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

Date of Decision: 15th April, 2021

+ ARB.P. 578/2020

**M/S ILFS ENGINEERING AND CONSTRUCTION
COMPANY LIMITED**

..... Petitioner

Through: Mr. Hrishikesh Baruah, Ms.
Aditi Mittal, Mr. Aditya Narayan Mahajan,
Mr. Siddhant Tripathi and Mr. Jatin Kumar,
Adv.

versus

**M/S INDIAN STRATEGIC PETROLEUM RESERVES
LIMITED**

..... Respondent

Through: Mr. Dinesh Pardasani, Adv.
with Ms. Shania Elias, Adv.

**CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR**

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

(Video-Conferencing)

1. By this petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), the petitioner seeks reference of its dispute with the respondent to arbitration.

2. The issue in controversy being limited, equally limited need be the reference to the factual fasciculus in which the dispute arises.

3. By contract dated 9th September, 2014, respondent entrusted, to the petitioner, the work of laying of a pipeline from Land Fall Point (LFP) to Mangalore/Padur Cavern for the Strategic Storage of Crude

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Oil at Padur. The contract contained General and Special Conditions, i.e. the GCC and the SCC, respectively.

4. *Vide* letter dated 9th February, 2018, the petitioner raised claims for compensation towards cost escalation borne by it in performing of the contracted work. The claims were rejected by the respondent *vide* letter dated 16th February, 2018. The petitioner rejoined *vide* letter dated 3rd April, 2018.

5. At this juncture, it would be appropriate to reproduce Clauses 1.0.34.0, 6.2.5.0, 6.3.3.0, 6.6.0.0, 6.6.1.0, 6.6.2.0, 6.6.3.0, 6.6.3.1 and 9.1.0.0 of the GCC, governing the contract between the parties, thus:

“1.0.34.0 “Notified Claim” shall mean a claim of the CONTRACTOR notified in accordance with the provisions of Clause 6.6.1.0.”

6.2.5.0 Payments of the amount(s) due on the Final Bill to the extent certified by the Engineer-in-Charge, shall be made within 84 (Eighty Four) days from the due date as specified in Clause 6.2.4.0 hereof, subject to the deductions provided in Clause 6.2.5.1.

6.3.3.0 The rates stated in the Price Schedule and the lump sum price(s) shall not be subject to escalation or increase for any reason whatsoever.”

6.6.0.0 CLAIMS BY THE CONTRACTOR

6.6.1.0 Should the CONTRACTOR consider that he is entitled to any extra payment or compensation in

respect of the works or supplies over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof, the CONTRACTOR shall give notice in writing of its claim in this behalf to the Engineer-in-Charge and the OWNER within 14 (Fourteen) days from the date of the issue of orders or instructions relative to any work(s) for which the CONTRACTOR claims such additional payment or compensation, or from the date of the happening of any other event upon which the CONTRACTOR bases such claim, as the case may be. 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 [sic] 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 OWNER in the manner and within the time aforesaid, and the CONTRACTOR hereby waives and relinquishes any and all claims and all his rights in respect of any claim which is not notified by the CONTRACTOR to the Engineer-in-Charge and the OWNER in writing in the manner and within the time aforesaid.

6.6.2.0 The Engineer-in-Charge and/or the OWNER shall be under no obligation to reply to any notice of claim given or claim made by the CONTRACTOR within the provisions aforesaid or otherwise, or to otherwise reject the same, and no omission or failure on the part of the Engineer-in-Charge or the OWNER to reject any claim made or notified by the CONTRACTOR nor any consideration thereof or dealing therewith shall be deemed to be an admission by the OWNER of the validity of such claim or waiver by the OWNER of the provisions of Clause 6.6.1.0 hereof.

6.6.3.0 Any or all claims of the CONTRACTOR notified in accordance with the provision of Clause 6.6.1.0 hereof as shall remain/ persist at the time of preparation of the 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 such claim, grounds on which it is based, and the amount claimed, and shall be supported by copy(ies) of the notice(s) sent in respect thereof to the Engineer-in-Charge and the OWNER under Clause 6.6.1.0 hereof. In so far as such claim shall in any material particular be at variance with the claim notified by the CONTRACTOR within the provisions 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 consequence in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

6.6.3.1 Any and all notified claims not specially reflected and included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived and relinquished by the CONTRACTOR, and the CONTRACTOR hereby waives and relinquishes all rights to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects to and in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.0.0 ARBITRATION

9.1.0.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.1.1.0 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 9.2.0.0 in respect thereof, and any dispute arising out of an amount claimed by the OWNER against the CONTRACTOR shall be referred to the arbitration by an Arbitral Tribunal comprised of 3 (three) arbitrators selected in accordance with the provisions of the Arbitration & Conciliation Act, 1996. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counterclaim(s). The

CONTRACTOR shall not, however, be entitled to raise as a setoff, 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.”

