Indian Oil Corporation Limited vs Ncc Limited on 20 July, 2022

Author: M.R. Shah

Bench: B.V. Nagarathna, M.R. Shah

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 341 OF 2022
(@ SLP (C) No.13161/2019)

Indian Oil Corporation Limited …Appellant(s)

Versus

NCC Limited …Respondent(s)

With
CIVIL APPEAL NO. 342 OF 2022
(@ SLP (C) No.13408/2019)
CIVIL APPEAL NO. 344 OF 2022
(@ SLP (C) No.13815/2019)
CIVIL APPEAL NO. 343 OF 2022
(@ SLP (C) No.13813/2019)
CIVIL APPEAL NO. 345 OF 2022
(@ SLP (C) No.13816/2019)

JUDGMENT

M.R. SHAH, J.

1. As common questions of law and facts arise in this group of appeals and as such between the same parties and with respect to similar contracts / agreements, all these appeals are decided and disposed of together by this common judgment and order.

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2. Feeling aggrieved and dissatisfied with the impugned judgment and orders passed by the High Court of Delhi, New Delhi in respect to Arbitration Petitions by which, in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Arbitration Act”), the High Court has allowed the said petitions and has appointed the learned Arbitrator by referring the dispute between the parties for arbitration, the Indian Oil Corporation Limited has preferred the present appeals.

3. For the sake of convenience, Civil Appeal arising out of Special Leave Petition No.13161/2019 arising out of the order passed by the High Court in Arbitration Petition No.115/2018 is treated as the lead matter.

4. The facts leading to the present appeal in a nut-shell are as under:

> 4.1. That, the appellant, Indian Oil Corporation Limited (hereinafter referred to as "IOCL") floated a tender in respect of the works described as "Civil, Structural & Associated UG piping works of VGO-HDT, DHDT & HCDS Units (EPCM-2) for Paradip Refinery Project". The respondent herein – NCC Ltd. (hereinafter referred to as "NCCL") was declared the successful bidder. After issuance of the Letter of Acceptance dated 17.03.2010, a // 3 // formal agreement was executed between the parties dated 28.04.2010. The relevant clauses of the Agreement which may have a bearing on the issues involved in the present appeals are as under:
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> "1.21.0.0 "Notified Claim" shall mean a claim of the CONTRACTOR notified in accordance with the provisions of Clause 6.6.1.0 hereof.
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> xxx xxx xxx
>
> 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 over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any Running Account Bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the CONTRACTOR claims such additional payment or compensation or of the happening of other event upon which the CONTRACTOR bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The OWNER shall not anywise be liable in respect of any claim by the CONTRACTOR unless notice of such claim shall have been given by the CONTRACTOR to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid and the CONTRACTOR SHALL be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid.
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> // 4 // 6.6.2.0 The Engineer-in-Charge and/or the Site Engineer 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 reject the same and no omission or failure on the part of the Engineer-in-Charge or Site Engineer to reject any claim made or notified by the CONTRACTOR or delay in dealing therewith shall be deemed

to be an admission by the OWNER of the validity of such claim or waiver by the OWNER of any of its rights in respect thereof, with the intent that all such claims otherwise valid within the provisions of Clause 6.6.1.0 read with Clauses 6.6.3.0 and 6.6.3.1 shall be dealt with/considered by the OWNER at the time of submission of the Final Bill.

6.6.3.0 Any claims of the CONTRACTOR notified in ac□cordance with the provision of Clause 6.6.1.0 hereof as shall remain at the time of prepara□tion of Final Bill by the CONTRACTOR shall be separately included in the Final Bill prepared by the CONTRACTOR in the form of a State□ment of Claims attached thereto, giving partic□ulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the CON□TRACTOR to the Engineer□in□Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner or par□ticular be at variance with the claim notified by the CONTRACTOR within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.

6.6.3.1 The OWNER shall not anywise be liable in re□spect of any notified claim not specifically re□flected in the Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and any and all notified claims not specifically reflected and included in the Final Bill in accordance // 5 // with the provisions of Clause 6.6.3.0 hereof shall be deemed to have been waived by the CONTRACTOR. Further the OWNER shall have no liability in respect thereof and the CON□TRACTOR shall not be entitled to raise or in□clude in the Final Bill any claim(s) other than a notified claim conforming in all respects and in accordance with the provisions of Clause 6.6.3.0 hereof.

6.6.4.0 No claim(s) shall on any account be made by the CONTRACTOR after the Final Bill, with the intent the Final Bill prepared by the CON□TRACTOR shall reflect any and all notified claims whatsoever of the CONTRACTOR against the OWNER arising out of or in con□nection with the Contract or work performed by the CONTRACTOR thereunder or in relation thereto, and the CONTRACTOR shall notwith□standing any enabling provision under any law or Contract and notwithstanding any right of claim in quantum meruit that the CONTRAC□TOR could have in respect thereof, be deemed to have waived any and all such claims not in□cluded in the Final Bill and to have absolved and discharged the OWNER from and against the same, even if in not including the same as aforesaid, the CONTRACTOR shall have acted under a mistake of law or fact.

6.6.5.0 Notwithstanding the existence of any claim by the CONTRACTOR in terms hereof or other□wise, the CONTRACTOR shall continue and be bound to continue and perform the works to completion in all respects according to the Contract (unless

the Contract or works be pri□orly determined by the OWNER in terms hereof) and shall remain liable and bound in all respects under the Contract.

6.6.6.0 The payment of any sum on account to the CONTRACTOR during the performance of any work or item of work in respect of which a claim has been notified by the CONTRACTOR in terms of Clause 6.6.1.0 hereof or the mak□ing or negotiation of any interim arrangements in respect of the performance of such work or item of work by the OWNER, shall not be // 6 // deemed to be an acceptance of the related claim by the OWNER, or any part or portion thereof with the intent that any such payment shall constitute merely an interim facility or interim assistance to the CONTRACTOR, and not an obligation upon the OWNER.

6.7.0.0 DISCHARGE OF OWNER'S LIABILITY 6.7.1.0 The acceptance by the CONTRACTOR of any amount paid by the OWNER to the CONTRAC□TOR in respect of the final dues of the CON□TRACTOR under the Final Bill upon condition that the said payment is being made in full and final settlement of all said dues to the CONTRACTOR shall, without prejudice to the notified claims of the CONTRACTOR included in the Final Bill in accordance with the provi□sions under Clause 6.6.3.0 hereof and associ□ated provisions thereunder, be deemed to be in full and final satisfaction of all such dues to the CONTRACTOR notwithstanding any quali□fying remarks, protest or condition imposed or purported to be imposed by the CONTRACTOR relative to the acceptance of such payment, with the intent that upon acceptance by the CONTRACTOR of any payment made as afore□said, the Contract (including the arbitration clause) shall, subject to the provisions of Clause 6.8.2.0 hereof, stand discharged and extinguished except in respect of the notified claims of the CONTRACTOR included in the Final Bill and except in respect of the CON□ TRACTOR's entitlement to receive the unad□justed portion of the Security Deposit in accor□dance with the provisions of Clause 6.8.3.0 hereof on successful completion of the defect liability period.

6.7.2.0 The acceptance by the CONTRACTOR of any amount paid by the OWNER to the CONTRAC□TOR in respect of the notified claims of the CONTRACTOR included in the Final Bill in ac□cordance with the provisions of Clause 6.6.3.0 hereof and associated provisions thereunder, upon the condition that such payment is being made in full and final settlement of all the claims of the CONTRACTOR shall, subject to the provisions of Clause 6.7.3.0 hereof, be deemed to be in full and final satisfaction of all // 7 // claims of the CONTRACTOR notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the CONTRACTOR relative to the acceptance of such payment with the intent that upon ac□ceptance by the CONTRACTOR of any pay□ment made as aforesaid, the Contract (includ□ing the arbitration clause) shall stand dis□charged and extinguished insofar as relates to and/or concerns the claims of the CONTRAC□TOR.

