

Sudip Das Vs. Mookherjee Biswas and Pathak and Ors.

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Court : Kolkata

Decided On : Jan-11-2016

Judge : Biswanath Somadder

Appellant : Sudip Das

Respondent : Mookherjee Biswas and Pathak and Ors.

Judgement :

ORDER

SHEET IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE AP No.322 of 2014 IN THE MATTER OF SUDIP DAS Versus MOOKHERJEE BISWAS & PATHAK & ORS.AP No.323 of 2014 IN THE MATTER OF SUBHADIP DEY Versus MOOKHERJEE BISWAS & PATHAK & ORS.AP No.324 of 2014 IN THE MATTER OF KANCHAN DUTTA Versus MOOKHERJEE BISWAS & PATHAK & ORS.BEFORE: The Hon'ble JUSTICE BISWANATH SOMADDER Date : 11th January, 2016.

Mr.Joydip Kar,Sr.Advocate, Mr.Siddhartha Ghosh, Mr.Sourav Kr.

Mukherjee, Advocates for the petitioner.

Mr.Swatarup Banerjee, Mr.Jishnu Chowdhury, Mr.Ambar Nath Banerji, Ms.Amrita Panja, Advocates for the respondents.

The Court : Since the issues sought to be raised in the three applications under section 11 of the Arbitration and Conciliation Act, 1996 are identical in nature, all the applications are taken up together.

Let the affidavits-in-reply filed in Court today be taken on record.

The three petitioners joined a partnership firm of Chartered Accountants in terms of a Deed of Partnership Reconstitution dated 3rd September, 2012.

The said deed contained, inter alia, an arbitration clause under clause 18.

The deed also contained a clause, being clause 8, which provided, inter alia, break-up of the monthly salary to be paid to each of the partneRs. The Partnership Deed was subsequently reconstituted on 1st April, 2013, whereby the monthly salary to be paid to each of the partners stood enhanced.

A specific clause was also provided in the reconstituted Partnership Deed dated 1st April, 2013, which reads as follows : All other terms and conditions set out in the earlier agreement will continue to be in force. According to the learned advocate appearing on behalf of the petitioner in all three matteRs. the aforesaid clause indicates a conscious acceptance of the arbitration clause, being clause 18, as contained in the Deed of Partnership dated 3rd September, 2012.

On the other hand, it is submitted by the learned advocate representing the respondents that where there is only a reference to a document in a particular context, the document will not get incorporated in its entirety into the new contract.

He also submits 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.

To buttress their respective submissions, both learned advocates have referred to a judgment of the Supreme Court which was rendered in the case of M.R. Engineers And Contractors Private Limited versus Som Datt Builders Limited reported in (2009) 7 Supreme Court Cases 696.

After considering the submissions made by the learned advocates for the parties, it may be apt to take note of the fact that while delivering the judgment in M.R.Engineers and Contractors Private Limiteds case, the Supreme Court has quoted the following passage from Russell on Arbitration : Reference to another document - The terms of a contract may have to be ascertained by reference to more than one document.

Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction.

This issue has to be determined by applying the usual principles of construction and attempting to infer the parties intentions by means of an objective assessment of the evidence.

This may make questions of incorporation irrelevant, if for example it is clear that the contractual documents in question are entirely separate and no intention to incorporate the terms of one in the other can be established.

However, the contractual document defining and imposing the performance obligations may be found to incorporate another document which contains an arbitration agreement.

If there is a dispute about the performance obligations, that dispute may need to be decided according to the arbitration provisions of that other document.

This very commonly occurs when the principal contractual document refers to standard form terms containing an arbitration agreement.

However the standard form wording may not be apt for the contract in which the parties seek to incorporate it, or the reference may be to another contract between parties at least one of whom is different.

In these circumstances it may be possible to argue that the purported incorporation of the arbitration agreement is ineffective.

The draftsmen of the Arbitration Act, 1996 were asked to provide specific guidance on the issue, but they preferred to leave it to the court to decide whether there had been a valid incorporation by reference.

* * * Subject to drawing a distinction between incorporation of an arbitration agreement contained in a document setting out standard form terms and one contained in some other contract between different parties, judicial thinking seems to have favoured the approach of Sir John Megaw in *Aughton*, namely, that general words of incorporation are not sufficient.

Rather, particular reference to the arbitration clause needs to be made to comply with Section 6 of the Arbitration Act, 1996, unless special circumstances exist.

Reference to standard form terms.- If the document sought to be incorporated is a standard form set of terms and conditions the courts are more likely to accept that general words of incorporation will suffice.

This is because the parties can be expected to be more familiar with those standard terms including the arbitration clause.

It is patently obvious from Russell's passage, as quoted above, that while interpreting terms of a contract by reference to more than one document, apart from applying the usual principles of construction, an attempt has to be made in order to infer the parties' intentions by means of an objective assessment of the evidence.

In the facts of the instant case, the clear intention which emerges from the latter Deed of Partnership dated 1st April, 2013, is that apart from enhancement of monthly salary being paid to the partners all other terms and conditions, as set out in the Partnership Deed dated 3rd September, 2012, would continue to remain in force.

Since the respondents do not dispute the existence of the Partnership Deed dated 3rd September, 2012, which contains, inter alia, clause 18, being the arbitration clause, there was a manifest and clear intention existing at the time of reconstitution of the Deed of Partnership on 1st April, 2013, to incorporate all the

terms and conditions as contained in the Deed of Partnership dated 3rd September, 2012 - including the arbitration clause - in the latter deed.

As such, it must be held that there exists an arbitration agreement, which binds the parties and that there has been a failure on the part of the respondents to appoint an arbitrator upon invocation of the arbitration clause by the petitioners. However, before this Court appoints an arbitrator, an opportunity is given to the parties to have the issues sought to be raised resolved through the process of mediation.

On the request of this Court, Mr.S.N.

Mookerjee, Senior Advocate, has agreed to accept the role of a Mediator.

In such circumstances, the parties are directed to forthwith approach the learned Mediator who shall try and ensure that the disputes existing between the parties are resolved amicably.

All the applications are made returnable four weeks hence (08.02.2016).(BISWANATH SOMADDER, J.) b.pal/SP/pa/nm

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