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Restrictive Arbitration Clause - Notified Claims

Date: 21st May, 2019

MCO LEGALS

List of Judgments					
S. No.	**Date of Judgment**	**Cause Title and Citation**	**Notes**	**Relevant Para No.**	**Page Nos. of Judgments**
1.	08.01.1985	Uttam Singh Duggal & Company (P) Limited -Vs- Indian Oil Corporation Limited & Another ILR (1985) II, Delhi 131	▪ Petition u/s 20 of the 1940 Act for filing of arbitration agreement in Court. ▪ Procedure for Notified Claim set out in agreement. ▪ Clause 9.0.0.0 applies only to a notified claim. ▪ No Appeal preferred against the said Judgment.	2, 18 and 27	10 – 23
2.	02.08.1991	Bansal Construction Company -Vs- Indian Oil Corporation Limited & Another 1991 SCC Online Del 420	▪ Petition under Section 8 and 20 of the 1940 Act for appointment of arbitrator and filing of arbitration agreement in Court respectively. ▪ If claim not Notified, Tribunal has no jurisdiction. ▪ Review Petition filed - dismissed.	–	24 – 27
3.	20.12.1994	International Building and Furnishing Company (Cal) Private Limited - Vs- Indian Oil Corporation Limited 57 (1995) DLT 536 (DB)	▪ Petition under u/s 33 of the 1940 Act challenging award ▪ Interpretation of GCC Clauses. ▪ Mere letter cannot be treated as notice for Notified Claim. ▪ No arbitration if not Notified Claim. ▪ If claim is not a notified claim,	3 to 8, 11 and 17	28 – 33

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			there is no agreement to refer claim to arbitration. Only notified claims can be referred. ▪ No Appeal preferred against the said Judgment.		
4.	18.02.1998	Sarup Lai Singhla - Vs- National Fertilizers (1998) 44 DRJ 753	▪ Petition u/s 20 of the 1940 Act for filing of arbitration agreement in Court (filed when the 1940 Act was in force) ▪ Jurisdiction of an arbitration tribunal is as decided by the parties in the agreement. ▪ No pleadings that Notified Claim - if claim not notified - arbitration clause not applicable. ▪ No Appeal preferred against the said Judgment.	–	34 – 40
5.	30.03.1998	A.B.G. Heavy Industries Ltd. v. Indian Oil Corporation Limited 1998 SCC OnLine Del 229	▪ Petition u/s 20 of the 1996 Act ▪ Issue whether notified claims not notified in writing (i.e. communicated orally) and not included in the Final Bill can be referred to arbitration? ▪ If dispute does not relate to notified claim, it cannot be referred to arbitration. ▪ No Appeal preferred against	9,10 and 18	41 – 49

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			the said Judgment.		
6.	01.03.2002	General Manager, Northern Railway and Another –Vs- Sarvesh Chopra (2002) 4 SCC 45	▪ Petition u/s 20 of the Arbitration and Conciliation Act, 1940. ▪ Delay in performance of the contract is governed by Section 55 and 56 of the Indian Contract Act, 1872 and not covered by arbitration agreement. ▪ If any claim comes within an "expected matter" clause then such clause cannot be referred to arbitration.	15, 16 and 18	50 – 61
7.	09.11.2006	Indian Oil Corporation Limited -Vs- Artson Engineering Limited 2006 SCC Online Bom 1106	▪ Petition under Section 34 of the 1996 Act. ▪ Jurisdiction of the arbitrator is governed by the arbitration agreement - Mere mentioning of claim in letter of invocation of arbitration is not enough ▪ Tribunal has no jurisdiction to make an award in relation to claims not notified. ▪ No Appeal preferred against the said Judgment.	4, 8 and 9	62 – 70
8.	27.04.2012	Indian Oil Corporation Limited -Vs- Era	▪ Petition u/s 11(6) of the 1996 Act	34 to 37 and 39	71 – 79

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S. No.	**Date of Judgment**	**Cause Title and Citation**	**Notes**	**Relevant Para No.**	**Page Nos. of Judgments**
		Construction (India) Limited (2012) 189 DLT 120	▪ If claim not notified then Tribunal has no jurisdiction. ▪ An appeal was filed by Era Constructions (India) Ltd. and the same was dismissed vide order dated 18.07.2012 passed in FAO (OS) 318/2012. ▪ SLP preferred by Era Constructions (India) Ltd. and the same was dismissed vide order dated 15.10.2012 in SLP (C) No. 30052/2012.		
9.	05.09.2014	Harsha Constructions –Vs- Union of India and others (2014) 9 SCC 246	▪ Petition u/s 2 (1) (b), 7(3), 16 and 34 (2) (a) (iv) of Arbitration and Conciliation Act, 1996. ▪ Arbitrator is not empowered to arbitrate upon disputes covered by clause 39 of GCC (general conditions of contract) as the said clause specifically excludes certain disputes as "excepted disputes" from arbitration. ▪ Issue is whether the arbitrator could have decided the issues which were not arbitrable? ▪ Even if non-arbitrable dispute is referred to arbitrator or even if an issue is framed by arbitrator as to such dispute, it is not open to arbitrator to arbitrate since it is beyond his	14,17 and 19	80 – 85

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			jurisdiction.		
10.	29.01.2015	Bongaigaon Refinery & Petrochemicals Ltd. –Vs- G.R. Engineering Works Ltd. Arb. A. No. 3/2005	▪ Appeal is directed against the judgment dated 18.08.2005 in Misc. (Arbitration) Case No. 5/2003. ▪ If any claim comes within an "expected matter" clause then such clause cannot be referred to arbitration. ▪ When arbitral award deals with a dispute not coming within the terms of the submission to arbitration, it is a jurisdictional error which is rectifiable. ▪ SLP preferred by G.R. Engineering Works Ltd. and the same was dismissed vide order dated 27.01.2017 passed in SLP (C) No. 15734/2015.	22 and 24	86 – 94
11.	10.03.2015	IOT Infrastructure & Energy Service Limited -Vs- Indian Oil Corporation Ltd. Arb. P. 334/2014	▪ Petition u/s 11(6) of the Arbitration and Conciliation Act, 1996. ▪ Disputes as to whether claims were Notified or not - Was referred to General Manager as per clause 9.0.2.0. ▪ General Manager decided the claim to be not Notified. (Page 26 of Compilation).	4, 5, 8 and 9	95 – 101

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S. No.	**Date of Judgment**	**Cause Title and Citation**	**Notes**	**Relevant Para No.**	**Page Nos. of Judgments**
			▪ Same clauses as instant case - once GM holds that claims not notified, it would stand excluded from arbitration - the question of referring the questions to arbitration does not arise. ▪ Petitioner failed to show how notwithstanding the contractual clauses which are binding on the parties, the petitioner could seek reference of the disputes to arbitration. (Page 28 of Compilation). ▪ No Appeal preferred against the said Judgment.		
12.	19.05.2015	Institute of Geoinformatics Private Limited -Vs- Indian Oil Corporation Limited (2015) SCC Online Del 9652	▪ Petition u/s 11(6) of the Arbitration and Conciliation Act, 1996. ▪ The GM held only 1 claim out of the total 5 claims was arbitrable. The remaining 4- not notified within 10 days - not notified to both, the EIC and Site Engineer. These 4 claims neither notified nor arose out of any notified claims and hence not arbitrable. ▪ Only Notified Claim subject to adjudication in arbitration. ▪ Whether claim is notified or	2, 5, 9, 10, 12 to 14 and 16	102 – 109

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			not, to be decided by the General Manager). ▪ IOT Infrastructure & Energy Service Limited v. Indian Oil Corporation Ltd. quoted. ▪ While deciding an application under Section 11(6) of the Act, it is beyond the jurisdiction of the Court to decide whether or not the conclusion arrived at by the GM was correct. ▪ SLP preferred by Institute of Geoinformatics Private Limited and the same was dismissed vide order dated 28.08.2015 passed in SLP (C) No. 23055/2015.		
13.	09.01.2017	Srico Projects Pvt. Ltd. –Vs- Indian Oil Foundation 2017 SCC OnLine Del 6446	▪ Petition u/s 11(6) of the 1996 Act ▪ Difference between claims of the Contractor and claims of the owner - Contractor's claims should be notified - no such limitation on owner's claims - agreed clause - clause not challenged as unreasonable. ▪ Clause 6.6.1.0 r/w Clause 6.6.3.0 - only notified claim can be referred to arbitration and nothing else.	11 to 16	110 – 113

List of Judgments					
S. No.	**Date of Judgment**	**Cause Title and Citation**	**Notes**	**Relevant Para No.**	**Page Nos. of Judgments**
			▪ No notified claim - no reference to arbitration. ▪ Petitioner not without remedy- can seek appropriate remedies in accordance with law. ▪ SLP preferred by Srico Projects Pvt. Ltd. and the same was dismissed vide order dated 03.07.2017 passed in SLP (C) No. 14976/2017.		
14.	08.02.2019	NCC Limited vs. Indian Oil Corporation Limited ARB.P. 115/2018	▪ Petition u/s 11(6) of the 1996 Act ▪ If on a bare perusal, it is found that a dispute is not related to the arbitration agreement, then the Court may decline relief under Section 11(2). ▪ However if parties contest whether a dispute falls within the realm of the arbitration agreement or not, then the best course would be to allow the Arbitrator to decide the issue. ▪ High Court does not agree that the decision of the General Manager in respect of excluded matters referred to in clause 9.0.2.0 is final.	59	114 - 133

1985 SCC OnLine Del 13 : ILR (1985) 2 Del 131

In the High Court of Delhi
Original Civil
(BEFORE D.P. WADHWA, J.)

M/S. Uttam Singh Duggal & Co. (P) Ltd. ... Petitioner;
Versus
Indian Oil Corporation Ltd. & Another ... Respondents.
Suit No. 697-A/1983
Decided on January 8, 1985

(i) Arbitration Act — S. 20 — Agreement to refer disputes to arbitration only in respect of notified claims — Claims not notified as prescribed to be deemed to have been waived — Notified claims — What are — Whether merely a step in, proceeding to commence arbitration — Letters written in ordinary course — Whether notice of claims — Claims not notified — Whether "disputes" to be referred to arbitration.

(ii) Arbitration Act — S. 20 & 37(4) — Existence or otherwise of dispute referable to arbitration only has to be considered at the stage of application for reference to arbitration, rest of the controversies are within the domain of the arbitrator — Whether or not the application has been made within the time as specified in the agreement, cannot be gone into at this stage.

(iii) Arbitration Act — S. 37(4) — The question of extension of time under — Does not arise if it is asserted that the claim is within time, there has to be a clear admission that claim is time barred to invoke provisions of section 37(4)

The agreement between the parties provided that in case of any claim for extra payment a notice had to be given within 10

days from the date of issue of orders or instructions relating to any work for which additional payment or compensation was claimed or on the happening of any other event on which the claim is based. There was also a clause in the agreement to refer disputes to arbitration. The contractor did not give notice as prescribed for additional claims, but raised a dispute in respect of such claims and sought reference to arbitration in a petition under section 20 of the Arbitration Act. The petitioner claimed extension of time under section 37(4) of the Arbitration Act. Dismissing the suit and the application for extension of time.

Held :

1. It has first to be seen whether there is a dispute to which the arbitration clause applies. The question of the existence of a dispute has to be seen first. That dispute has to be raised in accordance with the provisions of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. In fact if reference is made to the arbitration clause in the present case, no time limit as such is prescribed for the appointment of the arbitrator.

(Para 18)

2. It has to be held that the claim in the present case is not covered by the arbitration agreement. It has also to be held that the petitioner is not entitled to any extension of time under section 37(4) of the Arbitration Act.

(Para 28)

3. In a petition under section 20 an argument in the alternative that if the court finds that claim is barred as not having been raised within the time fixed under the agreement, cannot be

allowed. The Court cannot go into the question as to whether the claim is barred by time or not. To invoke jurisdiction of the court to invoke powers under section 37(4) there has to be a clear admission that the claim is barred under the agreement.

(Para 17)

For the Petitioner: Mr. S.L. Watel, Advocate with Mr. R.K. Wate, Advocate.
For the Respondents: Mr. V.K. Koura, Advocate.

Cases Referred To:

1. *Jedranska Slobodina* v. *Oleagine SA*, (1983) All ER 602;
2. *Sterling General Insurance Co. Ltd.* v. *Planters Airways Pvt. Ltd.*, (1975) 1 SCC 603 : AIR 1975 S.C. 415;
3. *Cotton Corporation of India Ltd.* v. *The Oriental Fire & General Insurance Co. Ltd.*, AIR 1984 Cal. 355;
4. *U.O.I.* v. *D.N. Revri and Co.*, (1976) 4 SCC 147 : AIR 1976 S.C. 2257;
5. *Babanaft International* v. *Avant Petroleum*, (1982) 3 All E.R. 244;
6. *Ved Prakash* v. *U.O.I.*, AIR 1984 Delhi 325;
7. *Jai Chand Bhasin* v. *U.O.I.*, AIR 1983 Delhi 508;
8. *Agro Company of Canada* v. *Richmond Shipping Ltd.*, (1973) 1 Lloyd's Rep. 392;
9. *Vulcan Insurance Co.* v. *Maharaj Singh*, (1976) 1 SCC 943 : AIR 1976 S.C. 287.

The Judgment of the Court was delivered by

D.P. WADHWA, J.:— This is a petition under S. 20 of the Arbitration Act (for short 'the Act').

2. The petitioner, a contractor, entered into a contract with the Indian Oil Corporation Limited (for short 'the Corporation'), respondent No. 1, for construction of certain works at Faridabad for the R & D Centre of the Corporation. Respondent No. 2 is the head of the R & D Centre, Faridabad. The contract contained an arbitration clause. Before I proceed further it is better to set out the relevant clauses of the contract between the parties teaching on the arbitration. These are:—

(i) "1.0.23.0. 'Notified Claim' shall mean a claim of the Contractor notified in accordance with the provisions of Clause 6.6.1.0. hereof."

(ii) "6.6.1.0. Should the contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts

due in terms of the contract as specified in Clause 6.3.1.0. hereof or should the Contractor dispute the validity of any deductions made or threatened by the Corporation from any Running Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10(ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claims such additional payment or compensation, or on the happening of

other event upon which the Contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim, nor shall the Corporation anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid, and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

(iii) "6.6.3.0. Any or all claims of the Contractor notified in accordance with the provision of clause 6.6.1.0. hereof as shall remain persist at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of claims attached thereto, giving particulars of the nature of such claim, grounds on which it is based, and the amount claimed, and shall be supported by a copies

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of the notice (s) sent in respect thereof to the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any material particular be at variance with the claim notified by the Contractor within the provision of 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof."

(iv) "6.6.3.1. Any and all notified claims not specifically reflected and included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived by the Contractor, and the Corporation shall have no liability in respect thereof and the Contractor shall not be entitled to raise or include in the Final Bill any claim (s) other than a notified claim conforming in all respects in accordance with the provisions of Clause 6.6.3.0 hereof.

(v) "9.0.0.0... ... any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the Corporation (whether or not the amount claimed by the Corporation or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the Corporation to the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the Head, R & D Centre."

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(vi) The arbitration clause was modified by Work Order No. 1 dated 3-12-1976 (item 13) as follows:—

"The Sole Arbitrator shall be selected by the Contractor out of a penal of seven persons, nominated by the Head, R and D Centre. All the seven persons so nominated shall be Engineers of standing."

3. The contract is dated 17-12-1976. The stipulated date for completion of the contract was 12-12-1978. However, the contract was completed on 1-7-1981. It is alleged that the delay in completion of the work under the contract was entirely due to the default on the part of the Corporation. By a letter dated 27-7-1981 (Ex. P-138), the contractor submitted its claims amounting to Rs. 31.55 lacs. These claims were specified under 9 different items, and pertained to (1) cost difference on materials purchased after 12-12-1978 (Rs. 2.70 lacs); (2) escalation on electrical goods (Rs. 1.50 lacs); (3) escalation on sanitary goods etc. (Rs. 0.75 lac); (4) extra cost on trade items executed beyond 25 per cent variation (Rs. 1.85 lacs): (5) under utilisation of labour etc. due to delay in supply of drawing (Rs. 7.50 lacs); (6) additional expenditure incurred on office establishment etc. after 12-12-1978 (Rs. 11.00 lacs); (7) loss suffered on account of interest recovered by the Corporation on Mobilisation Advance after 12-12-1978 (Rs. 3.00 lacs); (8) loss suffered on account of natural calamity being collapse of centering and shuttering of overhead tank due to squall on 16-6-1979 (Rs. 1.75 lacs); and (9) other miscellaneous losses (Rs. 1.50 lacs).

4. The contractor submitted the final bill for the work executed under the contract with letters dated 22-12-1981 (in respect of civil and mechanical works); dated 7-1-1982 (in respect of extra items); and dated 16-3-1982 (in respect of electrical works).

5. With letter dated 22-12-1981 with which the contractor's final bill in respect of civil and mechanical works was sent, the

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contractor also sent its claims amounting to Rs. 33.25 lacs. This it is stated, was as per requirement of clause 6.6.3.0. The excess in the claims now submitted with those submitted with letter dated 27-7-1981 was on account of items pertaining to extra cost on trade items executed beyond 25 per cent variation which in the earlier claim amounted to Rs. 1.85 lacs while in the final claim it was Rs. 3.55 lacs.

6. By letter dated 28-12-1981 of the Corporation, the contractor was informed that "none of the claims now raised by you have been notified within the provisions of Clause 6.6.1.0 of the General Conditions of Contract, and that, therefore, the Corporation cannot be liable in respect of any such claims". This letter was in reply to letter dated 27-7-1981 of the contractor.

7. Thereafter, it appears, there was further correspondence between the parties on the question of appointment of the arbitrator. The final bill of the contractor with which it had appended its claims for settlement was decided on 1-3-1983. The final bill was, however, signed by the contractor under protest. Another notice dated 26-4-1983 was sent to the Corporation by the contractor again seeking the panel of names from amongst whom the contractor was to select an arbitrator. Since there was no response from the Corporation, the present petition was instituted.

8. Along with the petition, the contractor also filed an application under S. 37(4) of the Act, it being IA No. 2210/83. This sub-section is as follows:—

> "(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence

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arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper."

It is prayed in this application that in case the court comes to the conclusion that 10 days period of notice as envisaged by clause 6.6.1.0 was applicable in respect of any of the claims of the contractor or that there has been delay in lodging any of its claims, time be extended for such period on such terms as the court deems just and proper to enable the reference of the subject disputes to arbitration in terms of arbitration agreement between the parties.

9. The case of the Corporation is quite simple. In fact, its case is what it said in its reply dated 28-12-1981 (Ex. P-139) to the letter dated 27-7-1981 of the contractor. The Corporation denied that the contractor submitted any claims to it in accordance with the provisions of clause 6.6.1.0 or that the contractor submitted any notified claim (s) with its final bill in accordance with the provisions of clause 6.6.3.0. The Corporation also referred to the difference of amounts in the two claims of the contractor: one submitted along with letter dated 27-7-1981 and the other with the final bill. The contractor in its petition had also referred to its letter dated 12-2-1982 which, according to the contractor, was a notice to the Corporation as contemplated by S. 37(3) of the Act. This the Corporation denied. In this letter the contractor had stated that in case it did not receive any positive response from the Corporation, it would seek redress through arbitration. To the

application under S. 37(4) of the Act of the contractor, the Corporation raised the following preliminary objections:—

> "The application is misconceived and is not maintainable since Section 37(4) of the Arbitration Act is not applicable to the present case, in as much as the arbitration agreement does not apply to the claims referred to in the Petition filed under Section 20 of the Indian Arbitration Act or to any of them, nor does there exist any term in the arbitration agreement that any claim to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed."

It was said that the court had no jurisdiction to refer to arbitration any claims which are not notified claims included in the final bill.

10. On the pleas thus raised the following issues were framed:—

1. Is the claim within the scope of the arbitration agreement?
2. If so, if such a claim is covered by the arbitration agreement?
3. If issues 1 and 2 are decided against the petitioners, then are the petitioners entitled to extension of time under Section 37(4) of the Arbitration Act?
4. Relief.

Parties have led evidence by means of affidavits.

11. Mr. Watel had various submissions to make. Strongly relying on a decision of the English Court of Appeal in *Jedranska Slobodna* v. *Oleagine SA* [(1983) 3 All ER 602] (1).

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Mr. Watel submitted that notice contemplated in the aforesaid clause 6.6.1.0 was merely a step to commence arbitration proceedings. If so, he submitted that the case fell within the provisions of S. 37(4) of the Act if it is held that no notice as required under this clause was given. According to the contractor, the claims were basically because of delay in completion of the contract which delay was caused by the Corporation, as the relevant drawings were not given to the contractor. It was submitted that when it is said that the claim of the contractor is not a notified claim as defined in clause 1.0.23.0, it merely means that notice of the claim was not given. To sum up, Mr. Watel submitted, in order to bring his case within the purview of S. 37(4) of the Act, that the claims were of recurring type and could not be quantified till the contract was completed; these arose out of the default committed by the Corporation and therefore the Corporation would know the consequences; the work was completed and accepted by the Corporation without demur; and if the claims are held to have extinguished the contractor could not go to the court and taking into account the amounts involved there will be undue hardship caused to the contractor. It was asserted that notice of breach which was given by the contractor to the Corporation though without specifying the amount would itself make the claim a notified claim. Reliance was placed on a decision of the Supreme Court in *Sterling General Insurance Co. Ltd.* v. *Planters Airways Pvt. Ltd.* ((1975) 1 SCC 603 : AIR 1975 SC 415) (2), wherein it was held that in interpreting S. 37(4) of the Act, the court has to take a liberal view of the meaning of the words "undue hardship". It was said "undue" must mean something which is not merited by the conduct of the claimant, or is very much disproportionate to it. It was then held that the court must take all the relevant circumstances of the case into consideration. Reliance was also placed on a decision of the Calcutta High Court in the *Cotton Corporation of India Ltd.* v. *The Oriental Fire & General Insurance Co. Ltd.* (AIR 1984 Cal. 355) (3),

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where the court took into account the amount involved in the dispute as one of the grounds while extending time under S. 37(4) of the Act.

12. Anticipating the argument of the Corporation that arbitration agreement would apply only to that dispute which fell within the definition of a "notified claim", Mr. Watel submitted that the arbitration agreement would include within its compass any difference or dispute between the parties provided that (a) such dispute has been notified within ten days of the date of occurrence, and (b) the same is included separately in the final bill. That such an interpretation should be given to the arbitration agreement in the present case, Mr. Watel relied upon a decision of the Supreme Court in *Union of India* v. *D.R. Revri & Co.* ((1976) 4 SCC 147 : AIR 1976 SC 2257) (4), wherein the Supreme Court observed as under:—

> "It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a commonsense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation."

13. Mr. V.N. Koura, learned counsel for the Corporation, submitted that the arbitration agreement in the present case did not cover all disputes between the parties. According to him, the dispute for the purpose of the arbitration agreement would not merely be the notified claims but only those notified claims which are included in the final bill. Even a variation in the notified claim would be a different claim. According to Mr.

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Koura, the present petition under S. 20 of the Act was not maintainable inasmuch as no difference between the parties had arisen to which the arbitration agreement applied and further question as to whether time should be extended under S. 37(4) of the Act would not be relevant. Mr. Koura further submitted that in any case the court would not have jurisdiction to extend time for giving notice in writing of the claim of the contractor under clause 6.6.1.0 and further that this clause does not merely stipulate a period of ten days but other conditions as well like giving of full particulars of the nature of the claim, grounds on which it is based and the amount claimed and is to be given to a particular authority. With reference to various letters written by the contractor prior to the letter of 27-7-1981, Mr. Koura submitted that none of these letters met the requirements of clause 6.6.1.0. He said that these letters could at best be taken as mere hints by the contractor of some possible claim, but these would certainly not be taken as substitute for a notified claim as required under the aforesaid clause. Referring to the letter of 27-7-1981 Mr. Koura submitted that even this did not meet the requirement of the clause. It was not addressed to the Engineer-in-charge/Site Engineer within ten days and also did not give any particular of the alleged claims and at best it contained heads of various claims and again this was no compliance with the provisions of the clause. It was stated by the Corporation that this clause was agreed to so as to prevent the contractor from raising any general claims at the end of the works when the claims could neither be properly verified nor properly assessed and that the object was to confine the contractor "only to those claims of which there could be a contemporaneous verification of the factors involved and the facts and figures given and to exclude general claims and assessments subsequently made". It was argued that if a particular drawing had not been furnished by the Corporation in time and as a result thereof the contractor incurred any wasteful or additional expenditure or damage he

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could have notified the Engineer-in-charge and the Site Engineer of the delay in furnishing of the drawing by the Corporation, with the details of personnel and equipment etc. rendered idle, and the costs, charges and/or damages etc. incurred as a result thereof at least within ten days of the receipt of the drawing. It was also submitted that before all these clauses in the agreement were agreed to, the contractor had desired that the arbitration clause should apply to all the disputes and differences arising under the contract, but this was not agreed to. Only change agreed to was that instead of three there should be seven names from which the contractor was to select an arbitrator and clause 9.0.0.0 was amended accordingly. Mr. Koura referred to a decision of the English Court of Appeal in *Babanaft International* v. *Avant Petroleum* [(1982) 3 All ER 244] (5) as being fully applicable to the present case. I may note here that this judgment was distinguished in the decision of the Court of

Appeal cited by Mr. Watel. Thus, according to Mr. Koura, neither S. 20 nor S. 37(4) of the Act applied.

14. Under S. 20 of the Act, I have to see if any difference has arisen to which the arbitration agreement, as contained in clause 9.0.0.0 applied and if so whether I should extend the time under S. 37(4) of the Act, in case I waive the time-bar limit.

15. The first limb of argument of Mr. Watei is that he complied with the requirements of clause 6.6.1.0 and, if so, in that case, as to whether the claim was barred by limitation or not was to be decided by the arbitrator, and he refers to a decision of a Full Bench of this court in *Ved Prakash* v. *Union of India* (AIR 1984 Delhi 325) (6) which approved a decision of the Division Bench in *Jai Chand Bhasin* v. *Union of India* (AIR 1983 Delhi 508)(7). In *Ved Parkash's case*, the petitioner by his letter dated 29-6-1981 asked the respondent to appoint an arbitrator. The Chief Engineer refused to make the appointment. The reason he gave was that the petitioner had

made the request for appointment of an arbitrator after the expiry of 90 days and it was a term of the clause that such a request should be made within 90 days, otherwise the Government shall be discharged and released of all liabilities and all claims would be deemed to have waived. Relying on a Division Bench decision in *Jai Chand Bhasin* (supra), the court held that this question falls within the province of the arbitrator to whom the disputes shall be referred. Whether the demand or arbitration has been made within the stated time and whether the claims should be deemed to have been waived in terms of the clause is essentially a question for the arbitrator to decide. The court is not concerned with it at this stage. The court has only to see that there are disputes and all those disputes are to be referred to arbitration as per agreement between the parties and the arbitrator can decide those questions.

16. In *Jai Chand Bhasin* (supra), the court held that in the aforesaid circumstances, S. 37(4) of the Act had no applicability. When there is no admission by the applicant/contractor in his application under S. 20 of the Act that the demand for arbitration in respect of his claim is beyond the period stated in the arbitration agreement, the question of invoking S. 37(4) is premature and does not arise. At the stage of the application under S. 20 the court is only to see that there are disputes and those disputes are to be referred to arbitration as per agreement between the parties and the arbitrator can decide those questions. The court is not concerned with the question whether the claim of the party to the arbitration agreement is barred by time. That question falls within the province of the arbitrator to whom the dispute is referred. The court was further of the view that S. 37(4) bears close resemblance to S. 28 of the Act. Just as the court has power under S. 28 to enlarge the time for making the award, similarly S. 37(4) empowers the court to extend the time for giving notice for appointing an arbitrator

in respect of any claim beyond the period of 90 days in stated circumstances of undue hardship. It was asserted that at the stage of an application under S. 20 when the applicant maintains that his claim is within time invocation of S. 37(4) is not attracted.

17. The second limb of the argument of Mr. Watel is that if the court finds that the claim of the contractor is barred as no notice to appoint an arbitrator was given within time prescribed or that an arbitrator was not so appointed or some other steps to commence arbitration proceeding were not taken, then the court should extend time on the facts and circumstances of the case. This argument, I am afraid, could only be advanced if the contractor admitted specifically that its claim was so barred. Otherwise, in view of the aforesaid two decisions of this court, I cannot possibly go into this question as to whether the claim of the contractor is barred by time or not. There has to be a clear admission of the contractor to that effect.

18. Analysing the clause in the case it has first to be seen if there is a dispute to which the arbitration clause applies. So, the question of existence of dispute is to be seen first. That dispute has to be raised in accordance with the provision of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. In fact, if reference is made to the arbitration clause in the present case, no time limit as such is prescribed for the appointment of the arbitrator. As I see clause 6.6.1.0 exists independently of clause 9.0.0.0. Under clause 6.6.1.0, (i) the contractor shall forthwith give notice in writing of his claim to the Engineer-in-charge and the Site Engineer within ten days from the date of issue of order of instructions relative to any works for which the contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim; (ii) such notice shall

give full particulars of the nature of such claims; (iii) grounds on which it is based; and (iv) the amount claimed. The contractor is debarred from raising any claim unless notice of such claim has been given in the manner and within the time prescribed, otherwise the contractor "shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-charge and the Site Engineer in writing in the manner and within the time aforesaid". Under clause 6.6.3.0 if any of the claims which has been notified in accordance with clause 6.6.1.0 still remains/persists at the time of preparation of final bill, the contractor is to specify the same in the form of a statement of claim attached to the final bill, again giving the particulars of the nature of the claims, grounds on which the claims are based and the amount claimed and this again is to be supported by copy of the notice sent in respect thereof to the Engineer-in-charge and Site Engineer. It is specifically mentioned in clause 6.6.3.0 that if the claim attached with the final bill be at variance with the claim notified under the provisions of clause 6.6.1.0, it shall be deemed to be a claim different from the notified claim with consequence that it shall stand waived as given in clause 6.6.1.0. However, under clause 6.6.3.1 any claim notified under clause 6.6.1.0 which is not calculated in the final bill stands waived. Thus, the parties agreed that before any claim/dispute could be subject matter of arbitration, certain formalities had to be gone into. Clause 9.0.0.0 which deals with arbitration applies only to disputes and differences arising out of a notified claim included in the final bill of the contractor. As noted above, there is no time limit prescribed in clause 9.0.0.0. In these circumstances, it is therefore difficult to see as to how the provisions of S. 37(4) would apply to the requirements of clause 6.6.1.0, assuming that the disputes in the present case are (1) covered under clause 9.0.0.0, and (2) that the contractor did take steps to commence arbitration proceedings within the time fixed by the arbitration agreement. Mr. Watel's argument is that notified claim is nothing but a claim in writing to the Corporation within ten days of

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the date of occurrence and this claim is to be included separately in the final bill. According to him clauses 6.6.1.0, 6.6.3.0 and 9.0.0.0 are inextricably interlinked and, therefore, the notified claim is merely some other steps to commence arbitration proceedings" as envisaged in S. 37(4) of the Act.

19. Before referring to the decisions referred to by counsel for the parties it would be appropriate to discuss the basics involved in a case like the present one. Normally, in commercial contracts one comes across a provision requiring certain formalities to be performed within a stipulated time. In default the arbitration is barred. In shipping contracts there is a clause known as the "Centrocon" arbitration clause which would be an ideal example. This clause reads as follows:—

> "... .... Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge, and where this provision in not complied with the claim shall be deemed to be waived and absolutely barred....."

Lord Denning MR in *Agro Company of Canada* v. *Richmond Shipping Ltd.* (1973 1 Lloyd's Rep. 392) (8) expressed the view that the courts now appears to regard a contractual time limit as a positively beneficial feature of a commercial contract. The objects of such a clause are, it has bean stated — (i) to provide some limit to the uncertainties and expense of arbitration and litigation; (ii) to facilitate the obtaining of material evidence; and (iii) to facilitate the settling of accounts for each transaction as and when they fall due. The English courts have repeatedly upheld the three months' time limit fixed by the Centrocon clause and have even enforced shorter periods thaw this, though clauses of this type are held to be construed strictly and a claim will not be barred by lapse of times unless the provision clearly applies to the claim in question. A distinction has to be made where a clause in the contract extinguishes the claim but that would not bar the right to refer the claim to arbitration. The result would simply be that when the arbitrator

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makes his award it would be to the effect that the claim fails. Then there is a clause which bars the right to arbitration but does not defeat the claim. The only effect of failure to comply with the time limit is that the enforcement cannot be effected by means of an arbitration. If the claimant wishes to assert his rights he must file a civil suit.

20. In the Law and Practice of Commercial Arbitration in England by Sir Mustill and Boyd, the learned authors, commenting upon the above two types of time barring provisions, observed as under:—

> "These two different types of time-barring provision may sometimes be combined in a single clause: failure to comply with the limits fixed by the clause destroys both the claim itself, and the arbitrator's right to adjudicate upon it.
>
> In many instances, the distinction between these two species of clause gives rise to no difficulty, since it is common for the clause itself to state explicitly that failure to perform the required formality within the time limit will have the effect of barring the claim. Thus, the clause may provide that in default of compliance 'the claim shall be deemed to be waived and absolutely barred', or that 'all claims shall be

deemed to be waived'. Rather less specific, but none the less sufficiently clear, are those clauses which stipulate that the formality to be performed within the time limit is the giving of a notice of claim, not (as in the case of some clauses) the commencement of an arbitration. Here, there is no need to read the clause as having any effect on the party's right to arbitrate; if the clause stipulates that notice of claim must be given within a certain number of days, then the obvious interpretation is that if the notice is not so given, the claim is lost."

(Pages 168-169, 1982 Edn.)

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21. Commenting on the provisions of S. 27 of the English Arbitration Act, which is almost similar to S. 37(4) of the Indian Arbitration Act, the learned authors said:—

"It will be observed that the section only applies in terms to those agreements which provide that in default of timely compliance with the specified formalities 'any claims to which the agreement applies shall be barred'. But relief under the section can be granted whether the effect of the clause is to bar the claim, or merely to bar the right to have the claim decided in an arbitration. Nor is the word 'claims' limited to causes of action: it applies to any claim to have an issue decided by arbitration.

The application of the section is also limited to those agreements where the formalities to be completed within the time limit consist either of the giving of notice to appoint an arbitrator, or the appointment of an arbitrator, or some other step to commence arbitration proceedings. The section has no application to limitation provisions under which the step to be taken is the giving of a notice of claim."

(Pages 176-177)

22. In the case reported as *Jedranska Slobodna* v. *Oleagine SA* ((1983) 3 All ER 602), the chartered vessel arrived at the port on 1-5-1980 and waited for discharge until 7-9-1980. Discharge was finally completed on 15-11-1980. The time for the commencement of arbitration expired on 15-2-1981, which was under the arbitration clause which read as under:—

'All disputes from time to time arising out of this contract shall,..... be referred to the final arbitrament..... Any claim must be made in writing and Claimants' Arbitrator appointed within three months of final discharge and where this

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vision is not complied with the claim shall be deemed to be waived and absolutely barred....."

No claim in writing was made nor the ship owners' arbitrator appointed within that period and the question that arose was that whether the court has jurisdiction under S. 27 of the English Arbitration Act to extend the time, and if it has jurisdiction whether it should extend the time. This section reads as follows:—

"Power of court to extend time for commencing arbitration proceedings. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an

> arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper."

The court held that whole of the clause related to arbitration. The first sentence required claims to be referred to arbitration; the second sentence dealt with the requirement that the claim is to be in writing and the arbitrator appointed in the limited period and the consequences if this does not occur. The court held "the use of the singular 'where this provision is not complied with' is a clear indication that the notice requirement is 'a step to commence arbitration proceedings'." The court observed, "We agree with Lloyd J that the appointment of the arbitrator

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and the making of the claim in writing in the arbitration clause go hand in hand, and that both provisions are so inextricably bound together that they should be regarded as part of the same process of commencing arbitration proceedings". This judgment distinguished the three Judges decision of the Court of Appeal (*Babanaft International* v. *Avant Petroleum*, (1982) 3 All ER 244) referred to by Mr. Koura. In this latter case there were two clauses in the agreement. The arbitration clause provided that any or all differences and disputes of whatsoever nature arising out of the Charterparty be put to arbitration in the City of London. It contained no time limit for commencing arbitration proceedings. There was another clause being clause M2 which was separate from the arbitration clause and which read as follows:—

> "Charterers shall be discharged and released from all liability in respect of any claims. Owners may have under this Charter Party * * * * * unless a claim has been presented to Charterers in writing with all available supporting documents, within 90(ninety) days from completion of discharge of the cargo concerned under this Charter Party."

