MANU/DE/2057/2018

IN THE HIGH COURT OF DELHI

O.M.P. (COMM) 5/2016

Decided On: 28.05.2018

Appellants: **Triune Energy Services Pvt. Ltd.**
Vs.
Respondent: **Indian Oil Petronas Pvt. Ltd.**

Hon'ble Judges/Coram:
Vibhu Bakhru, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Nakul Dewan, Dushyant Manocha, Ananya Gose and Zain Maqbool

For Respondents/Defendant: Jayant Mehta, Indranil Ghosh, Kumal Singh and Shubhankar

Subject: Arbitration

Acts/Rules/Orders:
Arbitration Act, 1940 [repealed] - Section 20; Arbitration And Conciliation Act, 1996 - Section 16, Arbitration And Conciliation Act, 1996 - Section 20, Arbitration And Conciliation Act, 1996 - Section 34, Arbitration And Conciliation Act, 1996 - Section 34 (2)(a)(iv), Arbitration And Conciliation Act, 1996 - Section 34(2)(b), Arbitration And Conciliation Act, 1996 - Section 37, Arbitration And Conciliation Act, 1996 - Section 5, Arbitration And Conciliation Act, 1996 - Section 8

Cases Referred:
Eastern Coalfields Ltd. vs. Sanjay Transport Agency and Anr. MANU/SC/1110/2009; Uttam Singh Duggal & Co. (P) Ltd. vs. Indian Oil Corporation Ltd. and Anr. MANU/DE/0156/1985; M/s. International Building and Furnishing Co. (Cal) Pvt. Ltd. vs. Indian Oil Corporation Ltd. MANU/DE/0137/1994; J.G. Engineers Pvt. Ltd. vs. Union of India (UOI) and Anr. MANU/SC/0527/2011

Case Note:
Arbitration - Validity of award - Section 34 of Arbitration and Conciliation Act, 1996 - Petition filed under Section 34 of Act impugning arbitral award -Whether decision of Arbitral Tribunal to reject claims made by Petitioner were sustainable - Held, there was no denial from Respondent that claims raised by Petitioner were not notified claims - Petitioner's claim did not relate to any extra payment of compensation in respect of work - It also did not pertain to any deductions made by Respondent - Disputes raised by Petitioner did not fall within definition of notified claims - Consequently said disputes were not arbitrable - Claims raised by Petitioner were not arbitrable in terms of agreement - It did not appear that Respondent had specifically disputed quantum of work done for which invoices were raised - Arbitral Tribunal had not examined same - Impugned award to extent it rejects Petitioner's claim for work done could not be sustained - Respondent had not been able to establish its claim for loss of profits - Impugned award to extent it rejected Petitioner's claims set aside - Petition disposed of. [36],[43], [53], [55],[59], [60]

JUDGMENT

Vibhu Bakhru, J.

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), inter alia, impugning the arbitral award dated 29.07.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, namely, Sh. Ramesh Chandra Jindal (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the contract for execution of the work of Project Management Consultancy services (PMC) for LPG import/export terminal at Ennore, Tamil Nadu.

2. By the impugned award, the Arbitral Tribunal has rejected all the claims of the petitioner and counter claims of the respondent (hereafter 'IPPL'). Apparently, the Arbitral Tribunal accepted that a sum of ₹ 52,43,500/- recovered by IPPL by invoking the bank guarantee furnished by the petitioner, was due to the petitioner; but, it did not direct the refund of the said amount, as it accepted that an amount of ₹ 55,00,000/- was due to IPPL for completing the work through an alternate agency, namely, M/s. Firecon. Even though, IPPL had not made any counter claim for the said sum, the Arbitral Tribunal adjusted the amount of ₹ 52,43,500/- from the sum of ₹ 55,00,000/- and awarded a sum of ₹ 2,56,500/- alongwith future interest at the rate of 12% per annum from the date of the award - that is, 29.07.2015 - till its realization, in favour of IPPL.

3. The principal controversy involved in the present petition is whether the Arbitral Tribunal had the jurisdiction to adjudicate the claims (not being Notified Claims) preferred by the petitioner and if so whether, the decision of the Arbitral Tribunal to reject the claims made by the petitioner, are sustainable.

