

Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

Arbitration Petition (Civil) No 1 of 2019

Shinhan Bank

Petitioner

Versus

Carol Info Services Limited

Respondent

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

- 1 On 5 August 2011, the petitioner entered into a Leave and License agreement with the respondent for the use and occupation of office premises situated on the 4th Floor of the West Wing at Wockhardt Towers, C-2, Block G, Bandra Kurla Complex, Bandra (East), Mumbai 400051 for a period of five years. On the same day, an Amenities agreement was contemporaneously executed with the Leave and Licence agreement. Upon the expiry of the term

of the Leave and License agreement, a fresh Leave and Licence agreement was executed between the petitioner and the respondent on 1 July 2016 for the continued use and occupation of the premises for a period of two years.

- 2 On 25 August 2016, the petitioner entered into an Amenities agreement with the respondent.
- 3 On 22 March 2017, the petitioner issued a notice of termination to the respondent stating that the Leave and Licence agreement and the Amenities agreement would stand terminated upon the expiry of the lock-in period, namely, on 1 July 2017.
- 4 The respondent replied to the termination notice on 30 March 2017. Asserting that the termination was not in accordance with the terms of the Leave and Licence agreement and the Amenities agreement, the respondent declined to refund the security deposits to the petitioner. According to the petitioner, vacant and peaceful possession of the licensed premises was handed over to the respondent on 13 June 2017.
- 5 On 3 July 2017, the petitioner served a notice of demand for refund of the security deposits together with interest. The claim was denied in a letter dated 13 July 2017. By another letter of 13 July 2017, the respondent served upon the petitioner a notice claiming an amount of Rs 2,59,85,856 towards the balance license fee and amenities charges for the period between 1 July 2017 and 30 June 2018 and claimed consequential losses amounting to

Rs 69,21,408 together with interest after adjusting the amount of the security deposits under the 2016 agreement.

- 6 By an Advocate's letter dated 29 September 2017, the petitioner sought refund of its security deposit in the amount of Rs 1,68,48,000 (which was deposited under the Leave and Licence agreement) and Rs 56,16,000 (which was deposited under the Amenities agreement) together with interest at the rate of 15% per annum. The respondent rejected the claim in its response dated 5 October 2017.
- 7 On 9 October 2017, the petitioner invoked arbitration and proposed the appointment of a sole arbitrator. In its response dated 13 October 2017, the respondent denied the existence of an arbitration agreement.
- 8 An arbitration petition under Section 11 of the Arbitration and Conciliation Act 1996 was instituted before the High Court of Judicature at Bombay, but it was withdrawn since the arbitration is an international commercial arbitration, the petitioner being a banking company incorporated under the laws of South Korea.
- 9 We have heard Mr Abhishek Puri, counsel for the petitioner and Mr Sanjeev Kumar Kapoor, counsel for the respondent.
- 10 Two agreements entered into between the parties. The first is a Leave and Licence agreement dated 1 July 2016. The second is an Amenities agreement

dated 25 August 2016. The bone of contention is whether there is an arbitration agreement between the parties. The contention of the respondent is that while the Amenities agreement contains an arbitration agreement, the Leave and Licence agreement does not. Hence, it has been submitted that the claim of the petitioner invoking arbitration must be rejected. Moreover, it has been submitted that the respondent has instituted a suit before the High Court of Judicature at Bombay on its Original Side and it would be open to the petitioner to move an application under Section 8 for seeking a reference to arbitration. It has been submitted that the claim of the respondent in the suit for outstanding license fees has been computed after adjusting the security deposit and hence the appropriate course of action for the petitioner would be to pursue its remedies under Section 8.

