

Delhi High Court Reaffirms Requirement For Express Incorporation Of Arbitration Clauses In Successive Agreements

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Introduction

In a recent decision in *Murali Lal Agarwal v. KMC Construction Ltd.*¹ the High Court of Delhi ("**High Court**") examined the legal framework for incorporating an arbitration clause from an earlier agreement into a subsequent one, particularly when the parties to the new agreement differ from those in the original. The High Court held that, in such cases, the incorporation of the arbitration clause requires an explicit stipulation demonstrating the clear intent of the newly introduced party to be bound by the arbitration agreement. This article delves into the High Court's decision and its implications for the incorporation of arbitration clauses in multi-party contractual contexts.

Brief Facts

The matter pertains to a petition ("**Petition**") filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") seeking the constitution of an arbitral tribunal in terms of an agreement dated 05.10.2013 ("**Agreement-I**").

In the Petition, the petitioner arrayed three parties as respondents, *i.e.*, M/s KMC Construction Ltd. ("**KMC**"), Pink City Expressway Ltd. ("**Pink City**"), and ETA Star Infrastructure Ltd. ("**ETA**").

In the course of the proceedings, the petitioner, at the outset, submitted that he did not wish to press the Petition *qua* Pink City as the said entity was under liquidation. This submission of the petitioner was recorded by the High Court without prejudice to his rights available under the Insolvency and Bankruptcy Code, 2016.

KMC, while resisting the Petition took a preliminary objection that there is no arbitration agreement between the petitioner and KMC. Thus, the Petition was *ex-facie* not maintainable.

In response, the petitioner submitted that the arbitration clause was discernible from a combined reading of two agreements, *i.e.*, Agreement-I and another agreement dated 31.10.2013 ("**Agreement-II**").

The first of the contracts, Agreement-I was admittedly entered only between the petitioner and ETA and concerned the six laning of Gurgaon-Kotpuli-Jaipur section of National Highway – 8. Agreement-I recorded that Pink City had been appointed as a concessionaire by the National Highway Authority of India under a concession agreement. Pink City, in turn, had appointed ETA as the engineering, procurement, and construction contractor. Ultimately, ETA awarded a portion of the works to the petitioner herein by way of Agreement-I. The arbitration agreement in Agreement-I refers to ETA as the "*employer*".

¹ Arb. P. 1416 of 2022. Delhi High Court neutral citation 2024:DHC:5129.

KMC entered into the picture only by way of Agreement-II. The petitioner, KMC, Pink City, and ETA were all parties to Agreement-II. By way of Agreement-II, KMC was substituted as the "employer" in place of ETA. This substitution of KMC in place of ETA as the employer as per the petitioner constituted an incorporation of the arbitration agreement under Agreement-I in Agreement-II.

On the other hand, KMC argued that, admittedly, Agreement-II did not contain an arbitration clause of its own. Further, KMC was only a party to Agreement-II and not Agreement-I. Thus, KMC submitted that it was not a party to the arbitration agreement contained in Agreement-I.

Decision of the High Court

At the outset, the High Court referred to Section 7 of the Arbitration Act which, *inter alia*, refers to incorporation of an arbitration agreement by reference. The relevant portion of Section 7 reads as below:

"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 High Court observed that the question as to whether an arbitration clause contained in one contract would stand incorporated by reference into a subsequent contract has been considered in several decisions of the Supreme Court and the High Court.

The principal authority in this regard is ***M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.***² wherein the Supreme Court while dealing with incorporation of arbitration agreements by reference summarised the existing legal position.

The Supreme Court in ***M.R. Engineers (supra)***³ held that a general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.

The decision in ***M.R. Engineers (supra)***⁴ has been followed in the judgment of the Supreme Court in ***Elite Engineering and Construction (Hyd.) Pvt. Ltd. v. Techtrans Construction India (P) Ltd.***⁵ and ***Giriraj Garg v. Coal India Ltd. and Ors.***⁶.

The High Court also referred to a judgment of its Division Bench in ***Mac Associates v. Parvinder Singh***⁷ which held that for an arbitration clause existing in another document to

² (2009) 7 SCC 696.

³ (2009) 7 SCC 696.

⁴ (2009) 7 SCC 696.

⁵ (2018) 4 SCC 281.

⁶ (2019) 5 SCC 192.

⁷ 2024 SCC OnLine Del 1313.

be incorporated by reference, there has to be a clear intention of the parties to incorporate the arbitration clause in the contract. There has to be a specific reference to incorporate the arbitration clause in a contract. The only exception to this rule is where the contract provides that the standard form of terms and conditions of an independent trade or professional institution shall apply to the contract. This exception was also termed as a single contract case which was explained as a situation "*where the parties seek incorporation of standard form of contract of one of the parties.*"

On the other hand, in a two-contract case a specific reference to the arbitration clause contained in an earlier contract is required for its incorporation in the main contract between the parties.

Applying the aforesaid principles, the High Court held that the instant case was similar on facts to the judgment in ***Mac Associates (supra)***⁸. The High Court held that the present case is also a two-contract case, rather than a single contract case. As such, KMC is only a part to Agreement-II which does not contain an express arbitration clause. Since Agreement-II does not include any specific reference to incorporation of the arbitration clause, and since array of parties in Agreement-I and Agreement-II was not the same, an express reference to the incorporation of arbitration clause was required to infer consent of the new party (in this case, KMC).

Even otherwise, the High Court noted that Agreement-II contained clauses which were worded contrarily when compared to the arbitration clause contained in Agreement-I. For these reasons, the High Court dismissed the Petition, leaving it open to the petitioner to take alternative remedies in respect of its claims.

Comments

The decision of the High Court highlights the necessity for explicit incorporation of arbitration clauses when transitioning between contracts with differing parties. The decision reaffirms the longstanding principle that merely referencing an earlier contract does not suffice to bind new parties to its arbitration terms unless there is a clear, specific stipulation to that effect. This decision aligns with established precedents which necessitate a discernible intent to incorporate arbitration provisions, rather than relying on general references or assumptions. The High Court's emphasis on clear intent and specific references is particularly important in complex, multi-party contracts where agreements evolve over time.

⁸ 2024 SCC OnLine Del 1313.

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