6. On 9th February, 2018, the petitioner addressed a communication to M/s Engineers India Limited (appointed by the respondent as the Engineer-in-Charge of the project and referred to, hereinafter, as “EIL”), notifying the following claims as payable to it by the respondent:

S. No.	Description	Amount (Rs.)
I	Plant and Machinery Costs which are deployed during the overstay period from July, 2015 to 15 th Nov 2017	17,21,48,149
II	Overhead Expenses incurred in the prolonged period of forced overstay from July, 2015 to 15 th Nov 2017	25,01,73,689
III	Head Office Overheads expenditure incurred from July, 2015 to 15 th Nov 2017	14,95,70,375
IV	Compensation for the losses of opportunity incurred due to delay in execution for the reasons not attributable to the contractor from July, 2015 to 15 th Nov 2017	50,58,75,000
V	Compensation for losses against margin money deposited for the bank guarantees from July, 2015 to 15 th Nov 2017 due to prolongation of Project.	27,19,078
VI	Compensation for the losses against the interest on working capital and profits blocked up during the stipulated completion of Contract due to delay in handing over of land and other reasons from July 2015 to 15 th Nov 2015	14,54,27,797
	Total	1,22,59,14,088

7. The controversy in the present case essentially revolves around three communications addressed by the petitioner to EIL on 16th July, 2018, 5th September, 2018 and 20th September, 2018 respectively.

8. Given the vehemence of opposition, by the respondent, to the reference of disputes between the parties to the arbitration, predicated entirely on these three documents, it is necessary, at the cost of brevity, to reproduce these three communications in their entirety, thus:

Petitioner to EIL dated 16th July, 2018

“Ref: CS-ES /6979/L/412/2018

Date: 16th July, 2018

To,

Mr. Vijay Shahri,
Resident Construction Manager,
Engineers India Limited,
SSCD-Padur Post, Via Kaup,
Udupi - 574106

Sub: Pipe Line Laying from LFP to Mangalore /Padur
Cavern via Intermediate Valve Station (IVS) for ISPRL
Project: Submission of RA Bill No.-35/ Final Bill

Ref: AS /6979-003-MK-TN-1010/1001- Pipeline Laying
from LFP to Mangalore / Padur cavern,

Dear Sir,

Please find enclosed herewith the RA Bill No.35/Final
for an amount of INR. 27,23,12,488.00/- (Indian Rupees
Twenty Seven Crore Twenty Three lakhs Twelve Thousand
Four Hundred Eighty Eight only) against Work Done value

including Goods & Service Tax (GST) in terms-of Clause 6.2.1.0 of GCC for your kind verification and certification for payment along with Contract Closing Documents and Notified Claims.

As per Clause 5.3.5 of Special Conditions of Contract (Part A, Sub Section A-2.2) Contractor is entitled for payment against statutory variation in respect of change in service tax rate after the submission of final price bid. Accordingly the Contractor herewith submit the claim against service tax variation payable till RA-35/Final Bill for an amount of Rs.38,132,366/-

As per Clause 14.0; the Contractor is entitled for Price Variation and accordingly the Claim for Price Variation for an amount of Rs.4,12,390/- is submitted herewith for your certification and further release of payment.

As per Clause 21.0; the Contractor is entitled for reimbursement of Fee paid for obtaining Statutory approvals and accordingly we are herewith submitting our claim for reimbursement of Statutory Approvals fees amounting to Rs.7,03,916/- for your certification and further release of payment.

You are requested to kindly certify the RA Bill - 35/Final bill and release our due and eligible payments as per the terms and conditions of the Contract.

This is without prejudice to our right and privileges under the contract and applicable law.

Thanking you and assuring our best services at all times.

Thanking you,
For IL&FS Engineering Construction Co. Ltd.
Oil & Gas Project -Mangalore”

Petitioner to EIL dated 5th September, 2018

“Ref: CS-ES /6979/L/412/2018
Date: 5th September, 2018

To,

Mr. Vijay Shahri,
Resident Construction Manager,
Engineers India Limited,
SSCD-Padur Post, Via Kaup,
Udupi - 574106

Sub: Pipe Line Laying from LFP to Mangalore /Padur
Cavern via Intermediate Valve Station (IVS) for ISPRL
Project: Submission of RA Bill No.-35/ Final Bill

Ref: AS /6979-003-MK-TN-1010/1001- Pipeline Laying
from LFP to Mangalore / Padur cavern,

Dear Sir,

Please find enclosed herewith the RA Bill No.35/Final for an amount of INR. 27,19,36,236.00/- (Indian Rupees Twenty Seven Crore Nineteen lakhs Thirty Six Thousand two Hundred Thirty Six only) against Work Done value including Goods & Service Tax (GST) in terms-of Clause 6.2.1.0 of GCC for your kind verification and certification for payment along with Contract Closing Documents and Notified Claims.

As per Clause 5.3.5 of Special Conditions of Contract (Part A, Sub Section A-2.2) Contractor is entitled for payment against statutory variation in respect of change in service tax rate after the submission of final price bid. Accordingly the Contractor herewith submit the claim against service tax variation payable till RA-35/Final Bill for an amount of Rs.38,113,877/-

As per Clause 14.0; the Contractor is entitled for Price Variation and accordingly the Claim for Price Variation for an amount of Rs.4,12,390/- is submitted herewith for your certification and further release of payment.

