

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE**

BEFORE:

The Hon'ble Justice Ravi Krishan Kapur

AP/77/2024

Tata Communications Limited
Vs
Rudrapriya Constructions LLP and Anr.

For the petitioner : Mr. Dhruba Ghosh, Senior Advocate
Mr. Altamas Alim, Advocate
Mr. A. Goyal, Advocate

For the respondent no.1 : Mr. Sarvapriya Mukherjee, Advocate
Mr. Rachit Lakhmani, Advocate
Mr. L. R. Mondal, Advocate

Judgment on : 05.09.2024

Ravi Krishan Kapur, J:

1. This is an application under section 11 of the Arbitration and Conciliation Act, 1996.
2. The petitioner, Tata Communications Limited, is an owner of a plot of land situated at premises no. 1/20, C.I.T Scheme, VII M, Ultadanga, P.O Kankurgachi, P.S Manicktalla, Kolkata 700054 having an area measuring approximately 30,472.45 sq. ft. (the premises).
3. By and under a lease deed dated 24 August 2018 (the initial lease deed), the petitioner had leased the premises to the respondent no.2 for business purposes.
4. In view of the repeated and continuous breach of obligations under the initial lease deed, the parties herein entered into a tripartite agreement which contemplated the respondent no.1 carrying the same business of event management, food court, ceremonial functions etc. (the deed of assignment).

5. Subsequently, disputes and differences arose between the parties which culminated in the petitioner terminating both the above agreements on 18 December 2023 *inter alia* on the ground of non-payment of lease rentals.
6. On 15 February 2024, the petitioner issued a notice under section 21 of the Act invoking the arbitration clause in terms of the initial lease deed and the deed of assignment. Notwithstanding receipt of the same, the respondents failed to respond to the said notice.
7. Upon filing of the application, an objection has been raised by the respondent no 1 on the ground that the deed of assignment does not contain an arbitration clause since there has been no specific incorporation of the same. In support of such contention, the petitioner relies on the decisions in *M.R Engineers and Contractors Private Ltd vs. Som Datt Builders Limited (2009) 7 SCC 696*, *Inox Wind Ltd vs. Thermocables Ltd (2018) 2 SCC 519*, *Giriraj Garg vs. Coal India Ltd & Ors (2019) 5 SCC 192*, *Vishranti CHSL vs. Tattva Mittal Corporation Pvt Ltd, 2020 SCC OnLine Bom 7618* and *NBCC (India) Limited vs. Zillion Infraprojects Pvt Ltd (2024) SCC OnLine SC 323*.
8. On behalf of the petitioner, it is contended that, on a combined reading of the deed of assignment read alongwith the initial lease deed it would be evident that clause 19.3 of the initial lease deed contains an arbitration clause is deemed to have been specifically incorporated in the deed of assignment. It is submitted that the mutual intention of the parties to resolve their disputes and differences by way of arbitration is clear and that there is nothing contrary in the deed of assignment to suggest otherwise. The deed of assignment is not an independent agreement and has to be read in conjunction with the initial lease deed. Both the documents are inter-linked. In support of such contention, the petitioner relies on *Jagdish Chander v. Ramesh Chander (2007) 5 SCC 719*.

9. Clause 19.3 of the initial lease deed provides as follows:

19.3: Dispute resolution- (a) Any dispute arising out of or in connection with this Lease Deed (including a dispute regarding the existence, validity or termination of this Lease Deed or the consequences of its nullity) shall be sought to be resolved and settled amicably between the parties, within 15 (Fifteen) Business Days of written notice of such dispute arising, failing which it shall be referred to and finally resolved by arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be conducted as follows:

(i) The parties shall appoint a sole arbitrator to resolve the aforesaid disputes or differences within a period of 15 (Fifteen) days of written notice of the disputes or difference, failing which the parties shall each appoint one arbitrator and the two arbitrators so appointed shall appoint a third arbitrator who shall be the presiding arbitrator.

(ii) All proceedings in any such arbitration shall be conducted in English.

(iii) The seat of the arbitration proceedings shall be Kolkata.

(iv) The arbitrator shall be free to award costs as he thinks appropriate.

(v) The arbitration award shall be final and binding on the parties, and the parties agree to be bound thereby and to act accordingly. All costs arising out of such arbitration shall be borne equally by the parties.

