IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.84 of 2014 (O&M)
DATE OF DECISION: 24.09.2015

KV Fire Chemicals (I) Pvt. Ltd. …..Petitioner

versus

Indian Oil Corporation Limited and another .....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE

Present: Mr. Harkesh Manuja, Advocate for the petitioner

Mr. R.K. Chhibbar, Senior Advocate with
Mr. Adarsh Jain, Advocate for the respondents

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996.

2. The parties had entered into an agreement dated 23.04.2001 under which the petitioner was to supply Alochol Resistant Aqueous Film Foaming (AR-AFFF 3/3) Liquid Concentrate to the respondents on the terms and conditions contained therein. The agreement contained the following arbitration agreement:-

> "All disputes arising out of this purchase order shall be first referred to the sole arbitration of a person selected by the vendor out of a panel of three person (sic) nominated by the General Manager of the Panipat Refinery & his decision/award shall be final and binding on the Panipat Refinery and the vendor. Subject to as aforesaid the Indian Arbitration Act 1940 shall apply to the arbitration proceedings under this contract. …. …. ……. …… …. …. …….. …… …. …. ."

3. The question in this petition is whether a claim can be referred to arbitration where one of the parties blacklists or decides to initiate proceedings for blacklisting another party. The question has several facets. I have come to the conclusion that it

is open to parties to refer the issue of blacklisting to arbitration. There is no rule of law that prohibits parties from referring an issue relating to blacklisting to arbitration. In any event, there is no bar to a reference of all other disputes arising under the agreement to arbitration merely because one of the parties decides to blacklist the other or initiates a process to consider whether the other party ought to be blacklisted or not. A view to the contrary would frustrate not only the arbitration agreement between the parties but the Arbitration and Conciliation Act, 1996, itself. The issue in each case is whether the arbitration clause is wide enough to cover the disputes that arise therein. The answer to the question depends *inter alia* upon the ambit of an arbitration agreement and the nature and causes of the blacklisting.

4. Disputes and differences arose between the parties. It is sufficient to refer to them only briefly. The respondents contended that the goods were defective and could not be used for fire-fighting which is the purpose for which they were purchased.

The petitioner, on the other hand, contended that the defects were on account of the improper storage thereof by the respondents. However, in order to maintain cordial business relations with the respondent, the petitioner, at a meeting between the parties, agreed to replace the goods rejected by the respondent. The consignment that was to replace the original consignment was inspected and tested by a third party. The respondents were, however, instructed not to send the consignment till the inspection report in respect of the original consignment was received. According to the petitioner, ultimately, the fresh

consignment was despatched after it was certified by the inspecting agency.

5. The petitioner requested the respondents to release the guarantee issued in terms of the agreement. The petitioner's grievance is that despite the above facts the respondents invoked the bank guarantee in the sum of Rs.1.06 crores. The respondent, however, contended that the quality of the fresh consignment was also defective and called upon the petitioner to remove the same from its premises.

6. The petitioner filed a suit before the Civil Judge Junior Division, Igatpuri (Maharashtra) for an injunction restraining the respondents from encashing the bank guarantee. An interim order dated 13.08.2013 was passed restraining the respondents from encashing the bank guarantee.

7. The respondents served a notice upon the petitioner dated 16.08.2013 calling upon it to show cause why it should not be debarred from entering into any contracts with the respondents and removed from the respondents' list of approved vendors. The notice reiterated that the goods were defective and the rejection thereof. The petitioner was called upon to file a reply failing which the respondents stated that it would be presumed that the petitioner had nothing to say and the respondents would proceed in the matter accordingly.

8. The petitioner by its reply dated 29.08.2013 refuted the contentions and called upon the respondents to refer the matter to arbitration in terms of the agreement.

