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

Decided on: 2nd March, 2021

+ ARB.P. 224/2020

**NORTH EAST ENGINEERING
AND CONSTRUCTION**

.....Petitioner

Through Ms. Ginny J. Rautray, Ms.
Anushka Ashok, Mr. Navdeep Singh and
Mr. Rachit Dhawan, Advs.

versus

**BRAHMAPUTRA CRACKER
AND POLYMER LIMITED**

..... Respondent

Through Mr. N.L. Ganapathi, Mr. Sidhant
Garg, Advs. with Mr. Amiteshmani Singh,
Sr. Manager (Law) and Ms. Jyotirupa
Phukan, Dy. Manager (Law)

CORAM:

HON'BLE MR. JUSTICE C .HARI SHANKAR

J U D G M E N T (O R A L)

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02.03.2021

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act"), seeking reference of certain disputes, pending between the petitioner and the respondent, to arbitration. The claims, of which the petitioner seeks reference, are nine in number and have been enumerated in the petition thus:

I. Claim no. I- Refund of encashed Bank Guarantee amounting to Rs.2,10,00,000/- with interest @18% per annum from 06.09.2016 till realization.

II. Claim no. II- Payment of the amount of Rs. 5,95,56,611.51 due against 30th R/A and Final Bill with interest @18% per Annum from 13.04.2017 (60 days after the date of submission of 30th R/A & Final Bill on 13.02.2017) till realization.

III. Claim no. III- Refund of Rs. 1,34,79,327/- with interest @18% per annum recovered by BCPL from R/A bills towards Price Reduction Schedule (PRS).

IV. Claim no. IV- Refund of amount of Rs. 29,93,017/-with interest @18% per annum deducted towards mandatory discount against CENVATable excise duty from R/A Bills as all excise invoices against bought out items have been submitted to BCPL from time to time for availing CENVAT.

V. Claim no. V- Refund of retained amount of Rs.15,60,066/- with interest @18% per annum from R/A bills towards non-submission of PF Challans as the necessary challans have been submitted to BCPL from time to time.

VI. Claim no. VI- Refund of retained amount of Rs. 6,13,984/- with interest @18% per annum towards Abnormally High Rate (AHR) items as rates for such items were submitted to BCPL through EIL for approval and payment.

VII. Claim no. VII- Extended stay compensation (beyond the scheduled completion period plus a grace period of 8 weeks) amounting to Rs. 3,72,50,000/-.

VIII Claim no. VIII- Compensation for reduction in contract value (from the awarded value of Rs.33,89,22,376.38 to the final executed value of Rs.24,33,83,122.78) amounting to Rs.10,81,162.38.

IX Claim no. IX- Loss incurred and damages suffered amounting to Rs.1,00,00,000/- due to wrongful termination of contract and illegal encashment of CPBG.”

Facts

2. Bids were invited by M/s. Engineers India Limited (EIL) on behalf of the respondent - Brahmaputra Cracker And Polymer Limited (BCPL), for certain works associated with Brahmaputra Petrochemical Complex at Lakwa, Assam. The petitioner bid, and was awarded the contract vide Fax of Acceptance dated 14th February, 2013, followed by a Detailed Letter of Acceptance dated 8th March, 2013. The total value of the contract was ₹ 33,89,22,376.38.

3. Clause 107 of the contract provided for resolution of the disputes between the parties, arising in the context of the contract, and reads thus:

“107.1 Unless otherwise specified, the matters where decision of the Engineer-in-Charge is deemed to be final and binding as provided in the Agreement and the issues/disputes which cannot be mutually resolved within a reasonable time, all disputes shall be referred to arbitration by Sole Arbitrator.

The Employer [GAIL (India) Ltd.] shall suggest a panel of three independent and distinguished persons to the bidder/contractor/supplier/buyer (as the case may be) to select any one among them to act as the Sole Arbitrator.

In the event of failure of the other parties to select the Sole Arbitrator within 30 days from the receipt of the communication suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and the EMPLOYER (GAIL) shall have discretion to proceed with the appointment of the Sole Arbitrator. The decision of Employer on the appointment of the sole arbitrator shall be final and binding on the parties.

The award of sole arbitrator shall be final and binding on the parties and unless directed/awarded otherwise by the sole arbitrator, the cost of arbitration proceedings shall be shared

equally by the parties. The Arbitration proceedings shall be in English language and venue shall be New Delhi, India.

