contract), pursuant to which, respondent no.1 agreed to purchase 400 metric tons of zinc metal from the appellant to be supplied in four lots of 100 metric tons each by June, 2011. The first contract was governed by the laws of England and Wales and contained an arbitration clause 28.2, which provided for resolution of disputes through arbitration under the London Court of International Arbitration (LCIA) rules. The seat of arbitration was at London.
5. The parties executed the second contract being no.061-11-15016-S (second contract) on 01.07.2011 whereunder the appellant was to supply 400 metric tons of zinc metal to respondent No.1 in two lots of 200 each. On 26.09.2011, an amendment was carried out to the second contract for replacing certain clauses on quantity, quality, shipment, price, quotational period and payment. The appellant further agreed to supply 600 metric tons with one lot of 200 metric tons by July 2011, another lot of 200 metric tons during July 2011/August 2011 and two lots of 100 metric tons each in October, 2011 as per the similar laws as that of the first contract, the seat being at London.

6. Being satisfied with the performance of the appellant, the parties entered into a third contract executed on 23.11.2011 bearing contract no.061-11-17714-S (third contract) for supply of 600 metric tons of zinc metal to respondent No.1 from December, 2011 to April, 2012. The contract containing arbitration Clause 29.2 was also governed by English laws and the seat was at London.
7. On 11.01.2012, the parties executed the fourth contract for supply of 200 metric tons of zinc metal during January, 2012 to February, 2012 on the similar terms of the third contract.
8. Subsequently, the parties wished to enter into a fifth contract for the sale-purchase of 6000 metric tons of zinc metal from March, 2016 to February, 2017 (Clause 5 of the contract). The business modalities were reduced into writing in an email dated 10.03.2016 for deciding the commercial terms. The respondent through an email dated 11.03.2016 expressly agreed to and accepted 'all' terms of the previous emails except the terms relating to provisional prices. Pursuant to the approval given by respondent No.1, the parties entered into a fifth contract, arbitration being governed under Clause 32.2 of the contract, which was also based on the English laws and provided for a three-member Tribunal, the seat of arbitration was again based at London.
9. With respect to the fifth contract, respondent no.1 was required to open an irrevocable letter of credit at a bank nominated by the appellant which would cover the provisional value of materials. The contract stipulated that respondent No.1 is to open a standby letter of credit (SBLC) of USD 50,000 available by payment at sight against

presentation of either a demand for payment or against the appellant's stand that respondent no.1 has failed to perform its obligation.

10. Subsequently, differences and the disputes arose between the parties with regard to the terms and conditions of the fifth contract as respondent No.1 did not pay the outstanding amount in sum of USD 867,411.23 to the appellant. Resultantly, the appellant encashed the SBLC of USD 1,003,000 towards such outstanding amount.
11. In response to the encashment of SBLC by the appellant, respondent No.1 filed a suit being CS (Comm) 154/2017 for declaration, permanent injunction and recovery of Rs.8 crores (approx.) whereunder the application being I.A. No.4550/2017 of the appellant under Section 45 of the Act was dismissed by the learned Single Judge as being without merits. Hence, the present appeal.
12. Mr. Rajiv Nayyar, learned senior counsel appearing for the appellant submits that the intention of the parties to refer their dispute to arbitration under the rules of LCIA in London is consistently evident from the past contractual relationship between the parties since the year 2011 when the first agreement was entered into between the parties.
13. Mr. Nayyar contends that there exists an arbitration agreement between the parties in terms of Clause 32.2 of the 2016 contract or Clause 29.2 of the 2012 contract, which is squarely covered within the meaning of section 44 read with section 2(f) of the Act. Thus, the arbitration agreement between the parties is a valid agreement. Counsel for the appellant submits that respondent No. 1, while challenging the validity of 2016 contract, has failed to challenge the validity of arbitration agreement on the narrow grounds under Section 45 of the Act. Contrary

to the said challenge, respondent no.1 has contradicted itself by relying upon the terms and conditions of the business confirmation email, as the arbitration agreement, incorporated by reference and mutually agreed between the parties cannot be unilaterally denied by respondent no.1 to avoid the arbitration clause. Counsel has further argued that the learned Single judge failed to interpret the legislative intention of Section 45 of the Act because mere signing or not signing of a contract is not a sufficient measure to determine the validity of the contract. In support of the contention that the arbitration clause can be validly incorporated by mutual consent by reference, learned counsel places reliance on para 17 of the judgement given in the case of *Inox Wind Limited v. Thermo Cables Ltd.* reported at 2018 (2) SCC 519, as reproduced under:

“17. This Court in *M.R. Engineers case [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271]*, which is discussed in detail supra, held the rule to be that an arbitration clause in an earlier contract cannot be incorporated by a general reference. The exception to the rule is a reference to a standard form of contract by a trade association or a professional institution in which case a general reference would be sufficient for incorporation of an arbitration clause. Reliance was placed by this Court on *Russell on Arbitration*, 23rd Edn. (2007). The development of law regarding incorporation after the judgment in *M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271]* requires careful consideration. It has been held in *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL, 2010 Bus LR 880 : 2010*

EWHC 29 (Comm)] that a standard form of one party is also recognised as a “single contract” case. In the said case, it was also held that in single-contract cases general reference is enough for incorporation of an arbitration clause from a standard form of contract. There is no distinction that is drawn between standard forms by recognised trade associations or professional institutions on one hand and standard terms of one party on the other. *Russell on Arbitration*, 24th Edn. (2015) also takes note of *Habas case [Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL*, 2010 Bus LR 880: 2010 EWHC 29 (Comm)].”

14. Mr. Nayyar further contends that the conduct of respondent No.1 in accepting invoices containing specific reference to 2016 contract, issuing standby letters of credit and furnishing letters of credits specifically referring to 2016 contract and addressing correspondence specific to contract 2016 makes it evident that the respondent has accepted the basic and essential conditions of the 2016 contract, including the arbitration agreement contained therein.
15. Counsel for the appellant submits that 2016 contract and business confirmation email contained a valid, enforceable and operative arbitration agreement with the seat being in London and accordingly, the present disputes among the parties ought to be referred to arbitration in accordance with the legislative mandate under Section 45 of the Act.
16. Mr. Nayyar further contends that Section 45 of the Act casts an obligation on the judicial authority before whom the matter is pending to refer the dispute to arbitration thereby protecting the sanctity of the contract, which was entered into between the parties by mutual consent.

He further argues that it is a settled position of the law that provisions of Section 45 of the Act prevails over the provisions of CPC and as such the jurisdiction of the civil court can be excluded when there exists an arbitration agreement which is valid and binding.

17. Mr. Nayyar has laboured hard to submit that 2016 contract expressly contained the acceptance of the terms and conditions as per the last contract i.e. 2012 contract. The contract of 2012 specifically provided for an arbitration clause whereby the disputes arising between the parties were to be referred to arbitration. It is the stand of the appellant that at no stage during the present dispute, the respondent objected to the arbitration clause. On the contrary, various invoices were raised incorporating the contract number relating to the 2016 contract and these were never objected to by the respondent. Further, respondent no.1's entire claim of alleged outstanding payments is solely premised on the terms and conditions of 2016 contract. Thus, respondent no.1 cannot refuse to acknowledge the 2016 contract, particularly, when it seeks to rely upon the terms and conditions for recovery of such payment. Further, the issue regarding encashment of letter of credit and bank guarantee, which was occasioned on account of respondent no.1's repeated breach is consequential to the main dispute between the parties.
18. Mr. V.K. Garg, learned senior counsel appearing for the respondents has contradicted the stand of the appellant. Mr. Garg has strongly urged before this Court that there was no arbitration agreement between the parties as mandated by Section 7 of the Act. He further submits that terms and conditions referred under the 2016 contract were neither

accepted nor concluded as the said agreement was never signed by the appellant. Since the said contract remained unsigned, there arises no question of acceptance of the arbitration clause for adjudication of any dispute. Mr. Garg has further that email dated 10.03.2016 is of no consequence as it was written by Glencore India and not by the appellant. It is the stand of the respondent that appellant is pleading a new case in appeal by averring that the arbitration clause was incorporated by reference since these are standard form contracts. However, this aspect was never specifically pleaded before the learned Single Judge nor argued.