It was held in this case that making of a claim does not by itself commence the arbitration proceedings or necessarily lead to their being commenced. The claim may be conceded or settled amicably. Donaldson, LJ observed, "In essence S. 27 empowers the court to extend the time fixed for giving notice to appoint an arbitrator, appointing an arbitrator or taking some other step to commence arbitration proceedings if doing so will prevent a claim becoming time-barred. It does not empower the court to extend any other time limits". This judgments of the Court of Appeal was distinguished in the decision cited by Mr. Watel on the ground that the arbitration clause and clause M2 were separate distinct and unrelated.

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23. I am of the view that the judgment of the Court of Appeal in *Babanaft International* v. *Avant Petroleum* (supra) referred to by Mr. Koura is more apt in the

present case. The court cannot extend the time for making a claim under clause 6.6.1.0 under S. 37(4) of the Act. Until a claim is made in accordance with this clause, there could not be any dispute which could be referred to arbitration under clause 9.0.0.0.

24. Mr. Watel made a distinction that in any case notices as regards claim Nos. 4, 8 and 9 were sent. He referred to various letters addressed by the contractor to the Corporation in this regard. I do not think any of these letters fulfils the requirements of clause 6.6.1.0. These letters were written as a matter of course without making any claim. In the letters it is complained that: drawings have not been given and "In case of any further delay all damages and idle labour charges shall be borne by the Indian Oil Corporation" (Ex. P-3 dated 9-3-1977); "The labour force is not idle at present but will be come idle if further drawings are not received" (Ex. P-4 dated 12-3-1977); "Therefore, till the full set of drawings are avail able to us the interest charge may kindly be waived" (Ex. P-5 dated 19-3-1977); "In absence of drawings we are incurring unnecessary expenditure of Rs. 2,000/- per day on account of idle labour, hire charges for machinery, stall and other miscellaneous expenses etc., which is a great loss to the company. It is requested that the drawings may be arranged and issued within 24 hours on receipt of this letter, failing which Rs. 2,000/- per day will be claimed on account of suspension of work and hampering of progress due to failure of the department to supply the requisite details/drawings" (Ex. P-6 dated 22-3-1977); "We, therefore, request you to kindly send us complete drawings along with necessary working details to enable us to proceed with the work. It is needless to point out that we have already suffered heavy financial loss due to non-availability of drawings" (Ex. P-8 dated 4-4-1977); "Our skilled labourers are sitting

idle and incurring heavy expenses. It is also noted that monsoon is approaching soon" (Ex. P-10 dated 15-4-1977); "We would like to bring to your notice time until such drawings as required by us are not given to us in full sets it is becoming difficult to expedite the work and all loss borne by us on this account shall be at the cost of the department which shall be fully liable for such charges. We do not want any piecemeal delivery of the drawings as it is not possible to plan the procurement of materials or schedule the work to be executed in a planned and phased banner" (Ex. P-11 dated 3-5-1977); and "Any delay in getting the necessary details shall cause unnecessary loss to us which shall be to your account" (Ex. P-13 dated 8-6-1977). The above are some of the examples of the 'notices' claimed by the contractor to have been sent. Mr. Watel wants me to rule that these fulfil the requirements of a "notified claim" under clause 6.6.1.0. I am afraid I cannot agree. The clause is quite simple and unambiguous and I need not refer to any rule of interpretation to construe the clause.

25. As regards the contention that it was not possible to comply with the requirements of clause 6.6.1.0 in terms in case of continuing breach, I have not been able to appreciate this argument as no particular instance of a continuing breach was brought to my notice. If the argument is relating to non-supply of drawings in time, the least the contractor could do was to give his claim within ten days of the receipt of the drawings and not wait till the whole contract was complete. No correlation has been shown as to why a notified claim could not be preferred within the period when the drawings were received and the whole contract was completed, if the argument of continuing breach is to be accepted.

26. I think it is too late in the day to contend that clause 6.6.1.0 is void merely because it not only bars the claims but the remedy as well: see *Vulcan Insurance Co.*

v. *Maharaj Singh*

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((1976) 1 SCC 943 : AIR 1976 SC 287) (9) where the Supreme Court held the following clause in an insurance policy to be valid:

> "In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

27. In any case, in the instant case the issue pertained to the arbitrability of the notified claim under cl. 9.0.0.0. What matters are agreed to be referred to arbitration depend upon the agreement between the parties. It, therefore, appears to me that cl. 9.0.0.0 would apply only to a notified claim. After taking this view, I have to hold that the present petition under S. 20 of the Act is not maintainable. Perhaps, it was not necessary for me to analyse the provisions of S. 37(4) of the Act but the arguments were intermixed and it was difficult to extricate one self from both examining the provisions of S. 20 vis-a-vis S. 37(4) of the Act particularly when the submission was that a notified claim was merely a step in proceeding to commence arbitration.

28. In view of the above discussion, it has to be held that the claim in the present case is not covered by the arbitration agreement or that it is not within the scope of the arbitration agreement. It has also to be held that the petitioner is not entitled to any extension of time under S. 37(4) of the Act. All these issues are thus held in favour of the respondent Corporation and against the petitioner contractor.

29. The suit is accordingly dismissed but with no order as to costs.

U.K.

Suit dismissed.

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1991 SCC OnLine Del 420 : (1991) 21 DRJ 322

High Court of Delhi

S No. 255-A/82

Bansal Construction Co. ... Petitioner;

Versus

Indian Oil Corporation Ltd. and Another ... Respondents.

P.K. BAHRI J.

Decided on 2.8.1991

ARBITRATION ACT, 1940

Sections 8 and 20—Direction for filing arbitration agreement and for reference of disputes to arbitrator—Claim not notified by petitioner in terms of clause of Arbitration Agreement—can be the same referred for arbitration (NO).

Held :

In the present case also, admittedly the petitioner had not notified his claim in terms of Clause 6.6.1.0 and thus, the same cannot be referred to for

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arbitration in view of the very wording of arbitration clause 9.1.0.0. So, I hold that the claim of the petitioner cannot be referred for arbitration. Issues are decided against the petitioner. Petition dismissed.

M/s. Bansal construction co....through Mr. B.K. Dewan, Advocate

Indian Oil Corporation Ltd...through Mr. V.N. Koura, Advocate & Another

P.K. BAHRI:— This petition has been filed under Sections 8 & 20 of the Arbitration Act for seeking direction for filing of the arbitration agreement and for reference of the disputes mentioned in the petition to the arbitrator to be appointed in accordance with the arbitration clause.

The petitioner had entered into a contract with the respondents for the work of "construction of effluent disposal channel out fall structure and WBM roads at MRP" operating through Mathura Refinery Project. This work was awarded to the petitioner vide letter dated October 20, 1977, with the stipulation that period of completion would be 20 months reckoned from the date of handing over of the site. It is averred that later on certain discussions took place and it was agreed on December 7, 1977, that the site shall, however, be handed over to the contractor progressively and the entire stretch of land within a maximum period of six months from the date of letter of acceptance. So, it is averred that the entire site was to be handed over latest by April 19, 1978 and it was assured that at least one-third of the land would be made available for execution of the work upto January 15, 1978. The petitioner has pleaded that, in fact, the respondents could make available only 600 meters of stretch of land against total land of 5,100 meters upto May 10, 1978. So, due to this breach of the term of the contract by the respondents, the petitioner is stated to have suffered losses for which the petitioner claims damages. It is pleaded that the entire work was completed by the petitioner on September 15, 1980, to the entire satisfaction of the respondents in terms of the contract. The petitioner had furnished security deposit of Rs. 3,27,000/- which was liable to be refunded on March 14, 1981, i.e. excluding the six months period of liability of the petitioner for maintenance of the work from the

date of the completion. The petitioner is also stated to have put up a claim for the payment of Rs. 7,72,410/-. The petitioner has pleaded that instead of releasing the security of Rs. 3,27,000/-, the respondents required the petitioner on April 3, 1981, to extend the validity period of the bank guarantee for a period of three months and the respondents were bent upon not to release the security deposit unless the petitioner agreed to reduce his claim. It is pleaded that the petitioner out of coercion agreed to receive any payment whatsoever offered by the respondents and the petitioner was then refunded his amount due to the petitioner on the basis of the work already done and Rs. 1,00,000/- out of the claim of Rs. 7,72,410/-. The petitioner then served a notice on the respondent for claiming Rs. 6,72,410/- and on failure of the respondent to pay the said claim, the petitioner has invoked the arbitration clause for reference of the disputes to the arbitrator. The details of the claim are mentioned in para 26 of the

petition. It is mentioned that the petitioner is entitled to payment on account of idle labour charges with effect from May 30, 1978 to June 15, 1978 which come to Rs. 22,035/- and the claim against the increase in the cost and material, transportation etc. the amount claimed was Rs. 7,50,375/- and after deducting Rs. 1,00,000/- already received, the petitioner has now set up his claim for Rs. 6,72,410/-. It is evident from the perusal of the petition that this claim is for damage incurred by the petitioner on account of respondent not making available the site to the petitioner within the stipulated period.

The respondents has contested the petition pleading that the petition is not maintainable as is hit by the provisions of Section 69 of the Indian partnership Act and on merits, it is pleaded that in view of the terms of the contract, articularly clauses 66.1.0 and clause 6.2.1.0. the petitioner was bound to notify the claim to the Engineer -in-Charge within ten days and the petitioner having not notified the claim in accordance with the main clause 6.6.1.0, the claim for damages is not covered by the arbitration clause 9.1.0.0.

Another plea taken is that the petitioner has accepted Rs. 1,00,000/- on full and final satisfaction of his claims and thus, is not entitled to raise any other claim which could be referred to arbitration.

Following issues were framed:

1. Is the petitioner a registered partnership firm and is the name of Shri Mahavir Prasad Bansal entered in the register of Registrar of firms as a partner thereof?
2. Whether the claims of the petitioner or any of them are notified claims within the scope of the arbitration agreement?
3. If issue No. 2 is proved, does the arbitration agreement stand discharged and extinguished as alleged by respondent No. 1?
4. Relief.

ISSUE No. 1

The matter was directed to be decided by affidavits. Shri M.P. Bansal has filed the affidavit in which he has mentioned that the petitioner is a registered partnership firm and he is one of the registered partners. In view of this affidavit which is not controverted, counsel for the respondent has not raised any contentions based on provisions of Section 69 of the Indian partnership Act. So, this issue is decided in favour of the petitioner.

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ISSUES NOS. 2& 3

Issues Nos. 2 & 3 would be dealt with together. In order to appreciate the contention being ra sed before me on these issues, it is appropriate to refer to relevant clauses of the contract. Clause 6.6.1.0 reads as follows:

"Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the contract as specified in clause 6.3.1.0 hereof or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any renning account bills or any payments due to him in terms of the contract, the contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim, nor shall the Owner anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid, and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid".

The arbitration clause contained in Clause 9.1.0.0 reads as follows:

"Subject to the provisions of Clauses 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager."

The learned counsel for the respondents has contended that unless and until the Contractor had notified his claim in consonance with the provision of Clause 6.6.1.0, the claim of the petitioner is not arbitrable in view of the clear wording of the arbitration clause.

The learned counsel for the petitioner, on the other hand, has contended that it was not incumbent on the part of the petitioner to have notified any such claim to the Engineer-in-Charge or the Site Engineer as required by Clause 6.6.1.0 and the claim in question is covered by the arbitration clause and it is for the arbitrator it decide the merited of the claim. The matter is not res integra as these two clauses appearing in

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the usual contracts of Indian Oil Corporation Limited came up for consideration in two judgements of this Court, one given in Suit No. 697-A/83, *Uttam Singh Duggal & Co. (P) Ltd.* v. *Indian Oil Corporation Limited & Another*, decided on January 8, 1985, by D.P. Wadhwa, J. and the other given in Suit No. 2399-A/85, *Associated Hybilds (P)*

Ltd. v. *Indian Oil Corporation Limited*, decided on October 15, 1987, by B.N. Kirpal, J.. In the case of *Uttam Singh Duggal* (supra) the Contractor has put up the claim alleging that there had occurred a breach of contract by the Indian Oil Corporation in furnishing the drawings. The Contractor in that case is alleged to have suffered damages for idle labour and due to escalation of prices of material and labour as the Corporation had committed breach of contract in not furnishing the drawings within the stipulated periods which delayed the execution of the work by the contractor. In the said case also, the plea was taken by the Corporation that the Contractor had failed to notify the claims in accordance with clause 6.6.10 and thus, the dispute was not arbitrable in accordance with the arbitration clause 9.1.0.0.

After dealing with all the contentions which could possible be raised in a very extensive judgement, the learned Judge came to the conclusion that unless and until the claim is notified in terms of clause 6.6.1.0 of the arbitration clause mentioned above. In the case of *Associated Hybilds (P) Ltd.* (supra), again the Contractor had set up the claim for damages on account of the Corporation not making available the site for the work within the stipulated period. The learned Judge after referring to the similar clauses clearly held that unless the claim is notified in terms of clause 6.6.1.0 the claim cannot be referred to arbitration under clause 9.1.0.0. In both the cases the petition under Section 20 was dismissed.

In the present case also, admittedly the petitioner had not notified his claim in terms of clause 6.6.1.0 and thus, the same cannot be refered to for arbitration in view of the very wording of arbitration clause 9.1.0.0. So, I hold that the claim of the petitioner cannot be refered for arbitration. Issues are decided against the petitioner.

Relief

In view of the decision in issues 2 & 3 the petition is liable to be dismissed.

I dismiss the petition, but in view of the peculiar facts of the case I leave the parties to bear their own costs.

August 2, 1991,

P.K. BAHARI J.

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1994 SCC OnLine Del 783 : (1995) 32 DRJ 354 (DB) : ILR (1995) 2 Del 293 : (1995) 57 DLT 536 : (1995) 1 Arb LR 548

HIGH COURT OF DELHI

FAO(OS) 194/94

International Bldg. & Furnishing Co.(CAL) Pvt. ltd.....Appellant;

Versus

Indian Oil Corporation Ltd.....Respondent.

M. JAGANNADHA RAO, C.J. AND ANIL DEV SINGH, J.

Decided on : Dec.20, 1994

Arbitration Act 1940

Section 33 — Arbitration clause — Interpretation of — The clause stipulating that only 'notified claims' be referred for arbitration — Contractor failing to notify the claim in accordance with the procedure prescribed — The arbitration clause cannot be invoked.

Mr. D.K. Kapoor, Sr. Adv. with Mr. B.D. Sharma, Adv. for Petitioner.

Mr. V.N. Koura with Mr. S.V. Bahadur, Advocates for Respondents.

M. JAGANNADHA RAO, C.J.— This is an appeal against the order of a learned Single Judge of this Court dated 19.8.1994. In a suit filed under Section 20 of the Arbitration Act, by the said order the learned Single Judge came to the conclusion that the arbitration clause requires "notified claims" alone to be referred to arbitration and in the present case the appellant does not have a "notified claim" which could be sent for adjudication by an Arbitrator. Hence the application was refused.

2. Aggrieved by the said order, the appellant has come up with this appeal. The brief facts of the case are that the appellant tendered for interior works (part II) furniture, furnishing etc. for construction of CMTI, Gurgaon, Haryana with the Indian Oil Corporation. A formal agreement dated 22.7.1993 was executed between the parties. The estimated value of the works was Rs. 77,71,667 based on schedule of fates annexed with letter dated 31.3.1993. The appellant was required to deposit a sum of Rs. 1,94,300 as security deposit being 2.5% of the accepted value as stipulated under clause 2.12 of the General Conditions of Contract. The appellant furnished bank guarantee for Rs. 1,94,300. According to the appellant, he completed the work to the tune of Rs. 13,30,933, but the respondent company did not make payment of the running bill. On that ground, the appellant gave a telegram on 20.2.1994 to the respondent informing that the appellant does not intend to proceed with the execution of the work. The appellant claimed Rs. 13,30,933 towards Work done for which running bill has been submitted, Rs. 6,50,000 towards loss of profit which the appellant would have earned, if he had been allowed to complete the work, and also sought release of the bank guarantee of Rs. 1,94,300.

3. When the appellant filed the case for reference to arbitration, the respondent contended that the Court could not refer the matter to arbitration inasmuch as the appellant had no "notified claim". What is meant by a "notified claim" must be

gathered from clauses 6.6.1.0 and 6.6.3.0 of the contract. A reading of the above clause 6.6.1.0 would show that in case the contractor considered "that he was entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the contract as specified in clause 6.3.1.0. or in case the contractor wanted to dispute the validity of any deductions made Or threatened by the owner from any running account bills or any payments due to him in terms of the contract, the contractor shall forthwith *give notice* in writing of his claim in this behalf to the *Engineer-in-Charge* and the *Site Engineer* within ten days from the date of the issue of orders or instructions relative to any works for which the contractor claim such additional payment or compensation. The said notice shall give full particulars of the nature of such claim, grounds on which it was based, and the amount claimed." The clause makes-it clear that unless the contractor has a notified claim by following this procedure, "the contractor shall not be entitled to raise any claim nor shall the owner anywise be liable in respect of any claim by the contractor unless *notice of such claim* shall have been given by the contractor to the *Engineer-in-Charge* and the *Site Engineer* in the manner and within the time as aforesaid". The clause further mentions what happens if

the contractor does not follow this procedure. It says "the contractor shall be deemed to have waived any or all the claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid".

4. So far as the other clause 6.6.3.0 is concerned, it makes it clear that "any or all claims of the contractor *notified* in the manner in which provided in clause 6.6.1.0 shall remain at the time of preparation of final bill by the contractor, then the same could be separately included in the final bill in the form of a statement of claims attached thereto, giving particulars of the contractor in the claim, ground on which it is based, and the amount claimed and shall be supported by copies of the *notices sent in respect thereof to the Engineer-in-Charge* and the *Site Engineer under clause 6.6.1.0.*

5. Then comes the arbitration clause 9.0.1.0 which reads as follows:—

> "Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 here of, any dispute or difference between the parties hereto arising out Of any "*notified claim* of the contractor included in his final bill in accordance with the provisions of clause 6.6.3.0 hereof and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner or any part thereof shall have been deducted from the final bill of the contractor or any amount paid by the owner to the contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the contractor from a panel of three persons nominated by the General Manager."
>
> 'Owner' here means the respondent, Indian Oil Corporation.

6. A reading of the arbitration clause shows that subject to certain other clauses referred to therein "any dispute or difference between the parties hereto arising out of any "*notified claim*" of the contractor included in his final bill in accordance-with the provisions of clause 6.6.3.0 hereof and/or arising out of any amount claimed by the owner (Indian Oil Corporation here) ... shall be referred to arbitration by a Sole Arbitrator selected by the contractor from a panel of three persons nominated by the General Manager".

7. It is, therefore, clear that arbitration at the instance of the contractor is available under clause 9.0.1.0 *only* in respect of "notified claims". That would mean that the contractor must have gone through the procedure indicated in clauses 6.6.1.0 and 6.6.3.0 and notified his claims to the Engineer-in-Charge and the Site Engineer within the period of ten days of the date of issue of orders or instructions relative to any works for which

the contractor was claiming such additional payment or compensation. In such a situation it is obvious that if the claim is not a "notified claim", the arbitration clause cannot be invoked by the contractor.

8. In the present case, when we asked the counsel as to whether the claims sought to be referred to arbitration are claims notified to the Engineer-in-Charge or Site Engineer as above mentioned, learned counsel for the appellant passed on certain papers to us, which we found/were not notices to the above said officers, but were notices to the General Manager of the respondent seeking arbitration under clause 9.0.1.0. Learned counsel for the appellant has not been able to place before us any notice to the particular officers designated in the contract so that it could be said that he had "notified claims" to be referred to arbitration.

9. The clauses relating to arbitration in the present case before us are similar to the clauses contained in the agreements entered into by the same company, viz. Indian Oil Corporation, which came up before this Court for adjudication earlier. The first such case is the one relating to *Uttam Singh Duggal and Co. (O) Ltd* v. *Indian Oil Corporation Ltd & Anr. (Suit No. 967-A of 1983)* decided by D.P. Wadhwa, J on 8.1.1985. By a very elaborate Judgment the learned Judge has referred to various rulings. Initially he referred to the decision of the Supreme Court in *Vulcan Insurance Co.* v. *Maharaj Singh* (AIR 1976 S.C. 287). In that case the Supreme Court held the following clause in an insurance policy to be valid:

> "In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

10. The learned Judge also followed the decision of the Court of Appeal in *Babanaft International* v. *Avant Petroleum* (1982) 3 All E.R. 244). In that case the arbitration clause provided that any or all disputes of whatsoever nature arising out of a chartered party be put to arbitration in the City of London. It contained no time limit for commencing arbitration proceedings. There was another clause being clause M2 which was separate from the arbitration clause which read as follows:—

> "Charterers shall be discharged and released from all liability in respect of any claims Owners may have under this Charter Party .....unless a claim has been presented to Charterers in writing with all available supporting documents, within 90 (ninety) days from completion of discharge of the cargo concerned under this Charter Party".

In that case it was held by the Court of Appeal that the making of a claim does not by itself commence the arbitration proceedings or necessarily lead to their being

commenced. The claims may be conceded or settled amicably. The Court of Appeal held that Section 27 of the English Arbitration Act did not permit the Court to extend any time limit other than in respect of the categories mentioned in that section and therefore, the Court could not extend time for the making of a claim. Following the said judgment, Wadhwa, J held that a claim had to be notified as required by clause 9.0.1.0. and to become a "notified claim" the contractor must have given notice thereof in writing before the Engineer-in-Charge and the Site Engineer within ten days from the date of the issue of orders or instructions relative to any works for which the contractor claimed such additional payment or compensation and that it was not open to the Court to extend the said time. Otherwise, reference to arbitration was not permissible.

11. We are in entire agreement with the view taken by Wadhwa,J in the above said case. The said decision was followed by B.N. Kirpal, J (as he then was) in Suit No. 2399-A of 1985—*Associated Hybilds Pvt. Ltd* v. *Indian Oil Corporation Ltd decided on 15.10.1987.* This case was again followed by P.K. Bahri, J in *Bansal Construction Co.* v. *Indian Oil Corporation Ltd & Anr—Suit No. 255-A of 1982 decided on 2.8.1991.* In all these three cases the contract was with the Indian Oil Corporation and the very same clauses 9.0.1.0., 6.6.1.0 and 6.6.3.0 fell for consideration and the view was taken that unless the claim was a "notified claim" there could be no reference to arbitration. The effect of the above decision would be that if the claim was not a "notified claim", the party could not invoke the arbitration clause but must resort to other civil remedies, subject of course to any other conditions incorporated in the contract between the parties.

12. Learned counsel for the appellant, however, relied on another decision of Bahri, J in *P.K. Kukreja* v. *D.D.A. and Others—Suit No. 3552/92 decided on 17.8.1994* and yet another decision of the same learned Judge in *Saraswati Construction Company* v. *East Delhi Co-operative Group Housing Society Limited—Suit No 785A/93 decided on 12.8.1994.* In these two latter cases, the learned Judge took the view that the Court could refer the matter to arbitration and certain clauses fixing time limits for raising claims could not be treated as mandatory. We do not express any opinion whether such a clause could not be treated as mandatory. However, in the first of these cases Bahri J. followed an earlier Full Bench decision of the Delhi High Court in *Ved Prakash Mittal* v. *Union of India* (AIR 1984 Delhi 325) in which similar clause for arbitration had come up

for consideration. The Full Bench came to the conclusion that the question whether the claims have been raised or not within 90 days and the effect of not raising the claim within 90 days, was for the arbitrator to decide but reference to arbitration could be made. To that extent, there is no difficulty, as stated below. But that does not offend the view taken by this Court in relation to the cases of Indian Oil Corporation. We shall explain the position a little more in detail.

13. In our view, the principle of the Full Bench in *Ved Prakash Mittal's case* now stands accepted by the Supreme Court in *Union of India* v. *L.K. Ahuja & Co.*, (a case which came up from Allahabad) Sabyasachi Mukherjee, J. (as he then was) after referring to *Jiwnani Engg. Works (P) Ltd.* v. *Union of India* (AIR 1978 Cal. 228) decided by His Lordship while in Calcutta High Court, observed that "it will be entirely be wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act, and secondly, whether the claim to be

adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts, a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation". Therefore, the distinction is clear enough. While in the case before us and before Wadhwa,J., the question was whether the claim, not being a 'notified claim' was referable, the position before the Full Bench in *Ved Prakash's case* was whether the claim was barred. In the latter case, it would be for the arbitrator to decide whether the claim was barred.

14. The distinction in these types of cases has been brought out clearly in yet another judgment of this Court decided by one of us (Anil Dev Singh, J.) in *Gas Authority of India Ltd* v. *SPIE CAPAG* (1993 (4) Delhi Lawyer 192). After referring to several cases of the English Courts, it was held that there is a distinction between "a claim being barred" which is for the arbitrator to decide and "an arbitration or reference being barred" in respect of specific disputes which is for the Court to decide when the reference is sought or when stay of suit is applied for. In that case, the judgment of Wadhwa, J. in *Indian Oil Corporation's case* was considered and clauses therein were referred to. On facts, following the principle in the *Indian Oil Corporation* cases it was held that the clause in *Gas Authority of India Ltd* case also barred the Court to make a reference in respect of the claim and that it was not a case where the question was merely whether the claim was barred or waived, which would be for the arbitrator to decide.

15. We find that Full Bench case in *Ved Prakash Mittal* was in fact distinguished by Wadhwa,J in *Uttam Singh Duggal's case*, already referred to. It

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was pointed out that in *Ved Prakash Mittal's case* the contractor had issued a letter on 29.6.1981 asking the respondent therein to appoint an arbitrator. The Chief Engineer refused to make the appointment. The reason he gave was that the contractor had made the request for appointment of an arbitrator after the expiry of 90 days and it was a term of the clause that such a request should be made within 90 days, otherwise the Government shall be discharged and released of all liabilities and all claims would be deemed to have been waived. It was held that at the stage of reference, the Court had only to see whether there were disputes and whether all those disputes were to be referred to arbitration and as to whether the claims were waived or not, was for the arbitrator to decide. That was the view of the Full Bench that, at the stage of reference, the Court was not concerned with the question whether any claim was barred by time. Wadhwa,J held that the question involved in *Uttam Singh Duggal's case* was whether the claim was a "notified claim" which alone could be referred to arbitration and not whether the claim was barred by time, as an Ved Prakash's case. Likewise, the learned Judge distinguished *Jai Chand Bhasin* v. *Union of India* (AIR 1983 Delhi 508) which was a Division Bench case approved by the Full Bench.

16. We are in entire agreement with the view taken in the *Indian Oil Corporation's case* by Wadhwa,J and the manner in which the learned Judge distinguished the decision of the Full Bench in *Ved Prakash Mittai'_s* and the decision of the Division Bench in *Jai Chand Bhasin* v. *Union of India* (AIR 1983 Delhi 508). We hold that the two latter decisions of Bahri,J in *Kukreja and Saraswati Construction* cases are,—for the same reasons assigned by Wadhwa,J. -, distinguishable.

17. The question before us is whether the claim is a "notified claim" so as to be referred to the arbitrator. If the claim is not a notified claim, there is no agreement to

refer the claim to arbitration. The words "notified claim" are given a particular meaning in the agreement of the parties. It is only those claims which can be referred. We are not here concerned with the question whether a claim is time barred and therefore deemed to be waived by the party as in the Full Bench case. If the matter goes to the civil court because we are declining arbitration, it will be for that court to decide whether the claim is barred or whether there is any waiver of the claim.

For the aforesaid reasons, the appeal fails and is dismissed.

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1998 SCC OnLine Del 118 : (1998) 44 DRJ 753 : (1998) 72 DLT 23 : (1998) 1 Arb LR 344 : (1998) 1 Arb LR 515

HIGH COURT OF DELHI

S.No. 3749/90

Sarup Lal Singhla.....Petitioner;

Versus

National Fertilizers Ltd.....Respondents.

J.B. GOEL, J.

Decided on : February 18, 1998

Arbitration Act, 1940

Section 20 — Reference to arbitration — Considerations for — There must exist an arbitration agreement, a dispute arising out of agreement and the petition must be within limitation before a reference to arbitration can be claimed.

Section 20 — Reference to arbitration — Referable claim — The terms of agreement stipulating that the claim should be a claim notified by the contractor in accordance with the contract — Reference in respect of a claim not notified, is not permissible.

Cases referred

Jai Chand Bhasin v. *Union of India*	AIR 1983 Del 508 (DB)
Ved Prakash Mittal v. *Union of India*	AIR 1984 Del 325 (FB)
Navbharat Dal Mills v. *Food Corporation of India*	1993 (1) Arb.LR 298 (DB) (Del)
Uttam Singh Duggal & Co. (P) Ltd. v. *Indian Oil Corpn. Ltd.*	ILR (1985) II, Delhi 131
Bansal Construction Co. v. *Indian Oil Corpn. Ltd.*	1991 (2) Arb.LR 409 (Delhi)
International Building and Furnishing Co. (Cal) Pvt. Ltd. v. *Indian Oil Corpn. Ltd.*	57 (1995) DLT 536 (DB)
Gas Authority of India Ltd. v. *SPIE CAPA G.S.A.*	AIR 1994 Del, 75
Union of India v. *L.K. Ahuja &Co.*	JT 1988 (2) SC, 82 : (AIR 1988 SC 1172)

Mr. G.N. Aggarwal, Advocate with Mr. Girish Aggarwal, Advocate for Petitioner.

Mr. V.P. Singh, Sr. Advocate with Mr. H. Hararu, Advocate

J.B. GOEL, J.— This petition under Section 20 of the Arbitration Act, 1940 (for short 'the Act') was formerly presented in the Court of Senior Sub Judge, Bhatinda.

However, on being returned due to lack of territorial jurisdiction this has been presented in this Court. The plaintiff wants that the disputes be referred to an arbitrator.

Briefly the facts are that the work of construction of external services in Phase-III at NFL Township (civil) Bhatinda was awarded to the plaintiff on the terms and conditions of the tender notice and a formal agreement was also entered into between the parties. The work was to start on 3rd September, 1981, and was to be completed in 15 months on 3rd December, 1982 but it was actually completed on 31st December, 1983. The plaintiff used to submit his running bills from time to time; payments against these bills were made and final bill was submitted on 6.2.84 against that payment was made

on 11.6.1984. The plaintiff had furnished a "No Claim Certificate" at the time of payment of the Final Bill in full and final settlement of his claims.

The plaintiff has alleged that during the execution of the work on the verbal orders of the officers of the defendant he had executed extra items of work over and above the agreed works for which he was orally assured that payment for these extra items of work would be made after the completion of the work; payments 'on account' were made and the payment against the final bill was made after making deductions arbitrarily and illegally and the receipt for full and final payment was obtained by putting pressure and coercion. As payment for the extra items of work has not been made in the final bill, he vide his letter dated 16.1.1985 made claim in respect of those extra items of work as per details given in Annexure-A but the respondent repudiated this claim in their letter dated 18.3.1985. His demand for reference of the disputes for arbitration was also refused. Hence this petition.

Defendant in their written statement have denied the claim of the petitioner. It is denied that the defendant has got done extra items of work from the plaintiff or any promise as alleged was made for making payments for any extra items of work. Payments against running bills were made in accordance with the contract and payment against final bill dated 6.2.1984 was made on 11.6.84 when the plaintiff has given a receipt with "No Claim Certificate" in token of full and final payment received by him. As there is no outstanding claims of the plaintiff against the defendant the arbitration clause does not survive. It is also alleged that only 'Notified Claim' could be referred for arbitration and the claims in question are not such 'Notified claims' as demand in respect thereof was not made in accordance with the terms of the contract. As such the disputes in question are not covered by the arbitration clause. It is thus denied that any claim subsists or that the disputes in question are referable for arbitration.

On the pleadings of the parties the following issues were framed on May 3, 1993:

1.Does the arbitration agreement between the parties not survive? OPD

2.Whether disputes and differences are not within the ambit of the arbitration agreement between the parties?

3.Whether the petitioner is estopped from seeking reference of alleged disputes to arbitration on the grounds as alleged by the respondent?

4.Relief.

Both the parties have led evidence by way of affidavit. The plaintiff has filed his own affidavit whereas on behalf of the defendant affidavit of Shri R.S. Sandhu, its manager was filed.

Learned counsel for the plaintiff has contended that the disputed claim relates to extra items of work done by the petitioner for which the payment has not been made inspite of demand and thus disputes have arisen which are to be decided by arbitration in accordance with arbitration clause; and the question whether the disputes/claims are barred by limitation or otherwise are not to be gone into by this Court but to be decided by the Arbitrator. He has inter alia relied on *Jai Chand Bhasin* v. *Union of India* AIR 1983 Delhi 508 (DB); *Ved Prakash Mittal* v. *Union of India & Ors.* AIR 1984 Delhi 325 (FB)

and *Navbharat Dal Mills* v. *Food Corporation of India and Anr.* 1993 (1) Arb. Law Reporter 298 (DB) (Delhi).

Whereas learned counsel for the defendant has contended that under the arbitration clause only disputes in respect of "notified claims" as defined under and raised in accordance with clauses 6.6.1.0 and 6.6.3.0 are referable for arbitration as these provisions have not been complied, the dispute raised now is not referable for arbitration; also that full and final payment against final bill has been accepted with "No Claim Certificate" and for this reason also no dispute subsists and the arbitration agreement also does not survive. According to him, the case law relied on behalf of the plaintiff is not applicable. Reliance has been placed on *Uttam Singh Duggal & Co. (P) Ltd.* v. *Indian Oil Corpn. Ltd. and Anr.* ILR (1985) II, Delhi 131; *Bansal Construction Co.* v. *Indian Oil Corpn. Ltd. &Anr.* 1991 (2) Arb. Law Reporter 409 (Delhi), *International Building and Furnishing Co. (Cat) Pvt. Ltd.* v. *Indian Oil Corpn. Ltd.* 57 (1995) DLT 536 (DB) and *Gas Authority of India Ltd.* v. *SPIE CAPAG S.A. & Ors.* AIR 1994 Del, 75.

In order to be a valid claim for reference under Section 20 of the Act, it is necessary that firstly, there should be an arbitration agreement; secondly, differences must arise to which the agreement in question applied and thirdly, that must be within time as stipulated in Section 20 of the Act. For a dispute to arise or exist there must be an entitlement to money and a difference or dispute in respect of the same. (*Union of India & Ann* v. *M/s. L.K. Ahuja & Co.* JT 1988 (2) SC, 82)

Thus existence of a dispute contemplated by the arbitration agreement/clause is essential for appointment of an arbitrator for a reference under Section 20 of the Act. The jurisdiction of the arbitrators is only that which is conferred on them by the consent of the parties as represented in the agreement and the claim for arbitration must be made in accordance with the provisions of the agreement and within the time limit prescribed thereunder. Where a dispute does not fall within arbitration clause, reference as well as award will be without jurisdiction and null and void.

The dispute in question was raised by the plaintiff in his letter dated 16.1.85 (Ex. P-1), after his final bill was settled, raising 12 items of claims of the value of Rs. 6,15,700/-. This was repudiated by the respondent in their letter dated 18.3.1985 (Ex. P-2) in the following terms:—

> "We do not find any genuinity in the claims and you have been paid full payment for the value of work done as per terms and conditions of the contract. You have never brought any such discrepancy to the notice of the Engineer incharge or the competent authority at any stage for such short payment and clause No. 6.6.1.0 is very much clear on this subject. This is also to make it clear to you that you have submitted no claim certificate towards settlement of all claims and payments while accepting final payment for the subject work.

In view of the above we hereby repudiate all your claims put up as referred above. This is issued without prejudice on either side."

