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

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Date of decision: September 04, 2017

+ O.M.P. (COMM) 317/2017

INDIAN OIL CORPORATION LIMITED PIPELINES DIVISION
(PLHO) Petitioner

Through Mr.Avinav Vashisht, Sr. Adv. with
Mr.Nishant Menon, Mr. Abhishek Birthray and
Mr. Shafiq Ahmed, Advs.

versus

INSTITUTE OF GEO-INFORMATICS PVT. LTD..... Respondent

Through Mr. Anukul Raj, Ms.Nikita and
Mr.Shashank Saurabh, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to set aside the Award dated 05.05.2017 passed by the learned Arbitrator.
2. On 19.11.2009, the petitioner is said to have invited sealed tenders for specified work. The respondent was declared as a successful bidder and a letter of acceptance was issued on 15.06.2010. Main contract was executed on 14.07.2010. The contract envisages execution of work of "Detailed Engineering survey, Soil survey, Cadastral survey & providing services for

establishing ROU in ROW of Paradip-Haldia-Durgapur LPG Pipeline Project" within 28 months from the date of issuance of Letter of Acceptance.

3. Disputes having arisen between the parties, the respondent filed a petition under Section 11(6) of the Act seeking appointment of an Arbitrator. On 18.10.2011 in Arb. Pet. 42/2011, this court noted the submissions of the petitioner that an application had to be first made to the General Manager of the petitioner in accordance with the arbitration clause. It was also agreed that the General Manager of the petitioner would consider the application of the respondent and pass an appropriate order in accordance with law within four weeks. The said petition in view of this direction was dismissed as withdrawn with liberty to the respondent to file a fresh petition if so advised. In terms of the above order, the respondent approached the General Manager of the petitioner and made the following claims: -

“(1) Claim of Rs.51,19,898/., for work done plus the service tax;

(2) Claim for refund of R.4,20,000 /- deposited by IGPL towards security deposit;

(3) Claim of Rs.18122,493 /- towards loss of profit suffered by IGPL;

(4) Claim for Rs.8,00,000/- for de-mobilization of equipment, machinery and man force from the work site; and

(5) Interest@ 16% per annum on the total sum of Rs.81,62,391/- claimed under 1 to 4 above with effect from 1.1.2011.”

4. The General Manager by its order dated 12.03.2012 held that the claims No. 1, 3, 4 and 5 are not notified claims and are not arbitrable. Claim

No. 2 for refund of security deposit and interest thereon were held to be arbitrable under Clause 9.0.1.0 of GCC. Steps were taken for appointment of an arbitrator from a panel of three persons from whom the petitioner was to make a selection of an arbitrator.

5. The respondent thereafter filed another petition under Section 11(6) of the Act before this court being Arb. Pet. No. 175/2012. This court rejected the plea of the respondent holding that the decision of the General Manager in this regard is final and the same cannot be a subject matter of challenge under these proceedings. The petition was accordingly disposed of with a direction that the petitioner shall forward a panel of three names to the respondent within four weeks. The respondent was to on receipt of the panel select a name to be appointed as a sole arbitrator. The Arbitrator so selected would be within his/her right to arbitrate upon claim No. 2 and interest, if any, thereon along with the counter claim, if any, of the petitioner.

6. The learned Arbitrator has now passed his award in favour of the respondent.

7. I have heard learned counsel for the parties.

8. Learned senior counsel for the petitioner has vehemently argued that despite the fact that claims No.1, 3, 4 and 5 were within the 'excepted matters' as per clause 9 of the Agreement between the parties and were not specifically referred to the learned Arbitrator by this court in its judgment dated 19.05.2015, the learned Arbitrator has still gone ahead and has passed the Award on the said claims. He urges that in a mischievous manner the learned Arbitrator mis-read the judgment of this court and came to a conclusion that the learned Arbitrator could decide upon the arbitrability of these claims. Learned senior counsel has relied upon the judgment of the

Supreme Court in the case of *SBP & Co. vs. Patel Engineering Ltd. and Anr.*, (2005) 8 SCC 618 to contend that the learned Arbitrator could not have ignored the order of this court and there was finality to the conclusions of this court.

9. Learned counsel for the respondent has however reiterated that this court in its judgment dated 19.05.2015 had left the issue open.

10. The basic controversy is that as to whether this court by its order dated 19.05.2015 had withheld reference of claims No. 1, 3, 4 to 5 from arbitration. Reference may be had to paras 7, 12, 16, 17 and 18 of the said judgment which read as follows:-

“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.

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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.

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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." (Emphasis Supplied)

11. A perusal of the above judgment of this court dated 19.05.2015 will clearly show that the court has noted the submissions of the respondent that the General Manager should have notified all the claims raised by the respondent and that his reasoning is untenable. The court records that the respondent has been unable to show how in view of the clauses of the contract, the respondent can seek reference of all the claims to arbitration. It records that it would be beyond the jurisdiction of the court to adjudicate about the act of the General Manager in not notifying the claims No. 1, 3, 4 and 5. It concludes that the said claims No. 1, 3, 4 and 5 are not arbitrable.

12. A perusal of the Award would show that the learned Arbitrator is taking a completely erroneous interpretation of the order dated 19.05.2015. The learned Arbitrator records as follows:-

“It is pertinent to note that the Hon'ble High Court has neither reviewed nor affirmed the decision of the General Manager relating to the issue of notified claims. Rather it has held in paragraph 16 that *"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."* Therefore, reliance by Respondent on the decision of the Hon'ble High Court (and the subsequent order of the Hon'ble Supreme Court) is misplaced.

13. It is quite clear that the reading of the order by the learned arbitrator is entirely erroneous. He has come to a wrong conclusion about the directions of this court.

14. The Supreme Court in the case of *SBP & Co. vs. Patel Engineering Ltd. and Anr.(supra)* held as follows:-

“20. Section 16 is said to be the recognition of the principle of ‘*Kompetenz – Kompetenz*’. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the arbitral tribunal. In *Konkan Railway (Supra)* what is considered is only the fact that under Section 16, the arbitral tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the arbitral tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an arbitral tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the arbitral tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.”

15. It is quite clear that the disputes which are subject matter of claims No. 1, 3, 4 and 5 were not arbitrable. This court while disposing of the arbitration petition under Section 11(6) of the Act on 19.05.2015 had specifically held so. In the light of this, there was no reason for the learned Arbitrator to have gone ahead and adjudicated upon those disputes. The impugned Award to the extent that it deals with claims No. 1, 3, 4 and 5 is held to be entirely illegal. The same has been passed contrary to the provisions of the Act. The Award to the extent it deals with claims No.1, 3, 4 & 5 is set aside. Rest of the Award is upheld.

16. Petition stands disposed of. Liberty is granted to the respondent to take steps as per law regarding its claims No.1, 3, 4 & 5.

**(JAYANT NATH)
JUDGE**

SEPTEMBER 14, 2017/rb