Subject to the above, the provisions of (Indian) Arbitration & Conciliation ACT 1996 and the Rules framed there under shall be applicable. All matter relating to this contract are subject to the exclusive jurisdiction of the court situated in the state of Delhi.

Bidders/suppliers/contractors may please note that the Arbitration & Conciliation Act 1996 was enacted by the Indian Parliament and is based on United Nations Commission on International Trade Law (UNCITRAL model law), which were prepared after extensive consultation with Arbitral Institutions and centers of International Commercial Arbitration. The United Nations General Assembly vide resolution 31/98 adopted the UNCITRAL Arbitration rules on 15 December 1976.”

4. The petition alleges that, owing to suspension of the work by the respondent, the petitioner had to idle, in respect whereof claims were submitted by the petitioner on 20th February, 2015, 9th March, 2015, 31st March, 2015, 19th May, 2015 and 20th November, 2015. The work was ultimately completed on 1st April, 2016 except for certain points raised by the respondent. On 10th June, 2016, the respondent suspended the work, which was followed by the issuance, by the respondent, to the petitioner, of a Show Cause Notice dated 15th June, 2016 making allegations of forgery and misrepresentation. On 5th September, 2016, the respondent terminated the contract and forfeited the security deposit submitted by the petitioner and, on the very next date, i.e. 6th September, 2016, the respondent encashed the performance bank guarantee of ₹ 2.10 crores, submitted by the petitioner.

5. The petitioner responded to the aforesaid Show Cause Notice, dated 15th June, 2016 *vide* communications dated 30th June, 2016 and 2nd July, 2016, denying the allegations. The petitioner also wrote to the respondent on 6th July, 2016 and 14th July, 2016, contending, *inter alia*, that the certificate of the Engineer In-charge of the respondent evinced the genuineness of the Completion Certificate submitted by the petitioner. As such, the respondent was requested to withdraw the Show Cause Notice issued to the petitioner. This was followed by reminders on 21st July, 2016, 1st August, 2016, 22nd August, 2016 and 5th September, 2016.

6. The petitioner also approached this Court under Article 226 of the Constitution of India by way of WP (C) 7856/2016. By orders passed in the said petition, the Show Cause Notice, as well as the order suspending the work, was stayed by this Court.

7. On 3rd July, 2018, the petitioner wrote to the respondent setting out the aforesaid Claims (I) to (IX) and requiring that the claims be referred to conciliation, in accordance with Clause 107.1 of the Contract.

8. No response having been received from the respondent within a period of 30 days of the said notice, the petition asserts that the efforts in conciliation had failed, resulting in the petitioner being entitled to invoke the provision for arbitration. Accordingly, on 14th September, 2019, notice, invoking Clause 107.1 of the General Conditions of Contract, providing for arbitration, was issued by the petitioner to the

respondent. The respondent was, therefore, requested to suggest a panel of three independent persons, from whom the petitioner could select one to act as a sole arbitrator to arbitrate on the disputes.

9. The respondent replied on 24th February, 2020 taking a stand that the invocation of arbitration by the petitioner was premature, to which the petitioner submitted a response on 18th March, 2020 followed by a reminder on 30th May, 2020.

10. It is in these circumstances that, on 1st July, 2020, the petitioner has filed the present petition before this Court seeking intervention by this Court under Section 11(6) of the 1996 Act, to appoint an arbitrator to arbitrate on the disputes between the petitioner and the respondent.

11. Mr. N.L. Ganapathi, learned counsel for the respondent, seriously opposes the request. He has specific, and distinct, objections, *qua* Claims II and III and *qua* Claims I, IV to IX, of the nine enumerated claims of the petitioner. Essentially, Mr. Ganapathi contends that Claims II and III are premature, whereas Claims I, IV to IX are not arbitrable in view of Clause 91.1 of the GCC, which reads thus:

“91.1 Should the CONTRACTOR consider that he is entitled to any extra payment for any extra/additional WORKS or MATERIAL change in original SPECIFICATIONS carried out by him in respect of WORK he shall forthwith give notice in writing to the ENGINEER-IN-CHARGE that he claims extra payment. Such notice shall be given to the ENGINEER-IN-CHARGE upon which CONTRACTOR bases such claims and such notice shall contain full particulars of the nature of such claim with full details of amount claimed. Irrespective of any provision in the

CONTRACT to the contrary, the CONTRACTOR must intimate his intention to lodge claim on the EMPLOYER within 10 (ten) days of the commencement of happening of the event and quantify the claim within 30 (thirty) days, failing which the CONTRACTOR will lose his right to claim any, compensation/reimbursement/damages etc. or, refer the matter to arbitration. Failure on the part of CONTRACTOR to put forward any claim without the necessary particulars as above within the time above specified shall be an absolute waiver thereof. No omission by EMPLOYER to reject any such claim and no delay in dealing therewith shall be waiver by EMPLOYER of any of this rights in respect thereof.”