6.7.3.0 Notwithstanding anything provided in Clause 6.7.1.0 and/or Clause 6.7.2.0 hereof the CON□TRACTOR shall be and remain liable for de□fects in terms of Clause 5.6.0.0 hereof and for the indemnity to the OWNER in terms of Clause 6.8.2.0, and shall be and remain enti□tled to receive the unadjusted balance of the Security Deposit remaining in the hands of the OWNER in terms of Clause 6.8.3.0 hereof.

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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 CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitra□tor selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter□claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitra□tion. The CONTRACTOR shall not, however, be entitled to raise as a set□off defence or counter□claim any claim which is not a Noti□fied Claim included in the CONTRACTOR's Fi□nal Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

// 8 // 9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CON□ TRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the pur□pose, 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 follow□ ing matters are hereby specifically excluded from the scope, purview and ambit of this Ar□bitration 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 jurisdic□tion 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 jurisdic□tion to entertain the same or to render any de□cision 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 Agree□ment;

(ii) Whether or not a Claim sought to be re□ferred to arbitration by the CONTRACTOR is a Notified Claim;

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill.

// 9 // 9.0.3.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re□ enactment(s) and/or modification(s) thereof and of the Rules framed thereunder shall ap□ply to arbitration proceedings pursuant hereto subject to the following conditions:

(a) The Arbitrator shall give his Award sepa□rately in respect of each Claim and Counter□Claim; and

(b) The Arbitrator shall not be entitled to re□view any decision, opinion or determination (howsoever expressed) which is stated to be fi□nal and/or binding on the CONTRACTOR in terms of the Contract Documents." 4.2. As per the contract entered into between the parties, the designated date for commencement of the project was the date of issuance of FOA i.e. 03.03.2010, and that the scheduled date of completion was 02.10.2011. It appears that the execution of the project was delayed, as a result of which the project was completed only on 28.12.2015. The NCCL was issued a completion certificate by the IOCL indicating the date of completion of the project as 28.12.2015. In view of the delay in completion of the project beyond the scheduled date, the NCCL made a request for extension of time vide the communication dated 23.05.2016. While the EOT requests were pending with the IOCL, the NCCL submitted its final bill dated 05.08.2016 to the Engineer□ In□Charge appointed under the contract between the parties.

// 10 // According to the NCCL, the NCCL in its final bill dated 05.08.2016 made a specific reference to the Notified Claims. There were correspondences between the Engineer□In□Charge and Thyssenkrupp Industrial Solutions India (P) Ltd. (hereinafter referred to as "TKIS") pending settlement of the final bill and the request for Extension of Time (EOT). The NCCL responded to the communication dated 01.11.2016 by the TKIS, vide its response dated 02.11.2016. It appears that the NCCL conveyed to TKIS that if its request for EOT were considered favorably and if price adjustment does not exceed 4%, then, all its extra/additional claims including Notified Claims submitted by it through various communications and the final bill should be treated as withdrawn.

4.3. The TKIS having received the aforesaid communication from the NCCL, made its recommendations vis□a□vis the request for EOT made by the NCCL. It appears that thereafter, TKIS in its communication dated 13.01.2017, informed NCCL that it had approved EOT for the period between 03.10.2011 to 03.11.2015, however, without price discount as per Clause 4.4.0.0 of the

General Conditions of Contract (hereinafter referred to as "GCC") and that for the period falling // 11 // between 04.11.2015 to 28.12.2015 which covered the period of 55 days, it had concluded that the delay was attributable to NCCL. Accordingly, TKIS conveyed to NCCL that for the later period, as per Clause 4.4.2.0 of the GCC, a price adjustment discount of 4% would be applicable.

4.4. It is the case on behalf of NCCL that being aggrieved, it wrote to the IOCL on 23.01.2017 to reconsider its decision and accord EOT upto the date of completion i.e. 28.12.2015 without making any adjustment towards price as indicated in the communication dated 13.01.2017.

4.5. That, thereafter, the IOCL released a sum of Rs.4,53,04,021/□ the amount calculated as per the communication dated 13.01.2017, after making due adjustments towards taxes etc. 4.6. It appears that subsequently and after a period of 6&1/2 months (after the settlement of the claim) and after receiving the final bill payment 8 days earlier, on 08.05.2017, vide communication dated 16.05.2017, NCCL reneged on the letter of 02.11.2016 and alleged that it was made to withdraw its claim under coercion and it had withdrawn its Notified Claims as TKIS vide its communication dated 01.11.2016, had indicated // 12 // that the review of the final bill and request for EOT would be considered only if it gave up its insistence on its Notified Claims being considered.

4.7. That IOCL sent its response vide communication dated 06.06.2017, wherein it stated that none of the claims mentioned in the final bill were Notified Claims.

4.8. In the above backdrop, NCCL invoked the arbitration clause contained in the Agreement on 01.07.2017. That, the IOCL, in accordance with Clause 9.0.2.0 referred the matter regarding arbitrability of NCCL's claims to the General Manager on 12.07.2017.

4.9. Vide the communication / letter dated 10.11.2017, the General Manager held that the claims cannot be referred to arbitration and that the Arbitration Agreement itself does not survive on account of NCCL withdrawing its Notified Claims. The General Manager held that therefore there exist no dispute to be referred to arbitration.

4.10.Thereafter the respondent – NCCL approached the Delhi High Court by filing Arbitration Petition No.115/2018 under Section 11(6) of the Arbitration Act for appointment of sole Arbitrator. The said petition was opposed by the IOCL on a // 13 // number of grounds. However, by overruling all the objections raised on behalf of the appellant – IOCL, by the impugned judgment and order, the High Court has allowed the said arbitration petition and appointed the sole Arbitrator.

4.11.Impugned judgment and order passed by the High Court dated 08.02.2019 in Arbitration Petition No.115/2018 is the subject matter of present Civil Appeal No.341/2022 (arising out of Special Leave Petition No.13161/2019).

5. With respect to other four contracts between the same parties and with same arbitration clauses, the NCCL's claims were sent to the General Manager under Clause 9.0.2.0 of the GCC. So far as the Civil Appeal arising out of SLP No.13408/2019 is concerned, the NCCL did not approach the General Manager but the Arbitration Petition filed before the High Court was forwarded by the

IOCL to the General Manager for its determination under Clause 9.0.2.0 of the GCC. That, in all the remaining four cases (Civil Appeal Nos.342/2022 to 345/2022), the General Manager declared that none of the claims were Notified Claims.

6. Thereafter the NCCL approached the High Court by way of Arbitration Petition Nos.115/2018, 356/2018, 116/2018, 407/2018 and 406/2018. By the impugned // 14 // judgment and orders, the High Court has allowed all the respective applications under Section 11(6) of the Arbitration Act and by different impugned judgment and orders, has appointed the sole Arbitrator. Impugned judgment and orders passed by the High Court is the subject matter of Civil Appeal Nos.341/2022 to 345/2022.

7. Shri K.K. Venugopal, learned Attorney General has appeared on behalf of the appellant – IOCL and Shri Ranjith Kumar, learned Senior Advocate has appeared on behalf of the respondent – NCCL.

8. Shri K.K. Venugopal, learned Attorney General appearing on behalf of the IOCL has vehemently submitted that in the present case both the parties are governed by the terms of the contract entered into between the parties viz. the GCC. That in fact, both the parties are governed by the procedure to be followed in case of dispute between the parties, more particularly contained in the GCC and the arbitration clause.

8.1 It is further submitted by the learned Attorney General that party autonomy is the backbone of arbitration and the terms of the contract have to be interpreted in the way the parties wanted and intended them to be. In this regard reliance is placed upon the decision of this Court in the case of Centrotrade Minerals & Metal Inc. v. // 15 // Hindustan Copper Ltd. reported in (2017) 2 SCC 228 (Paras 38□42).