Factual Context

4. On 26.12.2005, IPPL issued a Notice Inviting Tender (NIT) for Project Management Consultancy services (PMC) for implementation of LPG import terminal at Ennore, Tamil Nadu (hereafter 'the Project').

5. The petitioner submitted its bids pursuant to the aforesaid NIT. The said bid was accepted and, on 01.09.2006, IPPL issued a Letter of Intent (LOI) for the Project.

6. On 03.10.2006, IPPL issued a Work Order in the name of Triune Projects Pvt. Ltd. Subsequently, on 25.01.2007, the amended Work Order was issued in the name of the petitioner.

7. The petitioner claims that the tender documents were structured as a consultancy contract for Engineering Procurement Construction Management (EPCM) Project Execution Mode. However, in pre-award meetings, it was decided that the Project would be executed through lump-sum turnkey packages to be executed by the contractors and, therefore, the scope of services for the consultant would be on Project Management Consultancy (PMC) Mode.

8. The petitioner states that due to the change in the mode of execution of the work, the proper contractual documents could not be drawn up. However, it claims that it commenced the work on the Project after receiving the LOI and a part of the Project (described by the petitioner as Part I of the Project) was completed by December, 2006 except for the work of soil testing, which took further period of five months to complete.

9. The petitioner claims that by a letter dated 15.06.2007, IPPL asked the petitioner to hold commencement of Part II of the work till its confirmation. The petitioner was asked to resume the work by a letter dated 08.09.2007. It is stated that in view of the delay caused -which the petitioner claims is entirely attributable to IPPL - the project completion schedule was extended to April 2009.

10. Alleging that the petitioner had breached the terms of the contract, IPPL terminated the contract between the parties by a notice dated 12.08.2008. In its notice, IPPL alleged that the petitioner had breached the contract between the parties inasmuch as the petitioner had been negligent in performing its functions. IPPL further informed the petitioner that the survey and measurement of the work performed under the contract up to the date of termination would be conducted on 19.08.2008. IPPL also reserved its right to claim damages.

11. The petitioner submitted invoices for amounts aggregating ₹ 2,15,17,485/- for the work performed till May, 2008 against the aforesaid invoices. The respondent released a payment of ₹ 1,37,60,119/- and, therefore, the petitioner claimed that it was entitled to a sum of ₹ 77,57,366/- for the works executed by it.

12. IPPL invoked the bank guarantee furnished by the petitioner in the sum of ₹ 52,43,500/- and recovered the aforesaid amount from the concerned bank. The petitioner claims that it learnt about the said invocation on 11.09.2008.

13. On 18.10.2008, the petitioner instituted a suit for recovery and damages in the sum of ₹ 1,79,92,366/- in this Court (M/s. Saipem Triune Engineering Pvt. Ltd. v. Indian Oil Petronas Pvt. Ltd.: CS (OS) 2340/2008). The said amount included ₹ 77,57,366/- as the balance amount claimed by the petitioner for the work done; ₹ 52,35,000/- for the amount recovered by the respondent by encashment of the bank guarantee; and ₹ 50,00,000/- as nominal damages.

14. IPPL filed an application under Section 5 and 8 of the Act (IA No. 15811/2008 in CS (OS) 2340/2008) in the aforementioned proceedings, inter alia, claiming that the disputes in the suit were the subject matter of an arbitration agreement between the parties and, inter alia, praying that the parties be referred to arbitration. The petitioner resisted the aforesaid application claiming that there is no valid arbitration agreement between the parties. It claimed that there were three different arbitration clauses in the tender documents; Clause 9.0.1.0 of the General Conditions of the Contract (hereafter 'GCC'); Article 31 of the format for agreement of Project Management Services forming a part of the tender documents; and, Article 34 of the Draft Agreement. The petitioner claimed that all the three clauses were at variance with one another and had not been finalized.

15. By an order dated 10.01.2011 passed by a Coordinate Bench of this Court, IPPL's application under Section 8 of the Act was allowed and the parties were referred to arbitration. The petitioner preferred an appeal against the said order before a Division Bench of this Court, being FAO (OS) 113/2011, which was rejected by an order dated 01.03.2011, as not maintainable.

16. In terms of the order dated 10.01.2011, IPPL furnished a panel of three persons to the petitioner for one of them to be appointed as the sole arbitrator. The petitioner selected Mr. R.C. Jindal, a former employee of Indian Oil Corporation Ltd. (IOCL), to be appointed as the sole arbitrator and, thereafter, IPPL appointed the sole arbitrator to constitute the Arbitral Tribunal.