12. *Qua* Claims II and III, Mr. Ganapathi contends that the final bill (which constituted Claim II and to which Claim III also pertained) was deficient in various particulars, as necessary documents were not submitted with the final bill. This compelled the respondent to address communications to the petitioner on 27th February, 2017, 31st July, 2017, 22nd June, 2018 and 27th October, 2018, requiring the petitioner to submit the requisite documents. He submits that it was only after the issuance of the notice invoking arbitration on 14th September, 2019 that the petitioner, on 3rd October, 2019, submitted the said documents, relating to Claims II and III. Thereafter, he submits that payments, against the said Claims, were released by his client and, by 11th August, 2020, out of the total claim of ₹ 7.2 crores of the petitioner, as much as ₹ 6.4 crores already stood released by the respondent. As such, he submits that the very basis of these Claims as ventilated in the petition, stood fundamentally altered by the conduct of the petitioner after issuance of the notice invoking arbitration and the release of the aforesaid amounts by the respondent to the petitioner amounting to partial satisfaction of the claim of the petitioner. Mr. Ganapathi is, however, careful to point out that, as per his client, the

entire amount payable to the petitioner, even against the final bill, Claims II and III, stands released, as the amount certified by its Engineer has been released by the respondent to the petitioner. No amount remains to be paid to the petitioner, therefore, in the estimation of the respondent, even *qua* Claims II and III.

13. In any event, he submits that the present petition does not factor in the developments that took place after issuance of the notice invoking arbitration and cannot, therefore, be maintained at this juncture.

14. Apropos Claims I and IV to IX, Mr. Ganapathi relies on Clause 91.1 of the GCC, which has already been extracted hereinabove. Mr. Ganapathi points out that Clause 107.1, which provides for resolution of disputes, starts with the words “unless otherwise specified”, thereby making the said Clause subject to Clause 91.1. Clause 91.1, for its part, he points out, permits the contractor to seek recourse to arbitration, in respect of claims relating to “any extra payment for any extra/additional works or material change in original specifications” only after lodging of the claim with the employer within 10 days of the commencement of the happening of the event and quantification of the period of 30 days. This protocol, he submits, was never followed by the petitioner *qua* Claims I, IV to IX and, therefore, Clause 91.1 of the GCC specifically proscribed any recourse to arbitration at this stage. Mr. Ganapathi places reliance, in this context, on the following passage, from the judgment of the Supreme Court in *Oriental*

*Insurance Co. Ltd. v. Narbheram Power & Steel Pvt. Ltd.*¹, which was extracted and followed in *United India Insurance Co. Ltd. v. Hyundai Engineering & Construction Co. Ltd.*²

“23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

24. In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy. The rejection of the claim of the respondent made vide letter dated 26.12.2014 ascribes the following reasons:-

- “1. Alleged loss of imported coal is clearly an inventory shortage.
2. There was no actual loss of stock in process.
3. The damage to the sponge iron is due to inherent vice.
4. The loss towards building/sheds etc. are exaggerated to cover insured maintenance.
5. As there is no material damage thus business interruption loss does not triggered.”

15. Premised on the afore-extracted passage, Mr. Ganapathi submits that in exercise of its jurisdiction under Section 11(6) of the 1996 Act, this Court cannot ignore Clause 91.1 of the GCC and the prayer for referring Claims I, IV to IX to arbitration, having been made without exhausting the protocol specified in Clause 91.1, cannot be allowed.

¹ (2018) 6 SCC 534

16. Ms. Ginny J. Rautray, learned counsel for the petitioner, points out that Claims I and IV to IX do not fall within the purview of Clause 91.1, as they do not relate to “any extra payment for any extra/additional works or material change in original specifications”, to which Clause 91.1 specifically relates.

