

(2019) 01 KAR CK 0003

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 25 Of 2016

M/S Shri. Narasimhaswami

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 02-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(6A)
Arbitration Act 1940 — Section 20

Citation : (2019) 01 KAR CK 0003

Hon'ble Judges : Maheshwari, CJ

Bench : Single Bench

Advocate : Sampath Bapat, N.S. Sanjay

Final Decision : Disposed Off

Judgement

1. By way of this application under Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act of 1996'), the petitioner has made a request for appointment of Sole Arbitrator to adjudicate upon and decide all its disputes with the respondents, arising out of, and relating to the Contract Agreement No.CAO/CN/BNC/73104/A/100/II/2010 dated 12.02.2010.

2. Put in brief, the relevant background aspects of the matter are that the respondent No.2, the Chief Administrative Officer (Constructions), South Western Railway, Bengaluru, invited offers for the works titled "Arsiker-Birur patch doubling - Devanur yard re-modelling including formation, ballast, track linking, regarding construction of station building, FOB, Platform, PF shelters and other miscellaneous works" through tender notice No.CAO/CN/BNC/037/09 dated 19.06.2009. The petitioner submitted its tender on 23.07.2009 and after negotiations, the respondent No.3 conveyed acceptance through the Letter of Acceptance bearing No.W.496/15AKRB/07 dated 02.09.2009. In terms of the Acceptance Letter, the total value of the work was Rs.5,47,14,765/- and the same was to be completed within six months i.e., on or before 01.03.2010. Later, an Agreement bearing No.CAO/CN/ BNC/73104/A/100/11 dated 12.02.2010 was

executed with the General Conditions of Contract ('GCC') of the Engineering Department of South Western Railway and the Special Conditions and Specifications of Contract governing the contract. With reference to the copy of the GCC, the petitioner has pointed out that such conditions also provide the dispute resolution mechanism and for reference to arbitration. Clauses 63 and 64 of GCC have been referred in that regard.

3. The case of the petitioner is that it had mobilized man and machinery to execute the work within the time specified, but there had been delay caused due to the protests by the farmers; and it was revealed that the tender had been called without ensuring completion of land acquisition process. Further, according to the petitioner, the detailed drawings and plans were approved long after awarding the work and then, the respondents put extreme pressure to take up additional earthwork beyond the quantity in the agreement; and they also took a long time in processing variation statement, which resulted in blockage of a sum of Rs.90 lakhs.

4. The petitioner would submit that notwithstanding the delay due to the fault of respondents, they imposed penalty at the rate of Rs.25,000/- per week from 02.03.2010 to 31.08.2010 and then, increased the penalty to Rs.30,000/- per week from 01.09.2010 to 30.11.2010. The petitioner has pointed out that this way, a sum of Rs.27,45,438/- was recovered towards penalty for the alleged delay and the representations for waiver of penalty were not heeded to; and such imposition of penalty had the cascading effect as it made the petitioner disentitled for PVC bills and was condemned to face financial misery. The petitioner has referred to several communications dated 16.02.2011, 18.05.2011 and 10.08.2011 for waiver of penalty.

5. It is also submitted that to the extent possible, the works were completed by the petitioner on 20.12.2010 except circulating area, PF shelter, road works, which remained pending for want of approval of variation in quantities; that the variations were conveyed only on 07.06.2012; and that the work was finally completed on 20.02.2013. The petitioner has pointed out that after completion of the work, the representations dated 05.03.2013 and 18.03.2013 were sent to the respondents, but without any response. Further, the petitioner addressed the letter dated 13.02.2015 demanding payment of withheld amount as also damages, but this letter also did not evoke any response.

6. The petitioner has submitted that in view of inaction on the part of the respondents, it had invoked Clause 64 of the GCC providing for arbitration and made a request to the respondent No.1 i.e., the General Manager (South Western Railway), Hubli, to constitute the Arbitral Tribunal. It is averred that the respondents did not initiate steps for constitution of the Arbitral Tribunal and the time stipulated under the agreement for constitution of the Tribunal had expired.

