Garg Builders Through Shri Mohinder Pal ... vs Is Required To Follow The Process As Laid ... on 10 October, 2022

Author: V. Kameswar Rao

Bench: V. Kameswar Rao

$~3 to 6
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ARB.P. 47/2020, I.A. 10320/2021
+ ARB.P. 473/2021
+ ARB.P. 518/2021
+ ARB.P. 606/2021
GARG BUILDERS THROUGH SHRI MOHINDER PAL GARG
M/S GARG BUILDERS THROUGH SHRI SAURABH GARG
GARG BUILDERS
GARG BUILDERS
..... Petit
Through: Mr. Rahul Malhotra, Adv.

versus

HINDUSTAN PREFAB LTD.
.....
Through: Mr. Parveen Kumar Mehdirat
with Mr. Ram Singh, Advs.
(Item Nos. 3 & 6)

Mr. Shlok Chandra, SC with
Ms. Mansie Jain, Mr. Nimit
Mr. Keshav Garg, Advs. for
(Item Nos.3, 4 & 6)

Mr. Dinesh Soni, SSO/Repre
for ESIC (Item Nos.3 to 6)

Mr. Ripu Daman Bhardwaj, C
with Mr. Kushagra Kumar &
Aakriti Roy, Advs. for NDR
No.5)

Mr. Varun Nischal, Adv. wi
Mr. Vaibhav Mishra, Adv. &
Mr. Mukesh Kumar (Legal In
for R-1 (Item Nos.4 & 5)

Signing Date:22.10.2022
17:39:45

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
ORDER

% 10.10.2022

1. All these petitions have been filed seeking appointment of an Arbitrator.

2. There is no dispute that the respondent had carried out the work on behalf of ESIC (item Nos.3, 4 & 6) / NDRF (item No.5). Certain claims have been raised by the petitioner, which have been declined by the respondent/HPL herein.

3. An objection has been taken by the respondent/HPL, inasmuch as the petitioner has not made ESIC / NDRF for whom the work was carried out as a party respondent. On that objection, I had issued notice to ESIC / NDRF and they are being represented through Mr. Shlok Chandra, Standing Counsel and Mr. Ripu Daman Bhardwaj, CGSC, respectively. In fact, Mr. Malhotra, learned counsel for the petitioner had also stated, he has no objection for impleadment of ESIC / NDRF as party respondent before the Arbitral Tribunal, if so constituted.

4. Today, Mr. Shlok Chandra, Adv. and Mr. Ripu Daman Bhardwaj, CGSC appears for ESIC / NDRF and contested the plea that has been urged by the respondent/HPL stating that the petitioner and the HPL inter-se are governed by the Contract, which stipulates an arbitration agreement and ESIC/NDRF cannot be made a party respondents before the Arbitral Tribunal. Learned counsels also state that even otherwise, such a submission need to be made before the Arbitral Tribunal, if so constituted.

5. An objection is taken by learned counsel appearing for respondent/HPL that the contract contemplates General Conditions of Contract ('GCC', for short) and Special Conditions of Contract ('SCC', for short) and the procedure contemplated therein has not been followed by the petitioner before filing the present petitions seeking appointment of an Arbitrator. In this regard, my attention has been drawn to Clause 26 (item Nos. 3, 4 and 6) and Clause 27 of GCC (item No.5), which I reproduce as under:-

> "Clause 26: Settlement of Disputes and Arbitration:
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> Any or all Disputes, differences, or questions which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement or subject matter thereof shall first be endeavored to be amicably resolved at the top management level of the parties. However, in event of such dispute, difference or question etc. remaining unsolved, the same shall be referred to the arbitration by Sole Arbitrator to be nominated by The Chairman And Managing Director of Hindustan Prefab Limited, and provisions of the Arbitration and conciliation Act, 1996 shall be applicable. The place of such arbitration shall be at

New Delhi."

"27. Settlement of Disputes and Arbitration. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, design, drawings, and instruction here-in above before mentioned as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in Charge or any matter in connection with or arising out of the contract of carrying out of the work, to be acceptable, he shall promptly within 15 days request the DGM(C), HPL in writing/or written instructions or decisions. Thereupon, the DGM(C), HPL shall give his written instructions or decisions within a period of one month from the receipt of the contractor's letter.