8.2 It is submitted by the learned Attorney General that there are three categories of contracts which could arise for consideration, which can be summarized as under:

> (i) Where no arbitration agreement exists at all. As the arbitration agreement itself is an independent contract and is consensual in nature, it is left to the parties to include an arbitration agreement in the underlying contract, or not to include it. If no arbitration agreement exists in a contract, the only option if a dispute arises for either party is to go by way of a suit;
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> (ii) An arbitration agreement can exist in the underlying contract or outside the contract, which is absolute in terms. This is the standard arbitration clause, and would be in the nature of "where any dispute arises between the parties in relation to the interpretation or implementation of this contract, it shall be referred to arbitration under the Arbitration and Conciliation Act, 1996..." This would be an UNRESTRICTED or ABSOLUTE arbitration clause.

In such a case, in the background of Section 11(6□A), no question of the Court declining to refer the matter to arbitration would arise, if it finds that the arbitration // 16 // agreement exists and is valid. In such a case, every dispute between the parties has to be referred to arbitration because Section 11(6□A) would mandate this;

(iii) The third category would be where the parties agree to have an arbitration clause but also consensually agree that certain specified disputes alone will be the subject of arbitration. This would mean that no arbitration clause exists in regard to all other disputes, and no arbitration clause would exist in regard to the 'excepted' or 'excluded' disputes. In such a case, Section 11(6□A) itself cannot be invoked as no arbitration clause exists in regard to these other disputes. This would be a RESTRICTED arbitration clause.

8.3 It is further submitted by the learned Attorney General that when all the conditions mentioned in the GCC are satisfied and the procedure is followed and only with respect to the restricted arbitration clauses and with respect to the Notified Claims only the dispute between the parties can be referred to the arbitration.

8.4 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, // 17 // 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:

(1) Vidya Drolia v. Durga Trading Corpn.

[(2021)2 SCC 1, Paras 113□116) (2) Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engg.

[(2019) 9 SCC 209, Paras 28□29) (3) Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd.

[(2018) 6 SCC 534, Paras 10, 23] 8.5 It is submitted by the learned Attorney General that in the aforesaid decisions, this Court had occasion to consider the applicability of Section 11(6□A) and its impact.

8.6 It is submitted that in the case of Garware (supra), it is observed and held that where the underlying contract including the arbitration clause is not stamped, in such a case, the arbitration clause exists in fact but DOES NOT EXIST IN LAW. That in other words, Section 11(6□A) will not be a Bar for the Court holding that as the arbitration clause does not cover the particular dispute, Section 11(6□A) will not apply as there is no arbitration // 18 // clause in that regard and therefore, no reference to arbitration can be made.

8.7 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(6□A). 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(6□A) would not stand in the way of making a reference.

8.8 It is further submitted by learned Attorney General that in the present case the respondent NCCL received the amount of final bill in full settlement of their claims. That in the present case the arbitration clause itself states that where the final bill amount has been received by the party, or where a sum has been received on account of Notified Claims, the arbitration clause itself stands extinguished. Therefore, the fact that amount of final bill having been received in full settlement cannot // 19 // be the subject matter of reference by any specific stipulation in the contract.

8.9 Learned Attorney General has taken us to the relevant clauses of the GCC more particularly Clauses 1.21.0.0, 6.6.0.0, 6.6.1.0, 6.6.2.0, 6.6.3.0, 6.6.3.1, 6.6.4.0, 6.6.5.0, 6.6.6.0, 6.7.0.0, 6.7.1.0, 6.7.2.0, 6.7.3.0, 9.0.0.0, 9.0.1.0, 9.0.1.1, 9.0.2.0 and 9.0.3.0. It is contended that as per Clause 9.0.1.0, the only matter to which a reference to arbitration can be sought is a "Notified Claim" included in the final bill and to no other dispute. That all disputes other than Notified Claims included in the final bill, have to be pursued by way of a suit. The expression, "Notified Claim" is defined in Clause 1.21.0.0 of the GCC.

8.10 It is urged that only those Notified Claims which are notified in accordance with provisions of Clause 6.6.1.0, can be referred to arbitration.

8.11 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) 8.12 The learned Attorney General has also relied upon the following decisions of the Delhi High Court and Gauhati High Courts

dealing with identical clause in cases where the IOCL was a party and in which the Delhi High Court and Gauhati High Court have expressly interpreted the very Clause 9.0.1.0 and 9.0.2.0.

(i) China Petroleum Pipeline Bureau v. Indian Oil Corporation Ltd. [ARB.A. (COMM.) 35/2019, decision dated 10.01.2020]

(ii) Srico Projects Pvt. Ltd. v. Indian Oil Foundation [ARB. PET. 276/2016 decided on 09.01.2017 along with order dated 03.07.2017]

(iii) Institute of Geoinformatics (P) Ltd. v. Indian Oil Corporation Ltd. [ARB. PET. 175/2012 decided on 19.05.2015]

(iv) IOT Infrastructure and Energy Service v. Indian Oil Corporation Ltd. [ARB. PET. 334/2014 decided on 12.02.2015]

(v) Bongaigaon Refinery v. M/s. Buildworth Pvt. Ltd. // 21 // [Arb.Appeal 10/2006 before Gauhati High Court] 8.13 It is submitted that the Special Leave Petitions against the decision in the case of China Petroleum Pipeline Bureau (supra) and Srico Projects Pvt. Ltd. (supra) have been dismissed by this Court.

8.14 It is further submitted by learned Attorney General that in the present case the final bill payment had been made to the respondent and accepted by it pursuant to an understanding between the parties by which the respondent expressly waived its Notified Claims. It is submitted that the arbitration clause itself is subject to Clauses 6.7.1.0 and 6.7.2.0. It is submitted that Clause 6.7.2.0 dealing with "Notified Claims" expressly declares that the acceptance of any amount by the contractor in respect of the Notified Claims shall result in full and final satisfaction of the claims by the contractor in respect of the Notified Claims and hence, the contract, including the arbitration clause, shall stand discharged and extinguished. This is as per Clause 6.7.2.0 itself, notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment.

8.15 It is submitted that applying these principles to the present case, NCCL's express statement dated 02.11.2016 is required to be appreciated and/or // 22 // considered. That pursuant to the said statement by the NCCL, the IOCL (petitioner) levied a price adjustment of only 4% as opposed to 10%; and the respondent expressly withdrew its Notified Claims. It is submitted that the IOCL also paid the dues as per the final bill. The Notified Claims, having been withdrawn, therefore, could not more be the subject matter of any reference to arbitration. It is submitted that as a result of the acceptance by the NCCL of the amount paid pursuant to its final bill, and the Notified Claims having been withdrawn, and the result of Clauses 6.7.1.0 and 6.7.2.0, the contract, including the arbitration clause stands discharged and extinguished and therefore, subsequently, no reference to arbitration could be made.

8.16 It is submitted that it is only 6½ months later, on 16.05.2017 and after receiving the final bill payment 8 days earlier on 08.05.2017, that the NCCL reneged on its letter withdrawing its demand in regard to Notified Claims. It is submitted that the reason why the NCCL withdrew their demand for payment of the full amount of final bill including Notified Claims is that if 10% has been deducted due to the delay, an amount of Rs.14.8 Crores would have been deducted from the payment of NCCL. It is submitted that having received Rs.151 Crores against the contract of Rs.148 Crores, the NCCL was well aware that in such an eventuality, it would have received no amount against the final bill and its // 23 // bank guarantee would also have been invoked. That in fact by withdrawing the demand, the respondent was now able to get Rs.4.53 Crores as well as the return of the bank guarantee of Rs.14.8 Crores.

8.17 It is further submitted that Clause 9.0.2.0 of the GCC specifically excludes certain matters, such as disputes concerning the scope of the arbitration agreement, viz.,

(i) whether or not a claim is a Notified Claim; (ii) whether or not a Notified Claim is included in the contractor's bill etc.; from the scope, purview and ambit of the Arbitration Agreement. It is submitted that under sub□Clause (iii) thereof, a Notified Claim covered by a decision of the General Manager is specifically an excluded matter. It is submitted that in the present case the General Manager rejected the demand of the NCCL in regard to the Notified Claims, particularly as the demand in regard to 'Notified Claims' had been specifically withdrawn by the NCCL. It is submitted therefore that viewed from any angle, as no arbitration clause existed so far as the NCCL is concerned, the High Court has committed a serious error in referring the dispute between the parties to Arbitrator and appointing the Arbitrator.