17. The petitioner filed an application under Section 16 of the Act before the Arbitral Tribunal, inter alia, claiming that the disputes raised by it, were not arbitrable. The petitioner pleaded that Clause 9.0.0.0 of the Standard Contract did not apply, as the claims lodged by the petitioner were not Notified Claims. IPPL filed a reply and resisted the application on several grounds. It contended that the Arbitral Tribunal had been constituted by the consent of the parties and the issues sought to be raised by the petitioner had been conclusively decided by this Court. IPPL further denied that the Standard Contract was not applicable as the claims lodged by the petitioner were not the Notified Claims.

18. By an order dated 20.01.2012, the Arbitral Tribunal rejected the petitioner's application filed under Section 16 of the Act, inter alia, holding that the disputes raised by the petitioner had been examined by this Court in the judgment dated 10.01.2010. The Arbitral Tribunal also referred to Clause 9.0.1.0 of the GCC, which formed a part of the Tender Documents and observed that any dispute between the parties could be referred to arbitration.

19. Thereafter, the petitioner filed a statement of claim, claiming: (a) ₹ 77,57,366/- as the remaining invoices amount; (b) ₹ 52,35,000/- recovered by the respondent by encashment of the bank guarantee; (c) ₹ 50,00,000/- as damages; and (d) interest at the rate of 18% per annum till the realisation of the aforesaid amounts.

20. IPPL filed its statement of defence and the counter claims. IPPL raised three counter claims. It claimed (i) a sum of ₹ 4.29 crores as Terminalling Charges; (ii) ₹ 3,00,000/- for non-performance of work; and (iii) ₹ 2,00,000/- as interest and compensatory cost.

21. The arbitral proceedings culminated in the impugned award.

The Impugned Award

22. The Arbitral Tribunal framed the following issues:-

> "1. Whether the termination of the contract is illegal? If so, what effect:
>
> 2. Whether the encashment of the Bank guarantee is also illegal If so, what effect?
>
> 3. Whether the Claimants (M/s. Triune Energy Services Pvt. Ltd.) are entitled to get the claim as mentioned in the claim petition?
>
> 4. Whether the respondents are entitled to get the claim as mentioned in their counter claim?
>
> 5. Order as to costs?"

23. With regard to the first issue, the Arbitral Tribunal accepted IPPL's plea that the petitioner had been negligent in carrying out its work and, therefore, the termination of the contract by IPPL was proper and legal. With regard to Issue No. 3 - that is, whether the petitioner was entitled to the balance invoiced amount on account of work done - the Arbitral Tribunal held that since the termination of the contract was legal, the petitioner was not entitled to any claim.

24. The Arbitral Tribunal rejected all the counter claims made by IPPL as well. However, the Arbitral Tribunal held that IPPL was entitled to ₹ 55,00,000/- spent for execution of the work by another agency. Since IPPL had recovered a sum of ₹ 52,43,500/- by encashment of the bank guarantee, the Arbitral Tribunal awarded the balance sum of ₹ 2,56,500/- in favour of IPPL. The Arbitral Tribunal further held that IPPL would also be entitled to interest at the rate of 12% per annum from the date of the award till realization.

Submissions

25. Mr. Nakul Dewan, learned counsel appearing for the petitioner assailed the impugned award, essentially, on four fronts. First, he submitted that the Arbitral Tribunal had no jurisdiction to adjudicate the disputes between the parties as the disputes raised by the petitioner were not arbitrable. He stated that the arbitration proceedings could only be instituted by the petitioner in respect of Notified Claims and since the claim made by the petitioner were not Notified Claims, the same fell outside the scope of the arbitration clause.

26. Second, he submitted that the Arbitral Tribunal had erred in not awarding a sum of ₹ 77,57,366/- being the balance amount due against the invoices raised by the petitioner. He stated that there was no dispute as to the said invoices and the Arbitral Tribunal had merely rejected the claim on the ground that the termination of the contract was found to be legal. He submitted that even if the termination of the contract was accepted, the petitioner would be entitled to be paid for the work executed on the principle of quantum meruit.