As per Clause 21.0; the Contractor is entitled for reimbursement of Fee paid for obtaining Statutory approvals and accordingly we are herewith submitting our claim for reimbursement of Statutory Approvals fees amounting to Rs.7,03,916/- for your certification and further release of payment.

You are requested to kindly certify the RA Bill - 35/Final bill and release our due and eligible payments as per the terms and conditions of the Contract.

This is without prejudice to our right and privileges under the contract and applicable law.

Thanking you and assuring our best services at all times.

Thanking you,
For IL&FS Engineering Construction Co. Ltd.
Oil & Gas Project -Mangalore”

Petitioner to EIL dated 20th September, 2018

“Ref: CS-ES /6979/L/415/2018
Date: 20th September, 2018

To,

Mr. Vijay Shahri,
Resident Construction Manager,
Engineers India Limited,
SSCD-Padur Post, Via Kaup,
Udupi - 574106

Sub: Pipe Line Laying from LFP to Mangalore /Padur Cavern via Intermediate Valve Station (IVS) for ISPRL Project: Submission of RA Bill No.-35/ Final Bill

Ref: AS/6979-003-MK-TN-1010/1001- Pipeline Laying from LFP to Mangalore/Padur Cavern,

Dear Sir,

Please find enclosed herewith the RA Bill No.35/Final for an amount of INR. 27,19,36,236.00/- (Indian Rupees Twenty Seven Crore Nineteen Lakhs Thirty Six Thousand Two Hundred Thirty Six only) against Work Done value including Goods & Service Tax (GST) in terms of Clause 6.2.1.0 of GCC for your kind verification and certification for payment along with Contract Closing Documents. With this we are withdrawing our earlier submission vide our letter no.

CS-ES /6979/1/412/2018, dated 08th September 2018.

As per Clause 5.3.5 of Special Conditions of Contract (Part A, Sub Section A-2.2) Contractor is entitled for payment against statutory variation in respect of change in service tax rate after the submission of final price bid. Accordingly the Contractor herewith submit the claim against service tax variation payable till RA-35/Final Bill for an amount of Rs.38,113,877/- As per Clause 14.0; the Contractor is entitled for Price Variation and accordingly the Claim for Price Variation for an amount of Rs. 4,12,390/- is submitted herewith for your certification and further release of payment.

As per Clause 21.0; the Contractor is entitled for reimbursement of Fee paid for obtaining Statutory approvals and accordingly 'we are herewith submitting our claim for reimbursement of Statutory Approvals fees amounting to Rs.7,03,916/- for your certification and further release of payment. You are requested to kindly certify the RA Bill - 35/Final bill and release our due and eligible payments as per the terms and conditions of the Contract.

This is without prejudice to our rights and privileges under the contract and applicable law.

Thanking you and assuring our best services at all times.

Thanking you
For IL&FS Engineering & Construction Co.Ltd.
Oil & Gas Project -Mangalore”

9. According to Mr. Hrishikesh Baruah, learned counsel for the petitioner, the following list of notified claims were annexed to the first of the aforesaid three communications, dated 16th July, 2018:

PROJECT: PIPELINE LAYING FROM LFP TO MANGALORE/FADUR CAVERNS
CLIENT: CLIENT: INDIAN STRATEGIC PETROLEUM RESERVES LTD.
<u>NOTIFIED CLAIMS</u>
ENGINEERING IN-CHARGE ENGINEERS INDIA LTD. (EIL)
CONTRACTOR: IL&FS ENGINEERING AND CONSTRUCTION COMPANY LTD.

FOA NO : ISPR/MG/RPA/34 Dated 03.07.2014				
LOA NO ISPR/MG/RPA/35/Dated 11.08.2014				
Sr. No.	Item No.	ITEM DESCRIPTION	Rate(INR)	REMARKS
Uncertified Extra Claim				
1	EX-03	Interim Claim for compensation against losses/damages incurred due to extremely slow progress of Works due to various reasons not attributable to the Contractor. From July 2015 to November 2017	1,225,914,088.00	Submitted Vide letter No. 405, 09 th Feb, 2018
2	EX-04	Boring – Silver Gate Xing	3,751,110	Submitted Vide Letter No. 180, 09 th October, 2015
3	EX-05	Boring - IVS	1,811,649	Submitted Vide Letter No. 248, 09 th October, 2015
4	EX-06	Boring – ELF Junction	1,112,182	Submitted Vide Letter No. 249, 25 th April, 2016
5	EX-07	Extra Claim for 20 Nos. LR Bends	10,198,842	Submitted Vide Letter No. 293, 11 th August, 2016
6	EX-08	Extra Claim for Additional Cold Bend	29,196,813	Submitted Vide Letter No. 278, 12 th July, 2016
7	EX-09	Cost Incurred for Supply of 42” & 48” Piping	5,888,362	Submitted Vide Letter No. 399, 09 th January, 2018
Total Amount (INR)			1,277,873,046	
8	-	Rent Payment at Soorianje (Deducted in RA – 29, 30, 31,32, 33 & 34)	1,522,500	Deducted in Running Bills by ISPR
9	-	Police Protection	15,450	Payment Details attached
10	-	Blasting Payment at Kalathur	4,784,928	Payment Details attached
11	-	BSNL Payment for Leased Line at Padur	389,400	Payment Details attached
12	-	BSNL Payment for Leased Line at Mangalore	105,238	Payment Details attached
Total Amount (INR)			6,817,416	
Sub Total Amount (INR)			1,284,690,462	