8.18 Now, so far as the other four cases are concerned, the learned Attorney General has submitted that in those four cases the claims were referred / sent to the General // 24 // Manager under Clause 9.0.2.0 of the GCC. That in all the remaining cases the General Manager declared that none of the claims of the NCCL was a Notified Claim. Therefore, the claims which are found by the General Manager not to be Notified Claims are not arbitrable and are outside the scope and purview of the Arbitration Agreement. It is submitted that in that view of the matter, the High Court ought to have dismissed the applications / petitions filed by the NCCL under Section 11 of the Arbitration Act.

Making above submissions and relying upon decisions, it is prayed to allow the present appeals and set aside the respective orders passed by the High Court referring the dispute between the parties to arbitration and appointing the sole Arbitrator.

9. Present appeals are vehemently opposed by Shri Ranjith Kumar, learned Senior Advocate appearing on behalf of the respondent – NCCL.

9.1 Shri Ranjith Kumar, learned Senior Advocate appearing for the respondent – NCCL has made following submissions pointing out the relevant facts which, according to him, are relevant for deciding the dispute in present appeals.

(1) That, the parties herein had entered into an agreement, whereby the respondent NCCL was // 25 // tasked with the job of completing the civil, structural and associated UG Piping works for the Paradip Refinery;

(2) Due to certain reasons attributable to IOCL, there was a delay in completion of the works;

(3) In accordance with the GCC, NCCL on 23.05.2016, applied for extension of time and submitted its final bill on 05.08.2016;

(4) On 29.07.2016, NCCL issued the No Due Certificate, however, it also made it clear that the said Certificate would not include final bill amount, service tax amount and the Notified Claims due from IOCL;

(5) The Engineer□in□charge vide letter dated 01.01.2016, expressly acknowledged the presence of "Notified Claims" in the final bill and coerced NCCL to take back its Notified Claims in order to process its application for EOT;

(6) Under duress, NCCL was constrained to issue a letter on 02.11.2016 withdrawing its Notified Claims on the twin condition that the application for EOT is considered favorably and the price discount does not exceed 4% of the contract value; (7) That, the letter dated 02.11.2016 was clearly conditional and was in the nature of an offer and not an acceptance;

(8) Vide letter dated 13.01.2017, IOCL informed NCCL // 26 // that they had only partially allowed the application for EOT and a price discount of 4% was applied to the period for which the application for EOT was not allowed. Therefore, it is clear that IOCL did not positively respond to both the conditions stated by NCCL in its letter dated 02.11.2016;

(9) That, aggrieved by the aforesaid decision, NCCL without any delay, on 23.01.2017, communicated that the decision to partially allow its application for EOT is unacceptable as the same is not in accordance with the conditional offer given by NCCL and also since the delay was caused due to reasons attributable to the IOCL;

(10) Disregarding the aforesaid letter, IOCL on 08.05.2017, unilaterally released the payment against the final bill, after adjusting the price discount;

(11) That, NCCL on 16.05.2017 i.e. within 10 days from the release of the amount, informed IOCL that the application for price discount is misplaced and its 'Notified Claims' still hold good as the conditional offer of NCCL was not accepted;

(12) Since IOCL miserably failed to provide an appropriate response within a reasonable period of time, NCCL invoked the arbitration clause i.e. Clause 9.0.1.0 of the GCC and submitted its claims to IOCL;

// 27 // (13) It is submitted that as per Clause 9.0.1.0 read with Clause 9.0.2.0 of the GCC, IOCL had to refer the claims of NCCL to its General Manager and then the General Manager was to issue a declaration pursuant to which the arbitration could commence;

(14) It is submitted that in the claims concerned in four of the petitions, the determination was made by the General Manager in an inordinately belated manner. It is submitted that in 3 out of 5 petitions, the determination by the General Manager was made after NCCL filed the arbitration petitions before the High Court. It is submitted that in a completely malafide and deceptive manner, IOCL claims to have made a reference to the General Manager who determined the nature of claims after filing of the counter affidavit by NCCL before this Court.

(15) It is submitted that therefore, as such, IOCL is attempting to scuttle respondent's contractual right to pursue arbitration by bringing on record a document nearly two years after the respondent invoked the arbitration clause.

(16) It is submitted that the General Manager's decision which is relevant in SLP Nos.13161 and 13183 of 2019 was based on the ground that there was full and final settlement between the parties. It is // 28 // submitted that as the decision of the General Manager on "Notified Claims" was erroneous, malafide and on technical grounds, NCCL rightly approached the High Court of Delhi under Section 11(6) of the Arbitration Act seeking the relief of appointment of Arbitrator. It is submitted that therefore the High Court is absolutely justified in appointing the Arbitrator.

9.2 Shri Ranjith Kumar, learned Senior Advocate appearing for NCCL has supported the impugned orders passed by the High Court by making the following broad submissions:

> (1) As per the agreement entered into between the parties, the General Manager is not permitted to decide if a claim is barred by virtue of there being accord and satisfaction or a claim being an excepted claim.
>
> (2) Under Section 11(6□A) of the Arbitration Act, at the stage of appointment of an arbitrator, the scope of intervention by the Courts is confined to the examination of the existence of an arbitration agreement.
>
> (3) At the stage of appointment of the arbitrator, the Court cannot look into whether there has been accord and satisfaction between the parties (4) At the stage of appointment of arbitrator, the Court cannot look into whether a claim is an excepted // 29 // claim or not.
>
> (5) Contractual clauses cannot be read in a manner that abridges statutory rights and the doctrine of mutuality, to confer the power to unilaterally determine arbitrability of a dispute upon one of the parties.
>
> (6) As per the doctrine of election, the present proceedings ought to be dismissed since IOCL has preferred an application under Section 16(2) and 16(5) challenging

the jurisdiction of the Arbitral Tribunal.

9.3 On an interpretation of the Clauses of the GCC, Shri Ranjith Kumar, learned Senior Advocate appearing for the respondent NCCL has submitted that a bare perusal of the relevant clauses of the GCC would indicate that the General Manager of IOCL is neither entitled to examine whether a "Notified Claim" is an 'excepted claim' nor can he look into the issue whether there is accord and satisfaction between the parties. 9.4 It is submitted that Clause 9.0.1.0 is subject to Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0. Further, Clause 9.0.2.0 creates a machinery whereby IOCL has unbridled power conferred upon its General Manager to certify if a claim is capable of being referred to arbitration. The said clause, according to IOCL vests the sole discretion of deciding the arbitrability of claims on the General Manager. It is submitted that, as such, the // 30 // interpretation of the Clause as suggested by IOCL, is in derogation of not only the arbitrator's power to decide arbitrability, but also the Court's power under Section 11 of the Arbitration Act.

9.5 It is submitted that the said Clause would indicate that the General Manager is only supposed to see if the claim raised by the respondent is (i) a Notified Claim as defined under Clause 1.21.0.0 r/W. Clause 6.6.1.0; and

(ii) whether the Notified Claim is included in the final bill in accordance with Clause 6.6.3.0. That the General Manager is not empowered under the said Clause to state that a claim is not arbitrable due to full and final settlement between the parties or due to a claim being an excepted claim.

9.6 It is submitted that in the present case, the IOCL has admitted that the claims raised by the respondent are 'Notified Claims' and this fact has never been disputed by the IOCL or its General Manager. It is submitted that even the second condition is also fulfilled as the respondent's final bill includes its Notified Claims. It is submitted that thus the only logical conclusion which follows is that the Notified Claims raised by the respondent should have been referred to arbitration. However, the General Manager of the IOCL, in two cases, denied referring the Notified Claims to arbitration on the ground that there was full and final settlement // 31 // between the parties, and in other three cases the General Manager has denied referring the Notified Claims to arbitration on the ground that they are 'excepted claims'.