9. On 04.09.2013, the petitioner filed Arbitration Petition No.83 of 2013 under Section 9 of the Arbitration and Conciliation

Act, 1996 before the Court of Additional District Judge, Panipat, for an order restraining the respondents from blacklisting it. The respondents contended that the application under section 9 was not maintainable; that the question of blacklisting was not the subject matter of the contract entered into between the parties and that the petitioner, therefore, was not entitled to have the dispute referred to arbitration. The respondent contended that it was entitled to decide who it would deal with and that such a decision was an administrative decision which is subject only to judicial review and not to the decision of an arbitrator. The respondents also raised contentions on merits. The learned Judge held that the application was maintainable and rejected the contention that the show cause notice was not concerned with the purchase order and the terms and conditions thereof. He held that the subject matter of the show cause notice was connected with the purchase order and upholding the maintainability of the application, the learned Judge held:-

> "13. When the dispute has arisen between the parties with regard to the material supplied by the petitioner to the respondent on the basis of which the show cause notice dated 16.8.2013 has been issued by the respondent so as to place the petitioner on a holiday list, it cannot be said that the invocation of the arbitral clause is irrelevant for the purpose of the matter regarding holiday listing of the petitioner. The petitioner has already furnished bank guarantee regarding which litigation is pending before the Civil Courts at Igatpuri. Accordingly it is held that Civil Court at Panipat has every legal jurisdiction to hear and determine all action and proceedings arising out of the contract entered into between the parties i.e. the purchase order dated 23.4.2010. The Court has every jurisdiction to pass interim measures till the Arbitrator is appointed as per the terms and conditions of the contract in question entered into between the parties."

The interim relief was granted on merits with which I am not concerned. The interim relief was, however, granted only for the

limited period till an application for the same could be moved by the petitioner before the Additional District Judge.

10. The petitioner by its letter dated 24.02.2014 once again invoked the arbitration clause and called upon the respondents to refer all the disputes as referred to in its letter dated 29.08.2013 to arbitration in accordance with the said arbitration agreement. It is important to note that by the letter dated 29.08.2013, the petitioner raised disputes regarding the merits of the rival contentions including as regards the quality of the goods. The disputes were set out in detail. The technical aspects of the inspection reports were also referred to. The petitioner also raised a grievance regarding the encashment of the bank guarantee by the respondent. The negotiations that ensued between the parties thereafter were also referred to. Grievances regarding the show cause notice were voiced. Ultimately, the petitioner contended that it was not liable to be blacklisted.

11. Thus, at least two important disputes have been raised by the petitioner - a challenge to the validity of the blacklisting it and the invocation of the bank guarantee by the respondent.

12. The respondents having failed to appoint an arbitrator within 30 days, the petitioner filed this petition on 24.03.2014.

13. The respondents filed FAO No.5046 of 2014 under Section 37 of the Act challenging the order of the Additional District Judge, Panipat dated 07.02.2014 in the said Arbitration Petition No.83 of 2013 filed under Section 9. By an interim order dated 24.07.2014, the operation of the order dated 07.02.2014 was stayed till further orders. I am informed that the FAO is pending.

14. This being an application under Section 11 of the Act, the rival contentions on merits are not relevant. The parties reiterated their respective contentions on the merits of the matter. The respondents, however, opposed the application on the ground that the disputes and differences cannot be referred to arbitration as the petitioner does not have an arbitrable claim. The respondents' contentions are as follows:

It was firstly contended that the respondents having initiated action for blacklisting, the disputes and differences between the parties are not arbitrable and the petitioner cannot invoke the arbitration clause. The show cause notice dated 16.08.2013 was issued in exercise of the respondents' administrative powers. The subject matter of the show cause notice is not the subject matter of the contract between the parties as contained in the purchase order dated 23.04.2010. The disputes in respect thereof, therefore, cannot be referred to arbitration. In other words, the petitioner's objection to blacklisting does not fall within the scope of the arbitration agreement since such an action is in exercise of executive powers of the respondents under Article 298 of the Constitution and is an extra contractual matter. Further, the remedy sought in respect of blacklisting relates to an independent right unconnected with the contract. The respondent's right to enter into contracts with such parties as it chooses to is *de hors* the contract. The disputes regarding the show cause notice arise out of and are related to the personal right of the respondent to decide whom it would deal with and whom it would not deal with. The arbitrator does not have the power of judicial review of administrative action. The arbitrator does not, therefore, have the power to decide the issue of blacklisting.