Analysis

17. The law relating to Section 11(6) of the 1996 Act, and the scope of inquiry and examination by a Court exercising jurisdiction under the said provision, stand exhaustively clarified by the Supreme Court in its recent decision in *Vidya Drolia v. Durga Trading Corporation*³, which also takes stock, *inter alia*, of the judgments in *Oriental Insurance Company*¹ and *United India Insurance Company*² on which Mr. Ganapathi places reliance. The judgment in *Vidya Drolia*³ holds that, while exercising jurisdiction under Section 11(6) of the 1996 Act, the Court is required to examine only (i) the existence of an arbitration agreement between the parties, to which the parties are bound and (ii) the existence of an arbitrable dispute. Mr. Ganapathi, very fairly, states that he does not join issue on the existence of an arbitration agreement between the parties, but seriously contests the arbitrability of the disputes being sought to be raised by the petitioner, *inter alia*, for the reasons already noted hereinabove.

18. I have, this morning, pronounced a detailed judgment in *Hero*

² (2018) 17 SCC 607

*Electric Vehicles Pvt Ltd v. Lectro e-Mobility Pvt Ltd*⁴, in which I have examined the exact scope of inquiry by the court, into the arbitrability of the disputes, in the light of the law laid down in *Vidya Drolia*³. The following propositions, according to me, emanate from *Vidya Drolia*³ in this regard.

(i) The ambit of the jurisdiction of the High Court, under Sections 8 and 11 of the 1996 Act, is identical.

(ii) The parties can be relegated to arbitration, in respect of a dispute regarding which the suit is pending, only if the entire subject matter of the suit is arbitrable under the arbitration agreement between the parties, who are bound by the said arbitration agreement. The cause of action in the suit cannot be bifurcated and referred, in part, to arbitration.

(iii) Section 8 jurisdiction cannot be exercised to compel third parties, who are not privy to, or bound by, the arbitration agreement, to submit themselves to arbitral proceedings. This violates the principle of party autonomy and the consensual nature of arbitral proceedings.

(iv) The arbitrability of the dispute forming subject matter of the suit, and the arbitrability of the claim, are different. A claim may be non-arbitrable because of the scope of the arbitration agreement, not because the subject matter of the claim is essentially not amenable to arbitration. On the other hand, the subject matter of the suit is normally non-arbitrable only if it is not amenable to resolution by arbitration, in law.

(v) Non-arbitrability may be said to exist

(a) where the cause of action, and the subject matter of

³ 2020 SCC OnLine SC 1018

⁴ CS (Comm) 98/2020

the dispute, related to actions *in rem*, which do not pertain to subordinate rights *in personam* arising from rights *in rem*,

(b) where the cause of action and subject matter of the dispute affects third party rights, or has *erga omnes* effect, i.e. affects rights owed to all,

(c) where the cause of action and subject matter of the dispute require centralised adjudication, and for which mutual adjudication would not be appropriate or enforceable,

(d) where the cause of action and subject matter of the dispute relate to inalienable sovereign and public interest functions of the State, not amenable to adjudication by the arbitral process, or

(e) where the subject matter of the dispute is non-arbitrable by mandatory statutory fiat.

These principles are, however, not watertight, and have to be applied with care and caution.

(vi) Specific instances of non-arbitrable disputes are-

(a) insolvency disputes,

(b) internal company disputes which have to be addressed by a centralised forum, which would be more efficient and have complete jurisdiction to dispose of the entire matter, being actions *in rem*,

(c) grant and issue of patents and registration of trademarks being exclusive matters falling within the

sovereign or government function, having *erga omnes* effect, conferring monopoly rights,

(d) criminal cases, as they relate to sovereign functions of the State,

(e) violations of criminal law, as they are offences against the State and not just against the victim,

(f) matrimonial disputes relating to dissolution of marriage, restitution of conjugal rights, etc., which have no commercial or economic value and have *erga omnes* effect, and

(g) matters relating to probate or testamentary disposition, which are actions *in rem*, resulting in a declaration to the world at large.

(vii) Landlord-tenant disputes to be decided as per the Transfer of Property Act, 1882, are arbitrable, as they

(a) pertain to subordinate rights *in personam* arising from rights *in rem*,

(b) do not normally affects third party rights, or have *erga omnes* effect, requiring centralised adjudication,

(c) do not relate to inalienable sovereign functions of the State,

(d) are not excepted from resolution by arbitration, by the provisions of the Transfer of Property Act, and

(e) result in a resolution which can be executed and enforced like a decree of a civil court.