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The claim was obviously repudiated on two grounds, (i) that the claim was not raised under Clause 6.6.1.1.0, and (ii) final payment was accepted in full and final payment/settlement and 'No Claim Certificate' was given.

It is not disputed that the claims now raised by the plaintiff pertain to alleged extra items of work done beyond the work specifically agreed to be done under the contract. To appreciate the controversy involved it will be proper to refer to relevant clauses of the contract between the parties. These are as follows:—

1.0.23.0"Notified Claim" shall mean a claim of the Contractor notified in accordance with the provisions of Clause 6.6.1.0 hereof.

6.6.1.0Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any Running Account Bills or any payments due to him in the terms of the Contract the Contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claims such additional payment or compensation or on the happening of other event upon which the Contractor basis such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim, nor shall the Owner anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid.

6.6.3.0Any or all claims of the Contractor notified in accordance with provisions of Clause 6.6.1.0 hereof as shall remain/persist at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of claims attached thereto, giving particulars of the nature of such claim, grounds on which it is Based, and the amount claimed, and shall be supported by a copy (copies) of the notice(s) sent in respect thereof to the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any material particular be at variance with the claim notified by the Contractor within the provision of 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

6.6.3.1 Any and all notified claims not specifically reflected and included in the final bill in accordance with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived by the Contractor, and the Owner shall

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have no liability in respect thereof and the Contractor shall not be entitled to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects in accordance with the provisions of Clause 6.6.3.0 hereof.

ARBITRATION CLAUSE:

9.1.0.0Subject to the provisions of Clauses 6.7.1.0 and 6.7.2.0 hereof any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his final bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the Engineer-in-Charge.

In this case the dispute is not that the defendant (meaning the owner under the agreement) has raised any claim, for recovery of excess amount paid to, or for making any deduction from the final bill of the plaintiff. As such the only other dispute that would fall under the arbitration clause is "any dispute or difference between the parties hereto arising out of any "Notified Claim" of the contractor included in his final bill in accordance with the provisions of clause 6.6.3.0." of the contract.

"Notified Claim" as defined in Clause 1.0.23.0 reproduced earlier, is that claim of the contractor which is notified under Clause 6.6.1.0. Under Clause 6.6.1.0 where a contractor feels entitled to any extra payment for compensation in respect of the works over and above the amounts due in terms of the contract he is required (i) forthwith to give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer; (ii) Within 10 days from the issue of orders or instructions related to such works; and (iii) with full particulars of (a) the nature of such claims, (b) grounds on which it was based and (c) the amount claimed". The observance of these formalities are mandatory as otherwise the consequence of non-compliance of this procedure/conditions are also given in this clause itself as "the contractor shall not be entitled to raise any claim nor shall the owner any wise be liable in respect of any claims by the contractor" and further "the contractor shall be deemed to have waived any or all the claims and all his rights in respect of any claim not so notified".

In case this procedure of clause 6.6.1.0 is observed and any such notified claims remain outstanding or unsatisfied at the time of the preparation of the final bill, the same shall be separately included in the final bill prepared by the contractor in the form of a statement of claims and attached thereto, giving particulars and details as are required to be given in the earlier notice supported by a copy (copies) of the notice (s) sent in respect thereof under Clause 6.6.10:

In case of any variance in such claim with the claim notified under Clause 6.6.1.0 it shall be deemed to be a claim different from the notified claim with the consequences as given in Clauses 6.6.1.0 and 6.6.3.1.

It is not the case of the plaintiff pleaded in the plaint that the claims now sought to be raised were so notified within ten days with the details, particulars, dates and the

amounts as required under Clause 6.6.1.0 nor that these were included in a separate statement with the said details and particulars and submitted alongwith the final bill as required under Clause 6.6.3.0. alongwith requisite notice (s) Non-fulfilment of the conditions of Clauses 6.6.1.0 and 6.6.3.0 will take the claim outside the category of "Notified Claim". Under Clause 9.1.0.0 only the notified pa claim could be referred to arbitration. The dispute has to be raised in accordance with the provision of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. This position is well established, in view of the following decisions of this Court.

In *Uttam Singh Duggal And Co. (P) Ltd.* v. *Indian Oil Corpn. Ltd. & Anr.* (supra) where identical terms of the contract fell for consideration, it was held that unless the claim was a "notified claim" there could be no reference to arbitration. That decision has been followed later on in *Associated Hybilds Pvt. Ltd.* v. *Indian Oil Corpn. Ltd.* (Suit No. 2399-A of 1985 decided on 15.10.87), in *M/s. Bansal Construction Co.* v. *Indian Oil Corpn. Ltd. and Anr.* (supra) and again by a Division Bench of this Court in *International Building and Furnishing* v. *Indian Oil Corpn. Ltd.* (supra) and in *Gas Authority of India Ltd.* v. *SPIE CAPAG, S.A. & Ors.* (supra). In the last mentioned case after referring to the relevant case law both Indian and English such a clause like Clauses 6.6.1.0 and 6.6.3.0 has been held to be valid and binding between the parties. And it has further been held in that case that it is for the court to determine whether the matter is an "Excepted Matter" or not.

In *Ved Prakash Mittal's case* (supra) relied on behalf of the plaintiff it was a term of the contract that a demand for reference for arbitration should be made within 90 days of receiving the intimation from the Government that the bill is ready for payment, otherwise the claim of the contractor will be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims. The contractor had made request for appointment of arbitrator after the expiry of 90 days. The arbitration clause provided that "all questions and disputes shall be referred to the sole arbitration of.....". It was held that at the stage of reference, the Court has only to see whether there were disputes and whether all those disputes were to be referred to arbitration and as to whether the claims were waived or not was for the arbitrator to decide and the court was not concerned with the question whether any claim was barred by time. The Full Bench Judgment in the case of Ved Prakash Mittal had approved and followed another earlier Division Bench judgment in *Jai Chand Bhasin* v. *Union of India* (supra) where similar clause was under consideration. These two cases were considered but distinguished in *M/s. Uttam Singh Duggal's case* (supra) where it was held that the question involved in that case was whether the claim was a notified claim which alone could be referred to arbitration and not whether the arbitration was barred by time as was the case in *Ved Prakash Mittal's case* and *Jai Chand Bhasin's case.* The case of *Navbharat Dal Mills* v. *Food Corporation of India* (supra) has simply followed *Jai Chand Bhasin's case*

(supra) and *Ved Prakash Mittal's case* (supra) in similar circumstances. In *Union of India* v. *L.K Ahuja & Co.* (AIR 1988 SC, 1172) such a distinction has been noticed where it was observed that "it will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and secondly whether the claim to be adjudicated by the arbitrator was barred by

lapse of time. The second is a matter which the arbitrator would decide unless however, if on admitted facts, a claim is found at the time of making an order under Section 20 of the Act to be barred by limitation". This distinction has also been pointed out in *Gas Authority of India Ltd.* v. *SPIE CAPAG S..A. & Ors.* AIR 1994 Del.75.

The question in the present case is not whether the claim is barred but whether the claim is a 'notified claim' and, if not, whether it was referable to arbitration.

As noticed above, the claim/dispute raised in the present case is not a "notified claim" under Clause 1.0.23.0 read with Clauses 6.6.1.0, 6.6.3.0 and 6.6.3.1 and as such is not referable to arbitration under arbitration clause 9.1.0.0.

Issue No. 2 is thus decided in the negative against the plaintiff and in favour of the defendant.

In that view of the matter, it is unnecessary to go into the question whether the claim is barred or whether there was a discharge of the contract by accord and satisfaction or not because of acceptance of payment in full and final satisfaction of the final bill and the plaintiff having issued 'No Claim Certificate'. Issue Nos. 1 and 3 are un-necessary to be decided.

This petition, thus, has no merit and the same is hereby dismissed with costs. Costs Rs. 4,000/—.

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1998 SCC OnLine Del 229 : (1998) 2 Arb LR 393

Delhi High Court

(BEFORE S.N. KAPOOR, J.)

A.B.G. Heavy Industries Ltd. ... Appellant;

Versus

Indian Oil Corporation ... Respondent.

Suit No. 1831A of 1995

Decided on March 30, 1998

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The Judgment of the Court was delivered by

S.N. KAPOOR, J.:— This judgment shall dispose of a petition under Section 20 of the Arbitration Act, 1940.

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2. According to the petitioner's case, "*Modification and Associated Work of Vacuum Column and Crude Column at Mathura Refinery*" was given to the petitioner company on 20th August, 1991. Since the Mathura refinery was required to be shut down the work was to be completed within a short span of 12 days, it included increase in capacity of one of the vessels of the refinery which required specialised skills and machineries. Various unforeseen situations were encountered while executing the contract. Accordingly, the site engineer was informed of the same and configuration of the job was changed. Stainless steel lining was required to be grinded. In the peculiar circumstances of the case and the nature of the job, ten days notice in writing was not possible. The petitioner carried out the task under the instructions from the engineer incharge at site in all their goods faith and mutual understanding of extra payment. Hence, the accepted mode of notice between the parties was oral notice. On completion of the work the petitioner had to submit their final bill dated 27th November, 1991 exclusive of the amount for the extra work carried out by the petitioner, for the bill for extra work was rejected vide letter dated 11th May, 1993 vide Annexures D and E. Accordingly, dispute and differences arose. Clause 9 of the General Conditions of the Contract dated 20th August, 1991 provided for settlement of disputes between the parties by means of reference to an arbitrator, namely, the contract itself. However, the respondent Corporation gave a panel of three persons, all employees of the respondent Corporation. A copy of the agreement to refer the dispute is Annexure F.

3. Parties accordingly referred the dispute to the arbitration by Mr. J.K. Verma, General Manager, Mathura Refinery.

4. According to the petitioner, Mr. J.K. Verma, learned arbitrator, misconducted

himself and the proceedings. He adopted the procedure of special nature which was unheard of. The petitioner did not agree to such a short-cut procedure; raised objections and moved an application before the arbitrator requesting him to desist from going ahead with the arbitration proceedings in view of the expiry of statutory time period.

5. The learned arbitrator ultimately in the minutes of meeting dated 9th November, 1994 expressed his unwillingness to continue as an arbitrator and adjourned the arbitration proceeding sine die. On April 6, 1995, he resigned as an arbitrator. Vide Annexures O and P.

6. The petitioner is seeking appointment of a new arbitrator for adjudicating upon the disputes mentioned in paragraph 28 of the petition.

7. This petition is being contested by the respondent Corporation on the ground that Clause 9.0.0.0 of the General Conditions of Contract (hereinafter called "the GCC" for short) is confined to notified claims of the petitioner in accordance with Clause 6.6.1.0 and including final bill in 6.6.3.0. It is also claimed that numerous claims as mentioned in reply to paragraph 28 are neither notified claims nor included by the petitioner in the final bill and therefore, claim relating thereto is, therefore, not maintainable and no reference can be made to the arbitration of such claims as the same are not covered by the arbitration agreement. Appointment of arbitrator by the Court is opposed also on the ground that new arbitrator can only be appointed in accordance with the arbitration agreement between the parties for notified claims of the petitioner. No

other claim referred to in the petition can be referred to arbitration. Clause 9.0.0.0 of the GCC does not provide for supplying a vacancy by an outside arbitrator or for the appointment of any arbitrator other than those nominated in the clause.

8. I have heard learned counsel for the parties and gone through the record.

9. Following points need consideration:

(a) Whether the claims which are not notified in writing and not included in the bill can be referred to arbitration ?

(b) Whether the Court could supply the vacancy by an outside arbitrator not contemplated in Clause 9 ?

(c) Relief.

Point A

10. In so far as the question of reference on non-notified claims is concerned, the matter is amply settled by not one but several judgments of this court, including a judgment of D.B. However, before referring to those judgments, it would be desirable to refer to various Clauses of the arbitration agreement. Relevant Clauses of the GCC are reproduced as under:

> 1.0. 24.0. "Notified Claim" shall mean a claim of the Contractor notified in acceptance with the provisions of Clause 6.6.1.0.
>
> 6.6.0. 0. Claims by the Contractor.
>
> 6.6.1.0. Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the contract as specified in Clause 6.3.1.0 here of or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any Running Accounts Bills or any payments due to him in terms of

the contract, the Contractor shall forthwith given notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of issue of orders or instruction relative to any works for which the Contractor claim such additional payment or compensation, or on the happening of other event upon which the Contractor based such claim and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim nor shall the Owner anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the Manner and within the time aforesaid, and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim nor notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid.

6.6.3.0. Any or all claims of the Contractor notified in accordance with the provision of Clause 6.6.1.0 here of as shall remain persist at the time of preparation of Final Bill by the Contract or shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of claims attached thereto, giving particulars of the Contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s)

sent in respect there of the Engineer-in-Chief and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any material particular be at variance with the claim notified by the Contractor within the provision of Clause 6.6.1.0. hereto, it shall be deemed to be a claim different from the notified claim with consequence in respect there of indicated in Clause 6.6.1.0 hereof, and within consequence in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

6.6.3.1. Any and all notified claims not specifically reflected and included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 here of shall be deemed to have been waived by the Contractor, and the Owner shall have no liability in respect there of and the Contractor shall not be entitled to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0. 1.0. Subject to the provisions of Clauses 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the Parties arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 here of and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part there of shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager.

9.1.3.0. No award shall be challenged, nor shall be Contractor refuse to make an appointment within the provisions of Clause 9.1.0.0 here of on the ground that any person nominated by the General Manager or appointed by the Contractor pursuant to the provisions of the said clause, is an employee of the Owner is or otherwise howsoever connected with the Owner."

11. A similar contract came to be interpreted by this court in *Uttam Singh Duggal &*

Co. (P.) Ltd. v. *Indian Oil Corporation Ltd.*[1] Analysing the clauses in the said case, it has been held that it has first to be seen if there was a dispute to which the arbitration clause applies; in fact if reference is made to the arbitration clause in the present case, no time limit is prescribed for the appointment of the arbitrator. Ultimately it was held that even time could not be extended in case the conditions in the aforesaid clauses were satisfied.

12. A Division Bench of this Court in FAO (OS) 194/94, *Internation Building and Furnishing Co. (Cal.) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*[2], made the following observations in regard to similar kind of clause.

> "We are in entire agreement with the view taken in the *Indian Oil Corporation's case* by Wadhwa, J. and the manner in which the learned Judge distinguished the decision of the Full Bench in *Ved Prakash Mittal* v. *Union of India*[3], and the decision of the Division Bench in *Jai Chand Bhasin* v. *Union of India*[4]. We hold that the two latter decisions of Bahri, J. in *Kukreja* and *Saraswati Construction cases* are, for the same reasons assigned by Wadhwa, J.

> The question before us is whether the claim is a "notified claim" so as to be referred to the arbitrator. If the claim is not a notified claim, there is no agreement to refer the claim of arbitration. The words "notified claim" are given a particular meaning in the agreement of the parties. It is only those claims which can be referred. We are not here concerned with the question whether a claim is time barred and therefore, deemed to be waived by the party as in the Full Bench case. If the matter goes to the Civil Court because we are declining arbitration, it will be for that court to decide whether the claim is barred or whether there is any waiver of the claim.
>
> For the aforesaid reasons, the appeal fails and is dismissed."

13. In response to the plea that the petitioner could not given notice, a single Judge of this Court in *P.N. Shah* v. *Indian Oil Corporation Ltd.*[5]. observed as under:

> "Learned counsel for the petitioner submits that in fact the petitioner could not have given notice to the Engineer-in-Charge earlier during the execution of the work in regard to its basic claims pertaining to prolongation of work beyond the stipulated period on completion and the change effected by the respondent in the size of the pipes. If that be so, then the case of the petitioner does not fall within the purview of the clause 6.0.1.0 of the agreement. In this view of the matter, the claim of the petitioner would also not fall within clause 9.0.1.0 of the agreement as that clause is attracted only when the claims of the contractor have been notified in accordance within Clause 6.6.1.0.

14. Same view was taking in *Bansal Construction Co.* v. *Indian Oil Corporation Ltd.*[6], and *Associated Hybilds Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*[7]

15. There cannot be any dispute with the proposition that "the meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation" as has been held in *Union of India* v. *D.M. Revri & Co.*[8]. Adopting the same commonsense approach, when

(i) the intention appears to be to nip in the bud to forestall the eveil of fake claims raised sub-sequently.

(ii) by laying down detailed procedure and by creating a mechanism to meet the urgent needs by making an engineer-in-charge and site engineer available to lodge the claim, and

(iii) by specifically requiring notice in writing within 10 days, it cannot be said that these clauses of the contact could be interpreted otherwise. In case' written notice was not required within 10 days from the date of issue of order or instructions relating to any additional work, it might possibly be interpreted as submitted by learned counsel for the petitioner.

16. There cannot be any dispute with the proposition that 'Notice' does not necessarily mean 'communication in writing' as had been held in *Nilkantha Sidramappa*

Ningashetti v. *Kathinath Somanna Ningashetti*[9]. But "notice in writing" can never be an oral intimation. As such, this submission is of no help to the petitioner.

17. Another submission of the learned counsel for the petitioner is that objection to refer the matter to arbitration cannot be sustained for three reasons. Firstly, the respondent did not raise the objection to the inclusion of claims notified orally being outside the scope of the scope. Secondly, in *International Building and Furnishing Co. (Cai.) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.* (supra), (Pr. 12) this court has held that such a provision is not mandatory. Thirdly, the question of arbitrability of dispute must be decided by the arbitrator and not by the court in the light of *T.N. Electricity Board* v. *Bridge Tunnel Construction*[10]. I find that while the legal propositions cannot be disputed, in the present context this submission cannot be accepted. In so far as non-notified claims are concerned in absence of any agreement, reference could not be made. Moreover, this question related to scope of reference and consequently to the jurisdiction of the arbitrator. Secondly, in *Internation Building and Furnishing Co.* v. *Indian Oil Corporation Ltd.* (supra), distinction between "a claim being barred" which is for the arbitrator to decide and "an arbitration reference being barred" in respect of sepcific disputes which is for the court to decide, was clarified and followed by refusing to refer such disputes. Since the objection relates to jurisdiction it can be taken at any state. As regards nature of clause being mandatory or otherwise, *Intemation Building and Furnishing Co. (Cai.) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.* (supra), the Division Bench of this Court has not approved the view taken in earlier judgments and refused to express and any opinion whether such clause would not be treated as mandatory. Submission of the learned counsel for the respondent that seeing the purpose, the context and requirements, it is mandatory, cannot be rejected out of hand. As such this objection cannot be ignored by this court. Consequently, it is not possible to hold any view different from the view expressed by this Court in *Intemation Building and Furnishing Co.* (supra), and *Uttam Singh Duggal & Co. (P.) Ltd.* (supra).

18. Accordingly, if any dispute does not relate to a notified claim covered by Clauses 1.0.24.0, 6.6.1.0 or 6.6.3.1, it cannot be referred to arbitration. This point is decided accordingly.

Point B

19. Before this court considers the question of supplying the vacancy, the court in the peculiar facts and circumstances, has to consider first whether there is any notified claim which could be referred for arbitration. In this regard, it may be mentioned that in respect of following claims, there is no dispute that they are notified claims and reference is permissible under the clauses referred to above.

(i) Out of the numerous claims referred to in para 28(b) of the petition and concerning bills dated 19th October 1992, the claims mentioned at SI. No. 5, 7, 9, 14, 15, 16, 23, 24 and 26 at p. 112 to 117 of Annexure R to the petition;

(ii) Claim raised in bill dated 20th November 1992 for Rs. 19,576,85P.:

(iii) Claims mentioned in paras 28(i) and (j) are notified claims.

20. About other claims mentioned in various paras, of para 28 of the petition, the petitioner does not claim that any notice in writing was given within 10 days, as required under Clauses 6.6.1.0, 6.6.3.0 and 6.6.3.1 and obviously in view of the decision on point A, they cannot be referred for arbitration. However, this court need not go into the question of limitation and waiver etc., in respect of non-notified claims and leave the matter to be decided by Civil Court for this court is bound to decline arbitration in view of the judgment of Division Bench of this court in *Internation Building and Furnishing Co. (Cal.) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.* (supra). It will be for the Civil Court to decide whether the claim is barred or there is waiver of the claim or not.

21. In so far as notified claims are concerned, the matter could possibly be referred to for arbitration.

22. However, in this condition, the submission of the learned counsel, for the respondent is that the arbitrator should be a neutral arbitrator and not one from the panel to be chosen from the respondent's General Manager. On the other hand, it is contended by learned counsel for the petitioner that in any event, Clause 9 of GCC does not provide for supply of vacancy by an outside arbitrator or for the appointment of any arbitrator than those nominated in Clauses 9.0.1.0 and 9.1.3.0 read as under:

> 9.0. 1.0. Subject to the provisions of Clauses 6.7.1.0 and 6.7.2.0 thereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his final bill in accordance with the provisions of Clause 6.6.3.0. here of and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part there of shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to OB the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager.
>
> 9.1.3.0. No award shall be challenged, nor shall be Contractor refuse to make an appointment with the provisions of Clause 9.1.0.0 here of on the ground that any person nominated by the General Manager or appointed by the Contractor pursuant to the provisions of the said clause, is an employee of the Owner is or otherwise howsoever connected with the Owner.

23. If both the clauses are read together,

(i) arbitrator has to be a sole arbitrator;

(ii) it has to be selected by the contractor from the panel of three persons nominated by the General Manager, and

(iii). the contractor shall not refuse to make an appointment within the provisions of Clause 9.1.0.0 on the ground that any person nominated by the General Manager or appointed by the contractor pursuant to the proviso of said clause is an employee of the owner is or otherwise howsoever, connected with the owner.

24. It gives an indication that arbitrator could only be a person from a panel of three persons nominated by the General Manager.

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25. Learned Counsel for the petitioner referred to *Arvind Construction Co. Ltd.* v. *Engineering Projects India Ltd.*[11], in support of his contention that in that case vacancy could be supplied by the court for there is no provision in the arbitration agreement between the parties regarding filling up the vacancy of the arbitrator by the respondent itself. Accordingly, in view of Section 20(4) the vacancy may be supplied. However, the observations of Hon'ble Mr. Justice B.N. Kirpal do not support the contention of learned counsel for the petitioner in its entirely for the court observed:

> "In terns of the clause, the Chairman and Managing, Director himself can act as the sole arbitrator but I think the court, while exercising powers under Section 20(4) of the Arbitration Act, can direct that if the Chairman and Managing Director does not himself act as the sole arbitrator and decides to appoint another person as the sole arbitrator then the person to be so appointed should belong to a profession or a category suggested by the court. Such a direction by the court would not, to my mind, be contrary to the provision of the arbitration clause because the arbitration clause postulates the selection of the arbitrator by the Chairman & Managing Director and as long as this discretion remains with the appointing authority merely suggesting or directing the appointment of particular type of arbitrator would not be contrary to the arbitration clause."

26. These observations make it clear that this court was just directing the Managing Director to supply the vacancy and for supplying the vacancy certain suggestions were also made.

27. However, in a *pari material* case, *Indian Drugs & Pharmaceuticals Ltd.* v. *Indo Swiss Synthetics Gem Manufacturing Co. Ltd.*[12], Supreme Court in response to similar submissions made following observations in para 16.

> "....He prays that any retired High Court Judge may be appointed as an arbitrator by us. We have not felt inclined to accept this submission, because arbitration clause states categorically that the difference dispute shall be referred "to an arbitrator appointed by the Chairman and Managing Director of IDPL" (Indian Drugs and Pharmaceutical Limited) who is the appellant. This provision in the arbitration clause cannot be given a go-bye merely at the askance of the respondent unless he challenged its binding nature in an appropriate proceeding which he did not do."

28. Accordingly, since arbitration clause states categorically that "any dispute or differences....shall be referred to arbitration by a sole arbitrator selected by the contracto from the panel of three persons nominated by General Manager", in the light of the observations in *Indian Drugs & Pharmaceuticals Ltd.* v. *Indo Swiss Synthetics Gem Manufacturing Co. Ltd.* (supra), this provision in arbitration clause cannot be given a go-bye merely at the instance of the petitioner. In Govt, of Andhra the arbitration agreement provided for arbitration of 3 persons holding specific post. Civil Court ordered appointment of sole arbitrator. Supreme Court set aside the order and directed the trial Court to refer the dispute for decision to "the present Chief Engineer, Srisailam Project, Deputy Secretary to Govt., Finance Department and Director

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of Accounts, Sriramsagar Project with a direction to the parties to cooperate in concluding the proceedings expeditiously". Objections that the petitioner participated before the sole arbitrator (under protest) and the sole arbitrator has given award were overruled and the award was also set aside. This also indicates that the agreement of arbitration by specified persons cannot be ignored and if vacancy is to be supplied, it has to be supplied out of the specified class of person(s), as the case may be.

29. For the abovesaid reasons, it is held that while vacancy can be supplied in absence of any provision to the contract in the arbitration clause, it has to be supplied in terms of the agreement. Accordingly, the notified disputes cannot be referred for arbitration to any person not contemplated in Clause 9.

Point C: Relief

30. Now an altogether different facet of the same point is required to be seen. In *Prabhat General Agencies etc.* v. *Union of India*[13]. The Supreme Court observed in para 4 of the judgment as under:

> 4. Section 20 is merely a machinery provision. The subtantive rights of the parties are found in Section 8(1)(b). Before Section 8(1)(b) can come into operation it must be shown that
>
> (1) there is an agreement between the parties to refer the dispute to arbitration;
>
> (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute;
>
> (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died;
>
> (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled; and
>
> (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

31. Apart from this, it may further be added that in view of proviso to Section 8(1), the party may serve the other parties or the arbitrator as the case may be with a written notice to concur in the appointment or in supplying the vacancy. The right would arise only "if the appointment is not made within 15 clear days after service of the said notice, and thereafter the court may appoint on the application of the party who gave the notice." It means that the petition under Section 8 of the Arbitration Act read with Section 20 could not be filed without service of 15 clear days notice. In the petition, it is nowhere alleged that any such notice was given. As such, it would appear that the petition itself may not be competent as it is. But this would just amount to taking too technical a view which is likely to thwart substantial justice Filing of the petition itself is sufficient notice for Section 8(2) does not provide for written notice though service of notice may be interpreted to be written notice also.

32. For the foregoing reasons and, in order to do substantial justice in between the parties, it is desirable that for referring the disputes relating to notified claims

mentioned in para 28 of the petition the General Manager may nominate a panel of three persons within three weeks from today and the contractor may select one of them out of the panel of three persons so nominated by the General Manager for reference of disputes to the person so selected within two weeks thereafter.

33. The petition is disposed of accordingly. Parties are left to bear their own cost.

34. *Petition allowed.*

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[1] 1987 (1) Arb. LR 281.

[2] 1995 (32) DRJ 354 : 1995 (1) Arb. LR 548.

[3] 1984 (26) DLT 35 : 1985 Arb. LR 443.

[4] AIR 1983 Delhi 508 : 1983 Arb. LR 191.

[5] Suit No. 3220-A/89.

[6] 1991 (21) DRJ 322 : 1991 (2) Arb. LR 409.

[7] Suit No. 2399A/85 decided on 15th OCT, 1997.

[8] (1976) 4 SCC 147 : AIR 1976 SC 2257 (4).

[9] AIR 1962 SC 666.

[10] (1997) 4 SCC 121 : 1997 (2) Arb. LR 1.

[11] (1988) 35 DLT 250 : 1988 (2) Arb. LR 236.

[12] (1996) 1 SCC 54 : AIR 1996 SC 543.

[13] (1971) 1 SCC 79 : AIR 1971 SC 2298.

(2002) 4 Supreme Court Cases 45

(BEFORE R.C. LAHOTI AND BRIJESH KUMAR, JJ.)

GENERAL MANAGER, NORTHERN RAILWAY AND ANOTHER . . Appellants;

Versus

SARVESH CHOPRA . . Respondent.

Civil Appeal No. 1791 of 2002[‡], decided on March 1, 2002

A. **Arbitration Act, 1940 — S. 20 — Reference to arbitration — Held, must be the result of a judicial determination by the court that dispute sought to be referred is covered by the arbitration agreement — Therefore, if any claim comes within an "excepted" matter clause then such claim cannot be referred to arbitration — Clarified that it is not necessary that the contract between the parties should have provided for the settling of such an excepted claim by an authority appointed by the employer — Where respondent contractor's statement of claims did not even give any suggestion as to why four claims regarding delay, machinery lying idle and increase in cost of materials should not be considered to be covered by the "excepted matter" category under clause 63 of the General Conditions read with the Special Conditions of railway contracts, held on facts, the claims came under "excepted matters" — Division Bench of High Court erred in allowing respondent's appeal and referring the four claims to arbitration — Words and Phrases — "No claim/liability/damage clause"**

B. **Arbitration Act, 1940 — Ss. 20 and 17 — Arbitrability of a claim — Issue as to, held, may be determined at three stages: (i) while making**

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reference to arbitration; (ii) in the course of arbitral proceedings; and (iii) while making the award a rule of court

C. **Arbitration Act, 1940 — S. 20 — Excepted matters — Losses resulting from delay by employer not covered by arbitration agreement — Held, under Indian law a claim would be entertainable if: (i) contractor repudiates contract exercising rights under S. 55, Contract Act; (ii) employer extends time by entering into supplemental agreement or providing for compensation for the delay; or (iii) contractor gives notice that compensation for escalation of rates or delay would have to be made by employer and employer then accepts performance by the contractor despite delay or price rise — Contract Act, 1872, Ss. 55 and 56 — Compensation for delay**

D. **Constitution of India — Art. 141 — Held, a decision of the Supreme Court is only an authority for a proposition which it decides — Propositions should not be extracted from that which the Court has not really decided — Doctrines — Doctrine of stare decisis**

Allowing the appeal, the Supreme Court

Held :

Those claims which are covered by several clauses of the Special Conditions of the contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2, 11.3 and 21.5 of the Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railways", or "no claim will/shall be entertained". These are "no claim", "no damage", or "no liability" clauses. The other category of claims is where the dispute or difference has to be determined by an authority of the Railways as provided in the relevant clause. The first category is an "excepted matter" because the claim as per the terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon

by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in clause 63 refers to the second category of "excepted matters".

(Para 8)

The submission that an "excepted matter" should be one covered by a clause which provides for a departmental remedy and is not arbitrable for that reason cannot be justified on the basis of decisions in *Vishwanath Sood* v. *Union of India* and *FCI* v. *Sreekanth Transport*. A decision of the Supreme Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on. Those decisions cannot be read as holding nor can be relied on as an authority for the proposition by reading them in a negative way that if a departmental remedy for settlement of claim was not provided then the claim would cease to be an "excepted matter" and such should be read as the decision of the Supreme Court.

(Para 9)

Vishwanath Sood v. *Union of India*, (1989) 1 SCC 657; *Food Corpn. of India* v. *Sreekanth Transport*, (1999) 4 SCC 491, *distinguished*

While dealing with a petition under Section 20 of the Arbitration Act, 1940 the court has to examine: (i) whether there is an arbitration agreement between

the parties, (ii) whether the difference which has arisen is one to which the arbitration agreement applies, and (iii) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word "agreement" finding place in the expression "where a difference has arisen to which the agreement applies", in sub-section (1) of Section 20 means "arbitration agreement". The reference to an arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the court; it is a consequence of judicial determination, the court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to arbitral adjudication is one to which the arbitration agreement applies. It is not possible to subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by the arbitrator and such determination cannot be done by the court at any stage.

(Paras 10 and 19)

Food Corpn. of India v. *Sreekanth Transport*, (1999) 4 SCC 491; *Union of India* v. *Popular Builders*, (2000) 8 SCC 1; *Steel Authority of India Ltd.* v. *J.C. Budharaja, Govt. and Mining Contractor*, (1999) 8 SCC 122; *Ch. Ramalinga Reddy* v. *Superintending Engineer*, (1999) 9 SCC 610 : (1994) 5 Scale 67; *Alopi Parshad and Sons Ltd.* v. *Union of India*, AIR 1960 SC 588 : (1960) 2 SCR 793; *Prabartak Commercial Corpn. Ltd.* v. *Chief Administrator, Dandakaranya Project*, (1991) 1 SCC 498, *relied on*

In India the question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option.

(Para 15)

Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015), *relied on*

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising

his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

(Para 15)

Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of "excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the court will look at the nature of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the

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arbitration agreement does not apply, and therefore, the court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator.

(Para 16)

Continental Construction Co. Ltd. v. *State of M.P.*, (1988) 3 SCC 82; *Ch. Ramalinga Reddy* v. *Superintending Engineer*, (1999) 9 SCC 610 : (1994) 5 Scale 67, *relied on*

State of A.P. v. *Associated Engineering Enterprises, Hyderabad*, AIR 1990 AP 294 : (1989) 2 An LT 372, *approved*

Hudson's Building and Engineering Contracts (11th Edn., pp. 1098-99), *referred to*

To sum up: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (iii) an issue as to arbitrability of claim is available for determination at all the three stages — while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court.

(Para 17)

Russell on Arbitration (21st Edn., 1997) states vide para 1-027 (at p. 15), *relied on*

In the present case the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was not right in directing the said four claims to be referred to arbitration.

(Para 18)

The impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored.

(Para 20)

A-M/ATZ/25430/C

Advocates who appeared in this case:

Mukul Rohatgi, Additional Solicitor-General (A.D.N. Rao and Ms Anil Katiyar,

Advocates, with him) for the Appellants;

K.R. Gupta, Ms Neena Gupta, S. Chakraborty and Sudhir Kr. Gupta, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2000) 8 SCC 1, *Union of India* v. *Popular Builders* 53*c-d*

2. (1999) 9 SCC 610 : (1994) 5 Scale 67, *Ch. Ramalinga Reddy* v. *Superintending Engineer* 53*c-d*, 54*a*

3. (1999) 8 SCC 122, *Steel Authority of India Ltd.* v. *J.C. Budharaja, Govt. and Mining Contractor* 53*c-d*

4. (1999) 4 SCC 491, *Food Corpn. of India* v. *Sreekanth Transport* 52*b-c*, 52*c-d*, 53*b-c*

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5. (1991) 1 SCC 498, *Prabartak Commercial Corpn. Ltd.* v. *Chief Administrator, Dandakaranya Project* 53*d-e*

6. AIR 1990 AP 294 : (1989) 2 An LT 372, *State of A.P.* v. *Associated Engineering Enterprises, Hyderabad* 54*c*

7. (1989) 1 SCC 657, *Vishwanath Sood* v. *Union of India* 52*b-c*, 52*c*

8. (1988) 3 SCC 82, *Continental Construction Co. Ltd.* v. *State of M.P.* 53*e-f*

9. AIR 1960 SC 588 : (1960) 2 SCR 793, *Alopi Parshad and Sons Ltd.* v. *Union of India* 53*d*

The Judgment of the Court was delivered by

R.C. LAHOTI, J.— The respondent was granted by the appellants work of construction on bored piles 500 mm dia by cast in situ method for widening and raising of Pul Mithai (S). A contract was entered into between the parties on 27-4-1985. The contract is subject to the General Conditions of the contract of the Railways read with Special Conditions. Disputes arose between the parties and the respondent moved a petition under Section 20 of the Arbitration Act, 1940 praying for the arbitration agreement being filed in the court and six claims set out in the petition being referred to the arbitrator for settlement. The learned Single Judge of the High Court of Delhi (original side) directed two claims to be referred but as to Claims 3 to 6,

formed an opinion that the claims being "excepted matters" within the meaning of clause 63 of the General Conditions of the contract were not liable to be referred to arbitration. An intra-court appeal preferred by the respondent has been allowed and the four claims have also been directed to be referred by the Division Bench to the arbitrator on forming an opinion that they were not covered by "excepted matters". The appellants have filed this petition seeking special leave to appeal against the decision of the Division Bench.

2. Leave granted.

3. Clause 63 of the General Conditions of the contract provides as under:

"*Matters finally determined by the Railways.*—All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railways and the Railways shall within a reasonable time after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 18, 22(5), 39, 45(*a*), 55, 55-A(5), 61(2) and 62(1)(XII)(B)(*e*)(*b*) of the General Conditions of the contract or in any clauses of the Special Conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the contractor, provided, further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration."

4. Clauses 9.2, 11.3 and 21.5 of the Special Conditions of the contract are as under:

"*9.2*. No material price variation or wages escalation on any account whatsoever and compensation for *force majeure* etc. shall be payable under this contract.