10. Certain relevant clauses of the deed of assignment are as follows:

Recital D: "Based on mutual discussions and agreement between the parties, the parties have mutually agreed and decided to absolutely assign, transfer and substitute the leasehold rights granted in favour of the Initial Lessee under the Initial Lease Deed vis-à-vis the land, in favour of the Lessee for the limited purpose of carrying on the Business, on the terms and conditions recorded in the Initial Lease Deed and this Deed."

1.1: "The parties hereby confirm that save and except the revised terms and conditions specifically recorded in the Deed of Assignment of Lease, the parties have confirmed that all other terms, conditions and provisions recorded under the Initial Lease Deed shall apply mutatis mutandis to the Deed of Assignment of Lease and shall have been deemed to be incorporated in the Deed of Assignment of Lease verbatim and shall be read and construed accordingly and the assignment of lease of the land accorded in favour of the Lessee shall be governed accordingly."

1.2 Clause 2.1 and clause 2.2 of the Initial Lease Deed shall stand revised and replaced in its entirety as under:

2.1. Subject to payment of the Revised Lease Rent (as defined hereinafter) Security Deposit (as defined hereinafter) and observance of all the terms and conditions contained in the Initial Lease Deed read in conjunction with this Deed, the Lessor and the Initial Lessee hereby absolutely assign, transfer and substitute the leasehold rights initially granted in favour of the Initial Lease under the Initial Lease Deed vis-à-vis the Land to the Lessee for a period of the Revised Term (as defined hereinafter).

2.2. Assignment of the leasehold rights in relation to the Land is hereby undertaken by the Lessor to the Lessee for the limited purpose of the Business of the Lessee. The Parties acknowledge that the land shall not be used by the Lessee for any purpose other than for undertaking the Business, subject to the erection of only temporary structures thereon.

6. Security Deposit

Clause 2.5 of the Initial Lease Deed shall stand revised and replaced in its entirety as under:

"2.5(a) The Parties hereby agree and confirm that the interest free security deposit deposited with the Lessor by the Initial Lessee, amounting to a sum of INR 47,53,704 (Indian Rupees Forty Seven Lakhs Fifty Three Thousand Seven Hundred and Four), being 6 (six) months' of the current Revised Lease Rent (Security Deposit) under the Initial Lease Deed shall continue to be deposited with the Lessor, during the entire Revised Lease Term and shall be deemed to have been deposited by the Lessee under this Deed, towards the due performance by Lessee of its obligations under this Deed.

13. Miscellaneous

13.1. Save and except the capitalised terms defined in this Deed, all other capitalised terms not specifically defined herein shall bear the meaning, as assigned to it under the Initial Lease Deed.

13.3. Clause 19.5 of the Initial Lease Deed shall stand revised and replaced in its entirety, as follows:

"19.5 Stamp Duty and Registration Charges

The Lessee and the Lessor shall pay the stamp duty and the registration charges in equal proportion (i.e., 50:50) in respect of this Deed. The Parties shall attend the office of the concerned Sub-Registrar/Registrar and admit execution of this Deed and complete all registration formalities in respect thereof.

The Lessor's share of the stamp duty and the registration charges shall be initially borne and paid by the Lessee at the time of registration and the equivalent amount shall be reimbursed by the Lessor within 30 (Thirty) days from the date of receipt of debit note from the Lessee alongwith all supporting documents. Delay in making reimbursement shall attract penal interest at the rate of 12% (Twelve percent) per annum payable from the date when such reimbursement becomes due and payable by the Lessor."

13.4 Clause 19.9 of the Initial Lease Deed shall stand revised and replaced in its entirety, as follows:

19.9 Notices

Any notice required or permitted to be given under this Deed will be given in writing and delivered by (i) e-mail and any one of the following: (ii) hand-delivery, (iii) registered post or (iv) nationally-recognized courier, and addressed to the addresses set forth below. The service of a notice in the manner aforementioned would constitute valid service for the purpose of this deed.

RUDRAPRIYA CONSTRUCTIONS LLP
4, Amita Ghosh Road, Kolkata – 700029
Kind Attn: Shri Anuj Agarwal, Designated Partner

MUKTANGAN ESTATES PVT LTD
5A Earle Street, Ground Floor
Kolkata – 700026
Kind Attn: Shri Vikram Sikaria, Director

TATA COMMUNICATIONS LIMITED
VSB, Mahatma Gandhi Road,
Fort, Mumbai – 400001
Plot C-21 & 36, G Block, Bandra Kurla Complex,
Bandra (East) Mumbai
Pin: 400098
Kind Attn: Shri Ashwani Swami, Vice President – REIM

Save and except the changes recorded herein above, it is clarified that the balance contents of Clause 19 of the Initial Lease Deed shall remain unchanged and unaffected. (emphasis added)

11. Section 7(5) of the Act reads as follows:

(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.