(viii) The scope of examination by the Court exercising jurisdiction under Section 8 or under Section 11, is *prima facie* in nature. The Court is not to enter into the merits of the case between the parties. It is only to examine whether the dispute is *prima facie* arbitrable under a valid arbitration agreement. This *prima facie* examination is intended to weed out manifestly and *ex facie* non-existent or invalid arbitration agreements or non-arbitrable disputes, thereby cutting the deadwood and trimming off the side branches, in cases where the litigation cannot be permitted to proceed. The proceedings are preliminary and summary in nature and should not result in a mini-trial. *Unless there is a clear case of non-existence of a valid arbitration agreement, or of the dispute being ex facie non-arbitrable, tested on the above parameters, the court should leave these aspects to be decided by a competently constituted arbitral tribunal.* Relegation to arbitration should be regarded as a rule, and resolution by the civil court, where a valid arbitration agreement exists and is sought to be invoked by one of the parties, as an exception. The expression “chalk and cheese situation”, as used by this Court has, in this background, been approved by the Supreme Court. “When in doubt,” says Ramana, J., in his concurring opinion, “refer”. (Having said that, the “doubt”, in my view, has to be real and substantial, and not merely an escape route to avoid examining the issue in perspective.)

19. The Supreme Court has, clearly and categorically, held that, it is only where, *ex facie*, no arbitrable dispute exists between the parties, relatable to the arbitration agreement between them, that the court can refuse to refer the dispute to arbitration, on an application being made by either of the parties to the agreement in that regard.

20. Where an arbitration agreement exists, the general rule is that all disputes which are capable of resolution by arbitration, ought to be referred to the Arbitral Tribunal. The court is not expected, while exercising jurisdiction under Section 11(6), to enter into a detailed analysis of the arbitrability of the disputes, and is to examine the matter from a purely *prima facie* point of view.

21. Thus viewed, I am unable to agree with Mr. Ganapathi that a case, for rejecting the petitioner's request to refer Claims I, IV to IX, enumerated in para 1 (*supra*), to arbitration, under Clause 107 of the GCC, is made out.

22. Insofar as Claims II & III of the aforesaid nine claims are concerned, the only submission of Mr. Ganapathi is that the delay in making payments against the said claims was only because of the delay, on the part of the petitioner, in furnishing the requisite documents along with the final bill. He has invited my attention specifically, in this context, to the following passages from a communication dated 11th October, 2019, from the petitioner to the respondent:

“We are thankful to BCPL for agreeing to release an ad-hoc payment of Rs.3.65 crores towards our pending Pre-final bill, Final bill and other claims. Payment of Rs.97,00,000/- has already been received by us on 05.10.2019 against the agreed ad-hoc amount of Rs.3.65 crores. kindly release balance ad-hoc amount urgently.

We acknowledge the fact that the final settlement of our pending Pre-final and Final Bill will be done only when all documents submitted by us to EIL on 04.10.2019 are duly processed by them and forwarded to BCPL after verification

and analysis at their end and BCPL also agreed to final settlement immediately thereafter

We request BCPL to ensure processing payment of the pending amounts after making the statutory deductions, as and when final proposal is received from EIL.

Further, since the final Bill processing is pending for want of verification of our documents and recommendation by EIL, we acknowledge and hereby undertake and declare that with the release of the pending payment, we will not claim interest of any type under any head in our notice invoking arbitration dated 14.09.2019 except the claim of BG/SD amount with interest.”

Mr. Ganapathi would seek to contend that the second of the four extracted passages hereinabove, from the letter dated 11th October, 2019, amounts to a tacit acknowledgment, by the petitioner, of the fact that the failure, of the respondent, to make payments against the final bill raised by the petitioner was only owing to the default, on the part of the petitioner, in furnishing the requisite documents. He specifically stresses on the first sentence of the passage, especially the words “we acknowledge the fact that the final settlement of our pending Pre-final and Final Bill will be done only when all documents submitted by us to EIL on 04.10.2019 are duly processed by them....”. According to Mr. Ganapathi, this “acknowledgement”, amounts to an acceptance, by the petitioner, of its default in furnishing requisite documents along with its final bill. Having furnished documents after issuing notice invoking arbitration on 14th September, 2019, and payments having been released to the petitioner by the respondent thereafter, leaving a balance of a little over ₹ 80 lakhs, Mr. Ganapathi submits that the very basis of the prayer of the petitioner to refer the disputes to arbitration

stands eroded.

23. This, in my view, cannot constitute a sufficient ground for me to refuse to refer the disputes to arbitration, *qua* claims II and III.