19. It is further submitted that business modalities were initially reduced into writing vide email dated 10.03.2016. The issue of referring the dispute to arbitration was neither discussed nor approved by the respondent at any stage. The principle of *noscitur a sociis* will apply while construing the phrase 'all other terms and conditions.' The phrase referred to the other commercial terms and not the arbitration clause, which implies that the parties did not have any intention to resolve their disputes through arbitration. Thus, no valid arbitration agreement came into existence between the parties.
20. We have heard the learned counsel for the parties and carefully examined the impugned order dated 02.11.2017, terms of the first contract (2012) and the contract of the year 2016 and the rival contentions of the learned counsel appearing in the matter.
21. The short question which arises for our consideration is as to whether or not the arbitration agreement between the parties in terms of Clause 29.2 of the 2012 contract would apply to the disputes which have arisen

between the parties with regard to the supply of the year 2016 whereby the supplies were to be made between March 2016 to February 2017.

22. Learned Senior Counsel for the appellant has strongly urged before us that the contract of 2016, comprising of the arbitration Clause 32.2, was validly entered into between the parties. It is contended that the email dated 10.03.2016 sent by the appellant, along with the commercial business modalities, also reduced in writing other terms and conditions as per the 2012 contract and the said terms and conditions included the arbitration clause as well. It is also contended that the respondent vide email dated 11.03.2016 accepted all the terms as per the 2012 contract except one, which did not pertain to the arbitration clause, thereby making the arbitration clause of the 2012 contract acceptable on the part of the respondent.
23. We find no infirmity in the impugned order dated 2.11.2017 of the learned Single Judge in observing that the agreement entered into by the parties was not valid due to absence of parties being ad idem. Paragraphs 11 to 14 of the aforementioned order of the learned Single Judge passed in CS(COMM) 154/2017 read as under:

“11. When the parties entered into negotiation for sale purchase of 6000 metric tons of zinc in 2016, no concluding contract wherein signatures of the plaintiff came into existence. Contract No. 061-16-12115-S (Annexure D) dated 11.03.2016 incorporating comprehensive terms and conditions of the transaction bears signatures only on behalf of the defendant No.1. The terms and conditions contained therein apparently were not accepted, signed or stamped by the plaintiff or its duly authorized person. Business confirmation E-mail dated 10.03.2016 incorporating detailed terms and conditions of the agreement begins with:
Dear Mr. Aggarwal,

Further to discussions and *your below mail*, please following are the final terms at which GIAG *can offer zn metal to* Ganesh metals: XXXX

12. Apparently, it was an offer made to the plaintiff for its acceptance. The plaintiff vide email dated 11.03.2016 did not accept the offer in its entirety and respondent as “We confirm the same terms as said just one thing that provisional price of both, either the LC or invoice will be average of last 5 LME days.

13. Nothing is on record if this *change in the offer* expressly accepted by the defendant no.1. It responded by another email, “thanks for business confirmation. Reverting with *contract and performa*”. Nothing is on record to show if the contract containing detailed terms and conditions was exchanged thereafter and it was accepted by the plaintiff. The defendant No. 1 did not insist to get plaintiffs signatures on the contract accepting all the terms and conditions. Seemingly the defendant no.1 started acting upon the said unsigned contract.

14. From the exchange of emails reproduced above, it cannot be inferred that the plaintiff had expressly or impliedly agreed to all the terms and conditions incorporated in 2012 contract. The emails sent by the applicant to the plaintiff did not specifically record the terms and conditions as contained in 2012 contract. In fact, there was no reference of 2012 contract in the various exchanges that took place between the parties.”