If the DGM(C), HPL fails to give his instructions or decision in writing within the aforesaid period or if the contractors is dissatisfied with the instructions or decision of the DGM(C), HPL, the contractor may, within 15 days of the receipt of DGM(C), HPL decision, appeal to the CMD, HPL who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The CMD, HPL shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the CMD, in the prescribed format attached with SCC as Annexure-X HP L for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has become final, binding and conclusive in terms of Sub Para(i) above disputes of difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD, HPL on behalf of NDRF and with the consent of NDRF. If the arbitrator so appointed is unable or unwilling to act of resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed to respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, HPL of the appeal."

6. That apart, it is also urged that in terms of Clause 16 of the SCC, any dispute with regard to sub standard work, after the issue has been adjudged by the CMD of the respondent No.1, cannot be

referred to the process of arbitration being an excepted matter. In other words, he state that such a claim can be made before a Civil Court. Reference has been made to the judgments of the Supreme Court in the cases of Indian Oil Corporation Limited v. NCC Limited 2022 SCC OnLine SC 896 and DLF Home Developers Limited v. Rajapura Homes Private Limited & Anr., Arb.P.(Civil) No. 17/2020 decided on September 22, 2021.

7. These above objections of the learned counsel for the respondents i.e. ESIC / NDRF and HPL have been contested by Mr. Malhotra by stating that the initial clause of the SCC clearly stipulates that it is the provisions of the SCC, which would prevail over the GCC. He also state that between the provisions of GCC and SCC, the SCC being specified (which shall prevail) the petitioners has followed the same and as such, the stage of appointment of an Arbitrator has arisen. He also state now for the petitioners to follow the procedure would relegate back the petitioner by a period of six months really defeating the purpose of arbitration.

8. I have considered the respective pleas made by learned counsel for the parties.

9. Insofar as the plea raised by learned counsel for HPL that ESIC/NDRF, need to be made a party is concerned, the plea is contested by the counsel for ESIC/NDRF by stating, the inter-se agreement between petitioner and HPL do not contemplate involvement of ESIC/NDRF and even otherwise such a plea need to be considered by the Arbitral Tribunal. Only to be noted in Vistrat Real Estates Private Limited v. Asian Hotels North Ltd. 2022 SCC OnLine Del 1139 on which reliance has been placed by Mr. Chandra, the Court in paragraphs 11 and 14 has held as under:-

> "11. Hon ble Supreme Court in the decision reported as (2013) 1 SCC 641 Chrolo Controls India Private Ltd. Vs. Severn Trent Water Purification Inc. and Ors. though dealing with an international arbitration under Section 45 of the Act, held that even third parties who are not signatories to the arbitration agreement can be joined in arbitration. It laid down categories where the third parties can be impleaded to the arbitration and held that the expression „claiming through them should be construed strictly. It was held as under:
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> "70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.

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73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non- signatory parties would fall within the exception afore- discussed.

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.

75. We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognise the doctrine, while

others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in Ruhrgas AG v. Marathon Oil Co. [143 L Ed 2d 760 : 526 US 574 (1999)] discussed this doctrine at some length and relied on more traditional principles, such as, the non- signatory being an alter ego, estoppel, agency and third-party beneficiaries to find jurisdiction over the non-signatories.

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

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103. Various legal bases may be applied to bind a non- signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

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107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non- signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination.

> Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or issued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration".

14. Therefore, once a valid arbitration agreement exists between the parties, the issue whether the petitioner is entitled to any relief in the absence of a third party to the agreement or that third party is required to be impleaded in the proceedings, is covered by the Doctrine of Competence-Competence and it will be for the Arbitrator to decide the said issue. Thus, the issue whether in the absence of a third party, the petitioner can claim the refundable security deposit would be for the learned Arbitrator to determine."

