

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

Date of decision: May 19, 2015

+ **ARB. PET. 175/2012**

INSTITUTE OF GEOINFORMATICS (P) LTD. Petitioner

Through: Mr. Vivek Singh, Advocate

versus

INDIAN OIL CORPORATION LTD. AND ORS. Respondents

Through: Mr.Sujoy Kumar, Adv. with
Mr.Nishant Menon, Ms.Reeta
Mishra, Mr.Abhishek Birthray,
Advts.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

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 illegally 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 work 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 and Anr. Vs. Lafarge India Private Ltd., AIR 2014 SC 525*** and ***Union of India and Anr. Vs. 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. (Cal) Pvt. Ltd. Vs. Indian Oil Corporation Ltd.* and order dated March 10, 2015 in *Arb. P. 334/2014, IOT Infrastructure & Energy Service Ltd. Vs. 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 anyway 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 M/s. Uttam Singh Duggal & Co. (O) Ltd. v. Indian Oil Corporation Ltd. and another (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]2SCR62. 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 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 M/s. 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 M/s. Bansal Construction Co. v. Indian Oil Corporation and another (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.

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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 and Anr. (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 and Anr. Vs. 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.

(V.KAMESWAR RAO)
JUDGE

MAY 19, 2015
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