7. With reference to the factual aspects aforesaid, the petitioner has submitted that the agreed procedure for resolving the disputes having failed, it had no

other alternative and efficacious remedy than to invoke the jurisdiction of this Court under Section 11(6) of the Act of 1996; and the respondent No.1, having failed to constitute Arbitral Tribunal within the time specified, has forfeited the right to constitute the Tribunal and, therefore, it is a fit case for appointment of Sole Arbitrator.

8. Having regard to the issues involved in this matter, relevant it would be to notice that this petition was filed on 02.02.2016 and the notices herein were ordered to be issued on 13.07.2016. The notices were dispatched on 21.07.2016 and were received by the respondent Nos.2, 3 and 4 on 25.07.2016 and by the respondent No.1 on 27.07.2016. The memo of appearance on behalf of the respondents was filed by their learned counsel in this matter on 02.08.2016. Thereafter, the statement of objections came to be filed on 09.03.2018.

9. In the statement of objections, the respondents have not disputed the fact that the request made by the petitioner for arbitration under its letter dated 20.10.2015 was indeed received by them on 22.10.2015. It is, however, submitted that the said request was considered and rejected by the respondent No.1 -General Manager on 09.08.2016, on the ground that all the claims made by the petitioner in the request dated 20.10.2015 were of 'excepted matters' and were not arbitrable.

10. The respondents have referred to Clause 63 of the GCC and it is submitted that the contractor is entitled to request the General Manager to refer the dispute raised by it, but the General Manager is not bound to refer all the claims made by the contractor; and he is not obliged to refer the excepted matters. It is asserted by the respondents that the claims were rejected by them as the same related to excepted matters, which stand completely excluded from the purview of arbitration. It is also submitted that under Clause 63 of the GCC, the decision of the railway authority is final and binding on the contractor; and in this case, as the authority has taken a decision that the claims made were of excepted matters and stood excluded from the purview of arbitration, this decision is final and binding on the petitioner, who cannot challenge the same and cannot seek appointment of an arbitrator by invoking Section 11 of the Act of 1996.

11. With this statement of objection, the respondents have annexed a copy of the communication said to have been sent from the office of the General Manager (respondent No.1) to the petitioner on 09.08.2016 with reference to the petitioner's representation dated 20.10.2015. In the said communication dated 09.08.2016, the General Manager has stated as under:

"With reference to your above representation, request for referring the claim No.1 to 4 for arbitration has been perused by this office. On review of the above claims, it is noticed that

1. Claim No.1 & 2 are excepted from the purview of Arbitration as they arise out of Special Conditions of Contract and shall be treated as "Excepted Matters" in terms of Arbitration Agreement Clause 63. Hence these claims need not be

referred to Arbitration.

2. Claims No.03 & 04 for interest arise out of Claims 01 & 02 which are excepted from the purview of Arbitration. These claims are also governed by Clause 64 (5) in Arbitration Agreement.

Hence, competent authority has not agreed to refer the above claims for Arbitration.

This is for your kind information."

12. Nothing of an elaborate discussion is required to notice that the aforesaid communication dated 09.08.2016 had clearly been an afterthought and was sent only after receiving the notice of hearing of this application and until then, the request of the petitioner dated 20.10.2015, which was admittedly received on 22.10.2015, remained unattended at the end of respondents. The effect of such a dealing on the part of the respondents shall be examined hereafter a little later. At this juncture, the submissions made on behalf of the parties before this Court may be taken note of.

13. It is contended on behalf of the petitioner that the respondents neither replied to the demand for waiver of the penalty nor to the demand for arbitration at any time before presentation of the petition; and the reply, as contemplated by Clause 63 of the GCC, was never sent. Hence, according to the petitioner, the said Clause 63 is not attracted in this matter.

14. With reference to the decision of the Supreme Court in the case of Deep Trading Company v. Indian Oil Corporation & Ors.: (2013) 4 SCC 35, it is submitted that once a petition is presented to this Court, the respondents forfeit their right to nominate the Arbitrator. Further, with reference to the decision in National Insurance Company

Limited v. Boghara Polyfab Private Limited : (2009) 1 SCC 267 and Arasmeta Captive Power Company Private Limited & Ors. v. Lafarge India Private Ltd. : (2013) 15 SCC 414, it is submitted that whether the claim of the petitioner is that of "excepted matter" or not, cannot be gone into in these proceedings and this aspect is required to be left to the decision of the Arbitrator. It is further submitted that only the quantum of damages is excluded from the purview of arbitration under Clause 63 of the GCC and not the question as to whether the contractor is responsible for the delay or not. In other words, according to learned counsel for the petitioner, as to whether delay is caused and if so, who is responsible for the same, is to be decided by the adjudicatory mechanism and hence, the matter is arbitrable.