9.7 It is submitted that as per the GCC, the General Manager is not entitled to resist the reference of a Notified Claim to arbitration on the ground of accord and satisfaction. That the aspect pertaining to full and final settlement between the parties, forms part of Clauses 6.7.1.0 and 6.7.2.0 and not of Clause 9.0.2.0. That, in fact, Clause 6.7.1.0 expressly provides that upon payment of sums under the final bill, there shall be full and final settlement, without prejudice to the Notified Claims of the contractor included in the final bill. It is submitted that therefore, even after the payment of money on 08.05.2017, Notified Claims are neither settled nor is there full and final settlement in respect of Notified Claims. It is submitted that insofar as 'excepted claims' are concerned, as per Clause 9.0.2.0, once the General Manager comes to a decision that a claim is a Notified Claim and the same is included in the final bill, he is duty bound to refer the claim to arbitration. It is submitted that therefore the reasoning behind the decision rendered by the General Manager that the claims are not Notified Claims is not only unsustainable, but is also ex facie contrary to Clause 9.0.2.0. It is

submitted that Clause 9.0.2.0 does not // 32 // render the decision of the General Manager final.

9.8 It is further submitted that vide the Amendment Act, 2015, section 11(6-A) 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(6-A), 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(6-A) ought to be respected is the submission.

9.9 It is submitted that despite the above binding decision, in the subsequent decision in the case of United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd. [(2019) 5 SCC 362], a coordinate Bench of this Court took the view that once a claim is settled, it leaves no arbitral dispute subsisting under the agreement to be referred to the Arbitrator.

9.10 It is submitted that the conflicting decisions were considered and the issue has now been settled by a // 33 // 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).

9.11 Shri Ranjith Kumar, learned Senior Advocate appearing on behalf of the respondent has also relied upon the following decisions of this Court in support of his submissions of applicability of Section 11(6-A) and a very limited jurisdiction of the Courts while considering an application of Section 11(6-A) of the Arbitration Act post-2015.

(1) Uttarakhand Purv Sainik Kalyan Nigam Ltd. v.

Northern Coal Field Ltd.

(2020)2 SCC 455 (2) BSNL & Anr. v. Nortel Networks India Pvt. Ltd.

(2021)5 SCC 738 // 34 // (3) Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg.

(P) Ltd.

(2021)5 SCC 671 (4) Sanjiv Prakash v. Seema Kukreja (2021)9 SCC 732 9.12 It is further submitted that although 2019 Amendment to the Arbitration Act has deleted Section 11(6□A), this Court in the case of Vidya Drolia (supra) has clarified that the rationale behind the insertion of Section 11(6□A) of the Arbitration Act would continue to apply and guide the Courts on its scope of jurisdiction at stage one, that is, the pre□arbitration stage.

9.13 It is further submitted by learned Senior Advocate appearing for the respondent NCCL that as held by this Court in the case of Vidya Drolia (supra) as well as in the case of Swiss Timing Limited v. Commonwealth Games 2010 Organizing Committee [(2014) 6 SCC 677], the role of a Court is to assist and support arbitration and leave a substantive part of the adjudication to the arbitral Tribunal. It is submitted therefore that at the stage of an application filed under Section 11, the Court is only supposed to look as to, whether, a valid arbitration agreement exists. It is submitted that therefore the scope of intervention by the Court is restricted at the stage of appointment of // 35 // Arbitrator and it can neither examine whether certain claims are 'excepted' nor can it look into the issue of whether there is "accord and satisfaction".

9.14 It is further submitted by learned Senior Advocate appearing for the respondent NCCL that in cases where the claims are rejected by the General Manager on the ground that there was "accord and satisfaction" between the parties and hence, not referable to arbitration, in the instant case the respondent has disputed petitioner's contention on "accord and satisfaction" even before the payment of final bill. It is submitted that therefore the issue whether "accord and satisfaction" existed between the parties is virtual in nature and examination of the same would require detailed perusal of the evidence by the Arbitral Tribunal. That in any event, pursuant to the introduction of Section 11(6□A), the Court has to restrict itself to the issue of existence of the Arbitration Agreement at Section 11 stage and cannot delve into the issue of "accord and satisfaction" is the submission.

9.15 Relying upon the decisions of this Court in the case of Ambica Construction v. Union of India reported in (2006) 13 SCC 475 and R.L. Kalathia & Co. v. State of Gujarat reported in (2011) 2 SCC 400, it is submitted that as observed by this Court in the aforesaid two decisions, in many instances, contractors are coerced to issue a no□dues certificate, without which // 36 // no amount would be released. It is submitted that in the aforesaid decision it is observed that merely because the contractor has issued "No Dues Certificate", if there is an acceptable claim, the Court cannot reject the same on the ground of issuance of "No Dues Certificate".

9.16 It is further submitted that the question whether a Notified Claim is an 'excepted claim', is within the exclusive domain of the Arbitrator to be answered. Reliance is placed on the decision of this Court in the case of BSNL v. Motorola India (P) Ltd. reported in (2009) 2 SCC 337 and National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. reported in (2009) 1 SCC 267 (even prior to 2015 Amendment to the Arbitration Act) as well as in the case of Zostel Hospitality (P) Ltd. vs. Oravel Stays (P) Ltd. reported in (2021) 9 SCC

765. 9.17 It is further submitted that Section 11 of the Arbitration Act expressly confers powers upon the Courts to determine the existence of an Arbitration Agreement and subsequently appoint an Arbitrator. It is submitted that Section 8 confers upon the Courts and judicial authorities the power

to refer the parties to arbitration when there is an arbitration Agreement. Similarly, section 16 of the Arbitration Act categorically recognizes and empowers the Arbitral Tribunal to rule on any objection raised as against its jurisdiction. It is // 37 // submitted that therefore petitioner's interpretation of Clause 9.0.2.0 of the GCC qua the purported finality of the determination of its General Manager, seeks to usurp the statutory powers of the Courts as enshrined under Sections 8 and 11 and the statutory power of an arbitral Tribunal as enshrined under Section 16.

9.18 It is further submitted that insofar as the claims concerned in other four petitions (except the lead matter), the determination was made after an inordinate delay. That in 3 out of 5 petitions, the determination by the General Manager was made after the respondent filed the Arbitration Petitions before the High Court. That in SLP No.13408/2019, even no reference to the General Manager was made until the filing of the Arbitration Petition before the High Court. That therefore the General Manager's decision in the aforesaid four SLPs is inefficacious as the determination has been made not only thirty days after the submission of the claim, but also after the arbitration petitions were filed before the High Court. Reliance is placed upon the decisions of this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. reported in (2000) 8 SCC 151 (Paras 18 and 19).

9.19 It is further submitted by Shri Ranjith Kumar, learned Senior Advocate appearing for respondent □NCCL that in the present case, the petitioner had filed an // 38 // application challenging the jurisdiction of the Arbitral Tribunal under Sections 16(2) and 16(5) of the Arbitration Act before the Arbitral Tribunal on 10.06.2019, which is, after filing of the present petition and before the issuance of notice by this Court on 03.07.2019. That the petitioner has not disclosed the same and has suppressed this factum of pursuing two remedies simultaneously. It is submitted that therefore as the petitioner has elected to pursue the proceeding before the Arbitral Tribunal and as per the doctrine of election of remedies, the petitioner ought not to be permitted to continue the present proceedings before this Court.

Making above submissions, it is prayed to dismiss the present appeals.

10. We have heard learned Senior Advocates appearing for the respective parties at length.

10.1 By the impugned orders the High Court in exercise of powers under Section 11(6) of the Arbitration Act has appointed the Arbitrators to adjudicate and resolve the disputes between the parties arising out of the respective contracts. The respective orders passed by the High Court appointing the Arbitrator in applications under Section 11(6) of the Arbitration Act are the subject matter of present appeals.

