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

Judgment reserved on: 25.10.2018
Judgment pronounced on: 08.02.2019

\+ ARB.P. 115/2018

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

versus

INDIAN OIL CORPORATION LIMITED ..... Respondent
Through Mr. V.N. Koura with Mr. Nikhil Mundeja, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. 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.

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

16. 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.

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

17.1 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.

18. 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.

18.1 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.

18.2 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)

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

19.1 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.

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

21. 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

[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.

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.

21.1 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.

22. 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.

23. 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.

24. 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

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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

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.

25. 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.

25.1 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.

25.2 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.

25.3 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.

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

[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.

27. 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.

28. 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.

29. 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.

29.1 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

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[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.

included in the Final Bill as per the provisions of Clause 6.6.3.0[7] of the GCC.

30. 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.

30.1 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.

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[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.

(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.

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

31.1 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.

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

31.3 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.

31.4 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.

32. 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.

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[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.

32.1 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.

32.2 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.

33. 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.

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

34. 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.

34.1 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.

[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.

34.2 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:

35. 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.

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

37.1 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

[19] Supra 7, Page 8

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.

38. 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*, MANU/DE/5924/2017.

(iii) *Sam India Built Well (P) Ltd. v. Union of India & Ors.*, MANU/DE/4108/2017.

(iv) *Srico Projects Pvt. Ltd. v. Indian Oil Foundation*, MANU/DE/0050/2017.

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

[20] Supra 9, Page 8

[21] Supra 7, Page 8.

(vi) *J.G. Engineers Private Limited v. Union of India & Anr.*, (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. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors.*, (Civil Appeal No.8146 of 2018), dated 21.8.2018.

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

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

39. 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

[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.

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,

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[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.

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

[27] Supra 5, Page 7.

coordinate benches of this Court, it should refer the matter to a larger Bench:

(I) *IOT Infrastructure and Energy Service vs. Indian Oil Corporation Ltd.*, dated 10.3.2015, passed in ARB.P. 334/2014.

(II) *Institute of Geoinformatics Pvt. Ltd. vs. Indian Oil Corporation Ltd.*, (2015) SCC Online Del 9562.

(III) *Srico Projects Pvt. Ltd. vs. Indian Oil Corporation Ltd.*, 2017 SCC OnLine Del 6446.

39.1 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. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors.*, (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 Singhla 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:

40. 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

40.1 To recapitulate, firstly, the claim or claims lodged are Notified Claims.

40.2 Secondly, the claims lodged if not settled or withdrawn by the contractor (in this case NCCL), are included in the final bill.

40.3 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.

41. 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.

41.1 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.

42. 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

[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.

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.

42.1 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.

42.2 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.

43. 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.

44. 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

[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

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.

44.1 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.

44.2 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.

45. 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].

46. 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.

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[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.

46.1 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.

47. 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.

48. 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.

49. 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;*

[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.

(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."

50. 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.

50.1 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.

50.2 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

[44] Supra 3, Page 6
[45] Supra 5, Page 7

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.

50.3 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.

50.4 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.

50.5 This is also, how, Mr. Koura has placed his interpretation on the two clauses referred to above.

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[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

50.6 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.

50.7 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.

50.8. 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.

50.9 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.

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[52] Supra 5, Page 7

[53] Ibid

Impact of the Clauses in G.C.C.

51. 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.

51.1 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.

52. 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.

53. 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.

53.1 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.

53.2 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

[54] Supra 5, Page 7

the parties which could be referred to arbitration in accordance with the Clause 9.0.0.0 of the GCC.

53.3 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].

54. 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].

55. 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.

56. 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.

57. 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])

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[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

57.1 I may only indicate here that the judgment in the case of *National Insurance Company Limited versus Boghara Polyfab (P) Limited*, (2009) 1 SCC 267, was further refined in the decision rendered by the Supreme Court in *Union of India versus Master Construction Company*, (2011) 12 SCC 349[62]. 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.

57.2 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.

57.3 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

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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 re-examine 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.

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.

57.4 '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 versus State of Gujarat*, (2011) 2 SCC 400[63].

58. 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

[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

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:

59. 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.

59.1 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.

59.2 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.

59.3 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.

59.4 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.

59.5 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 sub-section (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)

60. 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.

61. 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:

62. 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 vs. Narbhehram Power and Steel Pvt. Ltd.*, 2018 (6) SCC 534 and *United India Insurance Co. Ltd. vs. Hyundai Engineering and Construction Co. Ltd. & Ors.*, 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.

62.1 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*.

62.2 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 Felguera 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.

62.3 To my mind, the ratio of the aforementioned judgments cannot be applied to the facts obtaining in the instant case.

62.4 The other judgments cited are: a judgment rendered by a Division Bench of this Court in the matter of *International Building and Furnishing Co. vs. 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. vs. IOCL*, ILR (1985) II Delhi 131 and *Gas Authority of India Limited vs. SPIE CAPAG, S.A.*, 1993 (27) DLT 562.

62.5 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.

62.6 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.

62.7 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.

63.8 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.

62.9 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.

70. In *Sarup Lal Singhla vs. 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

[65] Supra 9, Page 8

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.

70.1 For the reasons given above, to my mind, this case will also have no applicability to the facts obtaining in the instant case.

70.2 The facts in *IOT Infrastructure and Energy Service vs. 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.

70.3 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.

70.4 In the instant case, as noticed above, no such ruling has been rendered by the General Manager.

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[66] Supra 9, Page 8

[67] Supra 5, Page 7

70.5 This apart, the judgment was rendered prior to the insertion of sub-section (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.

70.6 Likewise, the judgment rendered in *Institute of Geoinformatics Pvt. Ltd. Vs. 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.

70.7 Insofar as the judgment in *Srico Projects Pvt. Ltd. vs. 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.

70.8 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 vs. Jagdish*, (2001) 2 SCC 247 and *U.P. Gram Panchayat Adhikari Sangh vs. 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.

70.9 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.

80. 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.

80.1 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 vs. Boghara Polyfab Private Limited*, (2009) 1 SCC 267 even prior to insertion of Sub section (6A) in Section 11 of the 1996 Act.

Conclusions

81. 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

[68] Supra 9, Page 8
[69] Supra 7, Page 8

keeping with the doctrine of *Kompetenz Kompetenz*; a doctrine which has statutory recognition under Section 16 of the 1996 Act.

82. 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.

83. It is, however, made clear that the parties will bear their own costs.

84. The Registry will dispatch a copy of the order to the learned Arbitrator.

RAJIV SHAKDHER
(JUDGE)

FEBRUARY 8, 2019
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