15. Cases involving blacklisting and where the issue is whether the claims are arbitrable or not are divided broadly into two categories. The first relates to all claims and disputes other than those relating to blacklisting. The second relates to the disputes regarding the blacklisting itself. The disputes regarding blacklisting itself in turn fall into two broad categories which I will specify when I deal with this part.

16. The extreme proposition that once the party to a contract blacklists or even decides to blacklist the other party, the arbitration agreement cannot be invoked with respect to any claim is totally unsustainable. It could have the effect of rendering not merely the arbitration agreement but the Arbitration and Conciliation Act, 1996, itself redundant.

17. Blacklisting is the exercise by a party of its prerogative to deal or not to deal with any party. That the State or an instrumentality of the State does not have an absolute and unfettered right to exercise this prerogative is a different matter and an aspect I will deal with later. The exercise of this prerogative, however, is unilateral. This unilateral act cannot deprive the other contracting party of its rights under the contract including the right to invoke the arbitration agreement contained therein. A view to the contrary would enable a party to frustrate an arbitration agreement by the simple expedient of blacklisting the other party.

18. If the State or an instrumentality of the State can blacklist the other contracting party, so can the other contracting party blacklist the State. In principle, this must be so. The other contracting party could as well say that it does not wish to

deal with the State or an instrumentality of the State for whatever reason and intends blacklisting the State with respect to future contracts. It is not unknown for parties not to deal with Government.

If precedents do not refer to cases where private parties decide not to deal with Government, it is because private parties are not bound to disclose their decision. Nor are they bound to deal with Government. Even assuming that this does not happen at all it is irrelevant. It is true that where the State is one of the parties, blacklisting is normally by the State and not by the other contracting party. That, however, is obviously on grounds of commercial expediency and is not on account of a difference in contractual rights. Therefore, the fact that where the State is a contracting party it is normally the State that chooses to blacklist the other contracting party is irrelevant for deciding the point under consideration. Either party can decide not to deal with the other in future.

Thus, if the submission on behalf of the respondents is accepted, even the private party can frustrate an arbitration agreement with the State or its instrumentalities by merely blacklisting them.

19. Where a contract is only between private parties, it is open to any of them without giving reasons and for any reason whatsoever not to deal with the other contracting party or parties in future. It is not justiciable unless of course there is a contract to the contrary. The power of judicial review is not, at least normally, available in respect of private parties to the contract. A private party does not have to give any reason for blacklisting. It does not have to justify its decision not to deal

with another party. The State and its instrumentalities, however, stand on a different footing. They are bound to act reasonably and fairly eschewing arbitrariness and irrationality while entering into contracts. They cannot at their whim and fancy decide against considering another party who is otherwise eligible for the award of the contract. Absent anything else, it is bound to deal with all citizens equally and to afford all citizens eligible to enter into contracts an equal opportunity to do so. Blacklisting has serious consequences and, therefore, normally, the State is bound to follow the rules of natural justice. In *Kulja industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others, (2014) 14 Supreme Court Cases 731*, the Supreme Court held:-

> "17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court."

20. I will shortly deal with the question as to whether the issue of blacklisting itself is arbitrable or not. Although I have

held that it is, I will for the purpose of the point under consideration *viz*. whether claims other than those relating to blacklisting are arbitrable, presume that it is not. If the issue of blacklisting is not arbitrable, it is possible that in some cases at least there is likely to be a conflict of decisions between the arbitral tribunal and the administrative decision taken by the party blacklisting. The requirement of the State to follow the rules of natural justice before blacklisting a party would require the State to give reasons for blacklisting. Such reasons would indeed in many cases deal with the facts and merits of the case pertaining to the performance of the contract in question. This is especially so where the party is blacklisted on account of its conduct pertaining to the very contract in question. The reliefs sought by the petitioner in arbitration proceedings including for enforcement of its contractual rights including restraining the respondents from invoking the bank-guarantee may well also require consideration of the same issues as those that arise in the proceedings relating to blacklisting.