10. As these claims remained outstanding, the petitioner invoked the provision for arbitration contained in Clause 9.1.0.0 of the GCC, *vide* letter dated 5th December, 2019 addressed to the respondent. The notice also nominated Hon'ble Mr. Justice A.P. Shah, an eminent retired Chief Justice of this Court and former Chairman of the Law Commission of India, as the petitioner's arbitrator. The respondent was called upon to appoint its arbitrator, so that the two learned arbitrators could appoint a third Presiding Arbitrator and the coram of the Arbitral Tribunal could be completed.

11. The respondent, however, replied on 23rd December, 2019, denying the arbitrability of the disputes and also denying that any amount was payable to the petitioner.

12. It is in these circumstances that the petitioner has moved this Court by the present petition under Section 11(6) of the 1996 Act, praying that this Court appoint a nominee arbitrator for the respondent, so that the two learned arbitrators could proceed to appoint the third arbitrator and the arbitral proceedings could take off. The respondent has filed reply to the petition and the petitioner has filed his rejoinder thereto.

13. Mr. Hrishikesh Baruah, learned counsel for the petitioner, and Mr. Dinesh Pardasani, learned counsel for the respondent, have been heard at length.

14. Mr. Baruah submits that the claims had been notified by the

petitioner in accordance with Clause 6.6.1.0 and that there is no dispute regarding the fact that this notification had taken place within the period of 14 days stipulated in the said clause. He also invited my attention to the days entered in the “Remarks” column in the list of notified claims attached to the letter dated 16th July, 2018, which also bear out the fact that the claims were notified within the aforesaid 14 days period. Though Mr. Pardasani, learned counsel for the respondent, sought to submit that he was disputing the contention of Mr. Baruah that the invocation of the claims was within the 14 day period contemplated by Clause 6.6.3.0, he acknowledges that no such specific challenge has been raised in the reply filed by the respondent in response to the present petition. To a query from the court as to when, according to him, the 14 day period stipulated in Clause 6.6.1.0 had expired, Mr. Pardasani submits that the claims related to delay and that, therefore, the said period of 14 days was required to be reckoned from the date of delay. To my mind, *prima facie*, such an argument would amount to re-writing Clause 6.6.1.0 which specifically states that the period of 14 days has to be from the “date of the issue of orders or instructions relative to the work for which the contractor claims additional payment or compensation”. This being a statutory prescription, it would bind the parties to the contract. Inasmuch as the disputes are being referred to arbitration, I do not see to state anything further in this regard. It would be open to the parties to agitate the point before the learned Arbitral Tribunal, which is eminently competent to adjudicate thereon.

15. The objection of Mr. Pardasani essentially revolves around the

Clause 6.6.3.0, 6.6.3.1, 6.2.3.0 and 6.2.5.0 of the GCC. He submits that Clause 6.6.1.0 cannot be read in isolation. Clause 6.6.3.0, he points out, is in clear continuation of Clause 6.6.1.0, and requires claims, notified under Clause 6.6.1.0, remaining unpaid at the time of preparation of the final bill to be separately included in the final bill prepared by the contractor, i.e. by the petitioner in the form of statement of form attached thereto, giving particulars of such claims, the grounds on which it was based, the amount claimed and supported by copies of notices sent in respect thereof to the EIC and the respondent. In the event of variance with the claims notified in Clause 6.6.1.0, Mr. Pardasani points out that Clause 6.6.3.0 deems the claims to be different from the notified claims. Mr. Pardasani also emphasises the effect of Clause 6.6.3.1, as deeming claims not specifically reflected and included in the final bill in accordance with Clause 6.6.3.0 to be deemed to have been waived and relinquished. Such disputes, therefore, points out Mr. Pardasani, cannot be referred to arbitration and are, *ex-facie*, not arbitrable in nature.

