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

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Reserved on: 06.12.2019

Date of decision: 10.01.2020

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ARB.A. (Comm.) 35/2019

CHINA PETROLEUM PIPELINE BUREAU

.....Petitioner

Through Mr. Atul Shanker Mathur, Advocate
with Mr. Rabal Mehrotra, Ms. Deepabali Datta and
Mr. Umang Katriya, Advs.

versus

INDIAN OIL CORPORATION LIMITED

.....Respondent

Through Ms. Rupam Sharma, Advocate

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present appeal under Section 37 (2) (a) of the Arbitration and Conciliation Act, 1996 ('Act') has been filed assailing the order dated 29.11.2019 passed by the learned Arbitrator whereby the application of the respondent herein under Section 16 of the Act has been allowed and the Arbitrator has held that all claims of appellant (claimant before the Arbitral Tribunal) except claim No. 2.11 along with interest, fall beyond the scope of Arbitration Agreement and are not arbitrable.

2. The brief facts necessary for adjudication of the present appeal are that on 20.08.2015 the respondent issued a Notice Inviting Tender for Main Line Laying and Combined Station Works for Laying New Crude Oil Pipeline from Chennai Port to CPCL, refinery at Manali, Chennai and Combined

Station Works of mechanical, civil, electrical and instrumentation works of other facilities at Chennai Port and CPCL refinery, Tamil Nadu.

3. The Appellant being declared as a successful bidder was awarded a Letter of Acceptance on 11.04.2016. The appellant issued a Bank Guarantee towards the initial security deposit in favour of the respondent for an amount of Rs. 3,10,53,113/- valid upto 10.10.2018. A formal Contract was entered into between the parties on 01.06.2016. The appellant commenced the work in June, 2016.

4. It is the case of the appellant that while his contract was subsisting, the respondent floated another NIT in September, 2016 but on being questioned, assured the appellant that it would not be given effect to. The appellant regularly communicated to the respondent the progress of the work but despite this the respondent terminated the contract vide letter dated 07.12.2016.

5. It is the case of the appellant that efforts were made, thereafter, to amicably resolve the disputes, but the same were unsuccessful. Thereafter, the respondent invoked the Bank Guarantee and the appellant filed a petition under Section 9 of the Act in this Court, which was dismissed.

6. The appellant then invoked the Arbitration Clause and sent a notice dated 31.10.2018 to the respondent requesting the respondent for nomination of an Arbitral Tribunal in accordance with Clause 9 of the General Conditions of Contract (hereinafter referred to as 'GCC').

7. The respondent replied to the said notice on 30.11.2018 stating that the claims made by the appellant were not 'notified claims'. The appellant objected to the said stand of the respondent and sent a detailed communication to this effect on 25.12.2018.

8. The respondent without considering the objections raised by the appellant and taking the same to be a failure on the part of the appellant to appoint a Sole Arbitrator, proceeded to appoint Shri R.D. Goyal as a Sole Arbitrator vide its letter dated 02.01.2019.

9. The appellant filed its statement of claim before the Tribunal on 23.03.2019 and raised the following claims:-

“2.1 Towards the loss incurred by the Claimant regarding Materials:

i. Expenses incurred for procurement of main materials= 308.02 lacs;

ii. Expenses incurred for third party inspection of the materials procured by the Claimant = 41.66 lacs; and

iii. Expenses towards procurement of consumable materials= 59.20 lacs

2.2 Towards the loss incurred by the Claimant for hiring of Manpower:

i. Expenses incurred in hiring Chinese staff= 573.93 lacs

ii. Expenses incurred in hiring Indian staff = 14.00 lacs

iii. Expenses incurred in hiring consultants for liasoning work= 5.50 lacs

2.3 Towards the loss suffered by the Claimant in procuring equipment for carrying out the subject work:

i. Expenses incurred towards Claimant's owned equipments = 133.16 lacs

ii. Expenses incurred for leased equipments = 10.72 lacs

iii. Expenses incurred for leased vehicles = 16.43 lacs

2.4 Towards the losses suffered by the Claimant in Mobilization and Demobilization of man power and equipments:

- i. Expenses incurred in Mobilization and Demobilization of man power = 57.82 lacs*
- ii. Expenses incurred in Mobilization and Demobilization of equipments = 63.96 lacs*