27. Third, he submitted that the award made in favour of IPPL was wholly unsustainable as even though the Arbitral Tribunal has rejected all of the counter claims made by IPPL, it has, nonetheless, awarded ₹ 55,00,000/- in IPPL's favour. The Arbitral Tribunal had also found that the petitioner was entitled ₹ 52,43,500/-, which was recovered by the respondent by encashment of the bank guarantee; but, had adjusted the aforesaid amount against a claim of ₹ 55,00,000/- even though no such counter claim had been made.

28. Lastly, he submitted that the Arbitral Tribunal had erred in holding that the termination of the contract on 12.08.2008 was valid because time was the essence of the contract. He stated that the period of the contract had already been extended till April, 2009 and, therefore, time was not the essence of the contract and could not be a ground for termination of the contract on 12.08.2008.

29. Mr. Mehta, learned counsel appearing for IPPL countered the submissions made on behalf of the petitioner. He submitted that the issue regarding the jurisdiction of the Arbitral Tribunal to adjudicate the claims could not be re-agitated as that issue had been considered by this Court while allowing IPPL's application under Section 8 of the Act.

30. Next, he submitted that the petitioner had consented to the constitution of the Arbitral Tribunal and, therefore, could not question the Arbitral Tribunal's jurisdiction. He further submitted that the petitioner in its application had also indicated its agreement for referring the disputes to an independent arbitrator.

31. With regard to the merits of the claim, Mr. Mehta submitted that the Arbitral Tribunal had accepted IPPL's contention that the petitioner had breached the contract and, therefore, no sums could be awarded in favour of the petitioner. Insofar as the invocation of the bank guarantee is concerned, Mr. Mehta submitted that IPPL was entitled to recover the amounts due by adjustment against the amount recovered by involving the bank guarantee.

32. Mr. Mehta, did not dispute the Arbitral Tribunal's observation that time was the essence of contract was erroneous.

Reasons and Discussions

33. The first and foremost issue to be addressed is whether the Arbitral Tribunal had the jurisdiction to adjudicate the claims raised by the petitioner. It is important to note that IPPL had not referred to any of the arbitration clauses in the application filed under Section 8 of the Act. It appears that at that stage, IPPL had claimed that Article 31 of the Format for Agreement of Project Management Services embodied the arbitration agreement between the parties. This was rejected by this Court in view of the decision of the Supreme Court in Eastern Coalfields Ltd. v. Sanjay Transport Agency & Anr.: MANU/SC/1110/2009 : (2009) 7 SCC 345. However, this Court had noticed that Clause 9.0.0.0 of the

General Conditions of the Contract (GCC) for Project Management Consultancy Services, which formed a part of the Tender Documents also provided for arbitration. This Court proceeded on the aforesaid basis and issued directions for constitution of the Arbitral Tribunal which were in conformity with Clause 9.0.1.1 of the GCC. Insofar as the decision as to the existence of the arbitration agreement is concerned, the decision of this Court was final. However, the question whether the disputes raised were arbitrable, was not finally decided. This is clear from this Court's observation: "In any case, it will be very much open to the arbitrator to take a view on this aspect of the matter and decide whether any or all the claims forming subject matter of this suit are covered under the arbitration clause or not."

34. The petitioner's contention that its claims were not Notified Claims and, therefore, were not arbitrable was not rejected. This Court had only expressed a prima facie view that the subject matter of the disputes would be arbitrable, also for the reason that IPPL had raised claims against the petitioner and it was presumed that the amount of the bank guarantee of ₹ 52,35,000/- had been encashed towards satisfaction of those claims.

35. The appeal (FAO (OS) 113/2011) preferred by the petitioner before the Division Bench of this Court against the decision of the Court referring the parties to arbitration was rejected on the ground of maintainability. This is so because an appeal against an order passed under Section 8 of the Act, for referring the parties to arbitration, was not appealable under Section 37 of the Act.

36. The petitioner once again raised the issue as to arbitrability of its claims before the Arbitral Tribunal and contended that Clause 9.0.0.0 of the GCC did not apply to the claims lodged by the petitioner since the same were not Notified Claims. At the material time, there was no denial from IPPL that the claims raised by the petitioner were not Notified Claims. In its reply, to the application filed under Section 16 of the Act, IPPL simply stated that "It is denied that the standards of contract is not applied to the claim as the claim lodged with the respondent is not notified claim".