24. As far as the submission of the petitioner with respect to the incorporation of the arbitration agreement of 2016 contract in terms of 2012 contract is concerned, the perusal of the relevant Clauses 32.2 (2016 contract) and 29.2 (2012 contract) display variations in the terms. The arbitration Clause 29.2 interalia included a part stating that the

parties waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, whereas the arbitration Clause 32.2 of 2016 contract was devoid of such a part. Moreover, the Clause 32.2 contained an additional part which stated that the number of arbitrators shall be three (one arbitrator to be appointed by each party and the third to be chosen by the two party appointed arbitrators). Thus, learned Single Judge has rightly observed that if the petitioner had the intention to retain all the terms and conditions of the 2012 contract in 2016 contract there was no reason to change the terms of the arbitration clause and therefore there was no acceptance, whether implied or express, on the part of the respondent.

25. Learned counsel for the petitioner, while relying on the judgement in the case of *Inox Wind Limited* (supra), has strongly urged before us that the contract of 2012, containing the arbitration clause, is a standard form of a contract and therefore the said clause can be incorporated in the 2016 contract by general reference. Law pertaining to the incorporation of the arbitration clause by reference has been discussed by the Apex Court in a catena of judgements. In the case of *M. R. Engineers and Contractors (P) Ltd. v. Som Datt Builders Ltd.* reported at (2009) 7 SCC 696 the Apex Court held that an arbitration clause in a previous contract cannot be incorporated by reference in a subsequent contract. However, as an exception to this rule, an arbitration clause of an earlier standard form contract by trade association or professional institutions can be incorporated by reference in a subsequent contract.
26. In the case *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* reported at 2010 Bus LR 880 before the Queen's Bench

Division, the Court categorised the contracts and held that in single-contract cases (category 1 and 2) a general reference to the arbitration clause from a standard form contract would be sufficient whereas in two-contract cases (category 3 and 4) a specific reference to the arbitration clause from an earlier contract is required. The said categories are reproduced as under:

“(1) *A and B make a contract in which they incorporate standard terms.* These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.

(2) *A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.*

(3) *A and B make a contract incorporating terms agreed between A (or B) and C.* Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub-contracts incorporating the terms of a main contract or sub-sub-contracts incorporating the terms of a sub-contract.

(4) *A and B make a contract incorporating terms agreed between C and D.* Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category.”

27. In the case of *Inox Wind Limited* (supra) the Supreme Court, while relying on *Habas* (supra), held that a general reference to a consensual standard form contract between parties is sufficient for incorporation of an arbitration clause. The Court, while modifying the law laid down in

M.R. Engineers (supra), also observed that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause. It was also observed that a conscious acceptance of the arbitration clause of the other document is necessary for the purpose of incorporating it into the contract. Para 18 is reproduced as under:

“18. We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In *M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271]* this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in *M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271]* case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from *Russell on Arbitration, 24th Edn. (2015)* would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this

Court in *M.R. Engineers case* [*M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] . We are in agreement with the judgment in *M.R. Engineers case* [*M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause.”

28. The facts in the case of *Inox Wind Limited* (supra) do not apply to the present case as the Supreme Court therein allowed the appeal for the reason that in the purchase order it was categorically stated that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions, which contained the arbitration clause, and the supplier being in the know of the said standard terms and conditions, accepted the same. Therefore, the purchase order being a single contract, a general reference to the standard terms and conditions was found to be sufficient. However, in the present case, in the contract of 2016, there was no categorical mention of purchase or supply to be based on the standard terms and conditions, including the arbitration clause, contained in the contract of the year 2012. Moreover, there is nothing on record which clearly shows that the respondent gave its acceptance to enter into a contract of 2016 for the supply to be made between March 2016 to February 2017 as per the standard terms and conditions of the contract of 2012.

29. Additionally, a standard form of contract is a 'take it or leave it' contract which does not leave scope for any negotiation with respect to its terms and conditions. However, in the present case the parties negotiated on the one of the terms of the contract that is the provisional price of LC or invoice. Also, the contract of 2016 contained an arbitration Clause 32.2, but the same was at variance with the arbitration Clause 29.2 of the contract of 2012. Therefore, we find no force in the contention of the Mr. Nayyar that the contract of 2016 was a standard form contract.
30. In view of the above discussion, we find no infirmity in the decision of the learned Single Judge.
31. Accordingly, the appeal stands dismissed.

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32. In view of the order passed in the appeal, the application also stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

NOVEMBER 14, 2019//