12. Incorporation of an arbitration clause in a subsequent contract is statutorily recognized under section 7(5) of the Act. In view of the above, even though a contract between the parties does not contain a provision for arbitration, an arbitration clause contained in a separate document whether independent or connected is imported and engrafted in the contract between the parties by reference, as to make the arbitration clause in such a document a part of the contract.

13. The basic juridical exercise involved is one of construction. The imputed mutual intention of the parties is to be ascertained by the general principles of construction. Inevitably, in every case of incorporation by reference the parties are not concerned with only one document alone but with at least two, one which contains an arbitration clause and the other which does not. The question of incorporation by reference has to be determined first by applying the

usual principles of construction and attempting to infer the intention of the parties by an objective assessment of the documents. The contractual document defining and imposing the obligations of the parties may have to be found to incorporate another document which contains an arbitration clause. The intention of the parties to enter into an arbitration agreement is to be deduced from the terms of the agreement and not its form. [*Jagdish Chander v. Ramesh Chander (2007) 5 SCC 719*].

14. The Supreme Court had summarised the scope and rationale of section 7(5) of the Act in *M.R. Engineers (Supra)* as follows:

24. The scope and intent of section 7(5) of the Act may therefore be summarised thus: (i) An arbitration clause in another document is deemed incorporated into a contract by reference if the following conditions are fulfilled: (a) the contract should contain a clear reference to the documents containing the arbitration clause; (b) this reference should clearly indicate an intention to incorporate the arbitration clause into the contract; and (c) the arbitration clause should be appropriate, in that it 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 which makes 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 one contract can be incorporated into another contract (where such reference is made), only by a specific reference to the arbitration clause.

iii) If the contracting parties decide that a contract is to be executed according to the terms of another contract, said reference only incorporates the provisions relating to execution alone. An arbitration agreement contained in the other contract is not automatically incorporated. This goes in line with the principle of separability.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (e.g., the standard terms and conditions of a Trade Association or the Architects Association) will apply to the contract, such standard form terms, 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 shall form a part of their contract (as e.g. 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.

The Supreme Court in *M.R. Engineers* also clarified:

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.

15. In other words, in view of section 7(5) of the Act, even if a contract between parties does not have a specific provision for arbitration, an arbitration clause contained in an independent but related document could be imported and incorporated in the contract between the parties by reference to such document in the contract if the reference is such as to make all clauses of such document including the arbitration clause in such document part of the contract.
16. The main aspect of section 7(5) of the Act requires a conscious acceptance of the arbitration clause from another document by the parties as a part of their contract, before such an arbitration clause could be read as a part of the contract but it 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. A contract referring to a document with the *intent* of having the same to become a part and parcel of the said contract alongwith all terms and conditions being read as applicable to the same or having all terms and conditions intended to govern and be incorporated in the said contract shall mean that the document in its entirety shall get lifted and incorporated in the contract.
17. In *Halbury's Laws of England, 4th Edition, Vol 2 page 267* it is stated as follows:

"If the agreement is written, it may be included in a particular contract by reference or implication. The agreement between the parties may incorporate arbitration provisions which are set out in some other document, but in order to be binding the arbitration provisions must be brought to the notice of both parties."

18. In *Commercial Arbitration by Mustill and Boyd, 2nd Edition, 105* it has been described as follows:

"..parties need not set out the terms of arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of clause or to a set of trade terms which themselves include provisions requiring disputes to be submitted to arbitration. Nor need the contract itself be contained in a single document."

19. Admittedly, the initial lease deed contains an arbitration agreement. Recital D of the Deed of Assignment of Lease expressly records that the parties based on mutual discussions and agreement had entered into the deed of assignment on terms and conditions as provided in the initial lease deed as well as the modified terms of the deed of assignment. Clause 1.1 of the deed of assignment stipulates that the terms, conditions and provisions of the initial lease deed, save and except those which have been revised shall apply *mutatis mutandis* to the deed of assignment and be deemed to have been incorporated. Clause 13 of the deed of assignment revises only certain sub-clauses of Clause 19 of the initial lease deed but consciously leaves the arbitration clause untouched. On a conjoint reading of the clauses of the deed of assignment and the initial lease deed it is evident that the entirety of Clause 19 stood incorporated in the deed of assignment including the arbitration clause save and except Clauses 19.5 and 19.9 which were consciously amended. All other sub-clauses of Clause 19 including the arbitration clause remained unaltered and are deemed to have been incorporated in the deed of assignment without any variation. There is also no term in the deed of assignment which is repugnant to the arbitration clause contained in the initial lease deed.
20. On a proper construction of the deed of assignment which is inter-connected and inter-related with the initial lease deed, the parties obviously intended the