11.3. No claim whatsoever will be entertained by the Railways on account of any delay or hold-up of the works arising out of delay in supply of drawings, changes, modifications, alterations, additions, omissions, omissions in the site layout plans or detailed drawings or designs and/or late supply of such materials as are required to be arranged by the Railways or due to any other factor on railway accounts.

21.5. No claim for idle labour and/or idle machinery etc. on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss."

5. Claims 3 to 6, whereon reference is sought for by the respondent to the arbitrator are as under:

3. There occurred tremendous increase in the cost of building materials. 52 Nos. of piles were bored after the expiry of stipulated completion period and particularly when the prices were too high. Additional cost incurred @ Rs 250 for these 42 Nos. of piles may please be paid. This has also been verified by your staff at site, Rs 250 × 42=Rs 10,500.

4. Piling rig with diesel-driven wench, mixture, machine, driving pipe, wheelbarrows, hoppers and other tools and plants remained idle at site for 24 months i.e. for 75 days. The entire machinery was procured from the market on hire

charges. Rent was paid @ Rs 1070 per day for this machinery. Hire charges amounting to Rs 80,250 (1070 × 75) may please be reimbursed.

5. The site was not made available for one month. Changes took place and decisions were delayed. The work which was required to be completed within 3 1/2 months dragged on for an additional period of 6 months. Establishment period of 6 months at a cost of Rs 10,000 per month. These losses may please be paid (Rs 10,000 × 6=Rs 60,000).

6. The work of Rs 5,95,000 was required to be completed within 3 1/2 months, meaning thereby, monthly progress would not be less than Rs 1,75,000. As against the entire work could be completed within a period of 9 1/2 months i.e. Rs 75,000 per month. The losses sustained for less output may be compensated and this comes to Rs 40,000."

6. According to the appellants, Claims 3, 4 and 5 are covered respectively by clauses 9.2, 21.5 and 11.3. Claim 6 is covered by clause 11.3 of the Special Conditions. On this there does not appear to be any serious controversy. The core issue is the interpretation of clause 63 of the General Conditions and Section 20 of the Arbitration Act, 1940.

7. A bare reading of clause 63 shows that it consists of three parts. Firstly, it is an arbitration agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with "excepted matters". "Excepted matters" are divided into two categories: (*i*) matters for which

provision has been made in specified clauses of the General Conditions, and (*ii*) matters covered by any clauses of the Special Conditions of the contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and hence shall not be referred to arbitration. The source of controversy is the expression: "matters for which provision has been made ... in any of the clauses of the Special Conditions of the contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor". It is submitted by the learned counsel for the respondent that to qualify as "excepted matters" not only the relevant clause must find mention in that part of the contract which deals with Special Conditions but should also provide for a decision by an authority of the Railways by way of an "in-house remedy", which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an "excepted matter". The learned counsel supported his submission by reading out a few clauses of the General Conditions and Special Conditions. For example, vide clause 18 of the General Conditions any question or dispute as to the commission of any offence or compensation payable to the Railways shall be settled by the General Manager of the Railways in such manner as he shall consider fit and sufficient and his decision shall be final and conclusive. Vide clause 2.4.2(*b*) of the Special Conditions, a claim for compensation arising on account of dissolution of a contractor's firm is to be decided by the Chief Engineer (Construction) of the Railways and his decision in the matter shall be final and binding on the contractor. Vide clause 12.1.2 of the Special

Conditions, a dispute whether the cement stored in the godown of the contractor is fit for the work, is to be decided by the Engineer of the Railways and his decision shall be final and binding on the contractor. The learned counsel submitted that so long as the remedy of decision by someone though he may be an authority of the Railways is not provided for, the contractor's claim cannot be left in the lurch by including the same in "excepted matters". We find it difficult to agree.

8. In our opinion those claims which are covered by several clauses of the Special Conditions of the contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2, 11.3 and 21.5 of the Special Conditions are illustrative of such claims. Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railways", or "no claim will/shall be entertained". These are "no claim", "no damage", or "no liability" clauses. The other category of claims is where the dispute or difference has to be determined by an authority of the Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned counsel for the respondent by way of illustration from

several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clauses 2.4.2(*b*) and 12.1.2. The first category is an "excepted matter" because the claim as per the terms and conditions of the contract is simply not entertainable; the second category of claims falls within "excepted matters" because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in clause 63 refers to the second category of "excepted matters".

9. The learned counsel for the respondent placed reliance on *Vishwanath Sood* v. *Union of India*[1] and *Food Corpn. of India* v. *Sreekanth Transport*[2] to strengthen his submission that an "excepted matter" should be one covered by a clause which provides for a departmental remedy and is not arbitrable for that reason. We have carefully perused both the decisions. *Vishwanath Sood case*[1] is one wherein clause 2 of the contract envisaged determination of the amount of compensation for the delay in the execution of work only by the Superintending Engineer whose decision in writing shall be final. In *Food Corpn. of India case*[2] also the relevant clause provided for the decision of the Senior Officer being final and binding between the parties. Both were considered to be "excepted matters". A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on. The two decisions relied on by the learned counsel for the respondent hold a clause providing a departmental or an in-house remedy and attaching finality to the decision therein to be an "excepted matter" because such were the clauses in the contracts which came up for the consideration of this Court. Those decisions cannot be read as holding nor can be relied on as an authority for the proposition by reading them in a negative way that if a departmental remedy for settlement of claim was not provided then the claim would cease to be an "excepted matter" and such should be read as the decision of this Court.

10. It was next submitted by the learned counsel for the respondent that if this

Court was not inclined to agree with the submission of the learned counsel for the respondent and the interpretation sought to be placed by him on the meaning of "excepted matter" then whether or not the claim raised by the contractor is an "excepted matter" should be left to be determined by the arbitrator. It was submitted by him that while dealing with a petition under Section 20 of the Arbitration Act, 1940 the court should order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties leaving it open for the arbitrator to adjudicate whether a claim should be held to be not entertainable or awardable, being an "excepted matter". With this submission too we find it difficult to agree. While dealing with a petition under Section 20, the court has to examine: (*i*) whether there is an

arbitration agreement between the parties, (*ii*) whether the difference which has arisen is one to which the arbitration agreement applies, and (*iii*) whether there is a cause, shown to be sufficient, to decline an order of reference to the arbitrator. The word "agreement" finding place in the expression "where a difference has arisen to which the agreement applies", in sub-section (1) of Section 20 means "arbitration agreement". The reference to an arbitrator on a petition filed under Section 20 is not a function to be discharged mechanically or ministerially by the court; it is a consequence of judicial determination, the court having applied its mind to the requirements of Section 20 and formed an opinion, that the difference sought to be referred to arbitral adjudication is one to which the arbitration agreement applies. In the case of *Food Corpn. of India*[2] relied on by the learned counsel for the respondent, it has been held as the consistent view of this Court that in the event of the claims arising within the ambit of "excepted matters", the question of assumption of jurisdiction by any arbitrator either with or without the intervention of the court would not arise. In *Union of India* v. *Popular Builders*[3] and *Steel Authority of India Ltd.* v. *J.C. Budharaja, Govt. and Mining Contractor*[4], *Ch. Ramalinga Reddy* v. *Superintending Engineer*[5] (para 18) and *Aiopi Parshad and Sons Ltd.* v. *Union of India*[6] SCR at p. 804 this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties would be liable to be set aside. In *Prabartak Commercial Corpn. Ltd.* v. *Chief Administrator, Dandakaranya Project*[7] a claim covered by "excepted matter" was referred to the arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This Court held that the arbitrator had no jurisdiction in the matter and that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void.

11. In *Continental Construction Co. Ltd.* v. *State of M.P.*[8] the contract provided for the work being completed by the contractor in spite of rise in prices of material and labour charges at the rates stipulated in the contract. It was held that on the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. An award given by the arbitrator for extra claim given by the contractor was held to be vitiated on the ground of misconduct of the arbitrator. There were specific clauses in the agreement which barred consideration of extra claims in the event of price escalation.

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12. In *Ch. Ramalinga Reddy* v. *Superintending Engineer*[5] claim was allowed by the arbitrator for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". Clause 59 of the A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim was found to be outside the defined exceptions. When extensions of time were granted to the appellant to complete the work the respondents made it clear that no claim for compensation would lie. For both these reasons, this Court held that it was impermissible to award such claim because the arbitrator was required to decide the claims referred to him having regard to the contract between the parties and, therefore, his jurisdiction was limited by the terms of the contract.

13. A Division Bench decision of the High Court of Andhra Pradesh in *State of A.P.* v. *Associated Engineering Enterprises, Hyderabad*[9] is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where clause 59 of the standard terms and conditions of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances to the work from any cause whatever", an award given by an arbitrator ignoring such express terms of the contract was bad. We find ourselves in agreement with the view so taken.

14. In *Hudson's Building and Engineering Contracts* (11th Edn., pp. 1098-99) there is reference to "no-damage" clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined "delays" including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefor. These "no-damage" clauses appear to have been primarily designed to protect the owner from late start or coordination claims due to other contractor delays, which would otherwise arise. Such clauses originated in the federal government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (*i*) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (*ii*) where the delay amounts to abandonment, (*iii*) where the delay is a result of positive acts of interference by the owner, and (*iv*) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and the Commonwealth. Not dissimilar

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principles have enabled some Commonwealth courts to avoid the effect of "no-damage" clauses. (See *Hudson*, *ibid.*).

15. In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in

prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, *Chitty on Contracts* (28th Edn., 1999, at p. 1106, para 22-015) states

> "a failure to perform by the stipulated time will entitle the innocent party to (*a*) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (*b*) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (*i*) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (*ii*) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (*iii*) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

16. Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of "excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the court will look at the nature of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the arbitration agreement does not apply, and therefore, the court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the

arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. *Russell on Arbitration* (21st Edn., 1997) states vide para 1-027 (at p. 15):

> "*Arbitrability.*—The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the Tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the Tribunal lacks substantive jurisdiction and third, on an

application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non-arbitrability as a ground for a court refusing to recognize and enforce an award."

17. To sum up, our conclusions are: (*i*) while deciding a petition under Section 20 of the Arbitration Act, 1940, the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (*ii*) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (*iii*) an issue as to arbitrability of claim is available for determination at all the three stages — while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court.

18. In the case before us, the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration.

19. After the hearing was concluded the learned counsel for the respondent cited a few decisions by making a mention, wherein the view taken is that "interpretation of contract" is a matter for the arbitrator to decide and the court cannot substitute its own decision in place of the decision of the arbitrator. We do not think that the cited cases have any relevance for deciding the question arising for consideration in this appeal. None of the cases is an authority for the proposition that the question whether a claim is

an "excepted matter" or not must be left to be decided by the arbitrator only and not adjudicated upon by the court while disposing of a petition under Section 20 of the Arbitration Act, 1940. We cannot subscribe to the view that interpretation of arbitration clause itself can be or should be left to be determined by the arbitrator and such determination cannot be done by the court at any stage.

20. For the foregoing reasons we are of the opinion that the view of the "excepted matters" taken by the Division Bench of the High Court cannot be sustained. The appeal is allowed, the impugned decision of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored. No order as to the costs.

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† From the Judgment and Order dated 28-2-2000 of the Delhi High Court in FAO No. 31 of 1989

[1] (1989) 1 SCC 657

[2] (1999) 4 SCC 491

[3] (2000) 8 SCC 1

[4] (1999) 8 SCC 122

[5] (1999) 9 SCC 610 : (1994) 5 Scale 67

[6] AIR 1960 SC 588 : (1960) 2 SCR 793

[7] (1991) 1 SCC 498

[8] (1988) 3 SCC 82

[9] AIR 1990 AP 294 : (1989) 2 An LT 372

2006 SCC OnLine Bom 1106 : (2007) 1 Mah LJ 825 : (2006) 6 Bom CR 465

Bombay High Court
O.O.C.J., Bombay
Arbitration and Conciliation Act, Section 7, 9 and 34
BEFORE D.K. DESHMUKH, J.

Indian Oil Corporation Ltd. ... Petitioner;
Versus
Artson Engineering Ltd., Mumbai ... Respondent.
Arbitration Petition No. 408 of 2005
Decided on November 9, 2006

(a) Arbitration and Conciliation Act (26 of 1996), SS. 7, 11(5) and 15(2) — Jurisdiction of the arbitrator is governed by the arbitration agreement — Appointment of substitute for an arbitrator — When an arbitrator is substituted, the jurisdiction of the arbitrator is not enhanced or reduced by the Court or the judicial authority.

The provisions of sections 11(5) and 15(2) of the Arbitration and Conciliation Act show that when the mandate of 'A' arbitrator is terminated his substitute is to be appointed by following the same procedure which is provided for appointment of arbitrator which was followed while appointing the arbitrator whose mandate was terminated, and the Chief Justice or his nominee under subsection (5) of section 11 of the Act gets power to appoint an arbitrator on failure of the parties to appoint an arbitrator. Both these provisions have no bearing on enlarging the jurisdiction of the arbitrator or restricting the jurisdiction of the arbitrator. Under these provisions only an arbitrator is substituted, the jurisdiction of the arbitrator is not enhanced or reduced by the Court or the judicial authority. The jurisdiction of the arbitrator is governed by the arbitration agreement. Perusal of section 7 of the Act shows that a judicial authority or Court does not have power to modify the arbitration agreement between the parties. Therefore, the order of the Court dated 7-7-2003 appointing a substitute arbitrator can by no stretch of imagination be read to enhance the jurisdiction of the arbitrator to decide the claims which are not arbitrable according to the arbitration clause.

(Para 7)

(b) Arbitration and Conciliation Act (26 of 1996), S. 34(2) — Jurisdiction of the arbitrator — If the claim itself is not arbitrable it does not become arbitrable only because of its inclusion in the notice invoking the arbitration clause.

The jurisdiction of the arbitrator is governed by the arbitration agreement between the parties and merely because a claim is included in the arbitration notice and denied by the other party, if the claim itself is not arbitrable, it does not become arbitrable only because of its inclusion in the notice invoking the arbitration clause.

(Para 8)

(c) Arbitration and Conciliation Act (26 of 1996), SS. 9 and 7 — Jurisdiction of arbitrator to make an award — Where claims are not notified arbitrator has no jurisdiction to make an award in such claims.

(Para 9)

(d) Arbitration and Conciliation Act (26 of 1996), S. 34 — Petition for setting aside the arbitral award — Ground which was never urged before the arbitrator cannot be permitted to be raised for the first time before the High Court.

(Para 10)

(e) Arbitration and Conciliation Act (26 of 1996), S. 34(4) — Adjournment of proceedings to enable the Arbitrator to eliminate the ground for setting aside the Award — Such power can be exercised by the Court only at the request of the parties.

(Para 11)

For Petitioner: *R.P. Bhatt with M.R. Bhatt* instructed by *B.K. and Girdharilal*

For Respondent: *Milind Vasudeo* instructed by *Ms. Swapnila Rane*

The Judgment of the Court was delivered by

By this petition the Award dated 30-6-2005 made by the learned sole Arbitrator directing the petitioner to pay to the respondent an amount of Rs. 3,12,74,444/- with interest, is challenged. The facts that are relevant and material for deciding this petition are that the respondent entered into a contract for execution of work of "Crude Distribution System" for AU V project at Gujarat Refinery site Vadodara of the petitioner-Indian Oil Corporation Ltd. The contract contained an arbitration clause. As per the arbitration clause in case of dispute on receipt of notice of arbitration from the claimant, the General Manager of the petitioner had to nominate a panel of three persons and the claimant had to select one of them as sole arbitrator. The respondent filed the petition under section 9 of the Arbitration and Conciliation Act, 1996 being Arbitration Application No. 31 of 2002. In that petition, the parties arrived at the consent terms. By virtue of those consent terms one Mr. H. Parekh was appointed as arbitrator. By the consent terms time for malting award was fixed. During the period that was fixed for making the award Mr. Parekh could not make the award. The parties did not agree on extension of term of the Arbitrator. Therefore, proceedings were initiated in this Court and in those proceedings in place of Mr. H. Parekh, Hon'ble Mr. Justice A.B. Palkar (Retired) was appointed as sole Arbitrator. Before the new Arbitrator the parties appeared, filed their pleadings, produced evidence and the learned Arbitrator made the Award directing the petitioner to pay to the respondent the aforementioned sum with interest.

2. Perusal of the Award shows that before the learned Arbitrator amounts were claimed on seven accounts. The learned Arbitrator in paragraph 20 of the Award has described those claims as (a) to (g). By the final Award the learned Arbitrator has issued directions to the petitioner to pay amounts to the respondent against claim Nos. (a), (b), (c), (d) and (g). The claims (e) and (f) have been rejected.

3. The principal challenge to the award is that the learned Arbitrator could not have issued a direction against the petitioner to make payment of any amount against claim (d). Perusal of paragraph 20 of the award shows that against claim (d) the respondent was claiming an amount of Rs. 26,97,759/- being the cost incurred in keeping the bank guarantee in force beyond the period require in the contract with interest at 18% per annum till the date of payment. According to the petitioner, as per the arbitration clause the arbitrator has jurisdiction to make an award in relation only to the notified claims. In short, according to the petitioner, the claim (d) was not arbitrable. According to the petitioner, under clause 9.0.1.0 and 9.1.1.0 of the General Conditions of the contract disputes and differences between the parties arising out of the notified claims of the contractor included in the final bill were only arbitrable. Claim (d) was admittedly not a notified claim and therefore, the Arbitrator had no jurisdiction to make any award in relation to that claim. According to the petitioner, therefore, the entire award is liable to be set aside. The respondent relied on the reasons that have been given by the learned Arbitrator for holding that the learned Arbitrator has

jurisdiction to make the Award in relation to claim (d). In addition it is submitted on behalf of the respondent that if the learned Arbitrator could award an amount lesser than the amount claimed in the final bill as a notified claim then by analogy the Arbitrator had power to award the amount higher than the amount claimed in the final bill. It is further submitted that by the consent terms all the disputes included in the arbitration notice dated 24-1-2002 were referred to the arbitration, and therefore, the learned Arbitrator had jurisdiction to make an Award in relation to claim (d). Then it is submitted that the petitioner has disputed the correctness of the final bill and has stated that the said bill is not a final bill. It is submitted that if the petitioner do not accept the said bill as final bill then it is not open for the petitioner to restrict the respondent to the claims notified in the final bill. It is further submitted that the claim (d) arose out of actual cost incurred by the respondent for keeping bank guarantee alive. It is submitted that there was deviation from the original contract only about giving one fresh bank guarantee instead of two bank guarantees contemplated under the contract and that right to claim cost of bank guarantee is implied in the consent terms. It is submitted that in any case claim (d) arouse out of the notified claim and therefore, it is arbitrable.

4. Now, in the light of these rival submissions, if the record of the case is perused, it appears that in the contract between the parties the arbitration clause is clause 9.0.1.0 It reads as under:—

"**9.0.1.0** Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any *dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof* and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to the contractor in respect of the work) shall be referred to arbitration by a Sole-Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager."

(emphasis supplied)

5. Perusal of the above quoted arbitration clause shows that disputes and differences between the parties arising out of any notified claim of the contractor included in the final bill in accordance with the provisions of clause 6.6.3.0 are arbitrable. Perusal of the above quoted arbitration clause shows that it has referred to three clauses in the agreement. In order to understand what is a notified claim, one has to refer to clause 6.6.1.0. It reads as under:—

"**6.6.1.0** Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amount due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any Running Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10(ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claim such additional payment or compensation, or on the happening of other event upon which the Contractor bases such claim, and such notice shall give full particulars of

the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim nor shall the Owner anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the site Engineer in the manner and within the time aforesaid and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim nor notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

6. Perusal of the above clause shows that if the contractor wants to claim any amount he is required to give notice in writing to the Engineer-in-charge and the Site Engineer. It further lays down that unless such a notice is given a contractor shall not be entitled to make any claim and the claims which are not made in this manner are deemed to have been waived. Then comes clause 6.6.3.0 which is referred to in the arbitration clause quoted above. The arbitration clause requires that the claims are to be notified in accordance with the provisions of clause 6.6.3.0. Clause 6.6.3.0 reads as under:—

"**6.6.3.0** Any or all claims of the Contractor notified in accordance with the provisions of clause 6.6.1.0 hereof shall remain at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of Claims attached thereto, giving particulars of the Contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. Insofar as such claim shall in any manner particular be at variance with the claim notified by the Contractor within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0

hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof."

7. Perusal of the above quoted clause shows that if any claims made by the contractor in accordance with the provisions of the abovequoted clause 6.6.1.0 remain undecided, they shall be included separately in the final bill. The contractor is also required to indicate the basis on which he is making the claim. He is also required to enclose copy of the notice given by him to Engineer-in-charge and Site Engineer in accordance with clause 6.6.1.0. Then comes clause 6.6.3.1. It reads as under:—

"6.6.3.1 Any and all notified claims not specifically reflected and included in the final Bill in accordance with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived by the Contractor, and the Owner shall have no liability in respect thereof and the Contractor shall not be entitled to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects in accordance with the provisions of Clause 6.6.3.0 hereof."

8. It lays down that the claims which are not included in the final bill as provided by the clause preceding those claims shall be deemed to have been waived. In my opinion clause 6.6.4.0 is also relevant. It reads as under:—

"**6.6.4.0** No claim(s) shall on any account be made by the Contractor after the Final Bill, with the intent the Final Bill prepared by the Contractor shall reflect any and all claims whatsoever of the Contractor against the Owner arising out of or in

connection with the Contract or work performed by the Contractor thereunder or relation thereto, and the Contractor shall notwithstanding any enabling provision in any law or Contract and notwithstanding any claim in quantum merit that the Contractor could have in respect thereof, be deemed to have waived any and all such claims not included in the Final Bill and to have absolved and discharged the Owner from and against the same, even if in not including the same as aforesaid, the Contractor shall have acted under a mistake of law or fact."

9. Perusal of the above quoted clause shows that all claims on any account made by the contractor after the final bill are deemed to have been waived. It is thus clear that it is only the notified claims which are arbitrable and in the contract elaborate provisions have been made for notification of claims and there is specific provision made that any claim of the contractor which is not notified in accordance with the above quoted clauses of the contract, is deemed to have been waived. It is an admitted position that so far as claim (d) is concerned, it was not notified at all and no procedure prescribed by the contract was followed in relation to that claim. It is also an admitted position that before the learned Arbitrator a specific contention was urged on behalf of the petitioner that the jurisdiction of the learned Arbitrator is restricted only to the notified claims. That contention of the petitioner has been dealt with by the learned Arbitrator in paragraph 136 and 137 of the Award. They read as under:—

"136. Mr. Bhatt Ld. Advocate for respondent drew my attention to arbitration clause contained in 9.0.1.0 and 9.1.1.0 of GCC clause 9.0.1.0 refers to dispute or difference between the parties arising for the notified

claim of contractor included in final bill. Therefore, according to Mr. Bhatt arbitration can be only in respect of claim notified in the final bill and the other claims are not arbitrable. As against this Mr. K.G. Wagle relied on the consent terms recorded in the High Court which are at pg. 680 Vol. 1 Book-2 and contended that parties by consent have varied the arbitration clause inasmuch as there was a change in the bank guarantee initially provided and one guarantee of Rs. 65 lacs was agreed to be given. Arbitration was made time bound for the first time by consent terms and therefore, there was novation in the original agreement contained in GCC arbitration clause. In fact there has been a further change in the scope of arbitrability of disputes in view of the order passed by Justice D.K. Deshmukh to which a reference has already been made. By the said order while appointing me as a substitute arbitrator, Justice D.K. Deshmukh after holding that the mandate of earlier arbitrator had come to end as per section 15 of the Arbitration and Conciliation Act 1996, ordered that the substitute arbitrator is appointed as a sole arbitrator to take up the disputes between the parties which were already referred to the arbitrator i.e. to Mr. H. Parekh whose mandate according to the order of the Ld. Judge had come to an end. Therefore, the disputes, which were referred to the earlier arbitrator now stand referred to me by virtue of this order and even the consent terms stand superseded. The disputes are the same which the claimant raised by filing claim petition before the earlier arbitrator and which claims were disputed by the respondent by filing the written statement.

137. Another aspect of the matter is arbitration notice was issued dt. 24-1-2002 by the claimant on Exhibit R-19 and its reply is at Exhibit R-20. The dispute raised in the petition were all raised in the notice and were denied by respondent and even on that ground also the claims based on the said disputes are arbitrable."

10. Perusal of the above quoted paragraphs 136 and 137 of the Award shows that the learned Arbitrator has given three reasons for holding that he is competent to

make Award in relation to claim (d). According to the learned Arbitrator the first reason is that because in the consent terms filed by the parties in the petition filed under section 9 of the Arbitration Act the arbitration was made time bound, the original arbitration clause was novated. The second reason given is that by the order passed by this Court substituting Hon'ble Mr. Justice A.B. Palkar as Arbitrator in place of Shri H. Parekh, the disputes which were referred to Shri H. Parekh stood referred to Justice A.B. Palkar and claim (d) was made by the respondent in his statement of claim therefore that claim also stood referred to Justice A.B. Palkar, therefore, he has jurisdiction to make the Award in relation to claim (d). The third reason given is that in the arbitration notice dated 24-1-2002 the respondent had included this claim and it was denied by the petitioner and therefore, the dispute becomes arbitrable.

11. Now to examine whether the first reason given by the learned Arbitrator in the Award is valid or not one has to refer to the consent terms. The consent terms to which reference is made by the learned Arbitrator in the above quoted

paragraph are dated 1-4-2002. So far as the arbitration clause is concerned, it is only clause (1) of those consent terms which is relevant. It reads as under:—

> "1. The petitioner and the respondent No. 1 agree that the arbitration between them shall be time bound and shall be concluded within a period of 8 months from the month following the month of appointment of Arbitrator. The Arbitrator shall also be bound by this condition. Subject to the above the petitioner and the respondent No. 1 by mutual consent may extend the time to conclude the arbitration, if necessary."

12. Perusal of the Clause 9.1.1.0 of the contract between the parties shows that the parties had decided that the arbitration shall be governed by the provisions of Indian Arbitration Act, 1940. Under the 1940's Act there was a time limit fixed for the arbitrator to make an award, and therefore, the parties after agreeing that the arbitration will be governed by the provisions of the 1940's Act had included following clause No. 9.1.2.0 in the contract. It reads as under:—

> "9.1.2.0 The Contractor and the Owner may by mutual agreement from time to time enlarge the time within which the Arbitrator shall make and publish his award, and the time for making and publishing the award shall accordingly stand enlarged."

13. By this clause the parties had agreed that by mutual consent they can extend the time fixed for making the Award. Perusal of the contract thus shows that when the parties entered into the agreement they had agreed that there shall be a period fixed by the parties for making of the Award and that period can be extended by mutual agreement of the parties. Clause (1) of the consent terms therefore, was in consonance with the agreement between the parties and not a modification of the agreement between the parties. Therefore, the first reason given by the learned Arbitrator that by the consent terms there was novation of the arbitration clause is incorrect.

14. So far as the second reason is concerned, the learned Arbitrator has relied on the order made by this Court dated 7-7-2003. Perusal of the order dated 7-7-2003 shows that order was made by this Court in Arbitration Petition No. 248 of 2003 and Arbitration Application No. 68 of 2003. The parties by consent terms had agreed to fix 8 months as time within which Shri H. Parekh was to make the Award. That period came to an end on 31-12-2002. The respondent did not agree to extend the term of Shri H. Parekh, instead respondent filed two proceedings before this Court, one was

Arbitration Petition No. 248 of 2003 seeking a declaration that the mandate of Shri Parekh the Arbitrator has come to an end, and the Arbitration Application No. 68 of 2003 was filed under section 11 of the Arbitration Act for appointment of substitute in place of Shri Parekh. Perusal of the order shows that this Court came to the conclusion that because the time for making the Award fixed by the consent terms came to an end, the mandate of Shri Parekh came to an end on 31-12-2002, and therefore, in terms of section 15 of the Act, a substitute arbitrator was to be appointed by following the same procedure which is provided in the contract for appointment of the arbitrator. The Court held that though according to the contract the petitioner has power to nominate the Arbitrator, because they have failed to nominate a panel as required by the contract within the time allowed by the law in terms of sub-section (5) of section 11 of the Act it is now the Chief Justice or

his nominee who can appoint the arbitrator and not the petitioner, and therefore, in exercise of power under sub-section (5) of section 11 of the Act, Hon'ble Mr. Justice A.B. Palkar was appointed as arbitrator. It is clear from the order of this Court that appointment of Hon'ble Mr. Justice A.B. Palkar as Arbitrator was made by the Court in view of the provisions of sub-section (2) of section 15 and sub-section (5) of section 11 of the Act. Those provisions read as under:—

"**11.** *Appointment of arbitrators*—

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him."

15. *Termination of mandate and substitution of arbitrator*—

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."

15. Perusal of the above quoted provisions show that when the mandate of 'A' arbitrator is terminated his substitute is to be appointed by following the same procedure which is provided for appointment of arbitrator which was followed while appointing the arbitrator whose mandate was terminated, and the Chief Justice or his nominee under sub-section (5) of section 11 of the Act gets power to appoint an arbitrator on failure of the parties to appoint an arbitrator. Both these provisions have no bearing on enlarging the jurisdiction of the arbitrator or restricting the jurisdiction of the arbitrator. Under these provisions only an arbitrator is substituted, the jurisdiction of the arbitrator is not enhanced or reduced by the Court or the judicial authority. The jurisdiction of the arbitrator is governed by the arbitration agreement. Perusal of section 7 of the Act shows that a judicial authority or Court does not have power to modify the arbitration agreement between the parties. Therefore, in my opinion, the order of the Court dated 7-7-2003 can by no stretch of imagination be read to enhance the jurisdiction of the arbitrator to decide the claims which are not arbitrable according to the arbitration clause. In my opinion, therefore, this reason given by the learned Arbitrator is completely incorrect.

16. So far as the third reason given by the learned Arbitrator is concerned, as observed above the jurisdiction of the arbitrator is governed by the arbitration agreement between the parties and merely because a claim is included in the

arbitration notice and denied by the other party, if the claim itself is not arbitrable, it does not become arbitrable only because of its inclusion in the notice invoking the arbitration clause. Therefore, this reason given by the learned Arbitrator is also not correct.

17. Thus, I find that the reasons that have been given by the learned Arbitrator, to hold that he has jurisdiction to make the Award in relation to the claims which are not notified, are not sustainable and are totally unacceptable and the conclusion reached by the learned Arbitrator in this regard is impossible conclusion.

18. A submission is made on behalf of the respondent that the amount awarded against claim (d) can be termed as cost awarded by the learned Arbitrator and therefore, the Arbitrator had jurisdiction to make the award. However, perusal of sub-section (8) of section 31 of the Act shows that the costs is well defined term and the costs incurred by a party for keeping bank guarantee alive pursuant to the agreement between the parties can by no stretch of imagination be termed as costs which the Arbitrator gets power to award. In any case, this ground does not appear to have been urged before the learned Arbitrator and has also not been referred to by the learned Arbitrator, therefore, the submission cannot be considered at the first time by this Court. It was also contended on behalf of the respondent that though claim (d) may not be itself a notified claim, but it arises out of the notified claim and therefore, the learned Arbitrator had jurisdiction to make the Award. Perusal of the terms of the contract which I have quoted above shows that there is elaborate procedure for making claims and any claim which is not made by following the procedure is deemed to have been waived, and therefore, there is no question of the Arbitrator getting jurisdiction to decide any claim arising out of the notified claim. In any case this ground was also never urged, admittedly, before the learned arbitrator and therefore, it cannot be permitted to be raised for the first time before this Court.

19. In the written submission that has been filed on behalf of the respondent, it is submitted that if this Court finds that the Award is liable to be set aside because of the directions made against claim (d), this Court should in order to eliminate the ground for setting aside the Award remit the matter back to the Arbitrator. Firstly, though the submission is made, the provision of law under which the Court can remit the award back is not pointed out by the learned Counsel appearing for respondent. The only power which the Court has in this regard is contained in section 34(4) of the Act under that power the Court can adjourn the proceedings in order to enable the Arbitrator to take steps to eliminate the ground for setting aside the Award. But perusal of that provision shows that such a power can be exercised by the Court only at the request of the parties. Therefore, I enquired from the learned Counsel appearing for respondent whether the respondent is willing to make an application under section 34(4) of the Act, the learned Counsel appearing for respondent after taking instructions stated that the respondent is not willing to make any application as contemplated by section 34(4) of the Act. Hence, I cannot make any order under section 34(4) of the Act. As I find that the learned Arbitrator has made the Award on a claim which was not arbitrable, the Award is vitiated and is liable to be set aside.

20. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondent is directed to pay cost of this petition to the petitioner as incurred by the petitioner.

Petition allowed.

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O.M.P. 104 of 2006

Indian Oil Corporation Ltd. v. Era Construction (India) Ltd.

2012 SCC OnLine Del 2425 : (2012) 189 DLT 120

Delhi High Court

(BEFORE S. MURALIDHAR, J.)

Mr. V.N. Koura with Ms. Mona Aneja and Mr. Sumit Singh Benipal, Advocates.

Indian Oil Corporation Ltd. ..... Petitioner

v.

Era Construction (India) Ltd. ..... Respondent

Mr. Manoj Singh, Advocate.

O.M.P. 104 of 2006

Decided on April 27, 2012

The Judgment of the Court was delivered by

1. Indian Oil Corporation Limited ('IOCL') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has challenged an Award dated 15th January 2006 of the learned sole Arbitrator in the disputes between it and the Respondent, Era Constructions (India) Limited ('ECIL') arising out of the award of civil and structural works for IOCL's Catalytic Reformer Unit ('CRU'), Utilities and Off-sites at Mathura Refinery, to ECIL by IOCL by a telegram of Acceptance dated 4th January 1995 followed by a Letter of Acceptance ('LOA') dated 22nd February 1995. By the impugned Award, the learned Arbitrator rejected IOCL's claims as being time barred and allowed ECL's counter claims in part.

Background facts

2. In terms of the LOA the work was to be completed within 12 months to be reckoned from the date of issue of the LOA. A formal contract was entered into between the parties on 3rd May 1995. According to IOCL, ECIL failed to carry out the work in accordance with the contract despite repeated warnings. By December 1995 the Respondent had completed the work of a value of approximately Rs. 91 lakhs against the job of the value of Rs. 3.25 crores on the fronts that were made available to it. It was apparent to IOCL, therefore, that ECIL would be unable to complete the work within the stipulated time. According to IOCL, in order to save time it decided to offload the balance part of the contractual scope of work and award it to another contractor in exercise of the rights vested in IOCL under Clause 4.6.4.0 of the General Clauses of Contract ('GCC'). IOCL issued a show cause notice dated 5th December 1995 to ECIL as to why the remaining scope of the work should not be offloaded to the another contractor at the risk and cost of ECIL in terms of Clause 4.6.4.0 GCC.

3. Thereafter, the work was offloaded to two agencies. The work of a value of Rs. 5,99,32,605 was awarded to RSB Projects Ltd. ('RPL') and the work of a value of Rs. 7,96,250 was awarded to M/s. Ram Sudhisht Singh & Sons ('M/s. RSSS'). IOCL states that both contractors were selected through a re-tendering process which was initiated in December 1995 itself. In terms of the GCC both the contractors would be deemed to be the sub-contractors of ECIL and appointed at the risk and cost of ECIL.

4. IOCL states that RPL completed the work awarded to it on 15th November 1997 whereas M/s. RSSS completed the work awarded to it on 21st September 1997. The final bill in respect of the work performed by RPL was jointly signed in June 1999 for a

sum of Rs. 5,73,31,218.71. According to IOCL, for this part of the work, it incurred an extra cost of approximately Rs. 1,92,67,113.44. As regards M/s. RSSS, the final bill was signed on 27th July 1999 for a sum of Rs. 5,37,377.50. IOCL claims that it incurred an extra cost of Rs. 1,97,866.75.