15. Learned counsel for the petitioner has also referred to and relied upon the decisions in Bharat Sanchar Nigam Limited & Anr. v. Motorola India Private Limited : (2009) 2 SCC 337, J.G. Engineers Private Limited v. Union of India & Anr. : (2011) 5 SCC 758, and an unreported decision of this Court in M/s. APR Constructions Limited v. Union of India represented by Chief Administrative

Officer (Const.), South Western Railway & Ors. : C.M.P. No.60 of 2015 decided on 23.08.2018.

16. Per contra, learned counsel for the respondents has strenuously argued that claim Nos.1 and 2, as raised by the petitioner, pertain to special conditions of contract and claim Nos.3 and 4 are for payment of interest; and such disputes being excluded from the purview of arbitration, the claim for appointment of arbitrator is not tenable. Learned counsel would submit that the decision as to whether a claim is of excepted matters or not is vested in the General Manager by the agreement of parties; and the decision of the General Manager that the claims of the petitioner are of excepted matters cannot be adjudicated in these proceedings under Section 11(6) of the Act of 1996.

17. Learned counsel has strongly relied upon the decision of the Supreme Court in the case of Oriental Insurance Company Limited v. M/s Narbheram Power and Steel Pvt. Ltd. : AIR 2018 SC 2295. Learned counsel has also referred to the decisions in General Manager Northern Railways & Anr. v. Sarvesh Chopra : (2002) 4 SCC 45 and M/s Harsha Constructions v. Union of India: (2014) 9 SCC 246.

18. Having given thoughtful consideration to the rival submissions and having examined the record, this Court is clearly of the view that the submissions on the part of the respondents do not carry substance and this petition deserves to be allowed and an independent arbitrator deserves to be appointed.

19. Having regard to the questions raised in this matter, appropriate it would be to take note of Clauses 63 and 64(1) of the GCC, as applicable to this case, which read as under:

"63. Matters finally determined by the Railway All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the General Manager and the General Manager shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in Clauses 8,

18, 22[5], 39, 43[2], 45[a], 55, 55-A[5], 57, 57-A, 61[1], 61[2] and 62[1] to

[xiii][B] of the General Conditions of Contract or in any clause of the special conditions of contract shall be deemed as "excepted matters" [matters not arbitrable] and decisions of the Railway authority, hereon shall be final and binding on the Contractor; provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause.

64. [1] Demand for Arbitration

[i] In the event of any dispute or difference between the parties hereto as to the

construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "expected matters" referred to in clause 63 of these conditions, the contractor after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

[ii] The demand for arbitration shall specify the matters, which are in question or subject of the dispute or difference as also the amount of claim/item wise. Only such dispute (s) or difference (s) in respect of which the demand has been made together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference."

20. The scope and extent of enquiry in this application under Section 11 of the Act of 1996 remains limited to the question as to whether there exists an arbitration agreement between the parties [vide sub-section (6-A) of Section 11]1. Even before insertion of the said sub-section (6-A) to Section 11 by way of Amendment Act of 2015, the scope of enquiry in these proceedings had been delineated by the Supreme Court in various decisions, including those in *SBP & Co. v. Patel Engg. Ltd.*: (2005) 8 SCC 618 and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*: (2009) 1 SCC 267. For ready reference, the following passage from the decision in *Boghara Polyfab (P) Ltd* (supra) may be usefully extracted as under:-

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is

1 Sub-section (6-A) of Section 11 of the Act of 1996 reads as under:-

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide;

(ii) issues which he can also decide, that is, issues which he may choose to decide; and

(iii) issues which should be left to the Arbitral Tribunal to decide. 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

(underlining supplied)

21. In the case of Bharat Sanchar Nigam Limited (supra), the Supreme Court pointed out the subtle distinction between the right to assess damages arising from the breach of condition and a right to adjudicate upon a dispute relating to the very breach of condition. In regard to the condition in contract, which provided that the quantum of liquidated damages assessed and levied would be final and not challengeable by the supplier, the Supreme Court pointed out the applicable principles in the following:

"26. Quantification of liquidated damages may be an excepted matter as argued by the appellants, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellants under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

27. The abovestated position can be ascertained through the judgment of this Court in the case of State of Karnataka v. Shree Rameshwara Rice Mills : (1987) 2 SCC 160. This Court in the said case, made a clear distinction between adjudicating upon an issue relating to a breach of condition of contract and the right to assess damages arising from a breach of condition. It was held that the right conferred to assess damages arising from a breach of condition does not

include a right to adjudicate upon a dispute relating to the very breach of conditions and that the power to assess damages is a subsidiary and consequential power and not the primary power." (underlining supplied)

22. In *J.G. Engineers Private Limited (supra)*, again with reference to the decision in *Bharat Sanchar Nigam Limited (supra)*, the Supreme Court said:

"19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal."

(underlining supplied)

23. In the case of *Harsha Constructions (supra)*, the Arbitrator had taken a decision on excepted matters and passed award thereupon. In that context, the Supreme Court said that it was not open for the Arbitrator to arbitrate upon and render decision on the "excepted" dispute. It could, at once, be noticed that there remains a distinction in the arbitrator taking a decision on an excepted dispute and in the arbitrator taking a decision on the issue as to whether a claim falls within the arbitration clause or is excepted or excluded from arbitration.

24. The case of *Sarvesh Chopra (supra)* related to a matter under Section 20 of the Arbitration Act 1940 and the interpretation therein cannot be directly applied to the scheme of Section 11 of the Act of 1996, particularly in view of the later decisions of Supreme Court. It may, however, be pointed out that even in *Sarvesh Chopra*, the Supreme Court observed that an issue as to arbitrability of claim is available for determination at all the three stages namely, while making reference to arbitration; in the course of arbitral proceedings; and while making the award a rule of the Court.

25. It is the decision in *Oriental Insurance Company (supra)* that the learned counsel for the respondents has strongly relied upon with the submissions that when the respondents are entitled to take a decision on the question of liability and the respondents have indeed taken a decision and denied the liability, the matter is not referable to arbitration. The relevant features of the said decision in *Oriental Insurance Company* may be taken note of in a little detail.

26. The controversy in the said case arose in the backdrop of the facts that the appellant-insurer repudiated the claim of the respondent under the Fire Industrial All-Risk-Policy and it was urged on behalf of the insurer that once the claim was repudiated, no difference or dispute could be referred to arbitration. The arbitration clause in the policy in question, being Clause 13, was examined by the Supreme Court (with emphasis on its second part), which reads as follows:

"13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all questions be referred to the decision of a sole arbitrator to be appointed in

writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrator, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained.

(Emphasis supplied)"

27. The Supreme Court, while pointing out that the arbitration clause is required to be strictly construed, made it clear that such a clause could lay the postulate in which situations it could not be given effect to. The Supreme Court observed thus:

"24. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration.

It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

25. In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy."

28. In the aforesaid background and with reference to the applicable principles, the Supreme Court concluded on the matter in the following:

"26. The aforesaid communication, submits the learned senior counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within Part II of Clause 13. The said Part of the Clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reasons for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer.

The insurance-company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance of liability. It is not one of the arbitration clauses which can be interpreted in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part II and Part III. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in *The Vulcan Insurance Co. Ltd* (AIR 1976 SC 287 (supra)). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is filed within two months hence, the benefit of Section 14 of the Limitation Act, 1963 will enure to its benefit."

(underlining supplied)

29. It is at once clear that as per the arbitration clause in *Oriental Insurance Company's* case (supra), no difference or dispute was referable to arbitration if the insurer would dispute or not accept its liability in respect of the policy in question. It had not been a clause where any 'excepted matter' was provided for. The fact that the said clause interpreted in *Oriental Insurance Company* was not pertaining to 'excepted matters', is distinctly pointed out by the Supreme Court in the emphasized portion of the decision in paragraph 26 *ibid*.