16. Mr. Pardasani also draws my attention to Clause 6.2.3.0 to submit that the final bill drawn in accordance with Clause 6.2.1.0 was required to be submitted along with the completion certification to EIL for certification, and that EIL was required to certify the final bill. Mr. Pardasani submits that the “final bill” submitted with the letter dated 16th July, 2018 was only a draft final bill, as it was not accompanied by any completion certificate. He points out that the only final bill submitted by the petitioner was the bill attached to the letter dated 20th September, 2018, after the completion certificate had been issued. It

was precisely for this reason, submits Mr. Pardasani, that though the bill attached to the letter dated 16th July, 2018 was submitted to EIL, EIL did not certify it or forward it to the respondent. (Significantly, however, Mr Pardasani does not seek to contend that EIL returned the bill dated 16th July, 2018 to the petitioner as not having been submitted in accordance with the provisions of the GCC.)

17. In these circumstances, Mr. Pardasani submits that the only final bill submitted by the petitioner, in accordance with the contract, was the bill attached to the communication dated 20th September, 2018. No statement of notified claims was attached to that bill. As such, submits Mr. Pardasani, the list of notified claims submitted with the bill of 16th July, 2018 could not come to the help of the petitioner and ought to be treated as having been waived by the petitioner. There being no list of notified claims attached to the final bill submitted with the letter dated 20th September, 2018, as was required by Clause 6.6.1.0, Mr. Pardasani submits that the claims of the petitioner cannot be referred to arbitration, in view of the strict protocol prescribed in Clause 9.1.0.0 of the GCC.

18. Mr. Pardasani relies on the judgment of this Court in ***Brilltech Engineers Pvt. Ltd. v Darrameks Hotels and Developers Pvt. Ltd***¹.

19. In rejoinder, Mr. Baruah invites my attention to a communication, dated 21st June, 2018, from the respondent to the petitioner, which reads thus:

¹ MANU/DE/2093/2020

“Dear Sir,

As discussed with Planning engineer M/s ILFS is advised to submit the final bill by 22.06.2018.

This is for your information & necessary action please.

Regards,

Dharuman Meyyazhagan

For Vijay Shahri
Resident Construction Manager
Engineers India Limited
Strategic Storage of Crude Oil Project-Padur
Mob: 9008071836”

20. Mr. Baruah also relies on the judgment of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*², and a coordinate Single Bench of this Court in *NCC Ltd. v. IOCL*³.

Analysis

21. The scope of examination by this Court, exercising jurisdiction under Section 11(6), is extremely limited and stands authoritatively delineated by the Supreme Court in its decision in *Vidya Drolia*².

22. There is no dispute, by the respondent, in the present case, of the existence of an arbitration agreement between the parties. The contest is only regarding the arbitrability of the dispute raised by the petitioner. Mr. Pardasani’s contention is that no arbitrable dispute, within the meaning of Clause 9.1.0.0 of the GCC, exists. This Court

² 2020 SCC OnLine SC 1018

³ 2019 SCC OnLine Del 6964

has, in its recent judgment in *Mahindra Susten Pvt. Ltd. v NHPC Ltd.*⁴ had occasion to study, in detail, the principles relating to the scope of examination by the court exercise jurisdiction under Section 11(6) of the 1996 act, into the aspect of arbitrability of the dispute, *vis-a-vis* the jurisdiction statutorily vested by Section 16 on the arbitral tribunal in that regard, as enunciated by the Supreme Court in *Vidya Drolia*². After extracting, *in extenso*, the relevant passages from *Vidya Drolia*², this Court arrived at the following conclusions:

“31. The import of the above passages from *Vidya Drolia*² is clear and unmistakable. Section 11(6A) of the 1996 Act has been held to continue to apply, as a guiding principle to be followed by courts at the referral stage, even after its omission. *Even while holding that the "arbitrability" of the dispute, along with the aspect of existence of an arbitration agreement between the parties, could be examined, to a limited extent, by the Court exercising jurisdiction under Section 8 or Section 11 of the 1996 Act, the Supreme Court has been circumspect, many times over, in emphasising the limitations of the Court in this regard. It has been made unmistakably clear that, in exercise of its limited scope of authority, to examine the questions of existence of the arbitration agreement and arbitrability of the dispute, at the referral stage, the Court has to be careful not to usurp the jurisdiction of the arbitral tribunal which, ideally, should examine these aspects. The scope of examination by the referral court under Section 11(6), into the aspects of existence of the arbitration agreement, or arbitrability of the dispute, is, strictly, prima facie. In other words, it is only if, prima facie, the Court finds that no valid arbitration agreement exists, that it would refuse to refer the dispute to arbitration. In undertaking this exercise, the Court should not get lost in thickets, or enter into debatable factual issues. Unless there are good and substantial reasons to the contrary, the Court is required to compel the parties to abide by the arbitration agreement. It is only in the case where the arbitration agreement is "ex facie non-existent or invalid", or the dispute is ex facie non-arbitrable, that the court would*

⁴ MANU/DE/0288/2021

refuse to refer the dispute to arbitration. The intention is "to cut off the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage", and to ensure that "vexatious and frivolous matters get over at the initial stage". This would also "save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept the plea of non-arbitrability". "Senseless and ill-considered claims" and "ex facie meritless, frivolous and dishonest litigation" were required to be weeded out, as, "on the other side of a very irresponsible and senseless claim", there was an innocent sufferer. Certainty, in the mind of the Court, that no valid arbitration agreement exists or that the disputes/subject matter are not arbitrable, is the sine qua non for rejection of the prayer for referring the dispute to arbitration, whether made under Section 8 or Section 11. The scope of examination at this stage is preliminary and summary and not in the nature of a mini-trial.