21. That, however, cannot deprive a party the right to invoke the arbitration clause to enforce its other rights, such as, for recovery of consideration under the contract, enforcing the performance of a contract and restraining the other party from committing a breach of the contract. Merely because the decision to blacklist the party is founded upon a consideration of the merits of the rival contentions in connection with the performance of the contract and an adjudication of the other party's claims involves a consideration of the same issues, it does not render the arbitration agreement between the parties unenforceable.

22. The consideration of the same issues in the two proceedings would not prevent a contracting party from blacklisting the other and the other contracting party from having its contractual and other rights enforced by invoking the arbitration agreement. The same situation would arise even if the blacklisted party files an action in a Court or before a tribunal for enforcement of its rights under the contract and shows cause before the State or its instrumentality with respect to its decision to blacklist it. The party blacklisted may not even challenge the order of blacklisting. It would nevertheless be entitled to file an action for recovery of its dues and for enforcement of its other rights. It cannot possibly do so before the party that blacklists it. If a party can file an action in Court, there is no reason why it cannot refer the dispute to arbitration.

23. The effect of one decision upon the other does not fall for my consideration in this application and I, therefore, do not intend expressing a view on it. That would be considered in appropriate proceedings and at the appropriate stage.

24. Blacklisting, as contended on behalf of the respondents, is an administrative act. The administrative actions of the State and the instrumentalities of the State can be tested by way of judicial review in view of the provisions of the Constitution of India, in particular, Articles 14, 32 and 226. The power of judicial review, undoubtedly, is not available to an arbitrator. I have assumed for the purpose of the point under consideration that the validity of the decision to blacklist by itself, therefore, cannot be decided by an arbitral tribunal and that an arbitrator would lack inherent competence and jurisdiction to grant relief

against a decision to blacklist a party. The inability, if any, of an arbitrator to grant relief against blacklisting does not, however, affect the arbitration agreement to any extent or in any manner whatsoever as regards claims other than those against the order of blacklisting. As I mentioned, a party may choose not to contest the order blacklisting it. It cannot, however, be prevented from adopting proceedings to enforce its other rights under the contract or otherwise. If it can do so by filing an action in Court, it can equally do so before an arbitrator.

25. At the cost of repetition, a view to the contrary would enable any of the parties to a contract to frustrate the arbitration agreement unilaterally. There is nothing in principal that supports such a contention.

26. The submission that once a party decides to blacklist the other party the arbitration clause cannot be invoked for any purpose is, therefore, rejected.

27. The next question is whether the issue of blacklisting itself is arbitrable or not to wit whether a party is entitled to challenge in arbitration it’s being blacklisted by the other contracting party.

28. Blacklisting arises broadly in two categories of cases. The first is related to the parties acts with respect only to a particular contract in respect whereof there is an arbitration agreement. The second is where it is on account of any other act of the party blacklisted.

29. A decision to blacklist a party is not necessarily on account of its performance under a particular contract. The second

category may include a party's conduct in relation to the contract containing the arbitration clause as well but it is not restricted to the same. It would include blacklisting on account of a party's acts in relation to a particular contract as well as in relation to other contracts and even for other reasons. It would include blacklisting for reasons unconnected to any relationship, contractual or otherwise, between the parties. A party can be blacklisted in respect of its poor performance or failure to perform satisfactorily other contracts between the same parties. A decision to blacklist a party may also be taken for reasons and on grounds wholly unconnected with the performance of a party in respect of contracts between them. Parties can also be blacklisted for commission of offences unrelated to the contracts between the parties. For instance, a party may decide not to enter into a contractual relationship with another party if it has been convicted of a particular offence and in a particular manner. A party may refuse to enter into a contractual relationship with a party facing serious charges of a particular type of offence or misdemeanor or even otherwise. It is not unusual for Government and Government companies to refuse to deal with enterprises or persons blacklisted by other agencies.

30. Blacklisting is a decision not to deal with a party in future whether for a specified period of time or permanently. An order against blacklisting would amount to directing the party blacklisting to deal with the party blacklisted. It amounts to directing the party blacklisting not to exclude the party blacklisted from being considered with respect to future contracts. I am not concerned here with the validity of an order permanently blacklisting a party. Even where a party is blacklisted on account

of its acts with respect to a particular contract the effect of blacklisting is not upon that contract but upon the blacklisted party's entitlement to be considered for future contracts. Whether such an order of blacklisting is arbitrable or not depends upon the ambit of the arbitration agreement.