24. I am not able to read the passages, extracted hereinabove from the letter dated 11th October, 2019, from the petitioner to the respondent, as amounting *ex facie*, to an admission of default, on the petitioner's part, in furnishing requisite documents along with its final bill. *Prima facie*, all that is stated in the letter is that the final settlement of the final bill would be done only when the documents submitted by the petitioner to the respondent till 4th October, 2019 were processed by the respondent.

25. In any event, the issue of whether there was, or was not, any default, on the part of the petitioner, in furnishing requisite documents with its final bill, can always be decided by a duly constituted Arbitral Tribunal.

26. Ms. Ginny J. Rautray, learned counsel appearing for the petitioner, emphatically refutes the submission that the final bill as deficient in any respect. I am not inclined to enter into this controversy, in exercise of my jurisdiction under Section 11(6) of the 1996 Act.

27. The fact of the matter is that, the final bill was raised, and, till the date of issuance notice invoking arbitration, payments against the

final bill were still outstanding. The release of a major portion of the said final bill was, even as per the submission of Mr. Ganapathi, made only after the petitioner had approached this Court by way of present petition under Section 11(6).

28. As such, I am unable to agree with the submission of Mr. Ganapathi that, *qua* Claims II and III, the present petition is premature.

29. It is always open to the respondent to point out, to the learned arbitrator, that the final bill of the petitioner stands paid in its entirety, and it is equally open to the petitioner to assert otherwise. This is a matter which appropriately ought to be decided by the Arbitral Tribunal, and would, in fact, constitute justification for allowing the request by the petitioner in that regard.

30. *Qua* Claims I and IV to IX, too, I am unable to accept the submissions of Mr. Ganapathi. Ms. Rautray has pointed out that the claims do not pertain to “extra payment for any extra/additional work or material change in original specifications”, which is what clause 91.1 of the GCC specifically caters to.

31. On a plain reading, Claims I and IV to IX do not purport to relate to extra payment of the kind contemplated by Clause 91.1. Of course, it would always be open to the respondent to seek to bring, before the learned arbitrator, Claims I and IV to IX as raised by the claimant, within the umbrella of Clause 91.1, and to seek to dispute

the very arbitrability of the said claims, premised on Clause 91.1.

32. The entire issue of applicability of Clause 91.1 to Claims I & IV to IX is, therefore, left open for decision by the learned Arbitral Tribunal. At this juncture, I may only observe that, given the mandate which the claims have been worded, it cannot be said, unexceptionally, that they fall within the ambit of Clause 91.1 of the GCC and are, therefore, not arbitrable in nature. This, needless to say, is only a *prima facie* view, and would not bind the arbitrator.

33. I reiterate that the respondent would be at liberty not only to assail the said claims on merits but also qua the arbitrability in the Arbitral Tribunal, and the Arbitral Tribunal would take an informed decision not only regarding the merits of the claims but also regarding the issue of whether they are arbitrable or not, in view of Clause 91.1. This issue is, therefore, left open for the decision of the Arbitral Tribunal.

34. In view of the above discussion, I am of the opinion that given the limited scope of examination, by this Court, exercising jurisdiction under Section 11 of the 1996 Act, it cannot be said that a *prima facie* case for rejection of the petitioner's request for referring the dispute to arbitration, exists.

35. As such, I am not inclined to decline the request to refer the aforesaid Claims I & IV to IX, as enumerated by the petitioner in the petition, to arbitration.

36. Ms. Rautray points out that similar issues between the petitioner and the respondent are presently being arbitrated by Hon'ble Mr. Justice M.L. Mehta (Retd.), a learned retired Judge of this Court.

37. In view thereof, I am of the opinion that it would be in the fitness of things and would also expedite resolution of the dispute if the present dispute is also referred to Hon'ble Mr. M.L.Mehta (Retd.) for arbitration.

38. The learned Arbitrator would fix his fees after consultation with the parties.

39. The respondent would also be at liberty to prefer any counter-claim, if it so chooses, before the learned Arbitrator in accordance with law.

40. The learned Arbitrator would furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

41. This petition stands disposed of in the aforesaid terms and to the aforesaid extent, with no order as to costs.

42. Needless to say, the observations contained in this judgment are only related to the prayer for appointment of the Arbitrator under Section 11(6) of the 1996 Act and should not be treated as an

expression of opinion, even tentative, regarding the merits of the case of the parties against each other.

43. All issues and facts in law, including the arbitrability of the disputes being raised by the petitioner, shall remain open for decision by the learned Arbitrator.

C. HARI SHANKAR, J.

MARCH 2, 2021

r.bararia/dsn