- 11 The Amenities agreement which was entered into between the parties on 25 August 2016, *inter alia*, contains the following provision:

“This Agreement is executed contemporaneously with the said Leave and License Agreement and shall be read and construed accordingly. The provision of this Agreement shall be deemed to be and shall constitute an integral part of the said Leave and License Agreement in respect of the License of the Licensed Premise granted by the Licensors to the Licensee. All provisions of the said Leave and License Agreement shall, mutatis mutandis; apply to this Amenities Agreement”

- 12 The Amenities agreement contains a provision to resolve disputes through arbitration. Clause 17 is in the following terms:

“17. All disputes, controversies or claims arising out of or relating to this Agreement: including existence or interpretation of any clause hereof, shall be referred to arbitration by a sole arbitrator duly appointed by mutual consent of both the Parties in writing, failing which under the provisions of the Arbitration and Conciliation Act, 1966. The cost of the Arbitration shall be borne equally. The place of arbitration shall be Mumbai and the arbitration shall be governed by the Arbitration & Conciliation Act, 1966 as amended from time to time. The language of the arbitration proceedings shall be English. The Award shall be final and conclusive. The Courts in Mumbai shall have exclusive jurisdiction to try and entertain matters arising herefrom.”

- 13 The submission which has been urged on behalf of the respondent is that in terms of Section 7(5), 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 submission is based on the decision of this Court in ***M R Engineers and Contractors Private Limited vs Som Datt Builders Limited***¹.
- 14 Clause (1) of the Amenities agreement which has been extracted above indicates that (i) the provisions of the Amenities agreement shall be deemed to be and shall constitute an integral part of the Leave and Licence Agreement in respect of the license granted by the petitioner to the respondent; and (ii) all the provisions of the Leave and Licence agreement shall *mutatis mutandis* apply to the Amenities agreement. Clause 17 of the Amenities agreement contains an agreement to refer disputes to arbitration.

1 (2009) 7 SCC 696

- 15 The plain consequence of clause (1) of the Amenities agreement is that all the terms of that agreement constitute an integral part of the Leave and Licence agreement. The Amenities agreement does not merely contain a reference to the Leave and Licence agreement. It incorporates all the terms of the Amenities agreement as an integral part of the Leave and Licence agreement. By doing so, the parties have intended to make the arbitration clause in the Amenities agreement an integral part of the Leave and Licence agreement.
- 16 Section 7(5) of the Arbitration and Conciliation Act 1996 stipulates that 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. Clause (1) of the Amenities agreement is intended to make the arbitration clause which is embodied in the Amenities agreement (Clause 17) an integral part of the Leave and Licence agreement.
- 17 In ***M R Engineers and Contractors Private Limited vs Som Datt Builders Limited*** (*supra*), this Court held thus:

“We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said

document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.”

- 18 The principle which emerges from the provisions of Section 7(5) is elucidated in paragraph 19 of the judgment, which is extracted below:

“Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts. It makes it clear that where there is a reference to a document in a contract, and the reference shows that the document was not intended to be incorporated in entirety, then the reference will not make the arbitration clause in the document, a part of the contract, unless there is a special reference to the arbitration clause so as to make it applicable.”

- 19 The arbitration agreement which is embodied in clause 17 of the Amenities agreement was intended by the parties for all intents and purposes to be a part of the Leave and Licence agreement.
- 20 There is no merit in the submission that the petitioner should be now relegated to pursuing the remedy under Section 8. In view of the clear terms of the contract between the parties, a reference to arbitration would be necessitated.
- 21 The sole Arbitrator who was nominated by the petitioner has since assumed the position of Lokayukta of the State of Maharashtra. Hence, we direct that

the disputes and differences between the parties arising out of claim of the petitioner shall be referred to the sole arbitration of Dr (Mrs) Shalini Phansalkar-Joshi, a former Judge of the High Court of Judicature at Bombay. The Arbitrator shall decide upon the fees in consultation with the parties and the modalities of arbitration.

- 22 The Registrar (Judicial) shall transmit a copy of this order to the sole Arbitrator.
- 23 The Arbitration Petition is accordingly disposed of.
- 24 Pending applications, if any, stand disposed of.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[Pamidighantam Sri Narasimha]

.....J.
[J B Pardiwala]

New Delhi;
March 13, 2023
CKB