5. IOCL, therefore, under Claim No. 1 before the Sole Arbitrator, demanded that ECIL should pay it Rs. 1,94,64,980 being the total extra expenditure incurred as a result of offloading of the contract in favour of the other subcontractors to save time and costs. The case of *IOCL* is that the claim to the above extent could be made by it only after the final bills in respect of the work undertaken by RPL and M/s. RSSS were reconciled upon completion of the respective works performed by them and, therefore, the claim is not barred by limitation.

6. IOCL's second claim was for Liquidated Damages ('LD') on account of delay in ECIL completing the work. According to IOCL, ECIL completed the work remaining with it, upon offloading in the manner explained hereinbefore, after a delay of nine months. IOCL computed the LD as Rs. 90,50,159. Again it was contended by IOCL that till such time RPL and M/s. RSSS completed their respective works on 15th November 1997 and 21st September 1997, the total value of the contract could not be computed and correspondingly the percentage thereof i.e. minimum of 1% and maximum of 10% being the permissible LD could not be computed.

7. IOCL's third claim was for a sum of Rs. 86,80,290 under Clause 4.6.3.0 of the GCC towards supervision charges being 15% of the contract value as a consequence of the offloading under clause 4.6.4.0 of the GCC. Again, IOCL contended that the contract value could be determined only after the sub-contractors completed their respective works. The fourth claim of IOCL was for a sum of Rs. 1,84,285 towards costs. IOCL's aggregate claim was for a sum of Rs. 3,73,79,714.

8. IOCL acknowledged that in terms of the final bill, it owed ECIL Rs. 27,00,577 and a sum of Rs. 21,81,432 being the cash security deposit which had been deposited and a sum of Rs. 16,52,600 being the amount recovered by way of payment made in lieu of the discharged bank guarantee as recorded in the Delhi High Court's order dated 3rd December 1996 in AA No. 152 of 1996. Therefore, the amount acknowledged for payment to ECIL was Rs. 65,34,609. Consequently, the net amount claimed by IOCL in the arbitration proceedings was Rs. 3,08,45,105.

9. ECIL opposed to the above claims and by way of a counter claim contended that it was entitled to interest at 18% per annum on the admitted sum of Rs. 65,34,609 by way of an interim award.

Issues framed by the Arbitrator

10. On the basis of the pleadings, the learned Arbitrator framed the following issues for determination:

"(1) Whether the respondent has committed any breach of their obligations under the contract? If so, to what effect?

(2) Whether the Indian Oil Corporation is entitled to any amount on account of risk purchase? If so, how much?

(3) Whether the Indian Oil Corporation is entitled to claim anything by way of liquidated damages? If so, how much?

(4) Whether the counter claim of the respondent is arbitrable for the reasons that those claims were not notified claims? If so, its effect?

(5) Whether the Indian Oil Corporation had committed any breach of their obligations under the contract? If so, what is its effect?

(6) To what amount, if any, either party is entitled to against the other?

11. Although no issue was framed as regards IOCL's claim being time barred, the learned Arbitrator nevertheless considered it.

12. It was submitted on behalf of IOCL that although the balance work was entrusted to other contractors on 15th December 1995, till those contractors completed their respective works and raised final bills, IOCL was not in a position to ascertain the exact amount. Therefore, its claims were within time. On behalf of ECIL, it was contended that the agreement was terminated on 15th December 1995 and, therefore, the cause of action for IOCL to claim damages and compensation arose on that date. Notwithstanding this, the work awarded to RPL was admittedly completed on 15th November 1997. IOCL did not file its claims even within three years of that date. The reference to arbitration in the present case was made only on 1st May 2001. Reliance is placed on the decisions in *Steel Authority of India* v. *J.C. Budharaja*; (1999) 8 SCC 122 : AIR 1999 SC 3275 and *Juggilal Kamiapat* v. *N.V. Internationale Crediet-En-Handeis Vereeninging 'Rotterdam'*; AIR 1955 Cal. 65.

The impugned Award

13. In the impugned Award, the learned Arbitrator accepted the above contention of ECIL and held that IOCL's claims were "hopelessly time barred". Consequently, the learned Arbitrator did not consider it necessary to answer Issues No. 2 and 3.

14. Turning to the issue of breach of contract (Issues No. 1 and 5), the learned Arbitrator concluded that the work-fronts could not be released to ECIL by IOCL in time. Further, the delays were on account of IOCL not releasing the drawings in time; not supplying relevant information regarding the soil and underground conditions; change in the security rules/procedure; and non-availability of important materials and equipment which were to be supplied by IOCL. On the other hand, IOCL had condoned the delay in ECIL completing the work by repeatedly extending the time for completion of the work. Consequently, it was concluded that there was no breach of contract committed by the ECIL and wherever it had failed to fulfill its obligations of the work allocated to it, there was good reason for such failure to complete the job. It was held that there was breach of contract by the IOCL.

15. Issue No. 4 was whether ECIL's counter claim was arbitrable since it was not notified. According to IOCL, in terms of Clause 6.6.1.0 of the GCC it was only where the claim was partly or wholly rejected and an objection thereto was raised in the manner prescribed under the clause that, the claim could be considered as notified. If it was included in the final bill, it can be treated as arbitrable. ECIL, on the other hand, contended that its claims were part of the formal discussion held between the parties as evidenced by minutes of the meetings. Therefore, there was no need for ECIL to write a formal letter to IOCL raising its claims. Further, IOCL had never formally rejected in writing any of the claims or bills of ECIL.

16. The learned Arbitrator accepted the above contention of ECIL and held that the stages envisaged under the relevant clauses of the GCC "have been followed in spirit" and that IOCL was estopped from disputing the claims of the ECIL on the ground that they were not notified since, in any event, discussions were held between the parties as regards such claims. Thereafter, the learned Arbitrator proceeded to deal with the ECIL's counter claims. The claim was allowed to the extent of Rs. 65,76,950. The claim for dewatering of foundation area was rejected. A sum of Rs. 77,446 was allowed under Counter Claim No. 3 on account of encountering of artificial obstructions, Rs. 47,703 under Counter Claim No. 4 for reimbursement of extra water charges, Rs. 1,60,496 under Counter Claim No. 5 for extra multi stage shuttering, Rs. 2,91,271 under Counter Claim No. 6 for payment of extra cost for re-fabrication of structural steel columns and Rs. 15 lakhs towards reimbursement of loss of profit on account of reduction in the scope of work. ECIL was awarded interest at 8% per annum from 15th December 1995 till the date of the Award.

Submissions of counsel

17. Mr. V.N. Koura and Ms. Mona Aneja, learned counsel appearing on behalf of IOCL submitted, in the first place, that the learned Arbitrator erred in proceeding on the basis that there was a termination of the contract. Referring to Clause 4.6.4.0 of the GCC it was submitted that the IOCL had only offloaded to other contractors the work which was in any event not going to be completed by ECIL before the stipulated date. Therefore, there was, in fact, no termination of the contract with ECIL. Further, under Clause 6.2.4.0 the money would become payable to ECIL only after submission of the final bill prepared in accordance with Clause 6.2.1.0. The sub-contracted work was within the knowledge of ECIL and was at its risk and cost. One of those sub-contractors raised the final bill on 1st August 1998 and the other on 12th/20th March 1999. It was only thereafter that IOCL was in a position to ascertain what was the amount it was going to claim from ECIL being the extra cost incurred by it in getting the work completed through the sub-contractors. Mr. Koura drew a distinction between Clause 4.6.4.0 and Clause 7.0.9.0 which pertained to termination and which, according to him, was not invoked in the present case at all. Relying on the decision in *Indian Oil Corporation Limited* v. *S.P.S. Engineering Ltd.*; AIR 2011 SC 987 it was submitted that the decision in *Steel Authority of India Limited* v. *J.C. Budharaja* was distinguishable on facts. As regards the counter claims of ECIL, Mr. Koura referred to Clause 9.0.1.0 and urged that only notified claims of ECIL could have been referred to arbitration. 'Notified claim' was defined in Clause 1.0.24.0 which in turn referred to Clause 6.6.1.0. Inasmuch as admittedly ECIL had not complied with the stages stipulated in the above clauses, its counter claims could not be said to be a notified one and the learned Arbitrator was in error in entertaining such claims. Further, the items of counter claims were not included in the final bill and were, therefore, not arbitrable at all. Mr. Koura relied on the decision in *Uttam Singh Duggal & Co. (P) Limited* v. *Indian Oil Corporation Limited*; ILR (1985) II Delhi 131.

18. On behalf of ECIL, it is submitted by Mr. Manoj Singh, learned Advocate, that the decision in *Delhi Development Authority* v. *I.S. Rekhi & Sons*;1995 (33) DRJ 401 conclusively decided the issue of limitation against IOCL. It is submitted that once there is a final bill raised by the contractor, the cause of action arises from that date. He referred to the order dated 22nd November 2001 passed by this Court in AA No. 411 of 1998 where, with the consent of the parties, the learned Arbitrator was appointed by this Court. It is submitted that with no objection having been taken by IOCL at that stage to the reference of ECIL's counter claims for arbitration, IOCL was estopped from raising such an objection subsequently before the learned Arbitrator. As regards the issue of limitation, it was submitted that the claim was sent by IOCL to the Respondent on 30th April 1999. A question was raised whether the limitation for IOCL's claims would cease to run merely because the sub-contractor did not raise a final bill. In that event the limitation period might be extended indefinitely. It was submitted that on 15th December 1995 IOCL had engaged the sub-contractor through a telefax and the contract amount also got crystallised on that date. Therefore, IOCL did not have to wait to prefer its claims till RPL or M/s. RSSS raised their final bill. It is submitted that the date of rescinding the contract by IOCL i.e. 15th December 1995 should be the date of commencement of the limitation for IOCL's claims against ECIL. It is submitted that the view taken by the learned Arbitrator that IOCL's claims were barred by limitation was a plausible view to take on the basis of the contractual provisions and did not call for interference. Reliance was placed on the decisions in *Vishindas Bagchand* v. *Chairman, Maharashtra State Electricity Board*; 2002 (1) MhLJ 222, *Panchu Gopal Bose* v. *Board of Trustees for Port of Calcutta*; (1993) 4 SCC 338 : AIR 1994 SC 1615 and *Steel Authority of India Limited* v. *J.C. Budharaja*. Reliance was also placed on the decision of this Court in *Shah Construction Company Limited* v. *Municipal Corporation of Delhi*; AIR 1985 Delhi 358 and *Satya Prakash Gupta* v. *Vikas*

Gupta (decision dated 24th November 2011 in RFA(OS) No. 23 of 2010). Mr. Manoj Singh pointed out that IOCL was not justified in retaining a sum of Rs. 65,34,609 which it admitted as being payable to ECIL. This payment did not require any final bill to be raised by the other sub-contractors. It was submitted that as regards the counter claims of ECIL, these were purely findings of fact on the basis of the evidence produced and did not call for review in exercise of the powers of this Court under Section 34 of the Act. Reference was made to the decisions in *Himachal Pradesh State Electricity Board* v. *RJ Shah & Company*; 1999 (4) SCC 214 and *Union of India* v. *Vijay Construction Co.*; 19 (1981) DLT 49. *Were IOCL's claims barred by limitation?*

19. The first issue to be considered was whether IOCL's claims were barred by limitation. This Court is not examining the plea whether without framing a formal issue in the matter, the learned Arbitrator could have decided the said issue. The fact remains that in the reply to the claims of IOCL, it was pleaded by ECIL that the claims of IOCL were "not tenable, besides being time barred by limitation and are liable to be rejected with heavy cost."

20. The learned Arbitrator appears to have made a fundamental error in proceeding on the basis that on 15th December 1995 there was a termination of the contract by the IOCL. A copy of the letter dated 15th December 1995 written by the IOCL to ECIL has been placed on record. The operative portion of the said letter reads as under:

> "You are, therefore, hereby informed that in exercise of powers conferred on Engineer-in-Charge, under Clause 4.6.4.0 of the General Conditions of Contract, another agency/sub-contractor(s) shall and is being appointed to undertake performance of the following works at your risk and cost:
>
> **21.** Civil and Structural works of utilities and offsite facilities.
>
> **22.** Civil and Structural works compressor house & related works inside CRU Process Unit.
>
> **23.** Underground piping inside CRU Process Unit.
>
> **24.** Pavement of CRU Process Unit.
>
> **25.** You will also be liable to pay the Corporation 15% supervision charges as provided in Clause 4.6.3.0 of the General Conditions of Contract and liquidated damages for delay in performance of the works and such other sums as may be payable by you to the Corporation under the Contract."

26. It is clear, therefore, that there was no termination of the contract by the letter dated 15th December 1995. The relevant clauses of the contract may now be referred to. Clause 4.6.4.0 reads as under:

> "4.6.4.0 Should the Engineer-in-Charge or the Site Engineer at any stage (notwithstanding that the time for completion of the relative work or item of work as specified in the Progress Schedule has not expired) be of opinion (the opinion of the Engineer-in-Charge/Site Engineer in this behalf being final) that the performance of any work or item of work by the Contractor is unsatisfactory (whether in the rate of progress, the manner, quality or workmanship of the performance, or in the adherence to specifications, or in the omission, neglect or failure to do, perform, complete or finish any work or item, or for any other cause whatsoever), the Engineer-in-Charge/Site Engineer shall be entitled (without prejudice to any other rights of the Owner and/or obligations of the Contractor under the Contract) at his discretion and the risk and cost of the Contractor either to appoint, procure and/or provide such labour/staff/machinery/tools/materials, etc., as the Engineer-in-Charge/Site Engineer (the decision of either of whom shall be final and binding upon the Contractor) considers necessary to achieve satisfaction in relation to the particular work, operation or item of work, or the work as a whole, as the case may be, or to appoint one or more sub-contractors for the

satisfactory performance thereof or any part thereof, or may undertake the performance thereof or any part thereof departmentally, and the provisions of Clause 4.6.3.0 thereof shall *mutatis mutandis* apply to any action taken by the Engineer-in-Charge/Site Engineer pursuant to this clause in the same manner as applicable to an action taken under the said clause."

27. The above clause has to be read in conjunction with Clause 7.0.9.0 to understand the distinction:

"7.0.9.0 Upon termination of the Contract the Owner shall be entitled at the risk and expense of the Contractor by itself or through any independent Contractor(s) or partly by itself and/or partly through independent Contractor(s) to complete to its entirety the work as contemplated in the scope of work and to recover from the Contractor in addition to any other amounts. Compensation or damages that the Owner may in terms hereof or otherwise be entitled to (including compensation within the provisions of Clause 4.4.0.0 and Clause 7.0.7.0 hereof) the difference between the amounts as would have been payable to the Contractor in respect of the work (calculated as provided for in Clause 6.2.1.0 hereof read with the associated provisions thereunder and Clause 6.3.1.0 hereof) and the amount actually expended by the Owner for completion of the entire work as aforesaid together with 15% (fifteen per cent) thereof to cover Owner's supervision charges, and in the event of the latter being in the excess former, the Owner shall be entitled (without prejudice to any other mode of recovery available to the Owner) to recover the excess from the security deposit or any monies due to the Contractor."

28. It is apparent that there is a separate clause as far as termination of the contract is concerned. As noticed hereinbefore IOCL did not terminate the contract with ECIL as such but only off-loaded the unfinished work to other contractors under Clause 4.6.4.0. Consequently, the cause of action for IOCL's claims against ECIL could not be said to have commenced with effect from 15th December 1995. ECIL itself completed its work and raised the final bill only in November 1999.

29. In *Indian Oil Corporation Limited* v. *S.P.S. Engineering Ltd.*, the Supreme Court dealt with the question whether IOCL's claims in that case could have been held by the Designate Court under Section 11 of the Act to be time barred. It was noticed that it was only when the work entrusted to the alternative agency was completed and the bills settled or finalized could the extra cost be determined even for the purpose of Clause 7.0.9.0. The finding of the Designate Judge under Section 11 of the Act was set aside and it was opined that the said question should have been left to be decided by the Arbitrator after completion of the pleadings. For the purposes of the present case, it is important, therefore, to note that for the purpose of IOCL's claims which were only with regard to the extra cost paid to the sub-contractors, and which was recoverable from ECIL in terms of Clause 6.1.4.2.0, unless the final bills of the sub-contractors after completion of their respective works were submitted and processed, IOCL would not be in a position to determine what amount, if any, was payable to ECIL against its final bill.

30. It is possible that in a given case, a sub-contractor might, despite completing the work, not raise a final bill. That does not mean that IOCL in such an event would be permitted to wait indefinitely. If the sub-contractor does not raise the final bill within three years of the completion of the works then in that case the claim of such sub-contractor itself may become time barred. Therefore, in the present case IOCL would not be permitted to wait beyond three years from the date of completion of the work by the sub-contractor to process the bills of ECIL. However, for the purposes of the present case, that is purely a hypothetical question. As regards M/s. RSSS, a completion certificate was issued by M/s. Engineers India Limited ('EIL') acknowledging the date of completion of the work by the sub-contractor as 21st

September 1997. The completion certificate was issued on 27th February 1999. The final bill was finalized on 12th/20th March 1999. Consequently, around this time as far as the work of M/s. RSSS is concerned, IOCL would be in a position to clearly determine what amount had to be claimed extra from the ECIL. As regards RPL, the final bill was raised by it on 1st August 1998 and the date of completion was 14th October 1997. With reference to both these dates, the statement of claims sent by IOCL to ECIL on 30th April 1999 was certainly within time. The actual invocation of the arbitration clause was on 1st May 2001 and, therefore, within three years of that date.

31. The decision in *Steel Authority of India Limited* v. *J.C. Budharaja* is distinguishable on facts. That case did not involve clauses similar to the ones in the present case. Given the nature of IOCL's claims in the present case, it was essential for the recovery of the extra cost incurred by IOCL in getting the work performed by the sub-contractor, the date of final payment by IOCL to the sub-contractor pursuant to the final bills raised by those sub-contractors would be the relevant as far the commencement of the limitation of IOCL's claims against ECIL were concerned.

32. The learned Arbitrator appears to have erred both factually and legally in deciding the issue of limitation. The factual error was in proceeding on the basis that there was a termination of the contract on 15th December 1995 when in fact by a letter of that date IOCL invoked Clause 4.6.1.0 for offloading the remaining portion of the contract, which was to be performed by ECIL, to sub-contractors after notice to, and at the risk and cost of ECIL. The learned Arbitrator failed to appreciate that IOCL's claim was only for additional costs incurred in getting the work performed through the sub-contractors. Such additional costs could not have been possibly known to IOCL till the final bills were raised by such sub-contractors and, therefore, the starting point for limitation was obviously the date on which the sub-contractors raised the final bills.

33. Consequently, this Court sets aside the impugned Award to the extent it holds that IOCL's claims were barred by limitation and fails to decide Issues Nos. 2 and 3. These have to be necessarily remitted to the learned Arbitrator for a fresh decision in accordance with law. *Maintainability of ECL's Counter claims*

34. As regards ECIL's counter claims, the issue to be determined is whether they were arbitrable as such. The arbitration clause of the contract is Clause 9.0.1.0 which reads as under:

> "9.0.1.0 Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any amount paid by the Owner to the contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three peons nominated by the General Manager."

35. It is plain from the reading of the above arbitration clause that the disputes that were arbitrable had to arise out of "any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0."

36. Clause 1.0.24.0 defines a notified claim as under:

> ""1.0.24.0 Notified Claim" shall mean a claim of the Contractor notified in acceptance with the provisions of Clause 6.6.1.0 hereof."

37. Clauses 6.6.1.0 and Clause 6.6.3.0 read as under:

> "6.6.1.0 Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any Running

Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claim such additional payment or compensation, or on the happening of other event upon which the Contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim nor shall the Owner anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

"6.6.3.0 Any or all claims of the Contractor notified in accordance with the provisions of Clause 6.6.1.0 hereof shall remain at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of Claim attached thereto, giving particulars of the Contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner particular be at variance with the claim notified by the Contractor within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof"

38. This Court is unable to appreciate the approach of the learned Arbitrator in holding that the mere fact that the parties were in correspondence and discussion amounted to a waiver by IOCL of the requirement of compliance by ECIL with the above clauses. There was no question of the clauses merely being "followed in spirit." There is a specific procedure envisaged which has to be followed before such a claim could be entertained. The learned Arbitrator was in terms of Section 28 of the Act bound to follow the clauses of the contract in determining whether ECIL's counterclaims were arbitrable. This was made explicit in the decision in *Uttam Singh Duggai & Co. (P) Limited* v. *Indian Oil Corporation Limited* where these very clauses were examined and in Para 18 it was observed as under:

"18. Analysing the clause in the case it has first to be seen if there, is a dispute to which the arbitration clause applies. So, the question of existence of dispute is to be seen first. That dispute has to be raised in accordance with the provision of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. In fact, if reference is made to the arbitration clause in the present case, no time limit as such is prescribed for the appointment of the arbitrator. As I see clause 6.6.1.0 exists independently of clause 9.0.0.0. Under clause 6.6.1.0, the contractor shall forthwith give notice in writing of his claim to the Engineer-in-charge and the Site Engineer within ten days from the date of issue of order of instructions relative to any works for which the contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim; (ii) such notice shall give full particulars of the nature of such claims; (iii) grounds on which it is based; and (iv) the amount claimed. The contractor is debarred from raising any claim unless notice of such claim has been given in the manner and within the time prescribed, otherwise the contractor "shall be deemed to have waived any or all claims and all his rights in

respect of any claim not notified to the Engineer-in-charge and the Site Engineer in writing in the manner and within the time aforesaid". Under clause 6.6.3.0 if any of the claims which has been notified in accordance with clause 6.6.1.0 still remains/persists at the time of preparation of final bill, the contractor is to specify the same in the form of a statement of claim attached to the final bill, again giving the particulars of the nature of the claims, grounds on which the claims are based and the amount claimed and this again is to be supported by copy of the notice sent in respect thereof to the Engineer-in-charge and Site Engineer. It is specifically mentioned in clause 6.6.3.0 that if the claim attached with the final bill be at variance with the claim notified under the provisions of clause 6.6.1.0, it shall be deemed to be a claim different from the notified claim with consequence that it shall stand waived as given in clause 6.6.1.0. However, under clause 6.6.3.1 any claim notified under clause 6.6.1.0 which is not calculated in the final bill stands waived. Thus, the parties agreed that before any claim/dispute could be subject matter of arbitration, certain formalities had to be gone into. Clause 9.0.0.0 which deals with arbitration applies only to disputes and differences arising out of a notified claim included in the final bill of the contractor. As noted above, there is no time limit prescribed in clause 9.0.0.0. In these circumstances, it is therefore difficult to see as to how the provisions of S. 37(4) would apply to the requirements of clause 6.6.1.0, assuming that the disputes in the present case are (1) covered under clause 9.0.0.0, and (2) that the contractor did take steps to commence arbitration proceedings within the time fixed by the arbitration agreement. Mr. Watel's argument is that notified claim is nothing but a claim in writing to the Corporation within ten days of the date of occurrence and this claim is to be included separately in the final bill. According to him clauses 6.6.1.0, 6.6.3.0 and 9.0.0.0 are inextricably interlinked and, therefore, the notified claim is merely "some other steps to commence arbitration proceedings" as envisaged in S. 37(4) of the Act."

39. Although the above case arose under the Arbitration Act 1940, the ratio applies on all fours to the case on hand. The inescapable conclusion is that the learned Arbitrator erred in entertaining the counter claims of ECIL despite those claims not being notified claims, not included in the final bill of ECIL and therefore not arbitrable. It is not as if ECIL was without a remedy as regards those counter claims. It could have filed a suit. This was an error of jurisdiction committed by the learned Arbitrator and, therefore, the impugned Award to that extent cannot be sustained in law. However, it is clarified that the Award to the extent it orders the admitted amount to be paid by IOCL to ECIL with interest at 8% per annum from the date ECIL invoked the arbitration clause up to the date of payment, is upheld.

Conclusions

40. For the above reasons, the impugned Award dated 15th January 2006 is set aside to the extent indicated above. The claims of IOCL are held to be within the limitation and are remitted to the learned Arbitrator for a fresh decision on merits after hearing both sides. For this purpose, the Registry will remit the entire arbitral record to the learned Arbitrator within two weeks. The question of payment of the amount admitted by IOCL as payable by it to ECIL will be decided in the fresh Award by the learned Arbitrator depending on the decision on *IOCL's* claims. The counter claims of ECIL are held to be not arbitrable and the impugned Award allowing them is set aside.

41. The petition is disposed of in the above terms with no order as to costs.

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(2014) 9 Supreme Court Cases 246 : (2014) 4 Supreme Court Cases (Civ) 803 : 2014 SCC OnLine SC 678

In the Supreme Court of India

(BEFORE ANIL R. DAVE AND VIKRAMAJIT SEN, JJ.)

HARSHA CONSTRUCTIONS . . Appellant;

Versus

UNION OF INDIA AND OTHERS . . Respondents.

Civil Appeal No. 534 of 2007[±], decided on September 5, 2014

A. **Arbitration and Conciliation Act, 1996 — Ss. 2(1)(b), 7(3), 16 and 34(2)(a)(iv) — Excepted matters — Arbitrator deciding a claim specifically excluded from arbitration by agreement — Impermissibility — Effect of such excepted matter being referred for arbitration or issue being framed thereon — Severability of remainder of award**

— Held, even if a non-arbitrable dispute is referred to arbitrator or even if an issue is framed by arbitrator as to such dispute, it is not open for an arbitrator to arbitrate since it is beyond his jurisdiction — Mere reference of non-arbitrable dispute to arbitration or arbitrator framing an issue as to an excepted dispute, does not amount to agreement by parties to refer said dispute for arbitration — When law specifically makes a provision with regard to formation of a contract in a particular manner, no presumption can be made with regard to a contract if the contract is not entered into by the prescribed mode

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— Cl. 39 of GCC (general conditions of contract) provided that for any extra work not covered under the contract undertaken by contractor and for which he incurs expenditure for which rates are not available in schedule of rates, he is entitled to be paid at the rates fixed by Engineer and if not satisfied with said decision, he may appeal to Chief Engineer whose decision is final and binding on both parties — However, in terms of Cl. 63 of GCC, decision taken by Chief Engineer under Cl. 39 an excepted matter, not amenable for arbitration — In instant case, rejecting objection of parties that though referred to arbitration, dispute as to payment for extra work is excepted matter beyond purview of arbitrator, arbitrator rendered decision on said dispute and made award — Unsustainability — Held, arbitrator is not empowered to arbitrate upon disputes covered by Cl. 39 as said clause specifically excludes certain disputes as "excepted disputes" from arbitration — Since arbitrator exceeded his jurisdiction by rendering award on non-arbitrable dispute, that part of award is bad in law and is quashed — Liberty granted to appellant to take appropriate legal action for recovery of payment for extra work done — Doctrines and Maxims — Doctrine of severability

(Paras 14 to 19)

Northern Railway v. *Sarvesh Chopra*, (2002) 4 SCC 45, *impliedly followed*

Madnani Construction Corpn. (P) Ltd. v. *Union of India*, (2010) 1 SCC 549 : (2010) 1 SCC (Civ) 168, *cited*

[**Ed.**: In *Northern Railway* v. *Sarvesh Chopra*, (2002) 4 SCC 45, it was held (SCC p. 56, para 16): "If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator."]

B. **Arbitration and Conciliation Act, 1996 — S. 7(3) — Arbitration agreement — Necessity of, for referring disputes to arbitration — Held, contract with regard to arbitration must be in writing since arbitration arises from contract — Further held, no presumption can be made as to arbitration unless there is specific written contract**

(Para 18)

Harsha Constructions v. *Union of India*, 2005 SCC OnLine AP 730 : (2005) 6 ALD 287, *partly reversed*

Appeal partly allowed N-D/53752/CV

Advocates who appeared in this case:

Vemula Prasad Rao, G. Ramakrishna Prasad, Ms Filza Moonis and Bharat J. Joshi, Advocates, for the Appellant;

D.S. Mahra, Advocate, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2010) 1 SCC 549 : (2010) 1 SCC (Civ) 168, *Madnani Construction Corpn. (P) Ltd.* v. *Union of India* 25

2. 2005 SCC OnLine AP 730 : (2005) 6 ALD 287, *Harsha Constructions* v. *Union of India* **(partly reversed)** 248*a*, 25

3. (2002) 4 SCC 45, *Northern Railway* v. *Sarvesh Chopra* 25

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The Judgment of the Court was delivered by

ANIL R. DAVE, J.— Aggrieved by the judgment dated 9-9-2005 delivered by the High Court of Judicature of Andhra Pradesh at Hyderabad, in *Harsha Constructions* v. *Union of India*[1], this appeal has been filed by M/s Harsha Constructions, a contractor, against the Union of India and its authorities. Hereinafter, the appellant has been described as "the contractor".

2. The Union of India had entered into a contract for construction of a road bridge at a level crossing and in the said contract there was a clause with regard to arbitration. The issue with which we are concerned in the instant case, in a nutshell, is as under:

> "When in a contract of arbitration, certain disputes are expressly 'excepted', whether the arbitrator can arbitrate on such excepted issues and what are the consequences if the arbitrator decides such issues?"

3. For the purpose of considering the issue, in our opinion, certain clauses incorporated in the contract are relevant and those clauses are reproduced hereinbelow:

> "*Clause 39*.—Any item of work carried out by the contractor on the instructions of the Engineer which is not included in the accepted schedule of rates shall be executed at the rates set forth in the 'Schedule of Rates, South Central Railway' modified by the tender percentage and where such items are not contained in the latter at the rates agreed upon between the Engineer and the contractor before the execution of such items of work and the contractor shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of work that the accepted schedule of rates does not include a rate or rates for the extra work involved.
>
> The rates payable for such items shall be decided at the meeting to be held between the Engineer and the contractor in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at, the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure. Provided

that if the contractor commences work or incurs any expenditure in regard thereto before the rates are determined and agreed upon as lastly mentioned, then and in such a case the contractor shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the rates as aforesaid according to the rates as shall be fixed by the Engineer. However, if the contractor is not satisfied with the decision of the Engineer in this respect he may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer supported by the analysis of the rates claimed. The Chief Engineer's decision after hearing both the parties in the matter would be final and binding on the contractor and the Railway.

* * *

Clause 63.—All disputes and differences of any kind whatsoever arising out of or in connection with the contract whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after receipt of the contractor's presentation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 18, 22(5), 39, 45(*a*), 55, 55-A(5), 61(2) and 62(1)(*xiii*)(B)(*e*)(*b*) of the general conditions of contract or in any clause of the special conditions of the contract shall be deemed as "excepted matters" and decisions thereon shall be final and binding on the contractor; provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration."

4. Upon perusal of Clause 63 of the aforestated contract, it is quite clear that the matters for which provision had been made in Clauses 18, 22(5), 39, 45(*a*), 55, 55-A(5), 61(2) and 62(1)(*xiii*)(B)(*e*)(*b*) of the general conditions of contract were "excepted matters" and they were not to be referred to the arbitrator.

5. In the instant case, we are concerned with a dispute which had arisen with regard to the amount payable to the contractor in relation to extra work done by the contractor.

6. Upon perusal of Clause 39, we find that in the event of extra or additional work entrusted to the contractor, if rates at which the said work was to be done was not specified in the contract, the amount payable for the additional work done was to be discussed by the contractor with the Engineer concerned and ultimately the rate was to be decided by the Engineer. If the rate fixed by the Engineer was not acceptable to the contractor, the contractor had to file an appeal to the Chief Engineer within 30 days of getting the decision of the Engineer and the Chief Engineer's decision about the amount payable was to be final.

7. It is not in dispute that some work, which was not covered under the contract had been entrusted to the contractor and for determining the amount payable for the said work, certain meetings had been held by the contractor and the Engineer concerned but they could not agree to any rate. Ultimately, some amount was paid in respect of the additional work done, which was not acceptable to the contractor but the contractor accepted the same under protest.

8. In addition to the aforestated dispute with regard to determination of the rate at which the contractor was to be paid for the extra work done by it, there were some other disputes also and in order to resolve all those disputes, Respondent 5, a former Judge of the High Court of Andhra Pradesh, had been appointed as an arbitrator.

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9. The learned arbitrator decided all the disputes under his award dated 21-9-2002 though the contractor had objected to the arbitrability of the disputes which were not referable to the arbitrator as per Clause 39 of the contract. Being aggrieved by the award, the Union of India had preferred an appeal before the Chief Judge, City Civil Court, Hyderabad under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") and the said appeal was allowed, whereby the award was set aside.

10. Before the City Civil Court, in the appeal filed under Section 34 of the Act, the following two issues had been framed:

(*a*) Whether the dispute was in relation to an "excepted matter" and was not arbitrable?

(*b*) Whether the claimant was entitled to the amounts awarded by the arbitrator?

The court decided the appeal in favour of the respondent and against the contractor. Being aggrieved by the order dated 8-4-2005 passed by the XIVth Additional Chief Judge, City Civil Court, Hyderabad, CMA No. 476 of 2005 was filed by the contractor before the High Court and the High Court was pleased to dismiss the same by virtue of the impugned judgment[1] and therefore, the contractor has filed this appeal.

11[*]**.** The learned counsel appearing for the appellant contractor had mainly submitted that as per Clause 39 of the contract, the Engineer of the respondent authorities was duty-bound to decide the rate at which payment was to be made for the extra work done by the contractor, through negotiations between the parties. A final decision on the said subject was taken by the respondent authorities without the contractor's approval and therefore, there was a dispute between the parties. He had further submitted that no specific decision was taken by the Engineer and therefore, there was no question of filing any appeal before the Chief Engineer and as the Chief Engineer did not take any decision, the aforestated clauses viz. Clauses 39 and 64 would not apply because Clause 64 would "except" a decision of the Chief Engineer, but as the Chief Engineer had not taken any decision, there was no question with regard to referring to Clause 39. He had, therefore, submitted that the award in toto was correct and the High Court had wrongly upheld the dismissal of the award by the trial court.

12. The learned counsel had, thereafter, referred to the judgments delivered by this Court in *Northern Railway* v. *Sarvesh Chopra*[2] and *Madnani Construction Corpn. (P) Ltd.* v. *Union of India*[3] to substantiate his case. The learned counsel had, thereafter, submitted that the appeal deserves to be allowed and the judgment delivered by the High Court confirming the order passed by the City Civil Court deserves to be quashed and set aside.

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13. There was no representation on behalf of the Union of India and therefore, we are constrained to consider the submissions made by the learned counsel for the appellant only.

14. Upon perusal of both the clauses included in the contract, which have been referred to hereinabove, it is crystal clear that all the disputes were not arbitrable. Some of the disputes which had been referred to in Clause 39 were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the Engineer concerned of the respondent and if the contractor was not satisfied with the rate determined by the Engineer, it was open to the contractor to file an appeal against the decision of the

Engineer before the Chief Engineer within 30 days from the date of communication of the decision to the contractor.

15. In the instant case, there was no finality so far as the amount payable to the contractor in relation to the extra work done by it is concerned, because the said dispute was never decided by the Chief Engineer. In the aforestated circumstances, when the disputes had been referred to the arbitrator, the disputes which had been among "excepted matters" had also been referred to the learned arbitrator.

16. Upon perusal of the case papers we find that before the learned arbitrator, the contractor did object to the arbitrability of the disputes covered under Clause 39, but the arbitrator had decided the said issues by holding that the same were not "excepted matters" but arbitrable.

17. The question before this Court is whether the arbitrator could have decided the issues which were not arbitrable.

18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.

19. If a non-arbitrable dispute is referred to an arbitrator and even if an issue is framed by the arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforestated issue before the arbitrator and yet the arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the arbitrator could not have decided the said "excepted" dispute. We, therefore, hold that it was not open to the arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed.

20. We also take note of the fact that the contract had been entered into by the parties on 24-4-1995 and the contractual work had been finalised on 31-3-1997. The award was made on 21-9-2002 and therefore, we uphold the portion of the award so far as it pertains to the disputes which were arbitrable, but so far as the portion of the arbitral award which determines the rate for extra work done by the contractor is concerned, we quash and set aside the same. Needless to say that it would be open to the contractor to take appropriate legal action for recovery of payment for work done, which was not forming part of the contract because the said issue decided by the arbitrator is now set aside.