33. It has been made further clear that the dispute would be regarded as "non-arbitrable", at the Section 8 or Section 11 stage, *only where the nature of the dispute is ex facie non-arbitrable, or where the dispute does not relate to the arbitration agreement. The situation has to be "chalk and cheese" or, alternatively, "black and white... without shades of grey". In all other cases, the Section 11 court should follow the more conservative course of allowing the parties to have their say before the arbitral tribunal. Cases where the dispute is, by law, ex facie non-arbitrable, would, for example, be criminal cases, cases involving exercise of sovereign power, cases which, by statutory fiat, are required to be determined by courts, cases in which the cause of action is in rem, or where the subject matter of the dispute affects third parties or has erga omnes effect, requiring centralised adjudication. "On the other hand, issues relating to contract formation, existence, validity and non-arbitrability ... would be factual and disputed and for the arbitral tribunal to decide". Questions involving mixed issues of fact and law have to be left to the arbitral tribunal.*

34. In order to underscore the limitations of the Section 8,

or Section 11 Court, in entering into debatable issues of existence of the arbitration agreement or arbitrability, the Supreme Court has emphasised the purpose behind conferring a limited jurisdiction, on the referral court, to examine these aspects. The conferral of such limited jurisdiction is intended "to prevent wastage of public and private resources", and to protect parties from being forced to arbitrate when the matter is clearly non-arbitrable. *Where, however, prima facie review appears to be inconclusive, or inadequate as it requires detailed examination, the matter has to be left for determination by the arbitral tribunal. Parties should not be allowed to use the referral proceedings as a ruse to delay or obstruct resolution of the dispute. Unjustified impairment of the referral proceedings should not be permitted. Even in cases which may fall under one of the limited categories where prima facie examination is permitted under Section 8 or Section 11, the Court may, nevertheless, decide that allowing the arbitrator to rule first on her, or his, competence would be best for the arbitration process.*

35. This position was alternately exposit, by the Supreme Court, as clarifying that the requirement of the court was "to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties-nothing more, nothing less". The court was permitted to interfere at the referral stage "only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute", all other cases requiring to be referred to the arbitral tribunal for decision on merits. The position was summed up by holding that "in case of debatable and disputable facts and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability".

36. Significantly, the Supreme Court opined that, in the case of pure commercial disputes, the more appropriate principle of interpretation would be one of liberal construction, as there was a presumption in favour of one-stop adjudication.

37. On the aspect of examination of the arbitrability of

the dispute at the referral stage, the Supreme Court held that "the court by default would refer the matter when contentions regarding to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings", cautioning the court not to usurp the jurisdiction of the arbitral tribunal, but to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(Italics and underscoring supplied)

23. The position in law which emerges from **Vidya Drolia**² is that, while the arbitrability of the dispute may also be examined by the Section 11 court, the examination has strictly to be *prima facie* in nature, with an intention to trimming off the side branches and weeding out the deadwood. The Court must recognize and respect the fact that pre-eminent jurisdiction, even to decide the question of arbitrability of the dispute, stands statutorily conferred, under Section 16 of the 1996 Act, on the arbitral tribunal. Usurping of that jurisdiction has, at all costs, to be avoided. It is only in a case where dispute is *ex facie* non-arbitrable in nature that the court can refuse to refer the dispute to arbitration.

24. Clause 9.1.0.0 of the GCC in the present case stipulates, at best, the following three pre-requisites, for a dispute to be arbitrable thereunder:

- (i) that the dispute must arise out of a notified claim of the contractor,
- (ii) that the notified claim must be included in the final bill of the contractor and

(iii) that such inclusion must be in accordance with the provisions of Clause 6.6.3.0 of the GCC.

If these three conditions are satisfied, the dispute is arbitrable under Clause 9.1.0.0.

25. The extent to which this Court can wade into the morass of facts, while exercising jurisdiction in a case such as the present, can only be such as would enable it to arrive at a *prima facie* view regarding the arbitrability of the dispute, and no more.

26. Viewed thus, I fail to see how it can be contended that the dispute raised by the petitioner is not arbitrable in nature.

27. The disputes were notified by the petitioner, firstly in its letter dated 9th February, 2018, and, later, in the list of notified claims attached to the letter dated 16th July, 2018, alongwith the final bill, annexed with the said letter (though Mr. Pardasani disputes that the bill could be treated as “final” at all).

28. These claims were, undisputedly, notified within the period of 14 days stipulated in Clause 6.6.1.0 of the GCC. The letter dated 16th July, 2018 expressly attached, therewith, the final bill. In this context, I find substance in the reliance, by Mr. Baruah, on the communication dated 21st June, 2018 from the respondent to the petitioner, requiring the petitioner to submit the final bill by 22nd June, 2018. It cannot lie in the mouth of the respondent to state that no final bill was submitted by the petitioner with the letter dated 16th July, 2018, though the petitioner was always well within its right to contest the payability of

the final bill, or of the notified claims attached to the said final bill in the arbitral proceedings.