37. The petitioner's application under Section 16 of the Act was rejected by the Arbitral Tribunal by an order dated 20.01.2012 without considering the petitioner's contention that the claims raised by the petitioner were not Notified Claims. The Arbitral Tribunal merely proceeded on the basis that an arbitration agreement existed between the parties and rejected the petitioner's contention with regard to non-arbitrability of the claims in the following words:-

> "However, in view of Clause 9.0.1.0 of the general conditions of the Contract for Project Management Consultancy Services which forms part of the tender documents which says in case of any dispute arising out of any claim between the parties shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 which was duly complied with by the Claimant by endorsing the selection of Arbitrator."

38. Undisputedly, the arbitration clause is not wide enough to encompass all the disputes between the parties. It is, thus, apparent from the above that the question, whether the disputes raised by the petitioner were arbitrable, as falling within the scope of Clause 9.0.1.0 of the GCC, was not addressed.

39. At this stage, it would be relevant to refer to the relevant Clauses of the GCC. Clause 9.0.0.0 of the GCC, which embodies the arbitration agreement between the parties, is set out below:-

> "9.0.0.0 ARBITRATION
>
> 9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONSULTANT included in the Final Bill of (lie CONSULTANT in accordance with the provisions of Clause 6.6.3.0 hereof if the CONSULTANT 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 CONSULTANT 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 CONSULTANT as counter claim(s) if a Notified Claim of the CONSULTANT has been referred to arbitration. The CONSULTANT 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 CONSULTANT'S Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.
>
> 9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONSULTANT out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONSULTANT fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.
>
> 9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are:
>
> (i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement.
>
> (ii) Whether or not a Claim sought to be referred to arbitration by the CONSULTANT is a Notified Claim;
>
> (ii) Whether or not a Notified Claim is included in the CONSULTANT'S Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the Consultant has opted for the Alternative Dispute Resolution machinery with respect to any Notified Claim included in the CONSULTANT'S Final Bill."

40. It is apparent from the plain language of Clause 9.0.1.0 of the GCC that only the dispute arising out of the Notified Claim of the Consultant which is included in the Final Bill, can be referred to arbitration. However, any dispute arising out of any claim of the Owner (IPPL) against the Consultant (the petitioner) is arbitrable. Thus, it is necessary to examine whether the claims made by the petitioner fall within the scope of Notified Claims.

41. Clause 1.21.0.0 of the GCC defines 'notified claims' as under:-

"1.21.0.0 "Notified Claim" shall mean a claim of the CONSULTANT notified in accordance with the provisions of Clause 6.6.1.0 hereof."

42. Clause 6.6.1.0 of the GCC reads as under:

"6.6.1.0 Should the CONSULTANT 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 Consultant DISPUTE THE VALIDITY OF ANY DEDUCTIONS MADE OR THREATENED BY THE owner FROM ANY running Account Bills, the CONSULTANT 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 work for which the CONSULTANT claims such additional payment or compensation or of the happening of other even upon which the CONSULTANT 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 anywise be liable in respect of any claim by the CONSULTANT unless notice of such claim shall have been given by the CONSULTANT to the Engineer-in-charge and the Site Engineer in the manner and within the time aforesaid and the CONSULTANT 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."

43. In the present case, the petitioner's claim do not relate to any extra payment of compensation in respect of the work. It also does not pertain to any deductions made by IPPL. Thus, plainly, the disputes raised by the petitioner do not fall within the scope of Clause 6.6.1.0 of the GCC and, therefore, do not fall within the definition of 'Notified Claims' as defined under Clause 1.21.0.0 of the GCC. Consequently, the said disputes are not arbitrable.

44. Mr. Mehta had earnestly contended that in terms of Clause 9.0.2.0 of the GCC, IPPL was a sole judge of the question whether a claim is a Notified Claim and, therefore, IPPL could always refer the disputes to arbitration. This contention is bereft of any merit. Clause 9.0.2.0 of the GCC provides for matters which are excluded from the scope of arbitration. These are excepted matters and are not arbitrable. Merely because, the question whether a claim is a Notified Claim or not excluded from the scope of arbitration clause, does not mean that IPPL's decision - which is ex facie contrary to the terms of the GCC -has to be accepted. The contractor is not rendered remediless; it only means that the said disputes cannot form a subject matter of the arbitration and the contractor, who is aggrieved by the excepted matter, has necessarily to take recourse to other remedies. This would include a challenge to his jurisdiction before the courts.