// 39 // 10.2 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.

10.3 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 10□ 23).

10.4 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 // 40 // 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.

10.5 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).

10.6 In the case of Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond and Gem Development Corporation Ltd. & Anr. [(2013) 5 // 41 // 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).

10.7 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 // 42 // 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.

10.8 In the case of Harsha Construction (supra), while interpreting the clause in the agreement by which some of the disputes were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the Engineer concerned and if the contractor was not satisfied with the rate determined by the Engineer, the contractor was required to follow the procedure mentioned in the said clause and in this regard, in paras 18 and 19, it is observed and held as under:

> "18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act. // 43 //
>
> 19. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforestated issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the Arbitrator could not have decided the said "excepted" dispute.

We, therefore, hold that it was not open to the Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed." 10.9 At this stage, a recent decision of this Court in the case of Vidya Drolia (supra), which, as such, is post-insertion of Section 11(6-A) of the Arbitration Act, is required to be referred to. In the said decision it is observed and held that the issue of non-arbitrability of a dispute is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons and non-arbitrability has multiple meanings. After referring to another decision of this Court in the case of Booz Allen & Hamiltan Inc. v. SBI Home Finance Ltd. [(2011) 5 SCC 532 (Para 34)], it is observed and held that there are facets of non-arbitrability, namely "(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the // 44 // Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such a joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal." After referring to and considering in detail the earlier decisions on the point, more particularly, with respect to non-arbitrability and the 'excepted matters', it is ultimately concluded in para 76 as under:

> "76. In view of the above discussion, we would like to propound a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:
>
> 76.1. (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
>
> 76.2. (2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralized adjudication, and // 45 // mutual adjudication would not be appropriate and enforceable;
>
> 76.3. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable;
>
> 76.4 (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
>
> 76.5 These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.
>
> 76.6 However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd.: (SCC p. 669, para 35) "35. ...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce,

> which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v.

Wilson and Cahill v. Cahill)." 10.10 On the question, who decides on non-arbitrability of the dispute, after referring to and considering the // 46 // earlier decisions on the point, more particularly, the decisions in the case of Garware Wall Ropes Ltd. (supra); Hyundai Engg. & Construction Co. Ltd. (supra) and Narbheram Power & Steel (P) Ltd. (supra), it is observed and held that the question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the Courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal. Thereafter, in para 153, it is observed and held that the expression, "existence of arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the reference stage would apply the prima facie test. It is further observed that in cases of debatable and disputable facts and, good reasonably arguable case etc., the Court would force the parties to abide by the arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. Ultimately in para 154, the proposition of law is crystallized as under:

> "154. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:
>
> 154.1. Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or // 47 //

11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i),

(ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.3. 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."

10.11 In the recent decision of this Court in the case of DLF // 48 // Home Developers Limited v. Rajapura Homes Private Limited and Another [2021 SCC Online SC 781] in which this Court also had an occasion to consider Section 11(6-A) of the Arbitration Act and ultimately has observed, after referring to and considering the decision of three Judges Bench of this Court in the case of Vidya Drolia (supra) that the jurisdiction of the Court under Section 11 of the Arbitration Act is primarily to find out whether there existed a written agreement between the parties for resolution of the dispute and whether the aggrieved party has made out a prima facie arguable case, it is further observed that limited jurisdiction, however, does not denude the Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. In the said decision, this Court had taken note of the observations made in the case of Vidya Drolia (supra) that with a view to prevent wastage of public and private resources, the Court may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims.

10.12 In the case of Nortel Networks India Pvt. Ltd. (supra), this Court had an occasion to consider the decision in the case of Vidya Drolia (supra) and in paras 46, 47 and 53.2, it is observed and held as under:

> "46. The upshot of the judgment in Vidya Drolia [Vidya // 49 // Drolia v. Durga Corpn., (2021) 2 SCC 1: (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441], which continue to hold the field. It must be understood clearly that Vidya Drolia [Vidya Drolia v. Durga Corpn., (2021) 2 SCC 1: (2021) 1 SCC (Civ) 549] has not re-surrected the pre-amendment position on the scope of power as held in SBP & Co. v.

Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618].

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal. 53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is

manifest that there is no subsisting dispute, the Court may refuse to make the reference."

11. Applying the law laid down by this Court in the aforesaid decisions, let us consider the relevant clauses of the GCC governing the parties and the procedure to be followed in case of disputes between the parties to the contract on non-payment of alleged dues may be on account of extra payment or compensation in respect of the works over and above the amounts due in terms of the contract and/or the dispute on the validity of any deductions made or threatened by the owner. // 50 // 11.1 Clause 1.21.0.0 defines "Notified Claims". It means a claim of the contractor notified in accordance with the provisions of Clause 6.6.1.0. As per Clause 6.6.1.0, the contractor shall have to give notice in writing of his claim with respect to any extra payment or compensation in respect of the works over and above the amounts due in terms of the contract or on the validity of any deductions made or threatened by the owner from any running account bills, by giving notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within ten days from the date of issue of the orders or instructions relative to any works for which the contractor claims such additional payment... etc. Such notice shall give full particulars of the nature of such claim, grounds on which it is based and the amount claimed. It also further provides that the owner shall not in any way be liable to in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-Charge and the Site Engineer. It also further provides that a contractor shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time (ten days from the date of issue of the orders or instructions). It further provides that all such claims otherwise valid within the provisions of Clause 6.6.1.0 // 51 // read with Clauses 6.6.3.0 and 6.6.3.1 shall have to be dealt with/considered by the owner at the time of submission of the Final Bill and that any action on the part of the owner (Engineer-in-Charge or Site Engineer) to reject any claim made or notified by the contractor or delay in dealing therewith shall be deemed to be an admission by the owner of the validity of such claim or waiver by the owner of any of its rights in respect thereof.

11.2 As per Clause 6.6.3.0, any claims of the contractor notified in accordance with the provision of Clause 6.6.1.0 and remain due at the time of preparation of Final Bill by the contractor, shall have to be separately included in the Final Bill prepared by the contractor in the form of a Statement of Claims attached thereto, giving particulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy of the notice sent in respect thereof by the contractor to the Engineer-in-Charge and the Site Engineer under Clause 6.6.1.0. It further provides that any variance with the claim notified by the contractor within the provision of Clause 6.6.1.0 shall be deemed to be a claim different from the Notified Claim with consequence in respect thereof indicated in Clauses 6.6.1.0 and 6.6.3.1.

11.3 Clause 6.6.3.1 further provides that the owner (IOCL) // 52 // shall not in any way be liable in respect of any Notified Claim not specifically reflected in the Final Bill in accordance with the provisions of Clause 6.6.3.0. It further provides that in and all Notified Claims not specifically reflected and included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 shall be deemed to have been waived by the contractor and the owner (IOCL) shall have no liability in respect thereof and the contractor shall not be entitled to raise or include in the Final Bill any claims

other than a Notified Claim conforming in all respects and in accordance with the provisions of Clause 6.6.3.0.

11.4 Clause 6.6.4.0 provides that no claim shall on any account be made by the contractor after the Final Bill. It further provides that any such claim shall be deemed to have been waived and with respect to all such claims not included in the Final Bill, the owner (IOCL) is absolved and discharged, even if not including the same, the contractor shall have acted under the mistake of law or fact.

Thus, on a fair reading of the aforesaid provisions, it can be seen that only those claims which are Notified after following the procedure as referred to hereinabove shall be considered as "Notified Claim" and in respect of any claim other than the Notified Claim, the owner is not liable to pay and as such is absolved and discharged // 53 // under the said clauses.

11.5 The next important clause is 6.7.0.0 with respect to the discharge of owner's liability. As per Clause 6.7.1.0, the acceptance by the contractor of any amount paid by the owner to the contractor in respect of the final dues of the contractor under the Final Bill upon condition that the said payment is being made in full and final settlement of all said dues to the contractor shall, without prejudice to the Notified Claims of the contractor included in the Final Bill in accordance with the provisions of Clause 6.6.3.0, be deemed to be in full and final satisfaction of all such dues to the contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment.