31. There is nothing in principal that prevents parties from agreeing to refer to arbitration disputes and differences relating to blacklisting. There is no statutory or other bar against the parties agreeing to refer their disputes with respect to a decision to blacklist to arbitration. Nor is there any bar to parties agreeing to refer to arbitration disputes and differences in relation to a possible decision to blacklist in future. Take a case where an order of blacklisting is already passed for any reason including for reasons relating to a particular contract or contracts and/or on account of the conduct of the blacklisted party for reasons unconnected to any relationship – contractual or otherwise between the parties. The parties can always agree to refer the disputes relating thereto to arbitration. The parties can also agree to refer such future disputes to arbitration even before blacklisting is contemplated. They are all arbitrable disputes. Whether relief against blacklisting ought to be granted or not is a question that relates to the merits of the matter which must be left for the determination of the Arbitrator.

32. That a high prerogative writ may be issued against the action of the State in respect of its decision to blacklist a party does not exclude the jurisdiction of a civil court to issue an order or decree for the same reliefs. There are innumerable cases where a writ can and is issued and in respect whereof a civil suit

is also maintainable. Thus, the mere fact that a writ against blacklisting can be issued in a case does not denude the civil court or an arbitrator of jurisdiction to entertain and try the case. There can accordingly be no restriction on the jurisdiction of an arbitrator from making an award granting similar reliefs, if the claim is otherwise arbitrable.

33. The question in each case must be whether the dispute relating to blacklisting like any other dispute falls within the ambit of the arbitration agreement.

34. The first category of cases *viz*. where blacklisting is related to or on account of the parties acts with respect only to a particular contract admits of no difficulty or complication. Blacklisting in such cases is on account of the party's acts relating to that contract. The grounds whether of defective services or lack of probity in dealings would constitute disputes capable of being adjudicated upon by civil courts or tribunals and by arbitral tribunals as well provided always that the dispute is otherwise arbitrable.

35. However, a usual arbitration clause in a particular contract would not cover the disputes pertaining to blacklisting in the second category of cases. In other words, in the second category of cases i.e. where blacklisting is not only on account of party's acts in relation to the contract containing the arbitration agreement in question, an arbitration clause in one contract would not imply an agreement between the parties to refer a decision to blacklist falling in the second category of cases to arbitration. The disputes in relation to the other contracts, obviously, cannot be covered by an arbitration agreement in respect of a contract to

which it relates unless it is specifically agreed to otherwise. Even if the other contracts contain any arbitration clause, it would make no difference for absent a specific agreement to the contrary, an arbitration clause in each agreement operates only in respect of that agreement.

36. However, the parties would be entitled to agree to refer the disputes arising in the second category of cases also to arbitration. The arbitration agreement must, however, in such cases specifically refer such disputes to arbitration. I must confess that I do not presently recollect having seen such an arbitration agreement. I do not, however, see any impediment in principle to the parties entering into such an arbitration agreement.

37. On behalf of the petitioner, reliance is placed upon a judgment of the Supreme Court in *Rashtriya Ispat Nigam Limited & Anr. Vs. M/s Verma Transport Company, 2006(7) SCC 275* wherein the interpretation and application of section 8 of the Act fell for consideration. The contract was entered into between the parties regarding handling and storage of certain material. The appellant terminated the contract and on the same day issued a notice calling upon the respondent to show cause why they and their firms/companies should not be black-listed. The respondents filed a suit for permanent injunction restraining the appellant from black-listing them or terminating the contract. Thus two reliefs were sought - one against the termination of the contract and the other against the show cause notice initiating proceedings for black-listing. The Civil Judge (Junior Division) directed the parties to maintain status-quo on both the issues. The appellant i.e. the defendant in the suit contended that the suit was not maintainable

as the subject matter thereof was covered by the arbitration agreement entered into between the parties. They accordingly filed an application under section 8 of the Act. The Civil Judge (Junior Division) rejected that application. The High Court dismissed the revision application and an application for a review of that order. Before the Supreme Court, the respondents i.e. the plaintiffs contended that the suit having been filed questioning the black-listing as also the termination of the contract was outside the purview of the arbitration agreement and the application under section 8 of the Act was, therefore, not maintainable. The following observations of the Supreme Court are relevant:-