30. The clause in the present case is nowhere akin to the clause that was interpreted in the case of *Oriental Insurance Company*. In the present case, as noticed, it is not provided that if the respondent would dispute or not accept the liability, then a reference would not be made to arbitration. The scheme of the applicable clauses in the present case (Clauses 63 and 64 *ibid*.) is entirely different, whereby and whereunder the disputes could be raised in relation to the matters except those falling under exception and the General Manager could take decision within 120 days and upon his failure to take decision or in other eventualities, the contractor could claim arbitration within 180 days of submission of final bill. The entire scheme being different and it being no where provided that repudiation by the General Manager would render the matter non-arbitrable, the reference to the decision in *Oriental Insurance Company's* case turns out to be rather misplaced.

31. Moreover, this Court is clearly of the view that the contention, as advanced on behalf of the respondents, is not only wholly baseless, but is rather an attempt to overreach the process of law with scant regard to the very conditions they are bound to. As has appeared in this case, the representations after representations made by the petitioner-contractor were not responded to by the General Manager, nor any decision was taken thereupon. Finally, the petitioner invoked the arbitration clause by serving a notice on 20.10.2015. The said notice was received by the respondents on 22.10.2015. Interestingly, even on the said notice, the General Manager and other respondents did not take any decision for over 9 months and then, the so-called denial of the claim of the petitioner for reference of the matter to arbitration, on the alleged ground that the claims were of 'excepted matters', came to be stated by way of the cryptic letter dated 09.08.2016 (as reproduced hereinabove), only after being served with the notice of this petition.

32. In the case of Deep Trading Company (supra), the Supreme Court, while reiterating and reaffirming its earlier decisions, has clearly held as follows:

"22. We are afraid that what has been stated above has no application to the present fact situation. In Newton Engg, this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in Newton Engineering was entirely different. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made under Section 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction under Section 11(6) in the matter of appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of the proceedings under Section 11(6) was of no consequence."

33. In the present case, the forfeiture of the right of the General Manager is clear from the very stipulation in the dispute resolution clauses themselves that such a decision was required to be taken within 120 days from the date of receipt of the claim. The General Manager not only omitted to do so, but came out with a cryptic repudiation letter only after receiving the notice of this petition. The right of the General Manager to reject any claim of the petitioner was lost by virtue of Clauses 63 and 64 as also on the extension of the principles in the case of Deep Trading Company (supra).

34. Viewed from any angle, the contentions on the part of the respondents deserve to be, and are, rejected. Noticeable it is that similar nature contentions were urged on behalf of the same respondents related with South Western Railway in the case of M/s APR Constructions Limited (supra). A co-ordinate Bench of this Court rejected such contentions after a detailed analysis of the applicable decisions and the aforesaid Clauses 63 and 64 of the GCC. The

decision aforesaid applies to the present case too.

35. The upshot of the discussion aforesaid is that the parties stand at conflict and the disputes do exist, which have not been resolved. Hence, the matter deserves to be referred to arbitration. Moreover, for the reason of the failure of procedure for appointment of arbitrator, it is just and proper that an independent arbitrator be appointed to adjudicate upon and decide the disputes between the parties, including their claims, counter-claims and objections.

36. In the interest of justice, it is made clear, with reference to the decision of the Supreme Court in Boghara Polyfab (P) Ltd and that of this Court in M/s APR Constructions Limited (supra) that the question as to whether any particular claim falls within 'excepted matters' or not also remains open to be decided by the arbitrator.

37. Accordingly, this petition is disposed of by appointing Shri Justice Subhash B. Adi, Former High Court Judge, to enter into the reference and to act as an Arbitrator to resolve the disputes between the parties under the provisions of the Act of 1996, as per the Rules governing the Arbitration Centre at Bengaluru.

38. In the interest of justice, it is made clear that the Arbitrator shall adjudicate upon and decide all the disputes between the parties including their claims, counter-claims and objections relating to the agreement in question. The requirements of the Arbitration and Conciliation Act, 1996, [as amended by the Arbitration and Conciliation (Amendment) Act, 2015], shall be complied with by all the concerned.

39. Needless to observe that all the questions arising between the parties in this matter shall remain open for determination in the arbitration proceedings.

40. A copy of this order be sent to the Arbitration Centre, Khanija Bhavan, Bengaluru, for proceeding further in the matter on administrative side and also to Shri Justice Subhash B. Adi, on the address available with the said Arbitration Centre, Bengaluru.