

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

+ ARB.P. 291/2009

SHIVANI HANDLOOM WCS LTD. Petitioner
Through: Mr. Shiv Khorana and Mr. Ashish
Khorana, Advocates

versus

UNION OF INDIA

..... Respondent

Through: Mr. A.S. Chandhiok, ASG with
Mr. Atul Nanda and Mr. Sandeep
Bajaj, Advocates.

Date of Decision : 31st May, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

JUDGMENT

MANMOHAN, J (ORAL)

1. The only issue that arises for consideration in the present petition is whether there is an arbitration clause in the agreement executed between the parties or not.
2. The relevant facts of the present case are that on 24th January, 2007, Rate Contract for supply of blankets was concluded between the petitioner and the Government of India, Ministry of Defence. The said

Rate Contract was valid for the period 12th January 2007 to 01st June, 2009. Clause 9 of the aforesaid Rate Contract reads as under:-

*“09. CONDITIONS OF CONTRACTS/AGREEMENT:
Condition governing the Rate Contract may be seen in the DGS&D 156. The Rate Contract and all the supply order placed under it shall be governed by the General Condition of Contract as detailed in DGS&D-68® including clause 24 thereof.....”*

3. On 20th March, 2008, the Headquarters, Director General Border Roads, wrote to the petitioner stating that it intended to procure blankets against currently valid Rate Contract and it asked for a sample of blanket along with a copy of the valid Rate Contract.

4. In the meantime, on 16th April, 2008, the Material Organisation, Controller of Procurement clarified to the Director General Border Roads that Indian Army had been included as Direct Demanding Officer in the Rate Contract and as Border Road Organisation was an integral part of the Indian Army, the Rate Contract automatically extended to it.

5. On 05th June, 2008, the Director General Border Roads placed a supply order upon the petitioner. The relevant terms of the supply order are reproduced hereinbelow:-

<i>“Supply Order No. :</i>	<i>53463/Blanket/Maint/Shivani/ 2008-09/DGBR/E3 Ord dt. 05 Jun, 2008 direct local purchase from M/s Shivani Handloom WCIS Ltd., Moti Bazar Katra Ahaluwali, Amritsar- 143001.</i>
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Rate of Contract No. RC No. MOPR/CMT-II/05BCLC144/123/2005/SHIVANI dated 24 Jan.2007, Valid from 12 Jan 2007 to 01 Jun 2009.

This order is intended for the supply of stores in the schedule below in accordance with the terms and conditions mentioned in the manner specified herein and shall operate to create a specific contract between the M/s Shivani Handloom WCIS Ltd. Moti Bazar Katra Ahaluwali, Amritsar-143001 on the one part and President of India on the other part.

S. No.	Description of Items reqd.	Specification drawing no.	A/U	Qty,	Rate	Total Cost
01	Blanket (PF) PCX0020	JSS: 7210-24-1996 WITH PDCV AMENDMENT (WOOLMARK)	Nos.	35897	598.00	21466406.00
					Total Amt.	21466406.00

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Inspection Authority : The Principal Director of Clothing & Victualling Integrated Headquarters Ministry of Defence (Naval) D-II Wing, Sena Bhawan, New Delhi-11.

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Special Instruction.

- (a) Terms of Payment. 95% payment will be made on proof of inspection and provisional receipt by the consignee. The balance 05% will be paid on final receipt and acceptance of stores by the consignee in good condition. Stores are to be despatched only by road. 95% intial bill should be accompanied by copy No 1 of inspection note duly signed by consignee as token of receipt. 05% bill will be accompanied by copy No. 2 & 5 of Inspection Note. 100% payment may also be processed when I/Note No.1, 2 & 5 are cleared by the consignee.
- (b) Transit Insurance.....”

6. However, as Principal Director of Clothing and Victualling was not willing to be an Inspection Agency, the Ministry of Defence asked

the Material Superintendent to amend the supply order by designating Direct Demand Officer as the Inspection Agency.