10. The real issue which arises for consideration is whether the petitioner is required to follow the process as laid down in the GCC, which I have already reproduced above. The plea of the counsel for the petitioner is, as per the stipulation in the SCC, and also the SCC being specific, it shall prevail whereas, the counsel for HPL would submit the SCC only stipulate, that special conditions shall supersede/supplement the relevant conditions given in CPWD (GCC) tender document. It means, the GCC and SCC supplement each other. The procedure in GCC/SCC for making a reference to Arbitration have to be harmoniously read/followed. This plea of the counsel for HPL has to be considered, in conjunction with other plea that in view of clause 16 of the SCC which stipulates that the decision of the Chairman and Managing Director HPL, regarding the quantum of reduction as well as justification thereof in respect of rates for substantial work will be final and would not be open to Arbitration and adjudication. It follows that, before the parties are referred to arbitration it is necessary that the dispute(s) (if any) to be referred are determined / established as per the contract, and is not an "excepted matter".

11. The reliance placed by learned counsel for the respondent No.1 on Indian Oil Corporation Limited (supra), the Supreme Court while considering a similar issue, has in paragraphs 30, 47, 49, 62, 63, 64, 65 and 66 held as under:-

> "30. It is submitted that the parties are at liberty to provide within the contract a departmental machinery for resolution of certain matters, the determination of which will be outside the scope of arbitration. That such departmental machinery, being the will of the parties as embodied in the contract, must be respected and given effect to. In support of the above submissions, reliance is placed on the following decisions of this Court:
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> (i) Food Corporation of India v. Sreekanth Transport (1999)4 SCC 491 (Paras 2, 3)

(ii) Harsha Constructions v. Union of India (2014) 9 SCC 246 (Paras 14, 18, 19)

(iii) Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Ltd. (2020) 3 SCC 222 (Paras 23, 24, 26, 30) xxx xxx xxx

47. It is further submitted that vide the Amendment Act, 2015, section 11(6A) has been inserted by virtue of which, the scope of intervention at Section 11 stage is very narrow.

Reliance is placed upon the decision of this Court in the case of Duro Felguera S.A. v. Gangavaram Port Limited [(2017) 9 SCC 729]. It is submitted that after insertion of Section 11(6A), the scope of intervention by the Court at the stage of appointment of Arbitrator is narrowed down and the Courts may have to now only examine the existence of a valid arbitration agreement. That in the aforesaid decision it is held that the legislative purpose is essentially to minimize the Court s intervention at the stage of appointment of Arbitrator and that the intention as incorporated in Section 11(6A) ought to be respected is the submission.

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49. It is submitted that the conflicting decisions were considered and the issue has now been settled by a Three Judges Bench of this Court in a subsequent decision rendered in the case of Mayavati Trading Private Limited v. Pradyuat Deb Burman [(2019) 8 SCC 714]. That after considering in detail the 246th Law Commission Report; the report of the High Level Committee regarding institutionalization of arbitration in India and the Statement of Objects and Reasons of the 2015 Amendment Bill, it is held that post 2015, the scope of the Courts powers at the stage of appointment of Arbitrator is confined to the examination of the existence of the arbitration agreement. It is submitted that the decision of this Court in the case of Mayavati Trading Private Limited (supra) has been subsequently followed by this Court in a recent decision in the case of Vidya Drolia (supra).

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62. It cannot be disputed that both the parties are governed by the GCC. The GCC are the part of the Agreements / Contracts between the parties. Under the GCC, the parties have agreed to resolve the dispute between them only in terms of the relevant clauses of the GCC referred to hereinabove. The parties have agreed that certain specified disputes alone will be the subject of arbitration.

63. In the case of Narbheram Power & Steel (P) Ltd. (supra), it is observed and held that the parties are bound by the Clauses enumerated in the policy and the Court does not transplant any equity to the same by re writing a clause. It is further observed and held 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. It is further observed that if a clause stipulates that under certain circumstances there can be no arbitration and they are demonstrably clear then the controversy pertaining to appointment of

Arbitrator has to be put to rest (Paras 1023).

64. In the case of Centrotrade Minerals & Metal Inc. (supra), this Court had an occasion to consider the concept of party autonomy and it is observed and held that party autonomy is virtually the backbone of arbitration. It is further observed and held that party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on the application of three different laws governing their entire contract - (1) proper law of contract; (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration. It is further observed in the said decision that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is also left to the contracting parties.

65. In the case of DLF Universal Ltd. & Anr. v. Director, Town and Country Planning Department, Haryana & Ors. [(2010) 14 SCC 1], it is observed and held that the contract is to be interpreted according to its purpose. The purpose of a contract is the interest, objective, values, policy that the contract is designed to actualize. It comprises the joint intent of the parties. It is observed that it is not an intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation (Para 13).