29. The third requirement in Clause 9.1.0.0, for the dispute to be arbitrable in nature, was that the inclusion of the notified claims with the final bill was required to be in accordance with Clause 6.6.3.0. All that Clause 6.6.3.0 states is that notified claims, remaining unpaid at the time of preparation of final bill, were to be “separately included in the final bill..... in the form of a statement of claim attached thereto, giving particulars of nature of such claims, grounds on which it is based and the amount claimed”, supported by copies of notices sent in respect thereof. Mr. Baruah has pointed out that the list of notified claims set out the details of the claims, the documents claiming the amounts, the amounts claimed and the dates when these claims were first submitted to the respondent, were duly attached to the communication dated 16th July, 2018. It cannot, therefore, be said that the notified claims were not included in the final bill in accordance with the provisions of Clause 6.6.3.0.

30. Thus, all three ingredients, envisaged as pre-requisites for the dispute to be arbitrable, by Clause 9.1.0.0 stand, therefore, *prima facie*, satisfied in the present case.

31. The reliance, by Mr. Pardasani, on Clause 6.2.3.0 of the GCC cannot, in my view, militate against this factual position. Clause 6.2.3.0 requires the final bill drawn in accordance with Clause 6.2.1.0 to be submitted to the Engineer-in-Charge together with the

completion certificate for certification. The issue, so far as Section 11(6) of the Act, juxtaposed with Clause 9.1.0.0 of the GCC, is concerned, is not whether the final bill was submitted in accordance with Clause 6.2.3.0 or not, but whether the notified claims were submitted in accordance with Clause 9.1.0.0. On this issue, I have already recorded a *prima facie* finding in favour of the petitioner.

32. Within the limited extent of my jurisdiction under Section 11(6) of the 1996 Act, I seriously doubt whether I can enter into the intricacies of whether the final bill was in accordance with clause 6.2.3.0 or not.

33. There is another aspect of the matter. Mr. Pardasani himself admits the fact that, on 20th September, 2018, a final bill was submitted by the petitioner. He contends, therefore, that the final bill which was earlier submitted on 16th July, 2018 was a “draft final bill”. With the letter dated 20th September, 2018, with which, according to him, the final bill was actually submitted by the petitioner, Mr Pardasani points out that there were no notified claims attached.

34. This argument would throw up the issue of whether, merely because, with the letter dated 20th September, 2018, the list of notified claims, attached to the earlier letter dated 16th July, 2018, was not re-attached, the petitioner could be treated as having given up the said claims. It is relevant to note, in this context, that the letter dated 20th September, 2018 only withdrew the earlier letter *dated 8th September, 2018, and that there is no communication from the petitioner to the*

respondent withdrawing the earlier letter dated 16th July, 2018. It merits reiteration, in this context, that the EIL, too, never deemed it appropriate to return the letter dated 16th July, 2018 to the petitioner, stating that it was irregular in any respect. More importantly, the petitioner has never, expressly or by necessary implication, withdrawn its Notified Claims, as attached to the letter dated 16th July, 2018.

35. It may, therefore, be also open to the petitioner to contend that the notified claims attached with the letter dated 16th July, 2018 continue to remain arbitrable, as they were never withdrawn by the petitioner by any letter or subsequent communication.

36. All these issues, clearly, would require a detailed factual analysis, which a court exercising jurisdiction under Section 11 of the 1996 Act can hardly be expected to undertake. No doubt, **Vidya Drolia**² specifically cautions courts, exercising jurisdiction under Section 11 from wading into these thickets. It cannot be said, at any rate, that a *prima facie* case of non-arbitrability of the dispute raised by the petitioner exists, as would justify rejection of the present petition.

37. Before concluding this judgment, I may also refer to the decision of this Court in **Brilltech Engineers Pvt. Ltd.**¹, on which Mr. Pardasani placed reliance. A bare reading of the said decision reveals that the facts of that case are completely distinct from those of the present case. In that case, this Court found, on facts, as under:

“11. There is no doubt that there has been a series of

communications, between the petitioner and the respondent, in connection with the claims of the petitioner. At the same time, I am not able to convince myself that these communications can suffice to constitute notification of the said claims, in accordance with the protocol set out in the various sub-clauses of Clause 52.1 of the GCC. It is seen that Clause 52.1.1 and Clause 52.1.2 prescribed a rigorous discipline, to be followed, in the matter of notification of claims. The contractor is required to give notice in writing of his claim within 10 days from the date of issue of orders or instructions relating to the works for which additional payment of compensation is sought. This notice is required to contain full particulars of the nature of claim, the grounds on which it is based and the amount claimed. The notice is required to be addressed to the Project Manager and the owner of the respondent. Clause 52.1.2 requires any such notified claims, which remain unpaid at the time of preparation of the final bill by the contractor, to be separately included in the final bill in the form of a statement of claim attached thereto, giving particulars of the nature of the claim, grounds on which it is based and the amount claimed, supported by copies of the notices sent in respect thereof by the contractor to the Project Manager and owner under Clause 52.1.1. Clause 52.2.1 provides for arbitration only of notified claims, included in the final bill in accordance with the provisions of Clause 52.1.2.