11.6 Clause 6.7.2.0 provides that the acceptance by the contractor of any amount paid by the owner (IOCL) to the contractor in respect of the Notified Claims of the contractor included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 and associated provisions thereunder, upon the condition that such payment is being made in full and final settlement of all the claims of the contractor shall, subject to the provisions of Clause 6.7.3.0, be deemed to be in full and final satisfaction of all claims of the contractor notwithstanding any qualifying remarks, protest or // 54 // condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment with the intent that upon acceptance by the contractor of any payment made, the Contract (including the arbitration clause) shall stand discharged and extinguished insofar as relates to and/or concerns the claims of the contractor.

11.7 The next important clause to be considered would be Clause 9.0.0.0. The said clause is for Alternative Dispute Resolution Machinery. As per Clause 9.0.1.0, subject to the earlier Clauses, namely Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0, 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 and if the contractor has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 and any dispute arising out of any Claim of the owner against the contractor shall be referred to the arbitration of a Sole Arbitrator. It also further provides that the owner may prefer its Claims against the contractor as counter□claims if a Notified Claim of the contractor has been referred to arbitration. It also further provides that the contractor shall not, however, be entitled to raise as a set□off, defence or counter□claim any claim which is not a

NOTIFIED CLAIM included in the contractor's Final // 55 // Bill in accordance with the provisions of Clause 6.6.3.0.

11.8 Clause 9.0.2.0 is an exclusion clause by which, certain matters are specifically excluded from the scope, purview and ambit of the Arbitration Agreement. It pro□vides that disputes or differences with respect to or con□cerning or relating to any of the matters mentioned/specified in Clause 9.0.2.0 are excluded from the scope, purview and ambit of the arbitration agreement. It further provides that any such matter which is specifically excluded viz. (i) with respect to or concerning the scope or existence or otherwise of the Ar□bitration Agreement; (ii) whether or not a Claim sought to be referred to arbitration by the contractor is a Noti□fied Claim; (iii) whether or not a Notified Claim is in□cluded in the contractor's Final Bill in accordance with the provisions of Clause 6.6.3.0 and (iv) whether or not the contractor has opted for the Alternative Dispute Res□ olution Machinery with respect to any Notified Claim in□cluded in the contractor's Final Bill shall have to be de□cided by the General Manager prior to the arbitration proceeding with or proceeding further with the reference and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any deci□sion with respect to such matters.

// 56 // Thus, on a fair reading of clause 9.0.0.0, only the dispute arising out of a NOTIFIED CLAIM of the con□tractor included in the FINAL BILL in accordance with the provisions of Clause 6.6.3.0 shall be referred to arbi□tration, that too, subject to Clause 9.0.2.0 and any dis□pute / matter falling within Clause 9.0.2.0 shall have to be first decided by the General Manager, including, whether or not a Claim sought to be referred to arbitra□tion by the contractor is a Notified Claim. Therefore, if the claim is not a Notified Claim, as per Clause 6.6.1.0 and the same is not included in the Final Bill, such a claim is outside the purview of the arbitration agree□ment. Whether or not a claim sought for arbitration by the contractor is a Notified Claim or any such matter / dispute is specifically excluded from the scope, purview and ambit of arbitration agreement, such matter / dis□pute shall have to be first decided by the General Man□ager prior to the arbitral proceeding with or proceeding further with the reference. Thus, unless there is a deci□sion by the General Manager on whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim or not, the Arbitrator or Arbitral Tribunal shall have no jurisdiction to entertain such a dispute.

The aforesaid clauses of the GCC are part of the contract between the parties herein and both the parties are bound by the aforesaid claims.

// 57 //

12. It is the case on behalf of the petitioner IOCL that the IOCL had settled the claim of respondent – NCCL accepting NCCL's offer to grant extension of time; not to give price adjustment of over 4% of the total contract value and consequently IOCL condoned the delay of 1493 days and granted extension of time without applying any price discount. Further for the delay of 65 days, IOCL applied the price discount of Rs.6,44,40,021 i.e. 4% of the total value of contract and thereafter IOCL released the payment of Rs.4,53,04,021/□against NCCL's final bill (adjusting price discount of Rs.6.4 Crores as against Rs.14.8 Crores) and also returned NCCL's Bank Guarantee which came to

be fully accepted by the respondent NCCL. It is the case of IOCL that thereafter, it was not open for the respondent to raise any further claim. Therefore, it is the case on behalf of the petitioner that, there being 'accord and satisfaction' for the claim, being an 'excepted claim', it was not open for the respondent to invoke the arbitration agreement and request for appointment of an Arbitrator. It is also the case on behalf of the petitioner IOCL that in view of the specific decisions by the General Manager, on "Notified Claims", in view of Clause 9.0.2.0, for the same claims which are not held to be 'Notified Claims' by the General Manager, the matter cannot be referred to the Arbitrator in view of the clause pertaining to excluded matters.

// 58 // On the other hand, it is the case on behalf of the respondent that acceptance of the amount of Rs.4,53,04,021/□was under duress and coercion. It is also the case on behalf of the respondent that earlier offer dated 02.11.2016 was a conditional one and was in the nature of an offer and subsequently when the offer was partially allowed, the respondent without any delay communicated that the decision to partially allow its application for EOT is unacceptable as the same is not in accordance with the conditional offer given by the respondent.

12.1 Now, so far as the General Manager's decision on Notified Claims is concerned, it is the case on behalf of the respondent that even the decision of the General Manager on the Notified Claims will always be subject to the decision of the Arbitral Tribunal. By the impugned judgment and order the High Court concluded and summed up as under:

> "81. Having regard to the foregoing discussion hereinabove my conclusions can be summed as follows:
>
> I) Where there is contestation or the decision rendered by the General Manager leaves scope for argument as to whether the claims lodged by a Contractor can be categorized as Notified Claims is best // 59 // left to the Arbitral Tribunal. In other words, except for the situation where there is no doubt that the claims were not lodged with the Engineer and the Site Engineer as required under Clause 6.6.1.0 68 read with 6.6.3.0 69, the matter would have to be left for resolution by Arbitral Tribunal.
>
> II) Aspects with regard to accord and satisfaction of the claims or where there is a dispute will also have to be left to the Arbitral Tribunal. The position in law in this regard remains the same both pre and post amendment brought about in the 1996 Act after 23.10.2015.

III) After the insertion of Subsection (6A) in 11 of the 1996 Act the scope of inquiry by the Court in a Section 11 petition, (once it is satisfied that it has jurisdiction in the matter) is confined to ascertaining as to whether or not a binding arbitration agreement exists qua the parties before it which is relatable to the disputes at hand.

IV) The space for correlating the dispute at hand with the arbitration agreement is very narrow. Thus, except for an open and shut case which throws up a circumstance indicative of the fact that a

particular dispute does it not fall within the four corners of the arbitration agreement obtaining between the parties the matter would have to be resolved by an Arbitral Tribunal. In other words, if there is contestation on this score, the Court will allow the Arbitral Tribunal to reach a conclusion one way or another. This approach would be in keeping with the doctrine of Kompetenz // 60 // Kompetenz; a doctrine which has statutory recognition under Section 16 of the 1996 Act."

13. Having heard learned Counsel appearing for the respective parties and in the facts and circumstances of the case, the issue / aspect with regard to 'accord and satisfaction' of claims is seriously disputed and is debatable. Whether, in view of the acceptance of Rs.4,53,04,021/- by the respondent NCCL which was released by IOCL on the offer / letter made by the respondent NCCL dated 02.11.2016 there is an instance of 'accord and satisfaction' of the claims is a good and reasonably arguable case. It cannot be said to be an open and shut case. Therefore, even when it is observed and held that such an aspect with regard to 'accord and satisfaction' of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to 'accord and satisfaction' of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that // 61 // aspects with regard to 'accord and satisfaction' of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of Sub-Section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to 'accord and satisfaction' of the claims.