> "**31.** The principal grievance of the plaintiff-respondent was the action on the part of the appellants terminating the contract. Grounds on which the order of termination was based, have been questioned in the plaint. Such contentions could well be raised before the arbitrator.
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> …… ……. ……. …….
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> **43.** The submission of the learned counsel for the respondents that the two different causes of action having been raised, namely, illegal termination of contract and blacklisting of the firm, Section 8 of the 1996 Act was not attracted is devoid of merit; inasmuch as according to the respondents themselves, both the causes of action arose out of the terms of the contract. What was necessary was to consider the substance of the dispute. Once it is found that the dispute between the parties arose out of the contract, Section 8 of the 1996 Act would be attracted.
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> …… ……. ……. …….
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> **50.** For the foregoing reasons, we are of the opinion that the application filed by the appellants under Section 8 of the 1996 Act was maintainable."
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> *(emphasis supplied)*

The decision supports the petitioner's case. What is important is that in the suit the plaintiff claimed reliefs against termination and blacklisting and the defendants' application under Section 8 was held by the Supreme Court to be maintainable.

38. The judgment of the Supreme Court in *Jammu and Kashmir State Forest Corporation vs. Abdul Karim Wani and others, (1989) 2 Supreme Court Cases 701* relied upon on behalf of the respondents is of no assistance for the issue raised therein was entirely different. The parties had entered into an agreement. The respondents filed an application under the Jammu & Kashmir Arbitration Act, 2002 for a direction to the appellant to file an arbitration agreement and to refer the disputes mentioned therein to an arbitrator. The appellant-corporation contended that the entire work was over and that the respondent's claim was not covered by the agreement or the arbitration clause contained therein. The claim was for additional work in addition to that covered by the contract. The corporation had invited tenders for extraction of timber which included the work of felling and removal of trees. The plaintiff was granted the work in respect of 4 lakhs cft. of standing volume timber. Subsequently, he was entrusted with additional work in respect of a further quantity of 2 lakhs cft. The authorities had earlier taken a decision for extraction of a total standing volume of 10,08,000 cft. against which the plaintiff had been entrusted with the extraction work of only 6 lakhs cft. The plaintiff sought additional work of the balance 4,06,000 cft. Clause-15 of the agreement reads as under:-

> "15. Extension for the additional volume available in the coupe will not be claimed as matter of right. But may be considered by the management where the achievement is 100 per cent."

It is based on this clause that the respondents founded their claim for the additional work. The Supreme Court held that the claim did not arise out of the written agreement between the parties and, therefore, rejected the prayer for reference of the claim to

arbitration. Reliance was placed on paragraph-4 of the judgment which reads as under:-

> "**4.** If the foundation of the claim of the respondent be any alleged assurance or custom or practice, it cannot be said that such claim arises out of the written agreement between the parties; and so the prayer for reference has to be rejected. If the case pleaded is true, the appropriate forum for the respondent will be a court of law directly granting the relief in an appropriate legal proceeding. It was, however, argued on behalf of the respondent before us that in view of para 15 of the tender notice, quoted earlier, which must be treated as a part of the agreement, the respondent has a right to be considered for allotment of the additional work since his past performance has been excellent. We are afraid, the impugned judgment of the High Court cannot be defended on this basis and the prayer of the respondent for reference of the dispute, as mentioned in his application before the High Court, cannot be granted under para 15 of the tender notice aforementioned.
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> ….. ….. ….. …..
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> When in the future, the Corporation makes a decision for the execution of the additional work and takes up the question of executing a contract for the purpose, the stage for consideration of the plaintiff-respondent's claim would be reached and a dispute may then arise if the Corporation refuses to consider his claim. Neither the agreement nor the tender notice deals with the question as to the conditions and time for grant of any additional work to the plaintiff and if his claim be interpreted as a demand for immediate allotment of any future work, the same cannot be connected with the agreement or the tender notice. We, therefore, do not agree with the observations of the High Court that the conduct of the Corporation in not taking up immediate deforestation of a part of Compartment No. 59-Marwah is reprehensible, simply for the reason that the trees in the area concerned are "to be extracted one day or the other" or that the plaintiff has the right to claim the additional work on the ground that his achievement in the past has been more than 100 per cent. We also hold that the claim raised by the plaintiff in his application before the High Court is not covered by the arbitration clause and cannot be referred for a decision of the arbitrator. The order of reference passed by the High Court, therefore, has to be set aside."