12. *The petitioner has filed a rejoinder, to the counter affidavit of the respondent, which raises the specific contention that the claims of the petitioner, which the petitioner seeks to be referred to arbitration, have not been notified in accordance with Clause 52.1.1, and no statement of claim, in accordance with Clause 52.1.2, has been issued in respect thereof. There is no traversal, of this contention, in the rejoinder filed by the petitioner. Even during oral arguments, Mr. Singhal, while acknowledging that the strict discipline of Clauses 52.1.1 and 52.1.2 may not have been followed by his client, nevertheless submits that the prayer, of his client, to refer the disputes to arbitration, ought not to be rejected on this ground, as the communications between the petitioner and the respondent indicate that the respondent had acknowledged the tenability of the petitioner's claims.*

13. Reference of claims to arbitration can be made, by the

Court, under Section 11, only if the claims are themselves arbitrable, in accordance with the Arbitration Agreement between the parties. *The claims of the petitioner not having been notified, and no statement of claim having been submitted, in that regard, in accordance with the protocol set out in Clauses 52.1.1 and 52.1.2, cannot be regarded as arbitrable within the meaning of Clause 52.2.1 of the GCC.”*

(Emphasis supplied)

38. *Brilltech Engineers¹*, therefore, involved a situation in which the contention, of the respondent, in that case, that the claims being sought to be referred to arbitration were not notified in accordance with the appropriate contractual provision, and no statement of claim, in respect thereof, was attached with the final bill, remained untraversed in rejoinder. Even during oral arguments, it was conceded, by learned counsel for the petitioner in that case, that the discipline envisaged in the contractual clauses referring to notification of claims, and inclusion thereof in the final bill, had not been followed by the petitioner. Reference of the claims was, nevertheless, sought on the ground that the tenability of the claims remained undisputed by the respondent. It is in these circumstances that the court went on to hold that the protocol for notifying claims, submitting them with the bill and referring them to arbitration not having been followed, the prayer for referring of dispute could not be allowed.

39. These infirmities do not attach to the claims of the petitioner in the present case. The claims were invited within the stipulated period, and submitted along with the final bill, in accordance with Clause 6.6.3.0 of the GCC.

40. As such, it cannot be said that no *prima facie* case of non-arbitrability of the disputes raised by the petitioner has been made out by the respondent.

41. By way of a closing observation, para 154.4 of the judgment in *Vidya Drolia*² may be reproduced thus:

“154.4 *Rarely as a demurrer* the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably ‘non-arbitrable’ and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal *but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.*”

42. Resistance, such as that manifested in the present case by the respondent, to arbitration of the dispute, even after admitting the existence of the arbitration agreement in the contractual executed, *ad idem*, with the petitioner, does complete disservice to the avowed statutory objective of “affirming and upholding the integrity and efficacy of arbitration as an alternative dispute resolution mechanism”. It is unfortunate that a public sector undertaking, such as the respondent, is adopting such a stance. At the end of the day, reference of the disputes to arbitration causes no prejudice to anyone and, if

anything, aids in expeditious resolution thereof.

43. Accordingly, this Court appoints Hon'ble Mr. Justice Mukul Mudgal, former Chief Justice of Punjab and Haryana High Court, as the respondent's arbitrator in the present case. The contact details of learned arbitrator are as under:

Phone No: 9818000250
Email ID: mudgalmukul@gmail.com

44. The parties are directed to contact the learned arbitrator at the aforesaid contact details within a period of one week from today.

45. The learned arbitrator appointed by the petitioner and the aforesaid learned arbitrator appointed by this Court on behalf of the respondent would, thereafter, proceed to appoint a third arbitrator so that the arbitral proceedings could commence.

46. The fees of the learned arbitrator appointed by the present judgement would be decided by the learned arbitrator in consultation with the parties.

47. In view of the transparent attempt, of the respondent, to thwart the enforcement of the arbitration agreement with the petitioner, I was inclined to mulct the respondent with costs. However, keeping in mind the fact that the respondent is a wholly owned subsidiary of the Oil Industry Development Board, I refrain from doing so.

48. The petition is allowed in the aforesaid terms.

49. All findings contained in this judgment, needless to say, are only for determining whether the prayer for referring the disputes to arbitration was required to be allowed, under Section 11(6) of the 1996 Act. They are strictly *prima facie* in nature and would not inhibit the Arbitral Tribunal, in any manner, from arriving at a different finding, on facts or in law, during the course of the arbitral proceedings.

C. HARI SHANKAR, J.

APRIL 15, 2021

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