13.1 Now, so far as the submission on behalf of the respective parties on the decision of the General Manager on Notified Claims in Civil Appeal No.341/2022 arising out of SLP (C) No.13161/2019 is concerned, the General Manager has decided / declared // 62 // that the claims are not arbitrable since they had been settled and the arbitration agreement has been discharged under Clause 6.7.2.0 of the GCC and no longer existed / subsisted. As observed hereinabove, the claims had been settled or not is a debatable and disputable question, which is to be left to be decided by the Arbitral Tribunal. Therefore, matters related to the Notified Claims in the facts and circumstances of the case also shall have to be left to be decided by the Arbitral Tribunal as in the fact situation the aspect of 'accord and satisfaction' and 'Notified Claims' both are interconnected and interlinked.

13.2 Now, so far as the Civil Appeal No.342/2022 arising out of SLP (C) No.13816/2019 is concerned, the General Manager in exercise of powers under Clause 9.0.2.0 had declared that none of the claims of the respondent is a Notified Claim. From the communication dated 22.06.2018, it appears that the General Manager, after elaborately dealing with all the alleged Notified Claims of the respondent has thereafter found that none of the claims made by the respondent is a Notified Claim. On a conjoint reading of the relevant clauses of the GCC viz. Clauses 9.0.1.0 and 9.0.2.0, the dispute arising out of Notified Claims only, which is included in the Final Bill of the contractor can be referred to arbitration. However, as per Clause 9.0.2.0, any dispute or difference on whether or not a claim sought to be referred to // 63 // arbitration by the contractor is a Notified Claim falls within the excluded matters and the Arbitrator or Arbitral Tribunal shall have no jurisdiction and/or authority with respect thereto. The dispute or difference whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim shall not and cannot form the subject matter of any reference or submission to arbitration. Therefore, on a fair and conjoint reading of Clause 9.0.1.0 and 9.0.2.0, it can safely be concluded that (i) only the Notified Claims of the contractor included in the Final Bill of the contractor in accordance with the provisions of Clause 6.6.3.0 shall have to be referred to arbitration; (ii) whether or not a claim sought to be referred to arbitration by the contractor is a Notified Claim or not, the Arbitrator or Arbitral Tribunal shall have no jurisdiction at all; (iii) whether or not a claim is a Notified Claim or not shall have to be decided by the General Manager and that too, prior to arbitration proceeding with or proceeding further with the reference. Therefore, once the General Manager, on the basis of the material on record takes a conscious decision that a particular claim sought to be referred to arbitration is not a Notified Claim, such a claim thereafter cannot be referred to arbitration. The language used in Clauses 9.0.1.0 and 9.0.2.0 is very clear and unambiguous.

// 64 // 13.3 As observed hereinabove, parties to the contract are free to agree on applicability of (1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration. Parties to the contract also may agree for matters excluded from the purview of arbitration. As observed by this Court in a catena of decisions, unless the effect of agreement results in performance of an unlawful act, an agreement, which is otherwise legal, cannot be held to be void and is binding between the parties. At this stage, the decision of this Court in the case of Sreekanth Transport (supra) is required to be referred to. In the case before this Court, the contract provided for exclusion of some matters from the purview of arbitration. A senior officer of the department was given the authority and power to adjudicate the same. One of the clauses provided that the decision of the Senior Officer, being the Adjudicator, shall be final and binding between the parties. This Court considered the same as 'excepted matters'. In the aforesaid decision, it is observed and held in paragraph 3 as under:

> "3. "Excepted matters" obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator □concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have found out lacking in its jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the // 65 // consistent view that in the event the claims arising within the ambit of excepted matters, question of

assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise; The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters: what are these exceptions however are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no ambiguity in the matter of adjudication of these specialised matters and termed in the agreement as the excepted matters." 13.4 In that view of the matter, the High Court has misread and misinterpreted the clauses 9.0.1.0 and 9.0.2.0 and has seriously erred in holding that where there is contestation or the decision rendered by the General Manager leaves scope for argument as to whether the claims alleged by the contractor can be categorized as Notified Claim is best left to the Arbitral Tribunal. The dispute whether the claim is a Notified Claim or not is specifically excluded from the scope, purview and ambit of the arbitration agreement. Therefore, once such a dispute falls within the 'excepted matters', any decision by the General Manager on the issue of Notified Claims cannot be the subject matter of arbitration proceeding.

13.5 Therefore, the High Court has erred in referring the dispute to arbitration and appointing a sole Arbitrator to adjudicate on the dispute with respect to the claims which as such are held to be not Notified Claims by the General Manager. Therefore, the Civil Appeal // 66 // No.342/2022 arising out of SLP (C) No.13408/2019 as well as Civil Appeal Nos.343/2022 and 345/2022 arising out of SLP (C) Nos.13813/2019 and 13816/2019 respectively deserve to be allowed and the impugned judgment and orders passed by the High Court in respective arbitration petitions deserve to be quashed and set aside.

13.6 So far as the Civil Appeal No.344/2022 arising out of SLP (C) No.13815/2019 arising out of the impugned judgment and order passed by the High Court in Arbitration Petition No.407/2018 is concerned, as the General Manager himself has declared that only one claim of the respondent was / is a Notified Claim, the said appeal is to be allowed partly by observing that the claim which is declared by the General Manager as a Notified Claim only shall have to be referred to arbitration and the learned Arbitrator shall have no jurisdiction to adjudicate the disputes with respect to other claims which as such are not declared as Notified Claims by the General Manager.

14. In view of the above and for the reasons stated above, following order is passed.

(1) Civil Appeal No.341/2022 arising out of the impugned judgment and order passed by the High Court in Arbitration Petition No.115/2018 is // 67 // hereby dismissed. However, it is observed that the learned Arbitrator shall first decide the aspect with regard to 'accord and satisfaction' of the claims and arbitrability of the disputes with regard to such claims by deciding an application under Section 16 of the Arbitration Act, which is reported to be pending. The learned Arbitrator shall first decide the jurisdiction of the Arbitral Tribunal and the arbitrability of the claims within a period

of three months from the date of first sitting which shall be within a period of one month from today.

All the contentions and/or defences which may be available to the respective parties are kept open to be considered by the learned Arbitrator in accordance with law and on its own merits and considering the relevant clauses of the contract and the material on record.

(2) Civil Appeal No.342/2022 arising out of the impugned judgment and order passed by the High Court in Arbitration Petition No.356/2018 is hereby allowed. Impugned judgment and order passed by the High Court in Arbitration Petition No.356/2018 referring the dispute between the parties to arbitration and appointing the Arbitrator is hereby quashed and set aside.

(3) Similarly, Civil Appeal No.343/2022 arising out of // 68 // the impugned judgment and order passed by the High Court in Arbitration Petition No.116/2018 and Civil Appeal No.345/2022 arising out of the impugned judgment and order passed by the High Court in Arbitration Petition No.406/2018 are allowed and consequently, the impugned judgments and orders passed by the High Court in Arbitration Petition Nos.116/2018 & 406/2018 are hereby quashed and set aside.

(4) So far as Civil Appeal No.344/2022 arising out of the impugned judgment and order passed by the High Court in Arbitration Petition No.407/2018 is concerned, the same is partly allowed. The impugned judgment and order passed by the High Court in Arbitration Petition No.407/2018 is hereby modified to the extent and it is directed that only one claim of the respondent which is declared by the General Manager as a Notified Claim shall have to be referred to arbitration and the learned Arbitrator shall adjudicate only that claim which is declared by the General Manager as a Notified Claim and the learned Arbitral Tribunal shall not have any jurisdiction to adjudicate on any other claims which as such are not declared as Notified Claims.

In the facts and circumstances of the case, // 69 // there shall be no order as to costs.

……J. [M.R. SHAH] ……J. [B.V. NAGARATHNA] NEW DELHI;

JULY 20, 2022.