The issue before me was neither raised before nor decided by the Supreme Court. The observations towards the end of the paragraph "*When in the future, the Corporation makes a decision*

for the execution of the additional work and takes up the question of executing a contract for the purpose, the stage for consideration of the plaintiff-respondent's claim would be reached and a dispute may then arise if the Corporation refuses to consider his claim" do not support the respondents case for the Supreme Court did not express a final opinion on what would happen if the corporation refused to consider the respondents' claim in respect of future contract(s). The Supreme Court merely observed that if that were to happen a stage for consideration of the respondents' claim would be reached and a dispute "may" then arise.

39. On behalf of the petitioner, reliance was placed on the judgment of a learned single Judge of the Delhi High Court in *SPS Engineering Ltd. vs. Indian Oil Corporation Ltd., 2004 (113) DLT 70*. This was a case under Article 226 of the Constitution of India. In that case, the respondent informed the petitioner that it had been decided to place the petitioner on the holiday list and to debar it from entering into any contract with the respondent for a period of three years. The learned Judge held:-

> "**8.** The other aspect that is of material importance is that the entire basis for placing the petitioner in the "Holiday List" is founded upon the allegations qua the performance or non-performance with regard to the contracts which were awarded to the petitioner. Therefore, it is not proper or correct on the part of IOCL even to suggest that placement in the "Holiday List" is entirely a non-contractual matter unrelated with the contracts awarded to the petitioner. I fail to see how the very allegations, on the basis of which the petitioner has been placed on the "Holiday List", will not figure in the deliberations before the arbitrator, who would be considering the disputes between the parties in their entirety as directed by a learned Single Judge of this Court in his order dated 17.03.2003. [Furthermore, the Committee that was constituted comprised entirely of officers of IOCL. In these circumstances, it would have been proper and appropriate for IOCL to have held its hands and waited for an adjudication by the arbitrator on the entire question of commission of breaches, etc., including the

> termination of the contracts. The determination by the arbitrator would have settled all these issues. As pointed out above, if the arbitrator held against the petitioner, and found it to be in default, then IOCL would be entitled to place the petitioner in the "Holiday List". In such an eventuality, IOCL could not be faulted.] I am in agreement with the contention of the learned counsel for the petitioner that the subject matter of arbitration and the question of placement in the Holiday List are intertwined and cannot be put into separate compartments. The records of the case itself reveal that the placement of the petitioner in the holiday List is not on account of reasons outside the contractual obligations of the parties."
>
> *(brackets provided)*

I am in respectful agreement with the observations of the learned Judge except those bracketed by me. I express no opinion regarding the observations bracketed by me as they do not fall for consideration in an application under Section 11.

40. A Division Bench of the Delhi High Court upheld this judgment in the case of *Indian Oil Corporation Ltd. vs. SPS Engineering Ltd., 2006 (128) DLT 417*, although on a different ground. This judgment does not deal with the question before me.

41. On behalf of the petitioner, a judgment of the Andhra Pradesh High Court in *Techno Industries, Kolkata and Anr. Vs. Indian Oil Corporation Ltd., Hyderabad and Ors., 2015(1) ALT 720* was relied upon. Paragraphs 16, 28, 29 and 33 thereof read as under:-

> "16. The issues that arise for consideration in this writ petition are:
>
> 1) Whether the writ petition is maintainable?
> 2) Whether the order impugned is sustainable? and
> 3) When arbitration clause which encompasses all issues of contract is provided, is it permissible for one of the contracting parties to resort to blacklisting (holiday list) and prohibiting the other contracting party from participating in future contracts is permissible ?
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> ……. …….. …… …….