66. In the case of Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond and Gem Development Corporation Ltd. & Anr. [(2013) 5 SCC 470], it is observed and held that a party cannot claim anything more than what is covered by the terms of the contract, for the reason that the contract is a transaction between two parties and has been entered into with open eyes and by understanding the nature of contract. It is further observed that thus the contract being a creature of an agreement between two or more parties has to be interpreted giving literal meanings unless there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves. It is further observed that the terms of the contract have to be construed strictly without altering the nature of a contract as it may affect the interest of either of the parties adversely (Para

23)."

12. A reading of the aforesaid paragraphs would reveal that wherever the parties have agreed to resolve the dispute between them only in terms of the agreement, they are required to follow the same before they are relegated to the process of arbitration, more specifically, as according to the learned counsel for the respondent No.1 / HPL, the claims with regard to the sub standard work are outside the realm of the arbitration process. In other words, the process contemplated under the contract is required to be gone into, to narrow down the disputes, which ultimately to be referred to the arbitration process. In view of the judgments referred to above and the stipulations in the contract agreement, I agree with the submission made by learned counsel for the respondent No.1.

13. The plea of Mr. Malhotra is by relying upon the following stipulation in the SCC.

> "These special conditions shall supercede/ supplement the relevant conditions given in CPWD Form 7/8 (Edition 2014 with up to date corrections and amendments) in the tender document."

14. The said plea looks appealing on a first blush but on a deeper consideration, the said clause does not in unequivocal terms state that the SCC shall supersede the GCC. It also consisted of the words „supplement the relevant conditions given in CPWD Form 7/8 . If that be so, stipulations in GCC and SCC have to be read harmoniously. If both are read harmoniously then the submission made by learned counsel for the respondent No.1 shall hold good. The intent of reading GCC / SCC harmoniously would mean that it is only those disputes, which have been narrowed down, shall ultimately be referred to the arbitration process, subject to the exclusion as contemplated in Clause 16 of the SCC.

15. Insofar as the submission made by learned counsel for the respondent No.1 by referring to Clause 16, the Supreme Court in Indian Oil Corporation Limited (supra) has, in paragraphs 23, 26 and 67 held as under:-

> "23. It is submitted that there are umpteen number of examples of restricted arbitration clauses. Reliance is placed on the decision of this Court in the case of United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd. reported in (2018)17 SCC 607, where the arbitration clause expressly stated that where a claim is made against the insurer and the insurer denies its liability, no reference to arbitration can take place. In support of the above submission, reliance is placed on following decisions of this Court:
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> (1) Vidya Drolia v. Durga Trading Corpn. [(2021)2 SCC 1, Paras 113116) (2) Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engg. [(2019) 9 SCC 209, Paras 2829) (3) Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd. [(2018) 6 SCC 534, Paras 10, 23] xxx xxx xxx
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> 26. It is submitted that in the case of Vidya Drolia (supra), this Court had considered various aspects with respect to the restricted arbitration clause. But in the case of unrestricted clauses, all issues raised by the contracting parties will have to be referred to arbitration, because of Section 11(6A). However, the instant case is a case of a restricted arbitration clause that specifically excludes certain issues from arbitration, as a result of which, no arbitration clause exists for those „other or „excepted disputes and hence, the question of referring those disputes would not arise. That in the case of Vidya Drolia (supra), the Arbitration Agreement itself sets out what is excluded from arbitration. Therefore, it was held that Section 11(6A) would not stand in the way of making a reference.
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> 67. In the case of Mitra Guha Builders (India) Company (supra), while interpreting the clause by which the parties agreed that the decision of the Superintending Engineer in levying compensation is final and the same is an „excepted matter and the determination shall be only by the Superintending Engineer and the correctness of his decision cannot be called in question in the arbitration proceedings and the remedy, if any, will arise in the ordinary course of law, the Three Judges Bench of this Court after referring to and considering the earlier decisions on the point observed and held that once the parties have decided that certain matters are to be decided by the Superintending Engineer and his decision would be final, the same cannot be the subject matter of arbitration."

