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The Doctrine of Composite Reference: The Conundrum and The Clarity

Introduction:

The Indian Arbitration and Conciliation Act, 1996 has witnessed a lot of change in various aspects in the recent few years. The conundrum associated with the composite reference of an agreement to arbitration has also witnessed some change. The current position of the doctrine of composite reference has been discussed in the recent judgment of the SC in *Duro Felguera, SA v. Gangavaram Port Ltd. (2017) 9 SCC 729*, where the court has clarified the current position of law. The main objective of the author here in this paper is to discuss the conundrum and the clarity associated with this doctrine by relying on some of the decisions of the hon'ble apex court of the country.

Current Position and the Conundrum

In order to have clarity over the current situation in law, it is important to go through the background of this judgment. So, here in this Judgment, the background goes like this that, *Gangavaram Port Limited* (GPL), the respondent in the instant case, awarded tender work to a Spanish Company *Duro Felguera Plant as Industrials SA* (*Duro Felguera*) and its Indian subsidiary *M/s Felguera Gruas India (P) Ltd. (FGI)*. Later on, for the purpose of ease, this original contract was divided into five distinct contracts and each of them contained a distinct work description in it. Subsequently, *Duro Felguera* was awarded the contract pertaining to the supply of bulk material and handling equipment however on the other hand the remaining four contracts were awarded to the Indian Subsidiary (FGI). It was important to note that all these contracts contained a separate arbitration clause in itself with *Duro Felguera* entering into corporate guarantee as well, thereby guaranteeing the due performance of all the works awarded to *Duro Felguera* and FGI, which had its own arbitration clause. A tripartite Memorandum of Understanding (MoU) was also executed between *Duro Felguera*, *FGI*, and *GPL* at the later stage.

After the dispute arose, the petitioner and the subsidiary issued five separate arbitration notices to the respondent in the instant matter. However, it was important to note that the petitioner just issued a composite notice i.e. one arbitration notice.

The contention drawn here by the respondent was very interesting as they relied upon the MoU and asserted the same to have an overriding effect over the original contract containing the arbitration clauses. They further asserted that a composite reference is made in the current dispute

to the “International Commercial Arbitration” in order to avoid multiple conflicting awards, save time, money, and resources. While the petitioners opposed the same and contended that all the contracts contained separate clauses and hence they were all distinct and hence composite reference can not be made.

The decision of the apex court in *Duro Felguera* has brought clarity in the application of this doctrine. The court here in this judgment clarified that there cannot be a single arbitration reference for disputes arising out of different agreements, even if they are interlinked to a single transaction. This means that in case of separate Arbitration clauses arising out of a single transaction can not be referred to a single tribunal and the concept of composite reference fails.

The court further went on to clarify the position of this concept by relying on the Judgment of *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641* wherein this doctrine was recognized by the apex court.

Upon a strong reliance made by GPL on *Chloro Controls* by asserting that the court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Upon their reliance on the said judgment, the court has clarified the position and held that the words “under or in connection with” that was used in the agreement in *Chloro Controls* had wider ambit and it meant that whatever dispute arising out of the mother agreement, the reference of the same would be made to a single arbitration tribunal, meaning a composite reference of the dispute. However, no such clause was present in the present case and all five contracts as well as the corporate guarantee have separate arbitration clauses that were neither dependent on the terms and conditions of the original contract nor on the MoU. Hence the court denied allowing the composite reference in the instant case.

The position of this doctrine has been clarified by the court by relying upon the judgment in *Chloro Controls*. The court has made it crystal clear that the interdependence of the contract is not necessary to attract composite reference. In order to make a composite reference of the dispute, it is necessary that such an intention arises through the wordings of the contract.

Scope of Reference through MoU.

The law regarding the reference to a contract containing the Arbitration clause has been explained in section 7(5) of the Indian Arbitration and Conciliation Act, 1996. The provision clarifies the position that mere reference of a document can not lead to the reference of the same to the arbitration. Here in the present case as well the MoU never expressly provided to incorporate within itself the complete reference of the contracts to a single arbitral tribunal and hence the composite reference can not be construed in the instant case. The law concerning the reference to the arbitration by virtue of a document had been explained by the Supreme Court in *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd(2009) 7 SCC 696* The court has held here in this case that the inclusion of an arbitration agreement by reference requires the reference to be specific and not merely a general reference. The court has also laid down the reference test wherein the court has emphasized on the general and specific reference. Relying upon the same reference test the court in the instant matter found that the MoU never mentioned specifically to submit the same to the arbitration. Therefore the composite reference was denied and the conundrum that arose in *Chloro Controls* was clarified here.

Conclusion:

Concluding the overall observation from the two decisions of the apex court, the law relating to composite reference stands clarified. There are two positions available now the one from the Chloro Controls and the other from the Duro Felguera. The court has aptly provided in these two decisions regarding the scope and application of the doctrine of composite reference. It is further clear that the drafting of the agreement needs to be effective to give effect to composite reference under the mother agreement. Further, the court has also clarified that the reference made to arbitration by any document needs to be specific and there must be 'a conscious acceptance' of the arbitration clause from another document. This will also result in the limited intervention of the courts and will prove to be effective in setting up a pro-arbitration regime.

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