45. It is also relevant to note that it was not IPPL's case that its concerned officer had decided that the claims made by the petitioner were Notified Claims; there is no averment to this effect in any pleading filed on behalf of IPPL.

46. Mr. Mehta's contention, that Clause 9.0.2.0 of the GCC provides that IPPL has the discretion to refer any matter to arbitration, is unpersuasive. In terms of Clause 9.0.1.0 of the GCC, only the disputes in respect of Notified Claims of the contractor could be referred to arbitration but all claims made by the owner (in this case IPPL) could be referred to arbitration. Therefore, in this case, IPPL was well within its right to refer its counter claims to arbitration but it was not open for IPPL to insist that the claims made by the petitioner - which are not Notified Claims - be referred to arbitration.

47. As noticed above, it was also not IPPL's claim before the Arbitral Tribunal that the petitioner's claims were Notified Claims. It is also relevant to note that a Coordinate Bench of this Court in its decision dated 10.01.2011 allowing IPPL's application under Section 8 of the Act had not accepted the petitioner's contention that the claims raised were not, prima facie, arbitrable. This was on the assumption that IPPL had also raised claims and it was presumed that the bank guarantee in the sum of ₹ 52,43,500/- had been encashed towards those claims. The relevant extract of the said decision is set out below:-

"13 It was contended by the learned counsel for the plaintiff that since the disputes subject matter of this suit, do not arise out of a notified claim of the plaintiff included in the final bill submitted by it, the arbitration clause referred-above does not apply to the suit claim. As noted earlier, the case of the plaintiff is that it had submitted invoices amounting to Rs. 2,15,17,485/- for the work performed till May, 2008 and a sum of Rs. 77,57,366/- out of that amount is still due to it from the defendant. It is difficult to accept that the claim with respect to this amount is not covered under the above-referred arbitration clause. Admittedly, the defendant has also raised claims against the plaintiff and presumably the amount of the bank guarantee of Rs. 52,35,000/- has been encashed towards satisfaction of those claims of the defendant. In any case, it will be very much open to the arbitrator to take a view on this aspect of the matter and decide whether any or all the claims forming subject matter of this suit are covered under the arbitration clause or not. Section 16 of the Arbitration & Conciliation Act, 1996 specifically confers power upon the arbitral tribunal to rule on its jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. Therefore, it will only be appropriate if this aspect of the matter is left to the arbitrator to determine."

48. Indisputably, any claim made by IPPL against the petitioner would be arbitrable under the terms of Clause 9.0.1.0 of the GCC and if the bank guarantee furnished by the petitioner had been encashed towards any of those claims, the said disputes would clearly be referred to arbitration. However, it transpires that the bank guarantee had not been encashed towards any of the counter claims raised by IPPL and, therefore, this assumption also did not hold true in this case.

49. Mr. Mehta had submitted that the purpose of Notified Claim was only to simply notify IPPL and this has been done by raising invoices. Thus, the claims raised by the petitioner were not Notified Claims. This contention is also unmerited for several reasons. First of all, Notified Claims are defined under Clause 1.21.0.0 of the GCC and, admittedly, these claims do not fall within the Scope of Clause 6.6.1.0 of the GCC. Secondly, it was not IPPL's case that the claims raised by the petitioner were Notified Claims.

50. In Uttam Singh Duggal & Co. (P) Ltd. v. Indian Oil Corporation Ltd. & Another: MANU/DE/0156/1985, a Coordinate Bench of this Court had considered the issue as to arbitrability of the dispute falling within the scope of Clause 9.0.0.0 of the GCC in the context of an application filed under Section 20 of the Arbitration Act, 1940, for reference of the disputes to arbitration. In that case, the petitioner had contended that a notified claim would also include any difference or dispute provided that such claim had been notified within 10 days of its occurrence. The said contention was countered by the learned counsel appearing for the respondent (IOCL). He submitted that the arbitration agreement did not cover all disputes between the parties and the dispute for the purposes of arbitration agreement would not merely be the notified claims but only those notified claims, which are included in the final bill and even a variation in a notified claim would be a different claim. After considering the rival contentions, the Court had held that Clause 9.0.0.0 applies only to disputes and differences arising out of a notified claim included in the final bill of the contractor and concluded as under:-

> "27. In any case, in the instant case the issue pertained to the arbitrability of the notified claim under cl. 9.0.0.0. What matters are agreed to be referred to arbitration depend upon the agreement between the parties. It, therefore, appears to me that cl 9.0.0.0 would apply only to a notified claim. After taking this view, I have to hold that the present petition under S. 20 of the Act is not maintainable."