arbitration clause to be incorporated in the deed of assignment. This is the only imputed mutual intention of the parties which can be arrived at on a combined reading of both the documents. Both documents are commercial documents and require to be read together. The parties were dealing at arm's length. It is not possible to sever the two documents. It is true that the rationale behind seeking a specific reference necessary to incorporate an arbitration clause is that the parties are precluded from bringing a dispute before Court, an arbitration agreement has to be a written agreement and an arbitration agreement is of a different nature from other clauses as it constitutes a self-contained collateral contract. Nevertheless, the above construction is so obvious that the parties must have not only formed an intent of the same but are deemed to have agreed to specifically have incorporated the arbitration agreement when executing the deed of assignment.

21. The underlying subject matter of both the agreements is immovable property. Ordinarily, such obligations are for a long duration. With the passage of time, inter-connected documents come into existence. One or more of the documents may contain an arbitration clause and others may not. The question is always one of construction. The exercise has to be conducted by reading the documents together and ascertaining as to what the parties must as commercial men have intended [*Russell on Arbitration @ 2-054 at page 56, 24th Edition, 2015*]. The parties to the initial lease agreement are both parties to the deed of assignment. An assignee can always be a party to an arbitration agreement. The deed of assignment expressly refers to, adopts and incorporates the initial lease deed. The parties are deemed to have been aware and had full knowledge of the arbitration clause and have consciously chosen not to omit the same. On the other hand, select clauses of the initial lease deed had been deliberately omitted or modified. Intention is never a matter of convenience post execution of the

documents. A party cannot choose to disclaim an arbitration clause depending on whether it is now in a stronger bargaining position i.e. being in possession of property belonging to another, not paying any occupational charges and having the oblique intent of procrastinating the ultimate result. There is also no merit in the contention on behalf of the respondent that by virtue of the deed of assignment only the leasehold rights in the premises stood assigned.

22. All the decisions relied on by the respondents are distinguishable and inapposite. As stated, this is a case of assignment where the documents itself are inter-linked and inter-connected. The express words in the deed of assignment specifically incorporate the initial lease deed. There is a deliberate intent of the parties to maintain continuity of contractual obligations. The intent of each of the parties is deemed to have been identical to each other i.e. there must have been consensus *ad idem* to retain and include the arbitration clause. There is no quarrel with the proposition laid down in each of the decisions cited by the respondents. In *M.R. Engineers (Supra)* the wordings in the arbitration clause contained in the main contract were found on facts to be inapplicable to cover the disputes between the contractor and the sub-contractor. Similarly, in *Inox Wind Limited (Supra)* the purchase order in a single contract situation having a general reference to a standard form was found to be sufficient for incorporation of the arbitration clause. In *NBCC (India) Limited (Supra)* the two contracts were found to be separate and independent. Clause 7 of the Letter of Intent was repugnant to the arbitration clause in the tender document. Hence, there could be no incorporation by reference. In *Giriraj Garg (Supra)* there was a general reference to a set of standard form contract which was ultimately held sufficient to incorporate the arbitration clause. The concept of single and two contract cases was elaborated upon. This decision also suggests that the test is to see whether there is anything repugnant or inconsistent with the terms of the

contract which is sought to be incorporated. For the same reasons, the decision in *Vishranti CHSL vs. Tattva Mittal Corporation Pvt Ltd (Supra)* is also distinguishable. Though this was a case of assignment, the wordings in both the contracts are different and distinguishable.

23. In view of the above, A.P No 77 of 2024 stands allowed. There shall be an order in terms of prayer (a) of the Notice of Motion. The Hon'ble Ms. Justice Indira Banerjee (Retired), Supreme Court of India, is appointed as a Nominee Arbitrator in terms of the prayer above, subject to the Arbitrator communicating her consent to the Registrar, Original Side of this Court within three weeks from date. The Advocate on Record of the petitioner shall communicate this order to the Arbitrator forthwith and positively within 7 days from the date of passing of this order.

(Ravi Krishan Kapur, J.)