2.5 Towards the losses suffered by the Claimant in subcontracting various works:

- i. Expenses towards N DT = 35 lacs*
- ii. Expenses towards geological survey= 19.23 lacs*
- iii. Expenses towards station civil works= 32.36 lacs*
- iv. Expenses towards security services= 1.70 lacs*

2.6 Towards the loss suffered by the Claimant in arranging for HOD Team expenses including material expenses, transportation expenses, depreciation and other expenses= 1070.04 lacs

2.7 Towards the loss suffered by the Claimant in incurring other direct expenses for the subject contract:

- i. Expenses incurred in construction and development of office and temporary camp and storage yard= 86.84 lacs*
- ii. Expenses incurred towards insurance payments = 6.66 lacs*
- iii. Expenses incurred towards labour registration and tax registration = 2.98 lacs*
- iv. HSE expenses= 5.13 lacs*
- v. Expenses incurred towards laboratory fees = 1.66 lacs*
- vi. Other miscellaneous expenses directly relating to the subject contract= 31.95 lacs*

2.8 Towards the loss suffered by the Claimant for the Loan Interest and Financial Costs:

i. Expenses incurred towards currency depreciation and loss if interest= 130.56 lacs

ii. Expenses incurred towards Financial costs =39.60 lacs

2.9 Towards the loss suffered by the Claimant for the Indirect expenses and Management cost of enterprise =274.81 lacs

2.10 Towards the loss of profit suffered by the Claimant for the illegal termination of the subject contract = 906.75 lacs

2.11 Towards the loss suffered by the Claimant for illegal invocation and encashment of its Bank Guarantee by the Respondent= 310.53 lacs. ”

10. Apart from the above, the appellant also claimed interest pendent lite and future @ 18% per annum, as well as cost of the Arbitration.

11. The respondent thereafter filed an application under Section 16 of the Act on 07.05.2019 objecting to the claims on the ground that they were not ‘notified claims’ and therefore not arbitrable.

12. The appellant filed its reply to the said application on 07.08.2019 contesting the application and on the ground that the Arbitrator had the power to adjudicate on the claims raised by the appellant.

13. The respondent filed its counterclaims on 17.10.2019 which are as under:-

<i>Serial No.</i>	<i>Claim Particulars</i>	<i>Amount (INR)</i>
<i>1.</i>	<i>Additional amounts expended by the counter claimant in getting the works</i>	<i>10,64,97,869/</i>

	<i>executed by a third party contractor due to failure of the Respondent in fulfilling its obligations under the Contract in accordance with the contractual right under Clause 7.0.9.0 GCC</i>	
2.	<i>IGST at 18% on additional amounts expended by the counter claimant, that is, GST on Claim 1.</i>	<i>1,91,69,616/-</i>
3.	<i>Supervision Charges at 15% on the amount expended by the Counter Claimant in execution of works by the third party contractor in accordance with the contractual right under Clause 7.0.9.0 GCC.</i>	<i>19,24,04,043/-</i>
4.	<i>GST at 18% on the Supervision Charges, that is, GST on Claim 3.</i>	<i>3,46,32, 728/-</i>
5.	<i>Material Recovery Claim</i>	<i>3,08,098/-</i>
6.	<i>Total amounts due (A) (1+2+3+4+5)</i>	<i>35,30, 12,354</i>
7.	<i>Cost of Arbitration</i>	<i>To be calculated at the end of the proceedings</i>
8.	<i>Pendente lite interest at 18% p.a. on</i>	<i>To be</i>

	<i>total amount due (A) from date of this counter claim till date of award</i>	<i>calculated</i>
9.	<i>Amount of Bank Guarantee to be adjusted from awarded amount.</i>	3, 10,53, 113/-
10.	<i>Future interest at 18% p.a. on the awarded amount from date of award till date of actual payment.</i>	

14. The Arbitrator after hearing arguments on the application passed the Impugned Order on 29.11.2019 allowing the application of the respondent under Section 16 of the Act and holding that the claims of the appellant were not arbitrable, except for claim No. 2.11, along with interest.

15. It is this order of the Tribunal which is impugned in the present appeal.

16. Learned counsel for the appellant contends that the Arbitrator while passing the Impugned Order has failed to consider that for adjudicating all the claims raised by the appellant and the counterclaims raised by the respondent, the issue or question regarding termination of the contract has to be adjudicated and the said issue being common basis for the claims and counterclaims cannot be simultaneously adjudicated by two different forums i.e. one in arbitration and the other in a civil suit. There cannot be two separate proceedings for deciding the claims and counterclaims respectively as this would lead to bifurcation of cause of action, besides their being a risk of the two different forums giving contrary or divergent findings on the question of termination.