21. For the reasons recorded hereinabove, the appeal is partly allowed with no order as to costs.

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† From the Judgment and Order dated 9-9-2005 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in CMA No. 476 of 2005

[1] *Harsha Constructions* v. *Union of India*, 2005 SCC OnLine AP 730 : (2005) 6 ALD 287

* **Ed.**: Para 11 corrected vide Official Corrigendum No. F.3/Ed.B.J./49/2014 dated 9-9-2014.

[2] (2002) 4 SCC 45

[3] (2010) 1 SCC 549 : (2010) 1 SCC (Civ) 168

Arb. Appeal No. 3/2005

Bongaigaon Refinary & Petrochemicals Ltd. v. G.R. Engineering Works Ltd.

2015 SCC OnLine Gau 6 : AIR 2015 Gau 57 : (2015) 3 BC 156

(BEFORE HRISHIKESH ROY, J.)

Bongaigaon Refinary & Petrochemicals Ltd., A Government Company with its Head Office at Dhaligaon under P.O. & P.S. Dhaligaon in the District of Chirangt (Previously in the Bongaigaon District), Assam ..... Appellant

v.

M/s. G.R. Engineering Works Ltd., A Company registered under the Companies Act, having its Registered office at Poonam Chambers, Dr. Annie Besant Road, Worli, Mumbai - 4000018 . .... Respondent

For the Appellant: Mr. K.N. Choudhury. ... Sr. Advocate, Ms. R. Deka, Mr. B.K. Kashyap, Mr. M. Mahanta ... Advocates.

For the Respondent: Mr. R.L. Yadav, Ms. K. Yadav ... Advocates.

Arb. Appeal No. 3/2005

Decided on January 29, 2015

JUDGMENT AND ORDER

Heard K.N. Choudhury, the learned Senior Counsel appearing for the appellant. Also heard Mr. K.L. Yadav, the learned Counsel appearing for the sole respondent.

2. This appeal is directed against the judgment dated 18.8.2005 (Page-13) in Misc. (Arbitration) Case No. 5/2003, whereby the learned District Judge, Bongaigaon has rejected the appellant's application for settling aside the majority Award dated 29.4.2003 (Page-30) by rejecting the Appeal filed under *Section 34* of the *Arbitration and Conciliation Act, 1996*, hereinafter referred to as "*the Arbitration Act*".

Relevant facts.

3.1 The appellant *Bongaigaon Refinary & Petrochemicals Ltd. (BRPL)* hereinafter referred to as "*the Owner*" invited tenders for detailed engineering, supply, fabrication, transportation, erection and testing etc. of 3 Nos. of LPG spheres on 21.6.1991. *Engineers India Ltd.* (EIL) were appointed as Engineer-in-charge for the contract. The respondent *G.R. Engineering Works Ltd.*, hereinafter referred to as "*the Contractor*", was awarded with the work order by Letter of Intent (LOI) dated 18.4.1992.

3.2 It was agreed between the parties that the work will be completed within a period of 18 months starting from 18.4.1992. Originally the date of completion of the work was fixed as 17.10.1993, however, as per *General Conditions of Contract (GCC)*, extension of time for completion of the work was permitted under certain specified circumstances. The work was completed eventually on 31.10.1994 with the delay of 379 days.

3.3 The respondent pleaded that although action for mobilization, execution and completion of the work was taken, yet the work could not be completed within the

scheduled time due to the reasons beyond their control. In this regard the respondent submitted a letter dated 21.2.1995 to the resident engineer thereby requesting not to impose *Liquidated Damage* (L.D.) for non-completion of the work within the scheduled time.

3.4. After that on 22.2.1995 the respondent submitted a final bill to the *Owner* and further requested that the extension of contract completion period be accorded. On decision being taken by the *Owner* and communicated to the Engineer-in-charge, *Engineers India Ltd. (EIL)* by letter dated 7.8.1996 informed the contractor that conditional approval to extension of the contractual period was granted by the *Owner* vide letter dated 5.8.1996 subject to levy of L.D. @2% of the total contract value.

3.5 After deduction of aforesaid 2% L.D, the contractor received a cheque for Rs. 86,16,992/- on 4.12.1996 from the *Owner.* Subsequently the contractor vide letters dated 2.1.1997 and 28.2.1997 raised grievance against the deduction and requested for reimbursement of the deducted L.D. The *Owner* vide letter dated 7.4.1997 justified the imposition by stating that L.D. was deducted for delay of 14 days since the contractor failed to take measures to expedite the delivery of fabricated materials at site. Eventually, the dispute regarding recovery of L.D @2% was referred to the 3 member Arbitral Tribunal at the instance of the contractor.

The contention of the Owner before the Arbitral Tribunal

4.1 The levy of L.D. @ 2% and also the counter claim of Rs. 2,43,34,412/- were justified by the *Owner* mainly on 2 counts i.e. under the GCC the Employer was vested with full power under *Clause 4.4.0.0* to levy L.D. upto 10% of the contract value and also because of the delay on the part of the contractor in completing the work, the *Owner* suffered huge loss.

4.2. The *Owner* further contended that their decision is final and binding upon the contractor in terms of the *Clauses 4.3.6.0* and *4.4.0.0* of the contract terms and in view of this the *Owner* submitted that this was not an arbitrable dispute.

4.3 Moreover since the payment against the final bill was received without protest by the contractor in full and final settlement on 5.12.1996, it was not open thereafter to the contractor to make any claim in respect of the final bill.

4.4. The dispute in question is covered by *excepted matter* and therefore the Arbitral tribunal lacked jurisdiction to decide the claim on L.D.

4.5 *Excepted matters* are those disputes in respect of which, an adjudicating mechanism is provided in the contract itself. In the instant case according to the *Owner*, the engineer-in-charge is the adjudicating authority and whose decision is final and binding on the parties.

5. The Tribunal framed 7 issues but the decision on the following issues are relevant.

iv. *Whether in view of Clause 6.7.0.0 of the contract, the contract including the arbitration clause stands discharged and extinguished as pleaded by the appe lant/respondent in para A of the preliminary objections?*

v. *Whether as contended by the appellant/respondent the issues raised by the claimant are "excepted matters and as such, they are outside the purview of arbitration?*

JURISDICTIONAL OBJECTION

6.1 On issue No. (iv) the *Owner* raised the preliminary objection that since full and final payment was received by the contractor without protest by endorsement dated 4.12.1996 coupled with the provisions of *Clause 6.7.0.0* of the GCC, the contract stood discharged and extinguished. Therefore the issue was not arbitrable.

6.2 On issue No. (v) the *Owner* contended that disputes raised by the respondent were *excepted matters* and as such those were outside the purview of arbitration.

Arbitrator's (Majority view)

Issue No. (iv)

7.1 The Tribunal by a majority view held that the payment received by the contractor on 4.12.1996 was a conditional one and not absolute and therefore the claim of the contractor for the balance amount was within jurisdiction of the arbitral tribunal and the arbitration clause did not get extinguished or discharged.

Issue No. (v)

7.2 By referring to the various clauses and the judgment of the Apex Court in *J.G. Engineer's (P) Ltd.* v. *Calcutta Improvement Trust* reported in (2002) 2 SCC 664 and decision of the Delhi High Court in *International Building and Furnishing Co. (CAL) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.* reported in 57 (1995) (1) Delhi Law Times 536 (DB), the Tribunal in its majority view rejected the contention raised by the *Owner* and further held that the issue of imposition of L.D. of 2% was not an *excepted matter* and therefore was not outside the purview of arbitration.

Arbitrator's (Minority view).

8.1 While dissenting with the majority view, the Co-arbitrator observed that the interpretation of *Clauses 6.6.1.0., 6.7.1.0., 6.7.2.0.* & *9.1.0.0.* given in the Award had not been correctly appreciated. By referring to the judgment in *International Building* (supra) the co-arbitrator held as follows -

Issue No. (iv).

8.2 As the final payment has been made under Clause 6.7.1.0. and as there was no *notified claim*, the contract, including the arbitration clause stands discharged and extinguished.

Issue No. (v).

8.3 In the absence of *notified claim* of the contractor, the claim is outside the purview of arbitration.

Arbitrator's Direction

9.1 The Arbitral Tribunal by order dated 29.4.2003 through their majority view directed the *Owner* to comply with the Award within 15 days and if the awarded amount of Rs. 44,66,525/- is not disbursed in time, it would attract future interest at the statutory rate of 18% p.a. from the date of the award till the date of payment.

9.2 However the co-arbitrator while disagreeing with the majority view, had passed a *no claim award* and further held that contract including the arbitration clause stood

discharged and extinguished and that the Arbitral Tribunal had no jurisdiction.

10. At this stage it would be appropriate to note the relevant Clauses of the GCC for better appreciation of the case.

Arbitration Clause

9.1.0.0 *- Subject to provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the contractor included in the final bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any part thereof shall have been deducted from the final bill of the contractor or any amount paid by the Owner to the contractor in respect of the work) shall be referred to arbitration as hereunder provided in Clause 9.1.1.0 and 9.1.2.0.*

Notified Claim

1.0.24.0 *- "Notified Claim" shall mean a claim of the contractor notified in accordance with the provisions of Clause 6.6.1.0. hereof.*

6.6.1.0 - *Should the contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in term of the contract as specified in Clause 6.3.1.0 hereof or should the contractor dispute the validity of any deductions made or threatened by the Owner from any Running Account Bills or any payments due to him in term of the contract, the contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The contractor shall not be entitled to raise any claim, or shall the Owner anywise be liable in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-charge and the Site Engineer in the manner and within the time aforesaid, and the contractor shall be deemed to have waived any or all claims and ail his rights in respect of any claim not notified to the Engineer-in-charge and the Site Engineer in the matter and within the time aforesaid.*

6.3.1.0 - *The remuneration determined as due to the contractor by application of the Schedule of Rates to the Final Measurements as provided for in Clause 6.2.1.0 hereof and associated provisions thereunder shall constitute the entirety of the remuneration and entitlement of the contractor in respect of the work under the contract, and no further or other payment whatsoever shall be or become due or payable to the contractor under the contract.*

Excepted matter

4.3.5.0 - *Within 7 (seven) days of the occurrence of any act, event or omission which, in the opinion of the contractor, is likely to lead to delay in the commencement or completion of work(s) at job site and its such would entitle the contractor for an extension of the time specified in this behalf in the Progress Schedule(s), the contractor shall inform the Site Engineer and the Engineer-in-charge in writing of the occurrence of the act, event or omission and the date of commencement of such occurrence. Thereafter, if even upon the cessation of such act or event or the*

fulfillment of the omission the contractor is of opinion that an extension of the time specified in the Progress Schedule(s) at job site is necessary, the contractor shall within 7 (seven) days after the cessation or fulfillment as aforesaid make a written request to the Engineer-in-charge for extension of the time specified in the Progress Schedule and the Engineer-in-charge may at any time Prior to completion of the work extend the time of competition in the Progress Schedule for such period(s) as he considers necessary, if he is of opinion that such act/event/omission constitutes a ground for extension of time in term of the contract and that such act/event/opinion/decision of the Engineer-in-charge in this behalf and as to extension necessary shall, subject to the provisions of Clause 4.3.6.0 hereof, be final and binding upon the contractor.

4.4.0.0 - *If there is any delay in the final completion of the work beyond the date for the final completion of the work or works aforesaid at the job site as stipulated in the Progress Schedule, the Owner shall (without prejudice to any other right of Owner in this behalf) be entitled to liquidated damages for delay at 1% (One percent) of the total contract value for each week or part thereof that the work remains incomplete beyond the Scheduled date of final completion for the work or works, as the case may be, at the job site, subject to a maximum of 10% (Ten percent) of the total contract value.*

6.7.1.0 *- The acceptance by the contractor of any amount paid by the owner to the contractor in respect of the final dues of the contractor determined in accordance with the provisions of Clause 6.3.1.0 hereof upon condition that the said payment is being made in full and final settlement of all said dues to the contract or shall, without prejudice to the claims of the contractor included in the Final Bill in accordance with the provisions under Clause 6.6.0.0. hereof and associated provisions thereunder be deemed to be in full and final satisfaction of all such dues to the contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment, with the intent that upon acceptance by the contractor of any payment made as aforesaid, the contract (including the arbitration clause) shall subject to the provisions of Clause 6.8.2.0 hereof, stand discharged and extinguished except in respect of the notified claims of the contractor included in the Final Bill and except in respect of the contractor's entitlement to receive the unadjusted portion of the Security Deposit in accordance with the provisions of Clause 6.8.2.0 hereof on successful completion of the defect liability period.*

11. The *Owner* challenged the legality of the Award under *Section 34* of the *Arbitration Act* by contending that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration and the decision is beyond this scope of the submission to arbitration. The Award was also challenged on the ground that it is in conflict with public policy of India.

12. However through the impugned judgment dated 18.8.2005, the learned District Judge, Bongaigaon held that although there was no *notified claim* under *Clause 6.6.1.0* by the contractor yet there is an arbitrable dispute regarding the deduction of L.D. from the final bill by the Owner. Proceeding on this basis and after noting that decision for the majority award was based on elaborate discussion of the Clauses of the contract, the Court found no scope to disturb the majority award. There was no reference to the minority award rendered by the co-arbitrator, in the impugned judgment.

APPELLANTS SUBMISSION

13.1 Assailing the legality of the Court's decision in the *Section 34* application, Mr. K.N. Choudhury, the learned Senior Counsel submits that the terms of the contract provides for finality of the claim and unless the contractor makes a *notified claim*, as defined under *Clause 1.0.24.0* the claim against deduction of the L.D. is an *excepted matter*.

13.2 The Senior Counsel refers to *Clause 6.7.1.0* of the GCC to project that full and final settlement of all dues was accepted by the contractor on 4.12.1996 and therefore in the absence of any *notified claim*, the dispute on deduction of L.D. is not arbitrable, as it is covered by the *exception Clause 6.7.1.0* of the GCC.

13.3 Referring to *Arbitration Clause 9.1.0.0* of the GCC, Mr. Choudhury submits that when the contractor have failed to notify its claim, no arbitrable disputes exists and therefore it is argued that the Award was passed without jurisdiction.

13.4 Since levy of L.D. was authorized by *Clause 4.4.0.0* of the GCC, the Owner argues that when the parties have expressly agreed for levy of L.D. for breach of contract, the same could not have been reversed by the Arbitrators. The Senior Counsel submits that the impugned Award is opposed to Public Policy of India within the meaning of the *explanation* to *Section 34(2)(b)* of the *Arbitration Act* and therefore the Court below should have quashed the majority award.

13.5 Referring to the minority opinion of the Co-Arbitrator Mr. V.R. Vyas, the Senior Counsel submits that as the contractor never notified any claim to the Engineer-in-Charge within the stipulated period, there is no arbitrable dispute and therefore exercise of jurisdiction by the Arbitrators is unjustified. Projecting further that the Deputy Manager (Accounts) of the Contractor had acknowledged the receipt of the tendered amount (after deduction of the L.D. @2%), as full and final settlement of the contractor's claim, there can be no arbitrable dispute for the deducted L.D.

RESPONDENTS SUBMISSION

14.1 Representing the *contractor*, Mr. R.L. Yadav, the learned Counsel submits that the award of an Arbitrator should not be lightly disturbed under *Section 34* of the *Arbitration Act* and the Court has no power to re-appreciate the material to reach a different conclusion. He relies on *Union of India* v. *B.K. Construction* reported in 2003 (3) GLT 712 in support of his argument.

14.2 Referring to the letter written by the contractor on 21.2.1995 where request was made for waiving the L.D., Mr. Yadav submits that the contractor made their claim well before the deducted payment was tendered by the Owner on 4.12.1996.

14.3. In this case, the execution was delayed by 379 days and Mr. Yadav refers to the fact that the contractor can't be held solely responsible for the delayed execution as contributory default of co-contractor i.e. Bridge and Rough was also found and therefore the logic for levying L.D. on the contractor is questioned by the respondent.

14.3 The contractor contends that acceptance of payment (with deduction of L.D.), should not debar the contractor from challenging the validity of the deduction and therefore it is argued that the Arbitrators were justified in examining the legality of the deduction and rightly gave their decision on the contractor's claim.

DISCUSSION

15. When the parties have bound themselves by various terms in executing a contract, it is necessary to carefully examine the Clauses of the contract to determine whether an arbitrable dispute could be raised on deduction of L.D. and whether the view taken by the Court in declaring that the Arbitrators acted within jurisdiction was correct and proper.

16. Under *Clause 4.4.0.0* of the GCC, if there is any delay in final completion of work, the Owner is entitled to L.D. at 1% for each week, subject to maximum of 10% of the total contract value. Admittedly the execution of the contract was delayed for 379 days but the Owner levied L.D. (Rs. 20,79,872/-) @1% per week for 14 days. The owner's Cheque (with deduction) was received by the Deputy Manager (Accounts) of the contractor on 4.12.1996 with the endorsement -

"The above amount is the full and final payment against our W.O. No. RX/038 dated 28.7.1992 adjustment of payment of R/A Bills and advances etc."

Only after accepting the final bill, the contractor raised their grievance on 2.1.1997 against deduction of L.D. by the Owner.

17. *Clause 6.6.1.0* of the GCC provides that if the contractor disputes the validity of any deduction made by the Owner, they should forthwith give notice in writing of his claim to the Engineer-in-Charge and unless such demand is made within the stipulated time, the contractor is deemed to have *waived* his claim.

18. The Owner's liability under *Clause 6.7.1.0* is discharged on acceptance by the contractor of the final payment determined as full and final settlement of all dues and only exception envisaged are in respect of *notified claims.* The *notified claims* if any can be referred for arbitration under *Clause 9.1.0.0* and therefore this clause bears close scrutiny.

19. The *Clause 9.1.0.0* interestingly provide for arbitration for all amount claimed by the Owner whereas only *notified claims* of contractor can give rise to an arbitrable dispute. Thus the contractor and the owner in respect of their respective claims are treated differently under the contract terms. In other words only the *notified claim* of the contractor can give rise to an arbitrable dispute but no such rider is imposed for claims of the owner.

20. Moreover when the contractor without protest accepts the tendered amount from the Owner in respect of the contractual dues, such payment (with deduction of L.D.), is an *excepted matter* where the terms of the contract doesn't envisage arbitration. Only for *notified claims*, arbitration is envisaged under the terms of the contract.

21. The Supreme Court in *Harsha Constructions* v. *Union of India* reported in (2014) 9 SCC 246 had held that if a non-arbitrable dispute is referred to an Arbitrator for a subject matter which is covered by the *excepted Clause*, is is not open to the Arbitrator to decide the issue and such decision when rendered for *excepted matter* can be quashed by the Court under *Section 34* of the *Arbitration Act.*

DECISION

22. In a reported decision arising under the old *Arbitration Act, 1940* (hereinafter referred to as '*the 1940 Act*"), the Supreme Court in *General Manager, Northern Railway* v. *Sarvesh Chopra* reported in (2002) 4 SCC 45 explained the concept of *excepted matter* where the parties agree for adjudication under specified authority and such matters are not arbitrable. In the case in hand, under *Clause 4.3.5.0* of the GCC,

the contractor was required to inform the Site Engineer and the Engineer-in-charge in writing of events/omission which is likely to delay in completion of work with a request for extension of time and the decision of the Engineer-in-charge is made final and binding upon the contractor. Therefore when we apply the ratio of *Sarvesh Chopra* (supra) to the present facts, it is found that the dispute pertains to levy of L.D. for delayed execution and for this the contractor should have informed the Site Engineer and the Engineer-in-charge in writing. But without such steps by the contractor the issue of deduction L.D. can't be said to be an arbitrable dispute.

23. What is seen here is that the L.D. was levied only for 14 days whereas the execution was delayed by 379 days. Therefore it is apparent that the Owner took into account the factors beyond the control of the contractor and major portion of the delay was thereby condoned. In this context, the observation must be made on the letter dated 22.7.1995 written by the Engineer-in-charge i.e. EIL, who recommended that the entire delayed period be condoned. But M/s. EIL was not empowered to condone the delay. The contract only empowers the Owner to decide on the issue and in this case, the Owner have considered the matter and levied the L.D. for the limited period of 14 days. Therefore when power vests on the Owner to take the decision on L.D., the recommendation made for condoning the delay by the Engineer-in-charge in my view will not benefit the contractor.

24. When arbitration award is rendered through competent jurisdiction, there can be no interference with such award in a proceeding under *Section 34* of the *Arbitration Act*, through re-assessment of the materials by the Court. There can be no quarrel with this submission of the contractor. But when the arbitral award deals with a dispute not coming within the terms of the submission to arbitration, it is a jurisdictional error which is rectifiable in a proceeding under *Section 34* of the *Arbitration Act*. Moreover if the award contains decisions on matters beyond the scope of the submission to arbitration or the decision is in conflict with Public Policy of India, the award can be quashed by the Court by exercising powers under *Section 34* of the *Arbitration Act*.

25. The issue here is whether the contractor's claim on L.D. was a *notified claim* for it to be arbitrated. The term *notified claim* is a defined expression under the GCC and it is only such claims which can be referred for arbitration. Here the contractor hadn't notified any claim and therefore I hold that the award was rendered without jurisdiction.

26. Upon application of the relevant clauses to the facts herein, when the contractor failed to inform the Engineer-in-Charge it amounts to *waiver* and therefore it is covered under *excepted* matter where arbitration is not envisaged. Therefore in my view it was not open to the arbitrator to render award on a non arbitrable issue.

27. In contracts where time is of essence and the contractors have bound themselves to levy of liquidated damage our country's public policy do justify deduction of L.D. since a Government undertaking with tax payers funding suffered loss for the delayed execution. Therefore even on this count the majority award can't be sustained and it is held that the Court erred in upholding the award which is against public policy of India. This conclusion is reached by accepting the wider meaning of the expression given by the Supreme Court in *ONGC Ltd.* v. *Saw Pipes Ltd.* reported in (2003) 5 SCC 705.

28. While some of the findings recorded in the impugned judgment are found to be based on incorrect facts for which the decision can be said to be perverse, the said

aspect doesn't require adjudication because the case is decided on other issues. In this case, there was no *notified claim* of the contractor and they accepted the final payment on 4.12.1996 without any protest. Therefore even assuming that a dispute existed on deduction of L.D., this wasn't an aribtrable dispute, as it was an *excepted* matter. Under these facts although the arbitrators based their decision on incorrect foundation those perversities are kept out of this decision since the jurisdictional issue is answered against the contractor who invoked arbitration.

29. In view of above, I quash the majority award of the two Arbitrators. Consequently the impugned judgment dated 18.87.2005 of the learned District Judge, Bongaigaon is declared to be unsustainable and the same is accordingly quashed. It is ordered accordingly.

30. With the above decision, this Appeal stands allowed without any order on cost.

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
44.
\+ **ARB.P. 334/2014**

IOT INFRASTRUCTURE & ENERGY SERVICE LTD. ..... Petitioner
Through: None.

versus

INDIAN OIL CORPORATION LTD. ..... Respondent
Through: Ms. Reeta Mishra and Mr. Abhishek Birthray, Advocates for Respondent/Applicant in IA No. 4918/2015.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% 10.03.2015

IA No. 4918/2015 (for modification of order dated 12th February 2015)

1. For the reasons stated therein, the application is allowed.

2. The order dated 12th February 2015 shall read as under:

"***IN THE HIGH COURT OF DELHI AT NEW DELHI**
3.
\+ **ARB. P. 334/2014**

IOT INFRASTRUCTURE & ENERGY SERVICE LTD.
..... Petitioner
Through: Mr. Amit Kumar Pathak and Mr. Vikas Jhangra, Advocates.

Versus

INDIAN OIL CORPORATION LTD. .....Respondent
Through: Ms. Reeta Mishra and Mr. Abhishek Birthray, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R

% 12.02.2015

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act 1996 ('Act') filed by the IOT Infrastructure and Energy Services Ltd. seeking the appointment of an Arbitrator to adjudicate the dispute between the Petitioner and the Respondent Indian Oil Corporation Ltd. arising out of a contract dated 31st January 2004 entered into between the parties whereby the Respondent was to provide drawings, description, plans, specification and machinery and the Petitioner was to perform civil, structural and piping works for the offsite-II for the Panipat Refinery Project of the Respondent at Haryana.

2. It is stated that during the execution of the works the Petitioner became entitled to certain sums of money and kept raising such claims from time to time between February and September 2005. The work was completed in February 2006. The completion certificate was issued to the Petitioner on 7th

September, 2006. In the meanwhile, on 21st December 2005, the Petitioner summarized its claims in the form of a statement and sent it with supporting documents to the Respondent as part of the final bill. The petitioner also raised a final bill by a letter dated 21st December 2005. The Petitioner sent a reminder on 3rd August 2006.

3. There is then a gap in the narration. The Petitioner states that it sent another reminder thereafter on 16th September 2009. The Respondent did not respond to the above letters. The Petitioner then invoked the arbitration clause and sent a letter dated 26th July 2011 requesting the Respondent to nominate three arbitrators out of which one could be chosen as Sole Arbitrator as per Clause 9.0.1.1 of the contract. By letter dated 11th October 2000 the Respondent repudiated the claim of the Petitioner. The stand of the Respondent was that in terms of Clause 6.6.0.0 of the GCC, after the acceptance of the final bill value, no further amount was payable under the contract

4. The Petitioner then approached this Court with Arbitration Petition No. 336 of 2013 which was disposed of by an order dated 2nd December 2013 recording the statement of counsel for the Petitioner that the Petitioner would approach the General Manager (GM) of the Respondent in terms of Clause 9.0.2.0. The Court gave liberty to the Petitioner to approach the Court gain after the decision of the GM was communicated to the

Petitioner.

5. On 16th December 2013, the Petitioner wrote to the GM communicating its claims. A hearing was fixed before the Executive Director on 22nd April 2014. Thereafter on 30th April 2014, the Respondent wrote to the Petitioner stating that the claims of the Petitioner were not 'notified' and therefore did not fall under the jurisdiction of arbitration. The price escalation towards structural steel and RFC was not tenable as per clause 2.6.1.0. Escalation towards manpower and consumables was not tenable according to clause 6.3.0.0 of GCC and compensation for extended stay and financing charges were not tenable as per contract clause 4.3.9.0 and 6.32.0 (vii) of GCC. Time extension been granted to the Petitioner without levy of the PD Clause. Consequently, the claims of the Petitioner were not notified. It was further pointed out that the Petitioner had also accepted the final bill with a declaration that all dues are clear and nothing is pending. Therefore, as per GCC 6.6.0.0, no claims were payable. It is thereafter the present petition was filed.

6. It is submitted by Mr. Amit Kumar Pathak, learned counsel for the Petitioner, that the question whether any of the Petitioner's claims are tenable or not or are barred by limitation can be examined in the arbitral proceedings and therefore the disputes should be referred to arbitration. On the other hand, it

is stated in the reply filed by the Respondent, and reiterated by Ms. Rita Mishra, learned counsel, that only a dispute which arises out of a 'notified claim' included in the final bill in accordance with Clause 6.6.3.0 can be referred to arbitration. Further matters specifically excluded under Clause 9.0.2.0 cannot form the subject matter of arbitration. The decision in this regard of the GM is final. It is pointed out that against all the dues and claims of the Petitioner under the final bill, the Respondent paid to the Petitioner in March 2007 Rs. 52,93,46,788. The said amount was accepted in full and final settlement of the dues owed to the Petitioner. The Petitioner submitted a no claim certificate stating: "This is to certify that we have no claims other than the measurement entered in the Final Bill and we accept the payment in full and final settlement of all our claims in respect of this work." It is pointed out that neither the final bill nor the above certificate has been produced by the Petitioner before the court.

7. In the rejoinder it is stated by the Petitioner that the certificate in question was already formed part of the earlier arbitration petition and therefore it was not deliberately suppressed. As regards the contention that these were not notified claims, there is no denial as such in the rejoinder.

8. The above submissions have been considered. In terms of Clause 6.7..1.0 once payment has been made in full and final

settlement of all dues of the contract it would be in full and final satisfaction of all such dues notwithstanding any protest. Here, there appears to be no protest recorded by the Petitioner either at the time of receiving such payment or subsequently. Under Clause 6.6.1.0 if the Contractor feels that he is entitled to any extra payment over and above the amounts due under the contract, he should give notice in writing to the Engineer-in-charge within 10 days from the date of issue of the order. Such 'notified claims' are, in terms of Clause 6.6.3.0 to be separately included in the final Bill the in the form of a statement of claim attached thereto. Clause 6.6.3.1 states that the Respondent would not be liable in respect of a notified claim not specifically reflected in the final Bill. It is therefore clear that only notified claims included in the final bill can be referred to arbitration. Under clause 9.0.2.0 once the GM decides that a certain item is not notified and cannot be referred to arbitration then it would stand excluded from arbitration. With the decision of Respondent being conveyed to the Petitioner by the letter dated 30th April 2014 holding that the claims the Petitioner were not notified, the question of referring those claims to arbitration does not arise.

9. The Petitioner has been unable to show how notwithstanding the above clauses of the contract, which are binding on the parties, the Petitioner can possibly seek reference of the disputes to arbitration. Consequently the court declines the

prayer of the Petitioner. The petition is accordingly dismissed."

S. MURALIDHAR, J

MARCH 10, 2015/dn

ARB. PET. 175/2012

Institute of Geoinformatics (P) Ltd. v. Indian Oil Corporation Ltd.

2015 SCC OnLine Del 9562

(BEFORE V. KAMESWAR RAO, J.)

Institute of Geoinformatics (P) Ltd. ..... Petitioner
Mr. Vivek Singh, Advocate

v.

Indian Oil Corporation Ltd. And Ors. ..... Respondents
Mr. Sujoy Kumar, Adv. with Mr. Nishant Menon, Ms. Reeta Mishra, Mr. Abhishek Birthray, Advs.

ARB. PET. 175/2012
Decided on May 19, 2015

V. KAMESWAR RAO, J. (Oral)

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act', in short) has been filed for appointment of an Arbitrator.

2. It is the case of the petitioner that the pipeline division of the respondent-corporation desired to execute the work of detailed engineering survey, soil survey and providing services for establishing ROU IN ROW of Paradip, Haldia, Durgapur, LPG Pipeline Project, entered into a contract with the petitioner on July 14, 2010. The contract has an arbitration clause, which is reproduced as under:

"9.0.0.0 ARBITRATION

9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of the Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Disputes Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its claim (s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as s set off defence or counter-claim any claim which is not a notified claim included in the CONTRACTOR'S Final Bill in accordance with the provisions of clause 6.6.3.0 hereof.

9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.

9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and

ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are:

(i) with respect to or concerning the scope of existence or otherwise of the Arbitration Agreement;

(ii) Whether or not a claim sought to be referred to arbitration by the CONTRACTOR is a notified claim;

(iii) Whether or not a notified claim is included in the CONTRACTOR's final bill in accordance with the provisions of clause 6.6.3.0 thereof;

(iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR'S Final Bill.

9.0.3.0 The provisions of the Indian Arbitration and Conciliation Act, 1996 and any re-enactment (s) and/or modification(s) thereof and of the Rules framed there under shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

(a) The Arbitrator shall give his Award separately in respect of each claim and counter claim and

(b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed), which is stated to be final and/or binding on the CONTRACTOR in terms of the Contract Documents.

9.0.4.0 The venue of the arbitration shall be New Delhi, provided that the Arbitrator may with the consent of the OWNER and the CONTRACTOR agree upon any other venue".

3. In a communication dated October 21, 2010, the Chief Construction Manager, Kolkata wrote a letter to the petitioner that it has not started the work for four months despite the fact that the work has to be completed within 28 months. It is the case of the petitioner that it had carried out the work assigned to it honestly. However, all of a sudden, the respondents had rescinded the contract vide letter dated November 2, 2010. The petitioner vide letter dated November 16, 2010, demanded the payment for the work done. The said communication did not elicit any response. The petitioner lodged five claims with the respondents invoking the arbitration clause, which are reproduced as under:

STATEMENT OF CLAIMS

A. The petitioner has executed the work worth Rs. 46,41,493.00 + S/tax 4,78,105.00 = Rs. 51,19,898.00 none of which have been paid.

B. At the time of contract the petitioner has deposited an amount of Rs. 4,20,000.00 towards security deposit. Due to unlawful rescission of contract the security amount has become due for refund to the petitioner.

C. The value of impugned contract is Rs. 67,91,749.30 and the petitioner is allowed to do the work of Rs. 46,41,793.00 only and the work of Rs. 121,49,956.30 has been iiiegaily snatched out of the petitioner's hands and thereby it has deprived from earning profit @15% which figures out of Rs. 18,22,493.00. This loss is sustained due to wrongful rescission of contract.

D. Due to rescission of contract the petitioner has required to demobilize the deployed resources at work site as equipments, machines and men-force from work site which has resulted us financial cost of Rs. 8.00 lakhs being notice period salary to the staff and other vendors.

E. According to above claims the petitioner has to get the payment of Rs. 81,62,391.00 from the respondents till 31st Dec. 2010 as such the petitioner is entitled to recover an interest w.e.f. 01/01/2011, @ 16% p.a. till the date of actual payment.

F. The petitioner is entitled for Rs. 5,00,000/- towards administrative and legal expenses".

4. Despite raising the claims, on the failure of the respondents to appoint an Arbitrator in terms of the stipulation referred above, the petitioner filed an Arbitration Petition No. 42/2011 in this Court. The Court initially issued a notice to the respondents. Finally, when the matter came up for hearing on October 18, 2011, it was argued on behalf of the respondents that as per the contract, the claims are required to be notified by the General Manager before any arbitration could be invoked. The Court accordingly, on the basis of the statement made by the learned counsel for the petitioner that the application will be made to the General Manager of the respondent-corporation in accordance with arbitration clause within two weeks and pursuant thereto, the General Manager of the respondent-corporation will consider the application of the petitioner and pass appropriate orders in accordance with law within four weeks thereafter, withdrew the petition with liberty to file fresh petition, if so advised, after the request is disposed of by the General Manager.

5. The General Manager vide order dated March 10, 2012 has held that the claim Nos. 1, 3, 4 & 5 are neither notified claims nor arise out of any notified claims and are therefore not arbitrable. In other words, the only claim said to be arbitrable under clause 9.0.1.0 of GCC is claim No. 2. The General Manager has called upon the IOCL to nominate a panel of three persons from whom the petitioner may select an Arbitrator under clause 9.0.1.0 to decide the said claim of the petitioner for refund of security deposit and interest thereon and to decide upon the respondents' claims against the petitioner. The reasons for not notifying the claim Nos. 1, 3, 4 and 5 are as under:

Claim no. 1

Claim for a sum of Rs. 51,19,8989/- towards the value of word done alongwith service tax

IGPL has contended that it has performed work of the value of Rs. 46,41,793/- up to for which it is entitled to be paid because of the termination. I am assuming in favour of IGPL that the termination of the Contract is the event on which the Contractor bases the claim. So viewed, the Claim for the first time made by the Contractor's letter dated 16.11.2010 addressed to the Engineer-in-charge and invoice dated 15.11.2010 do not satisfy the requirements of a notified claim since it has neither been made within 10 (ten) days of November 02, 2010, nor has been addressed or copied to the Site

Engineer.

Claim no. 3

Claim for a sum of Rs. 18.22.494/- towards loss of profit incurred as a result of termination of Contract

This Claim arises out of IGPL's contention that the Contract was wrongfully terminated by IOCL on 2.11.2010.

The said Claim was made for the first time by IGPL's letter dated 16.11.2010 addressed to the Engineer-in-Charge. This claim does not satisfy the requirements of a notified claim since it was neither made within 10 (ten) days of termination nor was addressed or copied to the Engineer-in-Charge.

Claim no. 4

Claim for Rs. 8.00.000/- towards cost of de-mobilization of equipment. machinery and man force from the work site

This Claim also arises out of the termination of the Contract on 2.11.2011 and was also made for the first time by IGPL's letter dated 16.11.2010 addressed to the Engineer-in-Charge. This does not satisfy the requirements of a notified claim, since it was also not addressed or copied to the Engineer-in-Charge, nor was made within 10 (ten) days of 2.11.2010.

Claim no. 5

Interest @ 16% per annum on the total sum of Rs. 81.62.391/- with effect from 1.1.2011

Since the principal amounts claimed under Claims 1, 3 and 4 are not arbitrable, the Claim for interest thereon is not arbitrable.

The claim for interest on Claim no. 2 is however arbitrable.