> 28. Clause 29 of annexure III of tender document read as under:
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> "any dispute and/or difference of any nature whatsoever regarding any right liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitrator of the Director (Marketing) of the Corporation, of some officer of the Corporation who may be nominated by the Director (Marketing)……."
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> 29. Same clause is incorporated in the contract entered with the first petitioner. In terms of the clause therein any dispute or difference arising out of the contract should be referred to an Arbitrator. It is an exhaustive provision encompasses of all aspects of contract including the issue of non supply of the requisite quantity as agreed upon and not renewing the agreement for further period. Thus when an arbitration clause encompasses all aspects, ignoring the said provision and resorting to general power of employer to cancel the contract and to penalize the contractor on the allegations of violation of terms of contract amounts to arbitrary exercise of power.
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> ……. …….. …… …….
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> 33. Since respondent corporation has now invoked the arbitration clause, all the issues which were the basis to include the petitioners in the holiday list and preventing them from participating in future contracts shall also be considered by the Arbitrator. It is always open to respondent corporation to regulate its future relationship with the petitioner after the decision by Arbitrator." *(emphasis supplied)*

I agree with the first sentence of paragraph-33. I, however, refrain from expressing any opinion with respect to paragraph-20 and the rest of paragraph-33 as these issues/questions decided by the learned Judge do not fall for consideration in the application before me. These issues would arise only in an application for a stay of the blacklisting proceedings.

42. The question now is whether the disputes raised in the present case fall within the ambit of the arbitration clause contained in the agreement. The disputes other than those relating to blacklisting itself can certainly be referred to arbitration for

reasons I have already stated. The arbitration clause is wide enough to make a reference of such disputes to arbitration. The arbitration clause is in respect of all disputes arising out of the purchase order. The dispute in the present case relating to blacklisting is on account of the conduct of the petitioner arising only out of the purchase order. It is not the respondents' case that the order of blacklisting in this case was on account of the petitioner's conduct in respect of any other contract. Nor is it the petitioner's case that the order of blacklisting was on account of the petitioner's conduct in any other respect whatsoever. In view of what I have already held the dispute relating to blacklisting, therefore, is arbitrable. The arbitration clause is wide enough to cover the disputes including in relation to the issue of blacklisting. The arbitration agreement in the present case entitles a reference to 'All disputes arising out of the purchase order'. The words "arising out of" are of wide import. In *Renusagar Power Co. Ltd. v. General Electric Company and another, 1984 (4) Supreme Court Cases 679,* the Supreme Court held in paragraph-25 that expressions, such as, "arising out of" are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement. The disputes in the present case, therefore, are covered by the arbitration clause.

43. Whether a claim for a mere declaration that a party has performed its obligation under the contract satisfactorily can be granted or not in the absence of the claimant seeking a consequential relief is an issue which the arbitrator has jurisdiction to decide. The maintainability or validity of a claim can always be decided by the arbitrator.

44. The respondents admittedly failed and neglected to appoint an arbitrator despite the arbitration clause having been invoked as far back as 24.02.2014 and despite this petition having been filed on 24.03.2014. The respondents have, therefore, forfeited their right to appoint an arbitrator. It is open, therefore, for me to appoint an arbitrator. I, however, intend following the arbitration clause, as I do not think that the respondents were negligent in exercising their right or refused to exercise their right to have an arbitrator appointed in terms of the arbitration agreement. The issues that fall for consideration are not involved.

45. The petition is, therefore, disposed off by directing the appointment of an arbitrator in terms of and in accordance with the arbitration agreement. The General Manager of the Panipat Refinery of the respondents shall constitute a panel of three persons and forward the same to the petitioner by 19.10.2015. The petitioner shall select the arbitrator from the said panel.

This order is stayed up to and including 30.11.2015 to enable the respondents to challenge the same.

24.09.2015
parkash*

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

Note: Whether reportable: YES