17. It is next contended by the appellant that the learned Arbitrator has wrongly assumed that it has no power to adjudicate on claims which are not ‘notified claims’ and has misread Clause 9.0.1.0 of the GCC.

18. Learned counsel for the appellant relies upon the judgment of the Supreme Court in the case of *Sukanya Holdings vs. Jayesh H. Pandya*, (2003) 5 SCC 531. It is submitted that in the said case one of the parties had preferred a civil suit in which an application was filed under Section 8 of the Act to refer the disputes to Arbitration. The Apex Court held that bifurcation of the suit in two parts, one to be decided by the Arbitral Tribunal and the other by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of disputes and decreasing the cost of litigation would be frustrated, besides increasing cost of litigation and harassment to the parties and also entailing the possibility of conflicting judgments and orders by two different Forums. Learned counsel has also placed reliance on the judgment of the Supreme Court in the case of *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Ors.*, (2013) 1 SCC 641, for the proposition that the cause of action in the suit cannot be bifurcated and a partial reference cannot be made by a Court. Reliance is placed on paras 1.3, 1.4 and 110 of the said judgment for the said proposition. For the same proposition reliance is placed on the judgment in the case of *Turnock vs. Sartoris*, (1889) 49 Chancery Division 150 (CA).

19. It is thus contended that the application under Section 16 has been wrongly allowed by the Arbitrator and the impugned order deserves to be set aside. A direction is prayed to the Arbitrator for adjudicating the claims preferred by the appellant in its statement of claim.

20. Per contra, learned counsel for the respondent contends that the order of the learned Arbitrator is justified in law and is in accordance with Clause

9.0.1.1 of the GCC. Attention of the Court is drawn to the said Clause wherein it is clearly mentioned that any dispute arising out of a 'notified claim' of the contractor included in the final bill in accordance with provisions of Clause 6.6.3.0, shall be referred to the Arbitration of a Sole Arbitrator.

21. Learned counsel further argues that the appellant had itself admitted before the Arbitrator that the claims sought to be referred were not 'notified claims' and on the basis of the said admission the Impugned Order has been passed. It is also pointed out that the said admission has been recorded in paragraphs 5 & 6 of the Impugned Order. In fact, even in the present appeal, the appellant does not dispute that the claims were not 'notified claims' and thus not arbitrable.

22. The next argument of the respondent is that once the appellant had admitted before the Tribunal that the claims were not 'notified claims', the present appeal could not have been filed and hence the same is not maintainable on this ground alone.

23. It is further contended that the appellant entered into the contract with full knowledge of all the clauses of the contract, including Clause 9.0.1.0. The appellant cannot now challenge the provisions of the contract or ask the Arbitrator to re-write the terms of the contract between the parties. Learned counsel contends that the present case is covered by a judgment rendered by a co-ordinate Bench of this Court in the case of *Institute of Geoinformatics vs. IOCL, 2015 SCC OnLine Del 9562*, being Arb. P. 175/2012, decided on 19.05.2015. It is submitted in the said judgment the Court was concerned with the same clause 9.0.1.0 and the same issue, although it was a petition under Section 11(6) of the Act. Learned counsel points that in the said judgment the Court has clearly held that the claims which are not 'notified

claims’ cannot be referred to Arbitration and reliance was placed by the Court on a Judgment by a Division Bench in the case *International Building and Furnishing Co. (Cal) Pvt. Ltd. vs. Indian Oil Corporation Ltd.*, 57 (1995) DLT 536, where a similar Clause as 9.0.1.0 was interpreted. Learned counsel also places reliance on another judgment of a co-ordinate Bench of this Court in the case of *Srico Projects vs. IOCL*, 2017 SCC OnLine Del 6446, which was also a petition under Section 11(6) of the Act. It is pointed out that in the said case the petitioner had invoked the Arbitration Clause and sought reference of claims which were not notified in terms of Clause 9.0.1.0. The Co-ordinate Bench held that as far as the contractor is concerned, only such of the claims which qualify as ‘notified claims’ and are included in the final bill, can be referred to arbitration. It is thus argued that there is no error in the Impugned order and the appeal deserves to be dismissed.

24. I have heard the learned counsels for the parties.

25. It is not in dispute that the contract between the parties contains Clause 9.0.1.0 as a part of the General Conditions of Contract which reads as under:-

“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 Sola 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.