Accordingly, I hold that Claims No. 1, 3, 4 & 5 (except so far as arises out of Claim No. 2) are neither notified claims nor arise out of any notified claims and are not, therefore, arbitrable.

6. The respondents in their reply, would justify the termination as well as the order of General Manager dated March 10, 2012.

7. Mr. Vivek Singh, learned counsel appearing for the petitioner, would state, that the General Manager should have notified all the claims raised by the petitioner in its letter dated November 16, 2010. He would say, the reasoning is totally untenable. That apart, he would state that even this Court while exercising jurisdiction under Section 11 of the Act necessarily has to refer all the claims which have been raised by the petitioner in the aforesaid communication. He would rely upon the judgments of the Supreme Court in the case of *Arasmeta Captive Power Company Private Limited* v. *Lafarge India Private Ltd.*, AIR 2014 SC 525 and *Union of India* v. *Raunaq International Ltd.*, 2008 (7) SCALE 355 in support of his contention.

8. On the other hand, Mr. Sujoy Kumar, learned counsel appearing for the respondents would justify the order of the General Manager by submitting that the same is in accordance with clause 9.0.0.0 of the contract. which relates to arbitration. He has

drawn my attention to the said clause, which clearly stipulates that it is only the notified claims in terms of clause 6.6.1.0 of the GCC, which are arbitrable within the scope of arbitration agreement and the same has to be decided by the General Manager under clause 9.0.2.0. He has drawn my attention to clause 9.0.2.0 that a claim which is not notified is an 'excluded matter'.

According to him, the General Manager, for good valid reasons, has not notified the claim Nos. 1, 3, 4 & 5. The only claim arbitrable being claim No. 2, the same has been notified, which claim would also be considered along with the claim of interest. He states that the aforesaid clause had come up for interpretation of this Court on several occasions, including recently in the month of March 2015. He would rely upon the judgments of this Court reported as 57 (1995) DLT 536, *International Building and Furnishing Co. (Cai) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.* and order dated March 10, 2015 in Arb. P. 334/2014, *IOT Infrastructure & Energy Service Ltd.* v. *Indian Oil Corporation Ltd.*

9. Having considered the submissions made by learned counsel for the parties and on a perusal of clause 9.0.1.0, it is clear that any dispute arising out of any notified claim of the contractor, included in the final bill of the contractor in accordance with the provisions of clause 6.6.3.0 shall be referred to the arbitration of the Sole Arbitrator selected in accordance with the provisions of the clause 9.0.1.1.

10. The General Manager, insofar as the claim No. 1 is concerned, which is a claim towards the value of the work done upto the date of termination, was of the view that the claim for the first time, was made by the petitioner on November 16, 2010, addressed to the Engineer In-Charge and invoice dated November 15, 2010 do not satisfy the requirement of a notified claim since it has neither been made within ten days of November 2, 2010 nor has been addressed or copied to the Site Engineer. This stipulation has been so laid down in clause 6.6.1.0, which I reproduce as under:

"6.6.1.0 Should the CONTRACTOR consider that he is entitled to any extra payment of compensation in respect of the works over and above the amounts due in terms of the contract as specified in clause 6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any running account bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf of the Engineer-in-Charge and the Site Engineer within 10 days from the date of the issue of orders or instructions relative to any works for which the CONTRACTOR claims such additional payment or compensation or of the happening of other event upon which the contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The OWNER shall not anywise be liable in respect of any claim by the CONTRACTOR unless notice of such claim shall have been given by the CONTRACTOR to the Engineer-in-charge and the Site Engineer in the manner and within the time aforesaid and the CONTRACTOR shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid".

11. Insofar as the claim No. 3 is concerned, the same is a claim for loss of profit. Here also, the General Manager has not notified the claim on an identical ground on which he did not notify claim No. 1.

12. Similarly, the claim No. 4 was also rejected on the same ground. Insofar as the submission of the learned counsel for the petitioner that de-hors the provisions in the contract, the claims need to be referred to the arbitration, is concerned, suffice to

state, that the matters specifically excluded under clause 9.0.2.0 cannot form the subject matter of the arbitration. The decision in this regard of the General Manager is final. Even if the claims, not notified, were subject matter of the final bill, the reasoning given by the General Manager was, the same were not made within ten days of the termination on November 2, 2010. The learned counsel for the petitioner was unable to show, how notwithstanding above clauses of the contract, which are binding on the parties, the petitioner can seek reference of all the claims through arbitration.

13. The Division Bench of this Court in *International Building and Furnishing Co. (Cal) Pvt. Ltd.* (supra) while interpreting similar and identical clauses has held as under:

"7. It is, Therefore, clear that arbitration at the instance of the contractor is available under clause 9.0.1.0 only in respect of "notified claim". That would mean that the contractor must have gone through the procedure-indicated in clause 6.6.1.0 and 6.6.3.0 and notified his claims to the Engineer-in-Charge and the Site Engineer within the period of ten day of the date of issue of orders or instructions relative to any works for which the contractor was claiming such additional payment or compensation. In such a situation it is obvious that if the claim is not a "notified claim", the arbitration clause cannot be invoked by the contractor.

8. In the present case, when we asked the counsel as to whether the claims sought to be referred to arbitration are claims notified to the Engineer-in-Charge or Site Engineer as above mentioned, learned counsel for the appellant passed on certain papers to us, which we found, were not notices to the above said officers, but were notices to the General Manager of the respondent seeking arbitration under clause 9.0.1.0. Learned counsel for the appellant has not been able to place before us any notice to the particular officers designated in the contract so that it could be said that he had "notified claims" to be referred to arbitration.

9. The clauses relating to arbitration in the present cases before us are similar to the clauses contained in the agreements entered into by the same company, viz. Indian Oil Corporation, which came up before this court for adjudication earlier. The first such case is the one relating to Uttam Singh Duggal & Co. (O) Ltd. v. *Indian Oil Corporation Ltd. (Suit No. 967-A of 1983) decided by P. D. Wadhwa, J. on 8.1.1985. By a very elaborate Judgment the learned Judge has referred to various rulings. Initially he referred to the decision of the Supreme Court in Vulcan Insurance Co.* v. *Maharaj Singh [1976] 2 SCR 62. In that case the Supreme Court held the following clause in an insurance policy to be valid:*

"In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

10. The learned Judge also followed the decision of the court of Appeal in Babanath International v. *Avant Petroleum. (1982) 3 All. E.R. 244. In that case the arbitration clause provided that any or all disputes of whatsoever nature arising out of a chartered party be put to arbitration in the City of London. It contained no time limited for commencing arbitration proceedings. There was another clause being clause M2 which was separate from the arbitration clause which read as follows:*

"Chatterers shall be discharged and released from all liability in respect of any claims owners may have under this Charter Party ..... unless a claim has been presented to Chatterers in writing with ail available supporting documents, within 90 (ninety) days from completion of discharge of the cargo concerned under this Charter Party."

In that case it was held by the Court of Appeal that the making of a claim does not by itself commence the arbitration proceedings or necessarily lead to their being commenced. The claims may be conceded or settled amicably. The Court of Appeal held that Section 27 of the English Arbitration Act did not permit the court to extend any time limit other than in respect of the categories mentioned in that section and, Therefore, the court could not extend time for the making of a claim. Following the said judgment, Wadhwa, J. held that a claim had to be notified as required by clause 9.0.1.0 and to become a "notified claim" the contractor must have given notice thereof in writing before the Engineer-in-Charge and the Site Engineer within ten days from the date of the issue of orders or instructions relative to any works for which the contractor claimed such additional payment or compensation and that it was not open to the court to extend the said time. Otherwise, reference to arbitration was not permissible.

11. We are in entire agreement with the view taken by Wadhwa J. in the above said case. The said decision was followed by B. N. Kirpal, J. (as he then was) in Associated Hybilds Pvt. Ltd. v. *Indian Oil Corporation Ltd. (Suit No. 2399-A 1985 decided on 15.10.1987). This case was again followed by P. K. Bahri, J. in Bansal Construction Co.* v. *Indian Oil Corporation (Suit No. 255-A of 1982 decided on 2.8.1991). In all these three cases the contract was with the Indian Oil Corporation and the very same clauses 9.0.1.0, 6.6.1.0 and 6.6.3.0 fell for consideration and the view was taken that unless the claim was a "notified claim" there could be no reference to arbitration. The effect of the above decision would be that if the claim was not a "notified claim", the party could not invoke the arbitration clause, but must resort to other civil remedies, subject of course to any other conditions incorporated in the contract between the parties.*

XXX XXX XXX

17. The question before us is whether the claim is a "notified claim" so as to be referred to the arbitrator. If the claim is not a notified claim, there is no agreement to refer claim to arbitration. The words "notified claim" are given a particular meaning in the agreement of the parties. It is only those claims which can be referred. We are not here concerned with the question whether a claim is time barred and Therefore deemed to be waived by the party as in the Full Bench case. If the matter goes to the civil court because we are declining arbitration, it will be for that court to decide whether the claim is barred or whether there is any waiver of the claim".

14. The learned Single Judge of this Court in *IOT Infrastructure & Energy Service Ltd.* (supra) had taken a similar view which reads as under:

"....Such 'notified claims' are, in terms of Clause 6.6.3.0 to be separately included in the final Bill the in the form of a statement of claim attached thereto. Clause 6.6.3.1 states that the Respondent would not be liable in respect of a notified claim not specifically reflected in the final Bill. It is therefore clear that only notified claims included in the final bill can be referred to arbitration. Under clause 9.0.2.0 once the GM decides that a certain item is not notified and cannot be referred to arbitration then it would stand excluded from arbitration. With the decision of Respondent being conveyed to the Petitioner by the letter dated 30th April 2014 holding that the claims the Petitioner were not notified, the question of referring those claims to arbitration does not arise".

15. Insofar as the judgment relied upon by the learned counsel for the petitioner in *Arasmeta Captive Power Company Private Limited* (supra) is concerned, the same

would not help the petitioner inasmuch as the petitioner has not challenged the order dated March 12, 2012 nor can challenge the same in the proceedings under Section 11 (6) of the Act.

16. Further, on a reading of para 42(ii) of the said judgment, it is clear that the Chief Justice or his designate, in an application under Section 11(6) of the Act, on an issue raised with regard to the 'excepted matters' cannot address the same on merit, whether such a matter is an 'excepted matter' under the agreement in question or not. In the present case, it would be beyond the jurisdiction of the Court while exercising the power under Section 11(6) of the Act to conclude whether the General Manager was right in not notifying the claim Nos. 1, 3, 4 & 5.

17. Insofar as the judgment in the case of *Raunaq International Ltd.* (supra) is concerned, even this judgment of the Supreme Court will not help the petitioner. In the said judgment, the Supreme Court referred to its earlier judgment in the case of *General Manager, Northern Railway* v. *Sarvesh Chopra*, 2002 (2) SCR 156, wherein, it is clearly held that even if it is a matter excepted from the arbitration agreement, the Court shall be justified in withdrawing the reference. Since the General Manager was of the view that the claim Nos. 1, 3, 4 & 5 not notified claims, the same are not arbitrable.

18. I may only state here, the reliance placed by the learned counsel for the respondents on some other judgments of this Court and the Supreme Court are not referred to in view of my conclusion above. Suffice to state, in terms of clause 9.0.1.1, the respondents shall forward panel of three names to the petitioner within four weeks from the receipt of copy of this order to enable the petitioner to select an Arbitrator. The petitioner, on receipt of such a panel, within 30 days thereafter, select a name to be appointed as an Arbitrator. The Arbitrator so selected, would be within his/her right to arbitrate the claim No. 2 and the interest, if any thereon along with the counter claim(s) if any of the respondents.

19. The petition is disposed of.

20. No costs.

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ARB.P. 276/2016

Srico Projects Pvt. Ltd. v. Indian Oil Foundation

2017 SCC OnLine Del 6446

In the High Court of Delhi at New Delhi

(BEFORE S. MURALIDHAR, J.)

Srico Projects Pvt. Ltd. ..... Petitioner

Mr. R.M. Sinha, Advocate.

v.

Indian Oil Foundation ..... Respondent

Mr. Rajat Navet and Mr. Kushagra Pandit, Advocates.

ARB.P. 276/2016

Decided on January 9, 2017

ORDER

S. MURALIDHAR, J.:— This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner, Srico Projects Pvt. Ltd. ('SPPL'), and the Respondent, Indian Oil Foundation, arising out of a contract dated 10th April, 2013 entered into between the parties consequent upon the Respondent awarding the Petitioner the work of "construction of tourist infrastructure facilities comprising of building works, interior works, internal and external electrical works, fire fighting, horticulture and landscaping etc. around Konark Sun Temple Complex in Orissa".

2. In terms of the contract, the proposed date of completion of contract was 10th October, 2014. However, the project was unable to be completed within the stipulated time for reasons which need not be discussed in the present order. What is relevant, however, is that Respondent terminated the contract on 16th September, 2015.

3. The Petitioner filed OMP (I) 536 of 2015 seeking to restrain the Respondent from invoking bank guarantees ('BGs') furnished by the Petitioner. This petition was dismissed by the Court holding that the invocation of the BGs by the Respondent was "neither fraudulent nor any special equities are made in favour of the Petitioner."

4. By a letter dated 14th December, 2015, the Petitioner invoked the arbitration clause and sought reference of the claim appended to the letter to arbitration in terms of Clause 9.0.1.1 of the General Conditions of Contract ('GCC'). In response thereto, by a letter dated 18th December, 2015, the Respondent informed the Petitioner that in terms of the aforementioned clause, the Petitioner was "entitled to request for arbitration of notified claims only which are included in the final bill." It was pointed out that the Petitioner had neither submitted its final bill upon joint measurements nor had given details of the notified claims. It was informed that the final bill for settlement in terms of Clause 6.6.0.0 was "still awaited" and, therefore, the request for appointment of an Arbitrator was not tenable "at the stage."

5. On 19th December, 2015, the Petitioner wrote to the Respondent stating that it was submitting the scrutinised bills with protest in respect of Brickbats laying in Main Avenue and pathway and filling sand in the main parking open area. The Petitioner also enclosed the list of all its claims and reiterated its request for appointment of an Arbitrator.

6. By a letter dated 12th January, 2016, the Respondent pointed out that in

accordance with Clause 6.6.1.0, the Petitioner was required to give notice in writing of all its claims arising out of any deductions made or threatened by the owner from any Running Account ('RA') Bills within ten days of the issue of the order relating to any works for which a claim was being made. Having gone through the claims submitted by the Petitioner along with its final bill, the Respondent was of the view that they did not justify as 'notified claim' under the GCC.

7. Thereafter, the present petition was filed in which notice was issued to the Respondent on 9th May, 2016. Pursuant thereto, the Respondent has filed a reply where it reiterated that "only notified claims" which have been included in the final bill can be referred to arbitration. It is further stated that under Clause 9.0.2.0, the question whether the claim qualifies as a 'notified claim' can only be decided by the General Manager ('GM') of the Respondent. The Petitioner was yet to approach its GM for a decision on the claims. It is, accordingly, contended that the petition itself is pre-mature.

8. In its rejoinder the Petitioner submits that the GM cannot decide upon the legal rights of the parties and it is the Arbitrator who can finally decide them.

9. Mr. R.M. Sinha, learned counsel appearing for the Petitioner apart from reiterating the contentions raised in the petition submitted that the statement of claims appended to the letters dated 14th December, 2015 and 19th December, 2015 could not be rejected in their entirety. They may have included claims which ought to have been notified and those which did not. He submitted that this decision whether any particular claim does not qualify to be referred to arbitration should be decided by the Arbitral Tribunal ('AT') itself and not by the Court. He submitted that under Section 11(6A) of the Act, as inserted with effect from 23rd October 2015, all that the Court was required to do was to examine the existence of an arbitration agreement between the parties and nothing more.

10. Mr. Rajat Navet, learned counsel appearing for the Respondent, on the other hand, submits that in terms of the arbitration clause, the only agreement between the parties is for reference of claims that are notified and determined as such by the GM to arbitration and nothing else. Having agreed to the above conditions of the contract, it was not open to the Petitioner to seek reference of such claims which were not even notified. He placed reliance on the decision of this Court dated 12th February, 2015 in Arbitration Petition No. 334 of 2014 (*IOT Infrastructure & Energy Service Ltd.* v. *Indian Oil Corporation Ltd.*) where the Court was interpreting an identical clause.

11. Clause 9.0.1.0 of the GCC reads as under:

> "Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any claims of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of clause 9.0.1.0 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof."

12. The above clause in turn refers to Clauses 6.6.1.0 and 6.6.3.0 which read as under:

> "Should the CONTRACTOR consider that he is entitled to any extra payment or

compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any Running Account Bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the CONTRACTOR claims such additional payment or compensation or of the happening of other event upon which the CONTRACTOR bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The OWNER shall not anywise be liable in respect of any claim by the CONTRACTOR unless notice of such claim has been given by the CONTRACTOR to the Engineer-in-charge and the Site-Engineer in the manner and within the time aforesaid and the CONTRACTOR shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

"6.6.3.0 Any claims of the CONTRACTOR notified in accordance with the provision of Clause 6.6.1.0 hereof as shall remain at the time of preparation of Final Bill by the CONTRACTOR shall be separately included in the Final Bill prepared by the CONTRACTOR in the form of a Statement of Claims attached thereto, giving particulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the CONTRACTOR to the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner or particular be at variance with the claim notified by the CONTRACTOR within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof."

13. A careful scrutiny of Clause 9.0.1.0 reveals that there is a distinction between the claims preferred by the Contractor and those preferred by the Owner i.e., the Respondent herein. As far as the Contractor is concerned, only such of those claims which qualify as 'notified claims' and which are included in the final bill can be referred to arbitration. However, as far as the Respondent is concerned, there is no such limitation. While it is arguable that such a clause would not be fair or reasonable, the fact is that the Petitioner has accepted the said clause and signed the agreement. It cannot now wriggle out of it. In fact, there is no challenge as such to the clause itself.

14. If the definition of a 'notified claim' in terms of Clause 6.6.1.0 is read with Clause 6.6.3.0, then it is clear that the agreement between the parties is only that such notified claims of the Contractor can be referred to arbitration and nothing else. This was noticed by the Court in *IOT Infrastructure & Energy Service Ltd.* v. *Indian Oil Corporation Ltd.* (supra) where while analysing the aforementioned clauses, the Court observed as under:

"Under Clause 6.6.1.0 if the Contractor feels that he is entitled to any extra payment over and above the amounts due under the contract, he should give notice in writing to the Engineer-in-charge within 10 days from the date of issue of the order. Such 'notified claims' are, in terms of Clause 6.6.3.0 to be separately included in the final Bill in the form of a statement of claim attached thereto. Clause 6.6.3.1 states that the Respondent would not be liable in respect of a notified claim not specifically reflected in the final Bill. It is therefore clear that only notified claims included in the final bill can be referred to arbitrator. Under clause 9.0.2.0 once the GM decides that a certain item is not notified and cannot be referred to arbitration then it would stand excluded from arbitration."

15. The Court is not persuaded to take a different view of the identical clause in the present contract. In other words, only such of those claims of the Petitioner which have been accepted as 'notified claims' by the GM can be referred to arbitration. The stand of the Respondent that in the absence of such 'notified claims' there cannot be a reference of the list of claims appended to the Petitioner's letters dated 14th and 19th December, 2015 to arbitration is, accordingly, upheld.

16. This, however, does not leave the Petitioner without a remedy. It will be open to the Petitioner to seek other appropriate remedies in accordance with law.

17. The petition is dismissed but, in the circumstances, with no order as to costs.

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ARB.P. 115/2018

NCC Limited v. Indian Oil Corporation Limited

2019 SCC OnLine Del 6964

In the High Court of Delhi at New Delhi

(BEFORE RAJIV SHAKDHER, J.)

NCC Limited ..... Petitioner;

v.

Indian Oil Corporation Limited ..... Respondent.

ARB.P. 115/2018

Decided on February 8, 2019, [Judgment reserved on: 25.10.2018]

Advocates who appeared in this case :

Dr. Amit George, Mr. Rishabh Dheer, Mr. Swaroop George, Mr. K. Dileep and Ms. Rajsree Ajay, Advs.

Mr. V.N. Koura with Mr. Nikhil Mundeja, Adv.

The Judgment of the Court was delivered by

RAJIV SHAKDHER, J.:— This is a petition filed under Section 11(6) read with Section 11(8)(b) of the Arbitration and Conciliation Act, 1996 (for short '1996 Act').

2. The petitioner, i.e. NCC Limited (hereafter referred to as 'NCCL'), seeks a direction for appointment of a Sole Arbitrator in respect of disputes which have arisen between the respondent, i.e. Indian Oil Corporation Ltd. (hereafter referred to as 'IOCL'), and itself.

3. Notice in this petition was issued on 12.2.2018.

4. Mr. V.N. Koura, Advocate, on that date accepted notice on behalf of IOCL. Since then, a reply has been filed on behalf of IOCL.

5. NCCL, on its part, has filed a rejoinder to the reply filed by IOCL.

6. At the outset, it would be relevant to state that IOCL resists the petition, broadly, on the ground that the claims with respect to which reference to arbitration is sought by NCCL are, firstly, not "Notified Claims", and secondly, under the terms of the contract obtaining between the parties, the jurisdiction to decide as to whether or not the claims are Notified claims vests solely in its General Manager.

Backdrop:

7. With this foreground, let me, broadly, indicate the backdrop in which this petition has been filed.

8. IOCL floated a tender in respect of the works described as "Civil, Structural & Associated UG piping works of VGO-HDT, DHDT & HCDS Units (EPCM-2) for Paradip Refinery Project" (hereafter referred as "Project").

9. Against the tender floated by IOCL, NCCL preferred a bid. After due evaluation, NCCL was declared successful.

10. Resultantly, a Fax of Acceptance dated 3.3.2010 (in short "FOA") was issued in favour of NCCL.

11. The FOA was followed by a Detailed Letter of Acceptance dated 17.3.2010 (in short 'DLOA') issued in favour of NCCL.

12. Consequent to the issuance of the FOA and DLOA in favour of NCCL, parties executed a formal Agreement dated 28.4.2010 (in short 'Agreement').

13. As per the Agreement, the value of the contract was pegged at Rs.

148,27,16,942/-.

14. Pertinently, the contract obtaining between the parties clearly indicates that the designated date for commencement of the Project would be the date of issuance of the FOA, i.e. 3.3.2010, and that the scheduled date of completion would be 2.10.2011.

15. The record shows that the execution of the Project was delayed as a result of which the Project got completed only on 28.12.2015.

16. NCCL was issued a completion certificate by IOCL indicating the date of completion of the Project as 28.12.2015.

17. In view of the delay in the completion of the Project beyond the scheduled date, NCCL made a request for Extension of Time (for short 'EOT') vide communication dated 23.5.2016.

18. Via this communication, NCCL requested IOCL to issue a consolidated EOT.

19. The reason why this was done, it appears, was that while IOCL, during the execution of the project, had been issuing work permits from time to time which allowed NCCL to continue performing its obligations under the contract, there was no formal EOT communication issued which would regularize the time taken in executing the Project beyond the scheduled date of completion.

20. Thus, while the EOT requests were pending with IOCL, NCCL submitted its final bill dated 5.8.2016 to the Engineer-in-Charge appointed under the contract obtaining between the parties i.e. Thyssenkrupp Industrial Solutions India (P) Ltd. (in short 'TKIS'). Pertinently, NCCL in its final bill dated 05.08.2016 made a specific reference to Notified Claims.

21. TKIS upon receipt of the final bill, vide communication dated 1.11.2016 informed NCCL that its final bill and requests for EOT were under review.

22. Further, more importantly, TKIS in the very same communication made the following observations:

> *"....NCCL have intimated vide letter dated 24.10.16 (Sl no 3 above) that the "No Claim Certificate" have been submitted vide letter No. NCC/IOCL/EPCM-2/U-985/16 -17 dated 29.07.16. The said letter states that "We also do not have any other claim or demand, what so ever, except the final bill amount, service tax amount and notified claims due from IOCL."*
>
> *NCCL is advised to withdraw the aforesaid Notified Claims enabling IOCL/TKIS for final review and processing the Time Extension Recommendation."*
>
> (emphasis is mine)

23. NCCL, it appears, on the very next date, i.e. 02.11.2016, submitted its response to TKIS.

24. Briefly, NCCL conveyed to TKIS that if its requests for EOT were considered favourably and if price adjustment did not exceed 4 per cent, then, all its extra/additional claims including Notified Claims submitted by it via various communications and the final bill should be treated as withdrawn.

25. TKIS having received the aforesaid communication from NCCL made its recommendations *vis-a-vis* the request for EOT made by NCCL.

26. Furthermore, TKIS in its communication dated 13.1.2017, informed NCCL that it had approved EOT for the period spanning between 3.10.2011 and 3.11.2015, *albeit*, without price discount as per Clause 4.4.0.0[1] of the General Conditions of Contract ("GCC") and that for the period falling between 4.11.2015 and 28.12.2015, which covered a period of 55 days, it had concluded that the delay was attributable to NCCL.

27. Accordingly, TKIS conveyed to NCCL that for the latter period as per Clause 4.4.2.0 (viii)[2] of the GCC a price adjustment discount of 4 per cent would be

applicable.

28. Being aggrieved, NCCL wrote to IOCL, on 23.1.2017, to reconsider its decision and accord EOT up to the date of completion, i.e. 28.12.2015, without making any adjustment towards price as indicated in TKIS's letter of 13.1.2017.

29. IOCL, on its part, without responding to NCCL's communication dated 23.1.2017, informed NCCL via an email dated 8.5.2017 that it had released Rs. 4,53,04,021.10, *albeit*, after making due adjustment towards taxes etc.

30. Being dissatisfied, NCCL, on 16.5.2017, put it on record, for the first time, that it had withdrawn its Notified Claims as TKIS vide its communication dated 1.11.2016, had indicated in no uncertain terms that the review of its final bill and request for EOT would be considered only if it gave up its insistence that its Notified Claims should be considered.

31. IOCL, on its part, sent a response vide communication dated 6.6.2017, wherein, it stated that none of the claims mentioned in the final bill were Notified Claims.

32. The suggestion was that arbitration in terms of Clause 9.0.1.0[3] of the GCC could take place only with respect to Notified Claims.

33. Furthermore, IOCL also made a reference to the fact that NCCL's request for grant of EOT till the date of completion without adjustment towards the price discount was untenable.

34. Emphasis was laid by IOCL on the fact that it had paid the final bill amount after making the following deductions: 4 per cent towards liquidated damages; amounts payable to sub-contractors which NCCL was required to settle; on account of risk and cost recoveries observed in its works; and lastly, in respect of water charges which NCCL was required to bear as per the terms and conditions of the contract obtaining between the parties.

35. NCCL responded by conveying its rebuttal via communication dated 20.6.2017.

36. It appears that NCCL, having regard to the fact that IOCL was not going to relent on its stand that EOT till 28.12.2015, without price adjustment, could not be considered, decided to trigger the arbitration mechanism provided in the contract obtaining between the parties.

37. Consequently, via communication dated 1.7.2017 NCCL invoked the provisions of Clause 9.0.1.0[4] of the GCC. While triggering the arbitration agreement, NCCL conveyed to IOCL that it was not opting for the Alternate Dispute Resolution (in short 'ADR') mechanism as provided in Clause 9.1.0.0 of the GCC.

38. IOCL, on its part, attempted to pay obeisance to the literal terms of the contract by intimating to NCCL that it was referring its letters dated 20.6.2017 and 1.7.2017 to its General Manager, as required under Clause 9.0.2.0[5] of the GCC, to decipher as to whether the remedy of adjudication via arbitration was at all available to NCCL.

39. What was sought to be emphasised in this communication of IOCL was that the remedy of arbitration provided in Clause 9.0.0.0[6] of the GCC was limited to only those claims of NCCL which were Notified and included in the Final Bill as per the provisions of Clause 6.6.3.0[7] of the GCC.

40. Resultantly, NCCL's request for appointment of an Arbitrator was examined by IOCL's General Manager. This aspect is reflected in the communication of IOCL's Chief General Manager (Projects) dated 19.7.2017.

41. The upshot of this communication is that the Chief General Manager in exercise of powers vested in him under Clause 9.0.2.0[8] of the GCC, called upon NCCL to file a statement in writing along with the supporting documents, if any, to demonstrate the

following:

(a) That the claims of NCCL were Notified Claims in terms of Clause 6.6.1.0[9] of the GCC.

(b) That the Notified Claims had been included in the final bill in accordance with the provisions of Clause 6.6.3.0[10] of the GCC.

(c) That the claims made, fall within the scope of the arbitration agreement as embodied in Clause 9.0.1.0[11] of the GCC.

42. NCCL, as required, compiled the necessary information and submitted the same along with its letter dated 7.8.2017.

43. Importantly, NCCL laid emphasis on the fact that during the course of execution of the project it had submitted its claims within the time frame envisaged under Clause 6.6.1.0[12] of the GCC.

44. The list of such communications, *albeit*, claim-wise, was enclosed in Appendix-I for IOCL's ready reference.

45. Furthermore, copies of letters were also enclosed. NCCL further brought to the notice of the Chief General Manager that all claims as notified in terms of Clause 6.6.1.0[13] had been included in the final bill as required under Clause 6.6.3.0[14] of the GCC.

46. Lastly, NCCL also brought to the notice of the Chief General Manager that it was not opting for an ADR mechanism and, instead, was seeking resolution of its disputes via arbitration.

47. The Chief General Manager, however, was not impressed with the material furnished by NCCL and, thus, vide communication dated 10.11.2017 communicated to NCCL that there was no scope for arbitration between parties and that none of its putative claims could be referred to arbitration in terms of Clause 9.0.0.0[15] of the GCC.

48. A perusal of this letter would show that the principal reason given by IOCL's Chief General Manager for declining NCCL's request for referring disputes to arbitration was the submission of the "No Claim Certificate" by NCCL, on 29.7.2016, followed by a letter dated 2.11.2016, to which, I have made a reference hereinabove.

49. The aspect as to whether the claims were Notified Claims in terms of Clauses 6.2.2.0[16] and 6.6.0.0 of the GCC was not adverted to in this communication by the Chief General Manager.

50. NCCL, it appears, was, somehow, still optimistic that the disputes raised by it would be referred to arbitration, and therefore, in that spirit, vide communication dated 20.11.2017, called upon IOCL to appoint an Arbitrator in terms of Clause 9.0.1.0[17] of the GCC.

51. While doing so, NCCL also sought to bring out the flaws in the determination made by the Chief General Manager on 10.11.2017.

52. IOCL, on its part, stuck to its stand and, accordingly, conveyed via its letter dated 06.12.2017 addressed to NCCL, its support to the decision taken by its Chief General Manager that the claims lodged could not be referred to arbitration.

53. In sum, it was conveyed by IOCL that in respect of matters referred to in Clause 9.0.2.0[18] of the GCC, the Chief General Manager was the competent authority whose decision as to whether or not reference to arbitration should be made was final.

54. In other words, as to whether or not the claims raised by NCCL were Notified Claims as per the provisions of Clause 6.6.3.0[19] was an aspect on which only the General Manager could rule.

Submissions of Counsel:

55. It is in this background that arguments on behalf of NCCL were advanced by Dr. Amit George, while submissions on behalf of IOCL were advanced by Mr. V.N. Koura.

56. Dr. George's submissions can, broadly, be paraphrased as follows:

57. IOCL's stand that its General Manager's determination was final and not reviewable (qua the aspect as to whether or not the claims lodged were a Notified Claims) was flawed for the following reasons:

i) Firstly, after the amendment of the 1996 Act and the consequent insertion of Sub -section (6A) in Section 11 the Court's ambit was confined to ascertaining the existence of an arbitration agreement. In other words, the Court was not required to examine as to whether or not a particular claim fell in the category of "excepted matters".

ii) Secondly, Section 16 of the 1996 Act recognizes the doctrine of ***Kompetenz Kompetenz***, which, in a nutshell, requires the Arbitral Tribunal to rule on objections, if any, with respect to its jurisdiction in the matter. Thus, if IOCL's stand was to be accepted, it would usurp the statutory power conferred on the Arbitral Tribunal under Section 16 of the 1996 Act.

iii) Thirdly, as to whether a particular matter falls in the 'excepted matters' category can be mutually decided by the parties by incorporating a particular benchmark in that behalf in the agreement obtaining between them. This, however, would not confer power on one party to unilaterally apply the benchmark and that too in a self-serving manner and, thereupon, declare a particular claim as one which falls in the category of 'excepted matters'.

iv) Fourthly, a perusal of the Notified Claims raised by NCCL would show that in order to come to the conclusion one way or another as to whether they fall within the ambit of Clause 6.6.1.0[20] of the GCC, a determination would have to be made as to when the cause of action arose for issuance of a notice qua a particular claim. In this behalf, it was sought to be emphasized that NCCL's notified claims primarily were in the nature of additional expenses incurred towards varied and additional items of work, prolongation costs incurred during the extended period provided for execution of the contract, and withheld amounts etc.

v) Lastly, the time limit stipulated in Clause 6.6.1.0[21] of the GCC for raising a claim was illegal and contrary to Section 28 of the Indian Contract Act, 1872.

58. In support of his submissions, reliance has been placed by Dr. George on the following judgments:

(i) *Duro Felguera S.A.* v. *Gangavaram Port Limited*, (2017) 9 SCC 729.

(ii) *KSC Construction Co.* v. *Union of India.*

(iii) *Sam India Built Well (P) Ltd.* v. *Union of India.*

(iv) *Srico Projects Pvt. Ltd.* v. *Indian Oil Foundation.*

(v) *Indian Oil Corporation Limited* v. *Raja Transport Private Limited*, (2009) 8 SCC 520.

(vi) *J.G. Engineers Private Limited* v. *Union of India*, (2011) 5 SCC 758.

(vii) *Obrascon Huarte Lain SA* v. *Her Majesty's Attorney General for Gibraltar*, (2014) EWHC 1028 (TCC).

(viii) *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Co. Ltd.*, (Civil Appeal No. 8146 of 2018), dated 21.8.2018.

(ix) *Grasim Industries Limited* v. *State of Kerala*, (2017) 6 SCALE 443.

(x) *Datar Switchgears Ltd.* v. *TATA Finance Ltd.*, (2000) 8 SCC 151.

59. On the other hand, Mr. Koura made the following submissions:

(i) Parties are entitled to determine as to what matters are to be referred to arbitration. In this behalf, one would have to pay obeisance to the terms of the contract which would include the procedure and the methodology incorporated therein to identify arbitral disputes.

(ii) The provision for arbitration incorporated in Clause 9.0.1.0[22] of the GCC was subject to and subordinate to the following clauses i.e. Clauses 9.0.2.0[23], 6.7.1.0[24] and 6.7.2.0[25]. A composite reading of the aforesaid clauses would show that only Notified Claims which were included in the contractor's (in this case NCCL's) final bill could form the subject matter of reference to arbitration.

(iii) As to what were Notified Claims stood defined in clause 1.21.0.0[26] of the GCC. The fact that Notified Claims had to be included in the contractor's final bill is provided in Clause 6.6.3.0 of the GCC.

(iv) In the same vein, it was argued that Clause 6.6.1.0 of the GCC prescribed the procedure to be followed by the contractor to notify a claim for the purposes of having it referred to arbitration.

(v) Thus, unless a contractor's claims fall within the ambit of Clause 6.6.1.0, that is, they are notified in accordance with the provisions of the said clause, they cannot be referred to arbitration.

(vi) Furthermore, even if the claims are notified (provided they are not settled or withdrawn prior to preparation of the final bill) they should, in accordance with Clause 6.6.3.0, be included in the final bill. In other words, unless the two conditions prescribed in Clause 6.6.1.0 and Clause 6.6.3.0 of the GCC are fulfilled, the claims lodged would not fall within the ambit of the arbitration agreement.

(vii) Besides this, the third condition has to be fulfilled by the contractor to have its claims referred to arbitration even if the first two conditions are fulfilled by him, which is, that the General Manger should issue a declaration or a certification with regard to the first two conditions, adverted to above, as per the power vested in him under Clause 9.0.2.0[27] of the GCC.