7. Mr. Shiv Khorana, learned counsel for petitioner submits that Clause 24 of DGS&D 68 contains the arbitration clause and the same stood incorporated in the contract executed between the parties as it specifically formed a part of Condition No.9 of the Rate Contract which was specifically referred to and made a part of the supply order dated 05th June, 2008.

8. On the other hand, Mr. A.S. Chandhiok, learned Additional Solicitor General for respondent-Union of India submits that the present petition under Section 11 is not maintainable as there is no arbitration clause in the supply order in question. He submits that the Rate Contract was referred to in the supply order as a matter of fact and nothing more. According to Mr. Chandhiok, the supply order mentions in detail its own terms and conditions without incorporating any of the terms and conditions of the Rate Contract.

9. Mr. Chandhiok submits that the supply order dated 05th June, 2008, constitutes a separate, independent and specific contract between the parties according to its own terms and conditions independent of the Rate Contract and the DGS&D conditions in clear and unambiguous language.

10. In this connection, Mr. Chandhiok relies upon a judgment of the Supreme Court in ***Himalaya House Co. Ltd. vs. The Chief Controlling Revenue Authority*** reported in ***(1972) 1 SCC 726*** wherein it has been held as under:-

“10.Mere reference to some earlier transactions in a document does not amount to an incorporation in that document, of the terms and conditions relating thereto.....”

11. Mr. Chandhiok further submits that if the intention of the parties was to incorporate the terms and conditions of Rate Contract, then they would have specifically provided so in the supply order. In this context, he refers to another supply order issued by the respondent for supply of compartment tray wherein it was specifically stipulated as under:-

“This order which is intended for the supply of the stores detailed in the schedule below in accordance with the terms and conditions of the DG of supplies & disposal rate contract mentions above and in the manner specific herein, shall operate to create a specific contract between the contract.....”

12. Mr. Chandhiok also submits that assuming without admitting that the supply order is under the Rate Contract, yet mere reference to another contract does not incorporate the arbitration clause in the supply order. He submits that arbitration clause in Rate Contract could only be invoked if disputes arise under the Rate Contract alone. In this

respect, Mr. Chandhiok relies upon Section 7(5) of the Arbitration and Conciliation Act, 1996, which reads as under:-

“7. *Arbitration agreement.*—

xxx xxx xxx

(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.”*

13. In this connection, Mr. Chandhiok relies upon a judgment of the Supreme Court in ***M.R. Engineers and Contractors Private Limited. vs. Som Datt Builders Limited*** reported in **2009 (7) SCC 696**, wherein it has been held as under:-

“14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract.....

15. Section 7(5) therefore requires a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties.....

xxx xxx xxx

18.where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied.....

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33. An arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a

collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to “carrying out” of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the main contract relating to execution of the work as contrasted from the dispute resolution, we are of the view that the arbitration clause in the main contract did not form part of the sub-contract between the parties”

14. Mr. Chandhiok lastly submits that disputes in the present case cannot be the subject matter of arbitration as the arbitrator cannot decide whether the respondent could have rejected the petitioner’s supply under the contract and whether the petitioner has committed breach of contract.

15. In rejoinder, Mr. Khorana submits that even though special conditions incorporated in the supply order were applicable, many other conditions were also applicable by virtue of incorporation of the Rate Contract. Some of the terms and conditions which were applicable between the parties, even though according to Mr. Khorana they had not been specifically mentioned in the supply order, are as under:-

“A. Clause 4 (i) Responsibility of Contractor to execute contract 4(ii) Rights of Rejection by consignees.

No Subletting.

B. Clause 6: not to charge higher price than what was fixed by Government and not to supply at lower price to anyone else.