51. In International Building and Furnishing Co. (Cal) Pvt. Ltd. v. Indian Oil Corporation Ltd.: MANU/DE/0137/1994, the Division Bench of this Court concurred with the view expressed by the Single Judge in Uttam Singh Duggal & Co. (supra).

52. In J.G. Engineers Private Ltd. v. Union of India & Another: MANU/SC/0527/2011 : (2011) 5 SCC 758, the Supreme Court had unequivocally held that an award adjudicating claims, which are excepted matters would violate Section 34 (2)(a)(iv) and 34(2)(b) of the Act.

53. Thus, in view of this Court, the claims raised by the petitioner were not arbitrable in terms of Clause 9.0.0.0 of the GCC.

54. The next question to be examined is whether the Arbitral Tribunal had erred in rejecting the claims raised by the petitioner. A careful reading of the impugned award indicates that IPPL's claim for the work done has been rejected only on the ground that the Arbitral Tribunal had held that the termination of the contract was legal. Plainly, the petitioner's claim for work done could not have been rejected only on that ground. Notwithstanding the legality of the termination of the contract, a contractor is entitled to the value of the work done.

55. IPPL had, inter alia, claimed that the petitioner had breached the terms of the contract and was negligent in carrying out its work. However, it does not appear that IPPL had specifically disputed the quantum of work done for which invoices were raised. Even if, any such dispute was raised, the Arbitral Tribunal had not examined the same. Thus, even on merits, the impugned award to the extent it rejects the petitioner's claim for the work done cannot be sustained.

56. Insofar as the petitioner's claim for recovery of the amount recovered against the bank guarantee is concerned, the Arbitral Tribunal accepted the same and, thus, the petitioner would be entitled to recover the said amount. However, the Arbitral Tribunal had proceeded to hold that IPPL had adjusted the same against the amount of ₹ 55,00,000/- as cost incurred by IPPL for engaging another agency. No such counter claim had been raised by IPPL and the question of permitting adjustment of the amount due to the petitioner against any such claim, did not arise.

57. It is relevant to note that IPPL had made only three counter claims. The first related to loss of profits on Terminalling Charges. IPPL had claimed that the delay in completion of the works was attributable to the petitioner and had the works been completed, IPPL would have earned terminal charges from the terminal that would have been constructed. IPPL further assumed that such charges would be at the rate of ₹ 1100 per metric ton but the cost would only amount to ₹ 600 per metric ton and, therefore, IPPL would make a profit of ₹ 500 per metric ton on providing Terminalling services. It was further assumed that IPPL would handle 25,000 metric tons per month and thus, had lost the opportunity to earn profit of ₹ 1.25 crores per month (500 x 25000). IPPL computed the loss of profits for three months as ₹ 3.75 crores. In addition, IPPL claimed that it would also be able to generate revenue of ₹ 54,00,000/- from direct sale of Propane/Butane/LPG. This amount was computed at net profit margin of ₹ 600 per metric ton and it was assumed that 3000 metric ton of Propane/Butane/LPG would be sold directly. Thus, resulting in loss of ₹ 18,00,000/- per month. The Arbitral Tribunal had rejected all of the aforesaid claims as "not proved by evidence or otherwise".

58. IPPL had also claimed a sum of ₹ 3,00,000/- on account of non-availability of (i) Resident Construction Manager; (ii) Civil Engineer; and (iii) Quality Control Engineers at site, which according to IPPL, the petitioner was obliged to depute at site. In addition, IPPL had also sought compensatory cost of ₹ 2,00,000/-. These claims were also rejected for lack of evidence.

59. This Court finds no infirmity with the aforesaid decision. Clearly, IPPL had not been able to establish its claim for loss of profits.

60. In view of the above, the impugned award to the extent it rejects the petitioner's claims is set aside. The parties are left to bear their own costs.