(viii) It is only when all three conditions referred to above are fulfilled that the arbitration agreement with respect to the claim(s) lodged by a contractor becomes enforceable. The reason that such elaborate procedural pre-requisites are provided in the GCC before the arbitration mechanism can be triggered is that, often after an elaborate exercise has been undertaken to secure the appointment of an Arbitrator it is discovered that the Arbitrator has no jurisdiction in the matter as the disputes raised by the contractor fall within the excepted category. The procedure put in place, in effect, avoids long and expensive litigation, in which, more often than not it is eventually held that the disputes are not arbitrable. Besides, mere disability of the contractor (i.e. NCCL) in having the matters referred to arbitration does not leave it remedy less as it can always take recourse to a civil suit to agitate its claims.

(ix) The Court cannot while exercising its jurisdiction under Section 11(6) of the 1996 Act determine the validity and the legality of the arbitration agreement.

(x) If the arbitration agreement is illegal or invalid, as sought to be contended on behalf of NCCL, then the Court, in any case, cannot make a reference to arbitration under such an agreement.

(xi) While exercising power under Section 11(6) of the 1996 Act, the Court is neither exercising appellate nor revisionary jurisdiction qua a certificate issued or declaration made by the General Manager.

(xii) If this Court were to disagree with the interpretation articulated, on behalf of IOCL *vis-à-vis* the arbitration agreement which, incidentally, finds resonance in

the following decisions rendered by coordinate benches of this Court, it should refer the matter to a larger Bench:

(I) *IOT Infrastructure and Energy Service* v. *Indian Oil Corporation Ltd.*, dated 10.3.2015, passed in ARB.P. 334/2014.

(II) *Institute of Geoinformatics Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*, (2015) SCC OnLine Del 9562.

(III) *Srico Projects Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*, 2017 SCC OnLine Del 6446.

60. Notably, apart from the three judgments referred to hereinabove, during the course of arguments, Mr. Koura relied upon the following judgments as well:

(i) *Oriental Insurance Company Ltd.* v. *Narbheram Power and Steel Pvt. Ltd.*, (2018) 6 SCC 534.

(ii) *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Co. Ltd.*, (2018) SCC OnLine SC 1045.

(iii) *International Building and Furnishing Co.* v. *Indian Oil Corporation Ltd.*, (1995) II Delhi 293.

(iv) *Uttam Singh Duggal & Co.* v. *IOCL*, (1985) II Delhi 131.

(v) *Gail* v. *SPIE CAPAG, S.A.*, (1993) 27 DLT 562.

(vi) *Sarup Lal Singhia* v. *National Fertilizers Ltd.*, 72 (1998) DLT 23.

(vii) *Dr. Vijay Laxmi Sadho* v. *Jagdish*, (2001) 2 SCC 247.

(viii) *U.P. Gram Panchayat Adhikari Sangh* v. *Daya Ram Saroj*, (2007) 2 SCC 138.

Reasons:

61. Having perused the material placed before me and heard the submissions advanced by the learned counsel for the parties, what has emerged is that, according to IOCL, if NCCL is to be given a pass-through for having its claims referred for adjudication by an Arbitral Tribunal it would have to satisfy the Court that it complied with the three conditions adverted to herein above.

Conditions stipulated in the Contract

62. To recapitulate, firstly, the claim or claims lodged are Notified Claims.

63. Secondly, the claims lodged if not settled or withdrawn by the contractor (in this case NCCL), are included in the final bill.

64. Third, IOCL's General Manager has declared/certified that the first two conditions, adverted to above, have been fulfilled by the contractor (i.e. NCCL).

Relevant Clauses of the G.C.C.

65. In order to ascertain as to whether NCCL's claims fall within the ambit of Notified Claims, it would be necessary to advert to some of the clauses of GCC.

66. The first and foremost is Clause 1.21.0.0[28], which defines Notified Claim(s). This clause simply says that Notified Claims are those which are notified in accordance with the provisions of clause 6.6.1.0 of the GCC.

67. On the other hand, Clause 6.6.1.0 of the GCC, in sum, provides that where a contractor considers that he is entitled to extra payment or compensation in respect of works executed by him which are sums over and above the amounts due in terms of Clause 6.3.1.0[29] or is aggrieved by deductions made or threatened by the owner/IOCL from the Running Account Bills, he is required to give a notice in writing of such claims to the Engineer-in-Charge and the site Engineer within ten (10) days of issuance of orders or instructions relative to any works qua which such additional compensation is claimed or on happening of such other event which forms the basis of the contractor's claim.

68. The Clause, further obliges the contractor to give full particulars of the nature of the claims, the grounds on which they are based and the amount for which the claims

are lodged.

69. The Clause goes on to state that if any of the aforesaid conditions are not fulfilled the claim(s) shall be deemed to have been waived.

70. Clause 6.6.3.0[30] provides for the second condition, to which, Mr. Koura had referred to in his reply. This clause provides that where a contractor has notified his claims in accordance with the provisions of clause 6.6.1.0[31] and these claims remain outstanding at the time of preparation of final bill they would have to be separately included in the final bill by the contractor in the form of statement of claims attached thereto, giving particulars of the nature of the claim, grounds on which they are based, and the amounts claimed, which in turn, are required to be supported by copies of notices sent by the contractor to the Engineer-in-Charge and the Site Engineer.

71. Clauses 6.7.1.0[32] and 6.7.2.0[33] speak of discharge of owners, i.e. IOCL's liability in certain situations. Though both these clauses are more or less similar, the distinguishing feature between the two is that the clause 6.7.1.0[34] speaks about acceptance of final dues by the contractor, which are adverted to in his final bill based on the condition that the payment made is full and final settlement of all dues of the contractor.

72. This clause emphasizes the fact that once payment is received by the contractor in such like circumstances, then, notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by a contractor the owner would stand discharged of its liability.

73. The only exception is the contractor's entitlement to receive unadjusted portion of the security deposit in accordance with the provisions of clause 6.8.3.0[35] upon successful completion of the defect liability period.

74. Insofar as the final bills, in which, Notified Claims are included-the provision for discharge and/or extinguishment owner's liability (i.e. IOCL liability) upon receipt of payment against such final bill (with a condition that it involves full and final settlement of all dues) is made in clause 6.7.2.0[36].

75. Clause 9.0.1.0[37] says that subject to the provisions of Clauses 6.7.1.0[38], 6.7.2.0[39] and 9.0.2.0[40], only those disputes which are Notified Claims and are included in the final bill as provided in Clause 6.6.3.0[41] and qua which a contractor has not opted for an ADR mechanism, shall be referred to arbitration of a sole Arbitrator in accordance with the clause 9.0.1.1.

76. What is interesting is that this clause also provides that while the owner (i.e. the IOCL) may prefer counter claims if Notified Claims of the contractor are referred to arbitration, the contractor cannot raise as defence set off or counter claim *vis-à-vis* the counter claim of the owner/IOCL which is not a Notified Claim included in the contractor's final bill.

77. Clause 9.0.1.1[42] provides for the manner in which the Sole Arbitrator has to be selected. The contractor as per this clause is required to choose a Sole Arbitrator out of a panel of three persons nominated by the owner i.e. IOCL. For this purpose, the contractor has been given thirty (30) days time frame. In case the contractor fails to select a Sole Arbitrator, the owner is given the authority to appoint a Sole Arbitrator out of the very same panel.

78. The other important clause to which reference is made on behalf of the IOCL is Clause 9.0.2.0[43]. This is a clause which adverts to matters qua which reference or submission to arbitration cannot be made and, consequently, the Arbitral Tribunal will have no jurisdiction to render a decision qua such matters.

79. The icing on the cake, so to speak, is, that the decision with regard to whether or not a particular claim falls within the category of "Excluded matters" is to be

decided by owner's/IOCL's the General Manager, *albeit*, prior to the arbitrator proceeding with the reference. Under the category of excluded matters, the following matters are referred to in Clause 9.0.2.0:

"(i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;

(ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR is a Notified Claim;

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill."

80. A conjoint reading of the aforementioned clauses would show that:

(i) For a claim to be categorized as a Notified Claim, a notice should be served by the contractor on the Engineer-in-Charge and the Site Engineer within ten (10) days of the cause of action arising for lodging a claim whether it is with regard to additional payment(s) or compensation or on happening of the event upon which the contractor bases such claim.

(ii) In case the claim qua which notice is sent, is neither settled nor withdrawn prior to preparation of the final bill, it is required to be included by the contractor in the final bill.

(iii) With regard to matters as to whether or not the claim sought to be referred is a Notified Claim or whether or not such claim is included in the contractor's final bill (in cases where it is neither settled nor withdrawn prior to the preparation of the final bill) - are matters qua which the General Manager has to take a decision.

81. Apart from what is noticed hereinabove, Clause 9.0.2.0 classifies the following two aspects as 'excluded matters'. These are matters concerning the scope or existence or otherwise of the arbitration agreement and whether or not the contractor has opted for an ADR mechanism with respect to Notified Claim included by the contractor in his final bill.

82. To my mind, there is a bit of conflict in the construct of Clauses 9.0.1.0[44] and 9.0.2.0[45]. The conflict is this: that while Clause 9.0.2.0 at the very outset alludes to what is specifically excluded from the scope, purview and ambit of arbitration agreement, it goes on to say, in respect of those very excluded matters (which are referred to in the clause) the decision would rest with the Chief General Manager.

83. Amongst the excluded matters is a category referred to in Sub-clause (ii) and (iii) of Clause 9.0.2.0[46], which gives the power to the General Manager to determine whether or not a particular claim made by the contractor is a Notified Claim and whether or not the Notified Claim is included by Contractor in his Final Bill in accordance with provisions of Clause 6.6.3.0[47]. Therefore, if the determination made under Sub-clause (ii) and (iii) of Clause 9.0.2.0[48] is excluded, then, even if the General Manager were to say that a particular claim is a Notified Claim and the same is included in the final bill, the same on a literal reading of the clause would fall outside the purview of arbitration. However, that interpretation cannot hold as Clause 9.0.1.0[49] clearly provides that only claims which are Notified Claims and are included in the final bill shall be referred to arbitration by a Sole Arbitrator unless the Contractor has opted for an ADR Mechanism.

84. In other words, a harmonious reading of Clause 9.0.1.0[50] with Clause 9.0.2.0[51] would lead to the conclusion that if the General Manager were to hold that a claim was

a Notified Claim and that claim was included in the contractor's final bill, then, it would be amenable to adjudication by a duly constituted Arbitral Tribunal.

85. This is also, how, Mr. Koura has placed his interpretation on the two clauses referred to above.

86. The problem, however, in accepting Mr. Koura's submission is that, he contends that the General Manager's decision taken with regard to whether or not a claim is a Notified Claim (which necessarily is required to be taken prior to the Arbitral Tribunal proceeding with the reference) is final.

87. Since, Mr. Koura has submitted that in this behalf one would have to go by the letter of the provision, I must indicate that while Clause 9.0.2.0[52] confers on the General Manager the power to decide as to whether or not a particular claim is a Notified Claim it attaches no finality to the General Manager's decision.

88. The word 'final' does not find mention in clause 9.0.2.0[53], though it refers to the fact that decision with respect to whether or not the claim(s) are Notified Claims will be that of General Manager. Besides this, the other difficulty in accepting such a construction is that if this construction as put forth by Mr. Koura, is accepted, it would literally amount to conferring power in one of the disputants to efface a mechanism consciously put in place by the parties for quick-resolution of disputes, *albeit*, outside the pale of formal Court proceedings. Conferment of unbridled power in any area is problematic: whether judicial, quasi judicial or administrative it is, however, fraught with even greater danger when it directly impinges upon the right of a contesting party. Fixing by a mutually agreed benchmark by the parties is one thing applying a benchmark unilaterally based on provisions which are not negotiated is a troubling proposition.

89. The fact that such a decision is more often than not based on subjective parameters only makes it even more difficult for me to accept such a submission advanced by Mr. Koura.

Impact of the Clauses in G.C.C.

90. In fact, if Mr. Koura's submission is to be accepted, then, even if, as in the instant case (as I will demonstrate shortly) the General Manager chooses not to examine as to whether or not the claim(s) lodged are Notified Claims, his decision will attain finality.

91. The General Manager's decision in the context of the provisions of Clause 9.0.2.0[54] according to Mr. Koura would be final, with no scope for second guessing; leaving the contractor bereft of his chosen remedy to have his disputes adjudicated by an Arbitral Tribunal.

92. In the instant case, the General Manager had in fact on 19.7.2007 written to NCCL to file supporting documents to demonstrate, *inter alia*, that the claims lodged by it were Notified Claim; that the purported Notified Claims had, in fact, been included in the final bill; and lastly, that the Notified Claims fell within the scope of the arbitration agreement.

93. Despite the fact that via a written communication dated 7.8.2017, NCCL submitted the requisite particulars along with copies of supporting documents, the General Manager in his decision rendered on 10.11.2017, chose not to deal with the most crucial aspect as to why the claims lodged by NCCL were not Notified Claims.

94. In his decision dated 10.11.2017 the General Manager adverts to only one aspect of the matter which was that NCCL had given a "No Claim Certificate" on 29.7.2016, and had, thereafter, proceeded to withdraw its Notified Claims which were included in its final bill via its subsequent communication dated 2.11.2016.

95. The upshot of this decision was that since the claims referred to in NCCL's letter dated 7.8.2017 stood settled, there existed no dispute between the parties which

could be referred to arbitration in accordance with the Clause 9.0.0.0 of the GCC.

96. Therefore, apart from anything else, the Chief General Manager in this case chose not to deal with the aspect as to whether or not the claims lodged by the petitioner were Notified Claims as envisaged in Clause 6.6.1.0[55].

97. The aspect pertaining to discharge of the owners (i.e. IOCL's) liability, as adverted to above, is referred to in Clauses 6.7.1.0[56] and 6.7.2.0[57].

98. Notably matter involving discharge of liability in respect of final dues which are incorporated in the final bill or Notified Claims which are included in the final bill against which payments are received by the contractor are not within the ambit of the General Manager.

99. The fact that the arbitration clause is made, inter alia, subject to the provisions of Clauses 6.7.1.0[58], 6.7.2.0[59] and 9.0.2.0[60] cannot, in my view, bring the aspect of discharge of liability within the scope and ambit of the power of the General Manger.

100. As to whether in the given facts and circumstances of the case there is accord and satisfaction is a matter which even prior to the amendment of the 1996 Act could be left by the Court to the discretion of the Arbitral Tribunal. (See: *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267[61])

101. I may only indicate here that the judgment in the case of *National Insurance Company Limited* v. *Boghara Polyfab (P) Limited*, (2009) 1 SCC 267, was further refined in the decision rendered by the Supreme Court in *Union of India* v. *Master Construction Company*, (2011) 12 SCC 349. In this case, the Court held that if the claimant's contention that the discharge voucher or no claim certificate had been obtained by fraud, coercion, duress or undue influence is contested by the opposite party, then the concerned Court should, in the very least, *prima facie* ascertain as to whether or not such dispute is *bona fide* or genuine.

102. In this particular case, what is required to be noticed is that TKIS vide letter dated 1st November, 2016 had in no uncertain terms advised NCCL to withdraw its Notified Claims to enable a final review and processing of the Time Extension Recommendation. NCCL's claim is that given this situation, it had no choice but to withdraw its Notified Claims, which, otherwise, had already been included in its final bill.

103. To my mind, *prima facie*, NCCL does make out a case of duress as it was made clear to it that its request for EOT till 28th December, 2015, would not be considered, till such time it withdrew its Notified Claims. In my view, this is a matter which would require trial and, therefore, would have to be referred to an Arbitral Tribunal.

104. 'No Claim Certificate' or withdrawal of Notified Claims by NCCL would not have me hold in this case that no dispute survived and hence parties need not be referred to an Arbitral Tribunal. The scope for rejection of a request made for the appointment of an Arbitral Tribunal, on this score, has become even narrower post the insertion of Subsection (6A) in Section 11 of the 1996 Act; an aspect which I have discussed in greater detail hereafter. Also see, observations made in paragraph 13 of the judgment of the Supreme Court in *R.L. Kalathia and Company* v. *State of Gujarat*, (2011) 2 SCC 400[63].

105. Thus, for the foregoing reasons, I am unable to accept the submission of Mr. Koura that the decision of the General Manager in respect of excluded matters referred to in clause 9.0.2.0[64] is final as it requires ascertainment of whether or not there has been discharge of liability by receipt of final payment, *albeit*, without coercion.

Effect of insertion of Subsection (6A) in Section 11:

106. This brings me to the other aspect of the matter, which is as to whether, given the fact that Section 11 has been amended with the insertion of Subsection (6A), the

tenability of the decision reached by the General Manager qua Notified Claims can be left to the Arbitral Tribunal. In other words, the Court, at the stage of rendering its view on a Section 11 petition, need not examine whether the conclusion reached by IOCL's General Manager is sustainable.

107. In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6A) of the 1996 Act. To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that it is required to examine, is, as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which, involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in Subsection (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement, it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the Arbitrator to form a view in the matter.

108. Thus, unless it is, in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned Court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal.

109. The reason that I have been persuaded to come to this conclusion is two-fold: first, it is often found that evidence may have to be led to show as to whether or not a particular dispute falls within the ambit of the arbitration agreement; and second, it is not as if the party opposing reference to arbitration cannot agitate its point of view before the learned Arbitrator even at a preliminary stage by taking recourse to Section 16 of the 1996 Act.

110. This provision allows the Arbitral Tribunal to rule on its own jurisdiction including rendering a decision on objections with regard to the existence or validity of the arbitration agreement. This aspect of the matter, to my mind, is no longer *res integra* in view of the decision of the Supreme Court in *Duro Felguera case.*

111. The observations made in this behalf are found in paragraphs 48 & 56 of Mr. Justice Kurian Joseph judgment (as he then was). Paragraphs 48 and 56 read as under:

> *"**48.** Section 11(6-A) added by the 2015 Amendment, reads as follows:*
>
> *"**11. (6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*
>
> *(emphasis supplied)*
>
> *From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.*
>
> xxx xxx xxx
>
> 59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [*SBP and Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v.

Boghara Polyfab (P) Ltd., (2009) 1 SCC 267: (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

(emphasis is mine)

112. The record in this case demonstrates that there is contestation with regard to purported determination made by the General Manager that the claims lodged by NCCL are not notified claims.

113. Given the facts obtaining in the instant case and the amendments brought about after 23.10.2015 in the 1996 Act which, *inter alia*, led to the insertion of Subsection (6A) in Section 11, the arguments advanced to the contrary by Mr. Koura cannot be accepted.

Cases cited by IOCL:

114. Before I conclude, let me deal with the judgments cited by Mr. Koura. Insofar as the judgments of the Supreme Court in the matter of *Oriental Insurance Company Limited* v. *Narbhehram Power and Steel Pvt. Ltd.*, (2018) 6 SCC 534 and *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Co. Ltd.*, 2018 SCC OnLine SC 1045 are concerned, to my mind, they would have no applicability, as in these cases the Supreme Court had ruled on the interpretation to be given to the arbitration clause appearing in the insurance policy, which, according to the Court, excluded recourse to arbitration in the circumstance where the insurer disputed or did not accept the liability.

115. More specifically, in *Oriental Insurance Company Limited case*, the clause which was under consideration was Clause 13 of the Insurance Policy, while in *United India Insurance Co. Ltd. case*, the clause which was under consideration was Clause 7 of the Insurance Policy. Both clauses being similar, led to the same conclusion was reached by the Court. In fact, in *United India Insurance Co. Ltd. case*, the Supreme Court relied upon its earlier decision in *Oriental Insurance Company Limited.*

116. What is of significance is that even though in the latter case i.e. *United India Insurance Co. Ltd.*, the decision rendered by the Court in *Duro Feiguera S.A.* v. *Gangavaram Port Limited*, (2017) 9 SCC 729 was cited, it was distinguished and not overruled. The principal ground on which *Duro Felguera, S.A. case* was distinguished was the language obtaining in Clause 7 of the Insurance Policy.

117. To my mind, the ratio of the aforementioned judgments cannot be applied to the facts obtaining in the instant case.

118. The other judgments cited are: a judgment rendered by a Division Bench of this Court in the matter of *International Building and Furnishing Co.* v. *Indian Oil Corporation Ltd.*, ILR (1995) II Delhi 293; preceded by two judgments passed by two Single Judges of this Court in the matter of *Uttam Singh Duggal and Co.* v. *IOCL*, ILR (1985) II Delhi 131 and *Gas Authority of India Limited* v. *SPIE CAPAG, S.A.*, 1993 (27) DLT 562.

119. The judgment of the Division Bench in *International Building and Furnishing Co. case* has relied upon the decisions rendered in *Uttam Singh Duggal* and the *Gas Authority of India Limited.* The Division Bench in *International Building and Furnishing Co. case* accepted the view taken by the Single Judge in *Uttam Singh Duggal case.*

120. What is pertinent to note is that these cases were decided when the old Act i.e., Arbitration Act, 1940, was in force. Besides this, insofar as the judgment in *International Building and Furnishing Co. case* is concerned a perusal of paragraph 8 of the judgment would show that when the Court queried the appellant's counsel he was unable to demonstrate that the subject claims had been notified to the Engineer-in-

Charge and the Site Engineer within the stipulated period of ten days, as required under Clause 6.6.1.0[65] of the GCC. The Court, in fact, observed that the notices handed over across the bar did not show that they had been served on IOCL's General Manager.

121. In the instant case, apart from the fact that the parties are governed by the 1996 Act, it did throw up facts that NCCL had, in fact, lodged claims with IOCL's Chief General Manager; though liability of the same is questioned by IOCL.

122. In *Gas Authority of India Limited case* (see paragraph 14), the Court drew, in my view, quite correctly a distinction between a claim being barred, an aspect which falls within the domain of the Arbitrator and the bar on referring the parties to arbitration, once the period prescribed in the contract for that purpose is crossed. The latter aspect according to the judgment was an aspect which the Court was required to decide.

123. As noticed in my narration of facts above, IOCL's General Manager, in the instant case has not observed that the claims preferred by NCCL are not Notified Claims because they were not lodged within the stipulated period of ten days with the Engineer-in-Charge and the Site Engineer. Thus, on facts, even this case is clearly distinguishable.

124. In *Sarup Lal Singhla* v. *National Fertilizers Ltd.*, 72 (1998) DLT 23, which is also a judgment rendered by a Single Judge of this Court based on the facts obtaining in that case, came to the conclusion that since claims lodged by the plaintiff in a suit filed under Section 20 of the Arbitration Act, 1940 were not Notified Claims, they could not be referred to an Arbitrator. The learned Single Judge in paragraph 17 of the judgment has recorded that there was no averment in the plaint, which would demonstrate that the claims made qua additional work were notified within the period of 10 days as required in Clause 6.6.1.0[66] of the GCC. The line of judgments which the Division Bench noticed in *International Building and Furnishing Co. case* were also, largely, noticed by the learned Single Judge in this case as well.

125. For the reasons given above, to my mind, this case will also have no applicability to the facts obtaining in the instant case.

126. The facts in *IOT Infrastructure and Energy Service* v. *Indian Oil Corporation Ltd.* (Arb. P. NO. 334/2014, decided on 10.3.2015) reveal that the petitioner had approached the Court for the second time. On the first occasion, the petition for appointment of Arbitrator was disposed of after the petitioner's counsel informed the Court that it would approach IOCL's General Manager in the first instance in terms of Clause 9.0.2.0[67] of the GCC. Thereafter, the petitioner, evidently, wrote to the General Manager to fix hearing before the Executive Director. Consequent thereto, the Executive Director examined the claims lodged by the petitioner and came to the conclusion that the claims pressed were not notified and therefore, could not be referred to the Arbitrator for adjudication.

127. Apart from the fact that as to whether the Executive Director could have rendered such a finding when Clause 9.0.2.0 of the GCC refers to the General Manager, which is an aspect that was, perhaps, not brought to the notice of the Court, the distinguishing factor is that the petitioner's claims were examined and thereafter a ruling was rendered that the claims had not been notified.

128. In the instant case, as noticed above, no such ruling has been rendered by the General Manager.

129. This apart, the judgment was rendered prior to the insertion of subsection (6A) in Section 11 of the 1996 Act. The judgment is dated 10.3.2015, whereas the aforementioned sub-section was inserted and brought into force by the Amendment Act of 2015, on 23.10.2015.

130. Likewise, the judgment rendered in *Institute of Geoinformatics Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*, 2005 SCC OnLine Del 9562 is also distinguishable. This judgment was also rendered on 19.5.2015, that is, much before the Amendment Act of 2015 was brought into force.

131. Insofar as the judgment in *Srico Projects Pvt. Ltd.* v. *Indian Oil Corporation Ltd.*, 2017 SCC OnLine Del 6446 is concerned, the facts obtaining in the said case would show that the petitioner had not approached IOCL's General Manger. It was the IOCL's stand before the Court, as reflected in its reply, that only Notified Claims could be referred to arbitration (see paragraph 7 of the judgment). The learned Single Judge relied upon the view taken in *IOT Infrastructure & Energy Service case* and came to the conclusion that only Notified Claims could be referred to the arbitration. Though, an argument was raised on behalf of the petitioner with reference to Section 11(6A) of the 1996 Act, no observation or determination was made by the Court in that behalf.

132. Thus, to my mind, the aforementioned judgments cannot be applied to the facts of this case, as the judgment is the precedent of what it decides and not what may, perhaps, according to a party logically flow from the judgment. Therefore, the judgments rendered in the matter of *Dr. Vijay Laxmi Sadho* v. *Jagdish*, (2001) 2 SCC 247 and *U.P. Gram Panchayat Adhikari Sangh* v. *Daya Ram Saroj*, (2007) 2 SCC 138 which were cited to emphasize that the view of Coordinate Bench on similar issue should be adhered to would not apply as before a judgment can be taken as a binding precedent, one would have to take into account the *ratio decidendi* of the judgments.

133. As discussed above, all the judgments except *Srico Projects Pvt. Ltd. case*, were rendered when sub-section (6A) had not been inserted in Section 11 of the 1996 Act. What is important to notice is that the learned Judge, based on the conclusion reached in earlier decision i.e. in the matter of *IOT Infrastructure and Energy Service case*, in which the Court was not called upon to consider the impact of Section 11(6A) of the 1996 Act, concluded that since the claims were not categorized as Notified Claims by the General Manager, they could not be referred to an Arbitrator for adjudication.

134. Pertinently, in *Duro Felguera S.A. case*, the Supreme Court has, in fact, considered the impact of Section 11(6A) of the 1996 Act and indicated that the Court while exercising power to appoint an arbitrator is to look to, perhaps, two aspects. First, as to whether the arbitration agreement is in existence, and second, as to whether the dispute is relatable to the arbitration agreement.

135. To my mind, insofar as the latter aspect is concerned, clearly, if there is a contestation (as against case pertaining to admitted facts), the issue would have to be examined by the Arbitrator; a view which the Supreme Court has, in fact, enunciated in *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267 even prior to insertion of Sub section (6A) in Section 11 of the 1996 Act.

Conclusions

136. Having regard to the foregoing discussion hereinabove my conclusions can be summed up as follows:—

I) Where there is contestation or the decision rendered by the General Manager leaves scope for argument as to whether the claims lodged by a Contractor can be categorized as Notified Claims is best left to the Arbitral Tribunal. In other words, except for the situation where there is no doubt that the claims were not lodged with the Engineer and the Site Engineer as required under Clause 6.6.1.0[68] read with 6.6.3.0[69], the matter would have to be left for resolution by Arbitral Tribunal.

II) Aspects with regard to accord and satisfaction of the claims or where there is a dispute will also have to be left to the Arbitral Tribunal. The position in law in this regard remains the same both pre and post amendment brought about in the

1996 Act after 23.10.2015.

III) After the insertion of Subsection (6A) in 11 of the 1996 Act the scope of inquiry by the Court in a Section 11 petition, (once it is satisfied that it has jurisdiction in the matter) is confined to ascertaining as to whether or not a binding arbitration agreement exists qua the parties before it which is relatable to the disputes at hand.

IV) The space for correlating the dispute at hand with the arbitration agreement is very narrow. Thus, except for an open and shut case which throws up a circumstance indicative of the fact that a particular dispute does it not fall within the four corners of the arbitration agreement obtaining between the parties the matter would have to be resolved by an Arbitral Tribunal. In other words, if there is contestation on this score, the Court will allow the Arbitral Tribunal to reach a conclusion on way or another. This approach would be in keeping with the doctrine of *Kompetenz Kompetenz*; a doctrine which has statutory recognition under Section 16 of the 1996 Act.

137. Resultantly, Hon'ble Mr. Jusitce Madan B. Lokur (Cell no: 9868219007), former Judge, Supreme Court of India is appointed as an Arbitrator in the matters. The learned Arbitrator's fees will be governed by the provisions of Fourth Schedule appended to the 1996 Act. Before entering upon reference, the learned Arbitrator will file a declaration as required under Section 12 and other attendant provisions of the 1996 Act.

138. It is, however, made clear that the parties will bear their own costs.

139. The Registry will dispatch a copy of the order to the learned Arbitrator.

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[1] **4.4.0.0 PRICE ADJUSTMENT FOR DELAY IN COMPLETION** 4.4.1.0 The contractual price payable shall be subject to adjustment by way of discount as hereinafter specified, if the Unit(s) are mechanically completed or the contractual works are finally completed, subsequent to the date of Mechanical Completion/final completion specified in the Progress Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s)/final completion of the works is not achieved by the last date of Mechanical Completion of the Unit(s)/final completion of the works specified in the Progress Schedule (hereinafter referred to as the "starting date for discount calculation"), the OWNER shall be entitled to adjustment by way of discount in the price of the works and services in a sum equivalent to the percent of the total contract value as specified below namely:

...(viii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 8 (eight) weeks of the starting date for discount calculation - 4% of the total contract value....

4.4.2.1 The starting date for discount calculation shall be subject to variation upon extension of the date for Mechanical Completion of the Unit(s)/final completion of the works with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause

4.4.2.0 hereof.

4.4.2.2 It is specifically acknowledged that the provisions of Clause 4.4.2.0 constitute purely a provision for price adjustment and/or fixation and are not to be understood or construed as a provision for liquidated damages or penalty under Section 74 of the Indian Contract Act or otherwise.

4.4.3.0 Application of price adjustment under clause 4.4.2.0 above shall be without prejudice to any other right of the OWNER, including the right of termination under Clause 7.0.1.0 and associated clauses thereunder.

[2] Ibid

[3] 9.0.0.0 ARBITRATION

9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the

provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

[4] Supra 3, Page 6.

[5] 9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject-matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are:

(i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;

(ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR is a Notified Claim;

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill.

[6] Supra 3, Page 6.

[7] 6.6.3.0 Any claims of the CONTRACTOR notified in accordance with the provision of Clause

6.6.1.0 hereof as shall remain at the time of preparation of Final Bill by the CONTRACTOR shall be separately included in the Final Bill prepared by the CONTRACTOR in the form of a Statement of Claims attached thereto, giving particulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the CONTRACTOR to the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner or particular be at variance with the claim notified by the CONTRACTOR within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

[8] Supra 5, Page 7.

[9] 6.6.1.0 Should the CONTRACTOR consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause **6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any Running Account Bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the CONTRACTOR claims such additional payment or compensation or of the happening of other event upon which the CONTRACTOR bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed.** The OWNER shall not anywise be liable in respect of any claim by the CONTRACTOR unless notice of such claim shall have been given by the CONTRACTOR to the Engineer-in-charge and the Site Engineer in the manner and within the time aforesaid and the CONTRACTOR shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid.

[10] Supra 7, Page 8.

[11] Supra 3, Page 6.

[12] Supra 9, Page 8.

[13] Supra 9, Page 8

[14] Supra 7, Page 8.

[15] Supra 3, Page 6.

[16] 6.2.2.0 The Final Bill shall, in addition to the payment entitlements arrived at according to the provisions of Clause 6.2.1.0 hereof and associated clauses above, include in a separate statement annexed thereto the notified claims of the CONTRACTOR as provided for in Clause 6.6.3.0 hereof.

[17] Supra 3, Page 6.

[18] Supra 5, Page 7.

[19] Supra 7, Page 8

[20] Supra 9, Page 8

[21] Supra 7, Page 8.

[22] Supra 3, Page 6.

[23] Supra 5, Page 7.

[24] 6.7.1.0 The acceptance by the CONTRACTOR of any amount paid by the OWNER to the CONTRACTOR in respect of the final dues of the CONTRACTOR under the Final Bill upon condition that the said payment is being made in full and final settlement of all said dues to the CONTRACTOR shall, without prejudice to the notified claims of the CONTRACTOR included in the Final Bill in accordance with the provisions under Clause 6.6.3.0 hereof and associated provisions thereunder, be deemed to be in full and final satisfaction of all such dues to the CONTRACTOR notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the CONTRACTOR relative to the acceptance of such payment, with the intent that upon acceptance by the CONTRACTOR of any payment made as aforesaid, the Contract (including the arbitration clause) shall, subject to the provisions of Clause 6.8.2.0 hereof, stand discharged and extinguished except in respect of the notified claims of the CONTRACTOR included in the Final Bill and except in respect of the CONTRACTOR's entitlement to receive the unadjusted portion of the Security Deposit in accordance with the provisions of Clause 6.8.3.0 hereof on successful completion of the defect liability period.

[25] 6.7.2.0 The acceptance by the CONTRACTOR of any amount paid by the OWNER to the CONTRACTOR in respect of the notified claims of the CONTRACTOR included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and associated provisions thereunder, upon the condition that such payment is being made in full and final settlement of all the claims of the CONTRACTOR shall, subject to the provisions of Clause 6.7.3.0 hereof, be deemed to be in full and final satisfaction of all claims of the CONTRACTOR notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the CONTRACTOR relative to the acceptance of such payment with the intent that upon acceptance by the CONTRACTOR of any payment made as aforesaid, the Contract (including the arbitration clause) shall stand discharged and extinguished insofar as relates to and/or concerns the claims of the CONTRACTOR.

[26] 1.21.0.0 "Notified Claim" shall mean a claim of the CONTRACTOR notified in accordance with the provisions of Clause 6.6.1.0 hereof.

[27] Supra 5, Page 7.

[28] Supra 26, Page 14.

[29] 6.3.1.0 The remuneration determined due to the CONTRACTOR under the provision of Clause 6.2.2.0 hereof shall constitute the entirety of the remuneration and entitlement of the CONTRACTOR in respect of the work(s) under the Contract, and no further or other payment whatsoever shall be or become due or payable to the CONTRACTOR under the Contract.

[30] Supra 7, Page, 8

[31] Supra 9, Page, 8

[32] Supra 24, Page, 13

[33] Supra 25 Page, 14

[34] Supra 24, Page, 13

[35] 6.8.3.0 Within 15 (fifteen) days of Application made by the CONTRACTOR in this behalf accompanied by the

Final Certificate, or within 15 (fifteen) days of the passing of the CONTRACTOR's Final Bill by the OWNER, whichever shall be later, the OWNER shall pay/refund to the CONTRACTOR the unadjusted balance (if any) of the Security Deposit for the time being remaining in the hands of the OWNER, and upon such payment/refund, the OWNER shall stand discharged of all obligations and liabilities to the CONTRACTOR under the Contract.

[36] Supra 24, Page 13.

[37] Supra 3, Page 6.

[38] Supra 24, Page 13.

[39] Supra 25, Page 14.

[40] Supra 5, Page 7.

[41] Supra 7, Page 8.

[42] 9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.

[43] Supra 5, Page 7.

[44] Supra 3, Page 6

[45] Supra 5, Page 7

[46] Supra 5, Page 7

[47] Supra 7, Page 8

[48] Supra 5, Page 7

[49] Supra 3, Page 6

[50] Ibid

[51] Supra 5, Page 7

[52] Supra 5, Page 7

[53] Ibid

[54] Supra 5, Page 7

[55] Supra 9, Page 8

[56] Supra 24, Page 13

[57] Supra 25, Page 14

[58] Supra 24, Page 13

[59] Supra 25, Page 14

[60] Supra 5, Page 7

[61] 23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.* [(2005) 8 SCC 618], that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot reexamine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be

guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

[63] 13. From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

[64] Supra 5, Page 7

[65] Supra 9, Page 8

[66] Supra 9, Page 8

[67] Supra 5, Page 7

[68] Supra 9, Page 8

[69] Supra 7, Page 8