26. The said Clause in turn refers to clauses 6.6.1.0 and 6.6.3.0 which read as under:-

6.6.1.0 Should the CONTRACTOR consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any Running Account Bills, 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 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.

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.”

27. A bare reading of clause 9.0.1.0 leaves no manner of doubt that the contractor is entitled to refer only those claims to arbitration, which are ‘notified claims’ and are included in the final bill prepared by the contractor. The respondent, however, has no such limitation or restriction under the clause. The said clause is a part of the contract entered into between the parties with open eyes and once the appellant has signed the agreement it cannot now either challenge the said clause or claim a reference, contrary to the provisions of the clause. The definition of a ‘notified claim’ is also clearly mentioned in the other clauses of the agreement and a holistic reading of clauses 6.6.1.0 and 6.6.3.0 along with Clause 9.0.1.0 makes it abundantly

clear that the agreement between the parties was that only ‘notified claims’ of the contractor would be referred to arbitration and any other claim would be beyond the scope of arbitration. Learned counsel for the respondent is thus right in its contention that the Arbitrator has rightly rejected those claims of the appellant which were not ‘notified claims’.

28. Learned counsel for the respondent is also right in its contention that the Arbitrator has decided the application under Section 16 not only on the analysis of the provisions of the relevant clauses but also on a clear admission by the appellant before it that the claims sought to be referred were not the ‘notified claims’. Even before this Court in the present appeal, counsel for the appellant does not dispute the fact that the claims sought to be referred are not ‘notified claims’. Relevant part of the impugned order reads as under:

*5. The arguments on Application, under section 16 of the Arbitration and Conciliation Act, 1996 filed by Respondent, were completed by both the parties. During the arguments the Respondent argued that in terms of the contract only notified claims of the Claimant, duly notified in terms of clause 6.6.1.0 of GCC duly included in the final bill under clause 6.6.3.0 of GCC can be subject matter of arbitration. The Claimant while, admitting that its claims raised under the arbitration are neither notified in terms of GCC nor have been part of any final bill, stated that considering both the claims and counter claims arise from the common issue of termination, either both parties claims would be part of the arbitration or both claims and counter claims would be ousted from arbitration. In support of the contention, the Claimant relied upon Supreme Court judgment reported as (2003) 5 SCC 531, **Sukanya Holdings (P) Ltd. vs. Jayesh Pandya***

*and Others Order dated 14th April, 2003. In the rejoinder argument, Respondent relying upon the cases of High Court Judgement reported as ARB. P. 276/2016, **Sirco Projects Pvt. Ltd. vs. Indian Oil Fondation** order dated 9th January, 2017 & Supreme Court Judgement reported as ARB. PET. 175/2012, **Institute of Geoinformatics (P) Ltd. vs. Indian Oil Corporation Ltd. And Ors.** order dated 19th May, 2015, stated that the arbitration clause of the Respondent has been upheld and it is a settled principle that while, Respondent's claims would be a part of Arbitration by virtue of Clause 9.0.1.0 of GCC, Claims apart from claim no. 2.11 of Claimant which pertains to Bank Guarantee are admittedly not notified and hence would have to be removed from arbitral proceedings.*

6. *It is stated that it is settled law that Arbitrator is a creature of the contract and has to function within four corners of the same. If the Arbitrator ignores the specific terms of the contract, it would be a question of jurisdictional error. In order to have a considered decision on the issue, it is considered pertinent to reproduce the relevant applicable clauses.*

Clause 9.0.1.0 of GCC states, "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 counterclaim (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 counterclaim 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.

Clause 1.21.0.0 of GCC states, "Notified Claim" shall mean a claim of the CONTRACTOR notified in accordance with the provisions of Clause 6.6.1.0 hereof.

It would be irrelevant at this point to get into the issue whether claims raised by the Claimant, apart from claim no. 2.11, are notified claims or not and duly included in the final bill as the claimant has admitted that the claims are not notified and have not been included in the final bill. Also, mechanism under clause 9.0.2.0 of GCC i.e. reference to GM for determination whether a particular claim is notified or not and duly included in final bill does not get triggered in the present instance considering both parties are of the view that the claims of the claimant are not notified, except claim no. 2.11, and are not included in the final bill. In light of the same, what remains is to see whether in terms of clause 9.0.1.0 of GCC, claims other than claim no. 2.11 shall remain in arbitration?