C. Clause 7 Security Clause

D. Clause 10 Return of Particulars

E. Clause 11 Risk of Loss or Damages to Government or Purchaser’s property.

- F. Clause 13 Charges for work necessary for completion of contract.*
- G. Clause 14(5) Facilities to Inspectors, 14(6), 7(ii), 7(iv), 7(v), 7(vi), 7(8).*
- H. Clause 15 Progress Reports.*
- I. Clause 16 Freight.*
- J. Clause 17 Inspector rights for inspection and procedure to be adopted after rejection.*
- K. Clause 18 Withholding and Lien in respect of sums as claimed & 18A – Lien in respect of claims in other contractors.*
- L. Clause 20 Laws governing the contract.*
- M. Clause 21 Indemnity.*
- N. Clause 22 Corrupt Practices.*
- O. Clause 23 Insolvency and breach of contract.*
- P. Clause 24 Arbitration.”*

16. Having heard the parties, I am of the opinion that this Court would have to determine as to whether the intention of the parties was to incorporate the terms of the Rate Contract in the contract executed between the parties.

17. Keeping all the facts and circumstances of the case in mind, I am of the view that a Rate Contract is a standing offer by the petitioner to enter into a contract within a specified time period in accordance with the terms mentioned in the Rate Contract. The supply order issued by the Direct Demanding Officer is an acceptance of the said offer. Consequently, the terms of both the Rate Contract and supply order constitute a part of the contract executed between the parties.

18. If Mr. Chandhiok's submissions were to be accepted, then in my opinion, the supply order would not conclude the contract but would amount to an offer or a counter offer on the part of the respondent.

19. In the present case, the supply order specifically refers to the Rate Contract executed between the parties and it nowhere stipulates that the Rate Contract is applicable only for the rates as alleged or that the other clauses of the Rate Contract are inapplicable.

20. Undoubtedly, the supply order contains certain specific terms and conditions, but these in my opinion, are like special conditions of the contract. I am fortified in my view by the expression "*Special Instructions*" above the special terms that have been incorporated by way of supply order. Consequently, in my opinion, the general conditions incorporated in the Rate Contract would certainly apply and constitute a part of the contract executed between the parties, unless and until it was specifically provided to the contrary in the supply order.

21. I may also mention that if respondent's submissions were to be accepted, it would lead to an incongruous situation as according to the respondent the disputes under the Rate Contract would have to be referred to arbitration, whereas other disputes under the same contract would have to be adjudicated upon and decided by a Civil Court.

22. The judgment of *Himalaya House* (supra) is clearly distinguishable on facts as in the present case the supply order was placed on the basis of Rate Contract with certain special conditions. Unlike in *Himalaya House* (supra), in the present case the terms of Rate Contract were not merely referred to but formed a part of the contract executed between the parties. Moreover, as pointed out hereinabove, there was no clause in the supply order which specifically excluded the terms stipulated in the Rate Contract.

23. The judgment of the Supreme Court *M.R. Engineering* (supra) is also inapplicable as the supply order of the respondent was not an offer or a counter offer but an acceptance of the conditions stipulated in the Rate Contract. Moreover, the Rate Contract is specifically incorporated in the supply order and there is no condition in the supply order which stipulates that the arbitration clause is inapplicable.

24. I am also not able to understand as to why specific disputes raised by the petitioner in the present case cannot be adjudicated upon by an arbitrator. In the present case, the petitioner is disputing the rejection of its goods by the respondent and is claiming the price of its goods. In my opinion, the same can certainly be adjudicated upon by an Arbitrator.

25. Consequently, present petition is allowed and respondents are directed to appoint an Arbitrator as stipulated in Clause 24 of the

DGS&D Contract 68 within a period of eight weeks from today. However, it is made clear that this Court has neither dealt with nor commented on the merits of the controversy between the parties and same shall have to be adjudicated upon by an Arbitrator without being influenced in any manner by this order. With the aforesaid observations, present petition stands disposed of.

MANMOHAN,J

MAY 31, 2010

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