The learned counsel has also referred to the judgment in the case of Oriental Company Insurance Limited. V. M/s Narbheram Power and Steel Pvt. Ltd., Civil Appeal No. 2268/2018 decided on May 02, 2018, wherein the Supreme Court considering a similar stipulation in the contract has in paragraphs 7, 8, 12, 20 and 24 held as under:-

> 7. To appreciate the rival submissions, it is necessary to scan and scrutinize the arbitration clause, that is, Clause 13 of the policy. The said Clause reads as follows:-
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> "13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrator, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy. It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained."

(Emphasis supplied)

8. When we carefully read the aforequoted Clause, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the Clause. The third part of the Clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator/arbitrators with regard to the amount of loss or damage is a condition precedent. The High Court, as the impugned order would show, has laid emphasis on the second part and, on that basis, opined that the second part and third part do not have harmony and, in fact, sound a discordant note, for the scheme cannot be split into two parts, one to be decided by the arbitration and the other in the suit.

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12. The aforesaid principles are in the realm of settled position of law. The natural corollary of the said propositions is that the parties are bound by the clauses enumerated in the policy and the court does not transplant any equity to the same by rewriting a clause. The Court can interpret such stipulations in the agreement. It is because they relate to commercial transactions and the principle of unconscionability of the terms and conditions because of the lack of bargaining power does not arise. The said principle comes into play in a different sphere.

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20. We may presently refer to the decision of the Madras High Court in M/s. Jumbo Bags Ltd. (supra). In the said case, learned Chief Justice was interpreting Clause 13 of the policy conditions. Referring to The Vulcan Insurance Co. Ltd.(supra), he has held thus:-

> "The dispute which is not referable to arbitration, being not covered by the clause cannot be over the subject matter of arbitration, and the remedy of the insured in this case is only to institute a suit."

And again :-

> "I am of the view that the remedy of arbitration is not available to the petitioner herein in view of the arbitration clause specifically excluding the mode of adjudication of disputes by arbitration, where a claim is repudiated in toto. The remedy would thus only be of a civil suit in accordance with law."

We concur with the said view.

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24. 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."

16. From the reading of the aforesaid paragraphs, it is clear that the Supreme Court has in unequivocal terms said that if a clause stipulates that under certain circumstances there can be no arbitration then the controversy pertaining to the appointment of an arbitrator has to be put to rest. It is necessary to state that Mr. Malhotra would contest the submission made by learned counsel for the respondent No.1 by stating that the claims of the petitioner are also not with regard to the sub standard work. Hence, all the claims which have been raised by the petitioner are necessarily to be referred to arbitration process. I say nothing on this submission made by Mr. Malhotra as this Court is of the view, in view of the plea raised by learned counsel for the respondent No.1 that the remedy

for the petitioner is to invoke the procedure/process as contemplated under the GCC/SCC (to be read harmoniously), the petitioner need to be relegated to the said procedure/process and if the petitioner still has any grievance, to seek such remedy as available in law.

17. Insofar as Arb.P. 518/2021 is concerned, it is the conceded case that vide letter dated January 25, 2021, the petitioner had submitted an appeal against the order of the DGM / AGM, HPL dated January 19, 2021. The said appeal was rejected by the respondent No.1 vide letter dated March 09, 2021 on the ground that the appeal filed by the petitioner was without any justification / reasons. According to Mr. Malhotra, the remedy under the GCC is to file a claim before the Dispute Resolution Committee, which he intends to file within 30 days from today.

18. At this stage, learned counsel for the respondent No.1 states since the appeal has been rejected by the CMD-HPL as no justification / reason was given by the petitioner, appropriate shall be for the petitioner to file a fresh appeal with all particulars before the CMD for reconsideration. If that be so, the petitioner shall file an appeal within the timeline(s) stipulated in the contract. Actions shall be taken on the same by the CMD as per the timeline(s).

19. It is also made clear that in all other cases the timelines prescribed in the GCC/SCC shall be strictly adhered to.

20. Petitions and connected application (s) are disposed of. No costs.

21. It is reiterated, if the petitioner has any dispute/grievance, it shall seek such remedy as available in law.

22. A copy of this order be kept in all the petitions.

V. KAMESWAR RAO, J OCTOBER 10, 2022/ak (Corrected and uploaded on 22nd October, 2022)