The first half of the clause is clear enough to state that it is only notified claims of the contractor duly included in the final bill which shall be the subject matter of arbitration.

Second half further states that Owner can refer any of its claims to arbitration. Further, any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR is also arbitrable in terms of clause 9.0.1.0 of GCC.

Claim no. 2.11 of the Claimant pertains to refund of invoked Bank Guarantee amount of

Rs.3,10,53,113.00 (Rupees Three Crore Ten Lakh Fifty Three Lakh One Hundred and Thirteen Only). The same is arbitrable as the Respondent is claiming the amount as an adjustment in its counter claims and falls under "any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR". Hence, the same is arbitrable. In furtherance of the same, any claim of interest thereon shall also be arbitrable.

Rest of the claims stated in statement of claims are not notified and not included in the final bill and hence fall beyond the scope of the arbitration agreement.

Counter claims of the Respondent are arbitrable as falling under the second part of Clause 9.0.1.0 of GCC.

In light of the above and the judicial pronouncements, I hold that all claims of the claimant, except Claim no. 2.11 of the Claimant along with any interest thereon (on claim no. 2.11), fall beyond the scope of arbitration agreement and are hence not arbitrable. Resultantly claims 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 and interest thereon stand dismissed from the arbitral proceedings."

29. In my view, the present case is squarely covered by the judgment in the case of *Institute of Geoinformatics (supra)* and *Srico Projects (supra)* against the appellant. In the case of *Institute of Geoinformatics (supra)*, a co-ordinate Bench of this Court has placed reliance on a judgment of a Division Bench in the case of *International Building and Furnishing Co. (Cal) Pvt. Ltd. (supra)* where a similar clause as Clause 9.0.1.0 and a similar controversy was under adjudication. Relevant para of judgment of the Division Bench reads 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.”

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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.”

30. A similar view has been taken by the Court in the case ***IOT Infrastructure & Energy Service Ltd. vs. Indian Oil Corporation Ltd., Arb. Pet. 334/2014***, the relevant para of 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”.

31. Relying on the said judgments the Court in the case of ***Institute of Geoinformatics (supra)*** held that the claims which are not notified cannot be referred to arbitration by virtue of clause 9.0.1.0 in the GCC.

32. In the case of ***Srico Projects (supra)*** the Court was again dealing with the same Clause 9.0.1.0 and an identical controversy. Relying on the judgment in the case of ***IOT Infrastructure & Energy Service Ltd. (supra)***, the Court dismissed the petition holding that claims not notified cannot be referred to arbitration. Relevant part is as under:

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

14. If the definition of a ‘notified claim’ in terms of Clause 6.6.1.0 is read with Clause 6.6.3.0, then it is clear that the agreement between the parties is

only that such notified claims of the Contractor can be referred to arbitration and nothing else. This was noticed by the Court in IOT Infrastructure & Energy Service Ltd. v. Indian Oil Corporation Ltd. (supra) where while analysing the aforementioned clauses, the Court observed as under:

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

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

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

33. The judgment cited by the appellant in the case of ***Sukanya Holdings (supra)*** would not apply to the present case as in the said case a suit had already been instituted by one party and the question was about reference of the claims to arbitration, after an application was filed by the other side under Section 8 of the Act. The interpretation of clause 9.0.1.0 and the issue of ‘notified claims’ was not under consideration by the Court. Similarly, the decision in the case of ***Taunton-Collins vs. Cromte (1963) C. No. 599***, is also not applicable to the present case as the said case was decided on the peculiar facts of that case.

34. Suffice it would be to state that once the parties have entered into an agreement with open eyes and have incorporated certain conditions in the same, the parties are bound by the same. The appellant signed the contract in question knowing that there was a provision in clause 9.0.1.0 whereby only ‘notified claims’ could be referred to arbitration. Once the appellant admits that the claims sought to be referred are not ‘notified claims’ it cannot seek their reference to arbitration. Besides, as noted above, the issue in the present appeal is squarely covered against the appellant by two judgments of this Court and the appellant has been unable to distinguish them.

35. I thus find no merit in the present appeal. The appeal is hereby dismissed and the order dated 28.11.2019 passed by the Arbitral Tribunal is upheld.

36. This, however, will not preclude the petitioner to seek any other remedy that is available to the petitioner in accordance with law.

I.A. No.17030/2019

In view of the above, the present application is hereby dismissed.

JYOTI SINGH, J

JANUARY 10th, 2020

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