

\$~34

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

+ W.P.(C) 872/2017 & CM No.3968/2017

NEWTON ENGINEERING & CHEMICALS
LTD

..... Petitioner

Through: Mr Paritosh Budhiraja and Mr
Lovekesh Aggarwal, Advocates.

versus

INDIAN OIL CORPORATION LTD AND
ANR

..... Respondents

Through: Mr V. N. Koura and Ms Paramjeet
Benipal and Mr Anupam Roy,
Advocates for Indian Oil Corporation.
Mr V. N. Koura and Mr Anupam
Roy, Advocates for respondent.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

27.02.2019

1. The petitioner has filed the present petition impugning an order dated 18.01.2017 passed by the General Manager of respondent no.1 (IOCL). By the impugned order, the General Manager of the IOCL is purporting to decide the matters which are excepted matters under the Arbitration Clause.
2. The disputes between the petitioner and IOCL relates to the Contract for Composite Works for 2X80 Sulphur Recovery Unit at Haldia Refinery, which was awarded to the petitioner on 26.12.2008. The contract between the parties included an Arbitration Clause.
3. The arbitral proceedings have already commenced and the Arbitral

Tribunal has already indicated that it is in seisin of the matter. By an order dated 25.11.2016, the Arbitral Tribunal rejected IOCL's application for stay of the proceedings and held that the dispute, whether the claims made by the petitioner are "notified claims" or otherwise fall within the arbitration agreement, cannot be referred to the General Manager of IOCL after the Arbitral Tribunal has been appointed.

4. Clause 9 of the General Conditions of the Contract (GCC) includes the relevant clause relating to arbitration and alternative dispute resolution machinery. Clause 9.0.0.0 relates to arbitration and is set out below:-

"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.

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.

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.

9.0.3.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment(s) and/or modification(s) thereof and of the Rules framed thereunder 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.”

5. It, *prima facie*, appears that in terms of clause 9.0.2.0, the question whether particular claim is a ‘Notified Claim’ is to be decided by a General Manager. Apparently, this is the exercise that is being carried out by the General Manager in this case. The impugned order also indicates that the General Manager has also termed the proceedings before him as “arbitration proceedings”. It is the petitioner’s case that the General Manager has no jurisdiction to entertain any such controversy, as the said matter is the

subject matter of arbitration. It is further contended that the proceedings commenced by the General Manager are not arbitration proceedings.

6. This Court is refraining from expressing any opinion on the rival contentions, as the question whether the Arbitral Tribunal has a jurisdiction to decide will be agitated before the Arbitral Tribunal. Any award rendered by the Arbitral Tribunal is also subject to the right of the non-prevailing party to seek redressal under Section 34 of the Arbitration and Conciliation Act, 1996. Plainly, if the petitioner is correct in its submission and persuades the Arbitral Tribunal to accept the same, the Arbitral Tribunal shall proceed to adjudicate the claims and make an award. Both the parties are entitled to challenge the same if any of the grounds, as indicated in Section 34 of the Arbitration and Conciliation Act 1996, are established.

7. As far as the decision of the General Manager is concerned, the same relates to the question whether the dispute is an excepted matter. Clearly, this issue is connected with the arbitration proceeding and no interference by this Court is called for. If the said proceedings are without jurisdiction as contended by the petitioner, his decision will be of no consequence.

8. This Court does not consider it apposite to entertain this controversy, as any decision in the present matter would have a bearing on the question whether the disputes being raised by the petitioner fall within the scope of excepted matters. This is also the controversy sought to be agitated by the petitioner before the Arbitral Tribunal.

9. In terms of Section 5 of the Arbitration and Conciliation Act, 1996, the scope of interference of Courts in arbitral proceedings is very limited. The present petition seeks to invite this Court to enter into a controversy

which has a direct bearing on the issues before the Arbitral Tribunal.

10. In view of the above, the present petition is dismissed. It is clarified that all contentions of the parties are reserved. Nothing stated in this order should be construed as an expression of opinion on the merits of the question whether the claim raised by the petitioner fall within the excepted matters or not and whether the General Manager of IOCL can decide the same.

11. The pending application is disposed of.

VIBHU BAKHRU, J

FEBRUARY 27, 2019
MK